WHY WE WILL PROBABLY NEVER SEE A JUDICIAL TAKINGS DOCTRINE

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INTRODUCTION

The chances that the United States Supreme Court would create a judicial takings doctrine were greatly diminished by its decision in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.[1] This Essay will review why, absent a major change in the Court's composition, it is unlikely to adopt the concept. The Essay will conclude by outlining a simple, workable alternative to the doctrine that would address the theoretical problem it is intended to resolve while avoiding its federalism, practical, and other infirmities.

In *Stop the Beach Renourishment*, the Court reviewed a Florida Supreme Court decision upholding a Florida statute that requires the establishment of a fixed boundary along the shoreline between public and private lands before the start of a beach replenishment project.[2] After the state court rejected the argument that establishing such a boundary would deprive upland owners of their property rights under Florida law, including their alleged right to have direct contact with the ocean, an association of landowners claimed that the state court had committed a judicial taking by suddenly and unpredictably changing state property law.[3] A unanimous United States Supreme Court rejected that specific challenge, reasoning that whether or not a judicial takings doctrine exists, none took place here because the Florida court's decision was supported by prior Florida case

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

2. *Id.* at 2599–2601; Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1108, 1120–21 (Fla. 2008).

3. *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

law.[4] The Court was split, however, on the much more significant question of whether it should recognize a judicial takings concept in the first place.

Only four Justices supported the concept that a judicial decision can itself violate the Takings Clause.[5] Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, opined that a state court commits a "judicial taking" when it "declares that what was once an established right of private property no longer exists . . . ."[6] Even those Justices would have limited the doctrine in two ways. First, they suggested that the remedy for a judicial taking would be reversal of the state court's decision, not compensation.[7] Second, they indicated that the alleged property owner would have the burden of proving the absence of any doubt about the existence of the property right.[8]

The remaining four Justices (Justice Stevens recused himself) refused to create a judicial taking concept in the first place. Rather, they expressed serious concerns about the basis for and impacts of that doctrine, with Justice Breyer (joined by Justice Ginsburg) concluding that because of those concerns the issue should be "left for another day"[9] and Justice Kennedy (joined by Justice Sotomayor) suggesting that "arbitrary or irrational" property rights decisions could be subject to due process rather than takings review.[10]

The reluctance of the four Justices to establish this new doctrine is well taken. There are good reasons why, since the States ratified the Fifth Amendment in 1791, the United States Supreme Court has never held that a court can be subject to a claim for just compensation under the Takings Clause. That novel concept would challenge our nation's federal structure, improperly freeze the common law, and create a host of potentially insurmountable practical problems. As a result, it is highly doubtful that on closer examination a majority of the current Justices would ever embrace the doctrine.

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4. *Id.* at 2613.

5. U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution includes what is commonly called the "Takings Clause" or the "Just Compensation Clause." It provides: "[N]or shall private property be taken for public use, without just compensation." *Id.*

6. *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (Scalia, J., plurality opinion).

7. *Id.* at 2607.

8. *Id.* at 2609 n.9, 2611. That second limitation—the need to prove the absence of any doubt—would have likely frustrated advocates of this new doctrine, because it would have been a daunting task to prove beyond any doubt that a court extinguished an established right.

9. *Id.* at 2618 (Breyer, J., concurring in part and concurring in the judgment).

10. *Id.* at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005)).

I. A JUDICIAL TAKINGS DOCTRINE WOULD HAVE IGNORED STATE SOVEREIGNTY

One of Justice Breyer's apprehensions about a judicial takings doctrine was the possibility that, if the Court adopted the concept, "federal judges would play a major role in the shaping of a matter of significant state interest—state property law."[11] His concern is well taken. Under our federal system, the sovereign States determine their own property laws.[12] State courts in particular have a special ability to develop rules of property grounded in the individual State's unique history and physical landscape. Moreover, as Justice Breyer recognized, this is "an area of law familiar to state, but not federal, judges."[13]

A judicial takings doctrine, however, would undermine this well-established and traditional authority of state courts to determine the scope of their own State's property laws. It would do this by expanding takings law to subject state court property law determinations to federal review. Specifically, the doctrine would encourage dissatisfied litigants to argue that a state court has taken property without payment of just compensation because it has issued a decision that purportedly departs from prior holdings. This would subject a wide range of state court holdings to unwarranted federal review, including decisions concerning:

- Corporate asset distributions
- Marital property allocations
- Inheritance rules
- Employee rights
- The scope and location of easements
- Vested rights involving licenses
- Franchise rights

This unprecedented interference with state court authority would disregard our Founding Fathers' recognition that "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary

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11. *Id.* at 2619 (Breyer, J., concurring in part and concurring in the judgment).

12. Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

13. *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring in part and concurring in the judgment). A unanimous Court made a related point in another takings decision, *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), where it explained that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *Id.* at 347.

course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[14] That reservation goes to the core of our federal structure. Its expression in *The Federalist* was subsequently embodied in the Constitution's Guarantee Clause, under which the United States must "guarantee to every State in this Union a Republican Form of Government . . . ."[15] It is further affirmed by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[16]

Consistent with these principles, the Court rejected the judicial takings concept over a century ago in *Sauer v. City of New York*.[17] There, the City built a viaduct over a street that impaired a landowner's access to his land, as well as his access to light and air. The owner sued, but New York's highest court denied relief on "the ground that under the law of New York he had no easements of access, light, or air" that could restrict street improvements.[18] The United States Supreme Court then heard the owner's claim that the City, in building the viaduct, denied him due process by taking his property without compensation.[19] The Court rejected the claim. It reasoned that various state court decisions concerning this issue "have been conflicting, and often in the same State irreconcilable in principle. *The courts have modified or overruled their own decisions* . . . ."[20] The Supreme Court made it clear, however, that this is a matter for the States, not the federal judiciary, to decide. "Surely such questions must be for the final determination of the state court."[21]

Sauer essentially adopted the reasoning of Justice Holmes—who significantly is the father of regulatory takings law[22]—in a dissent that he authored in 1905, two years before *Sauer* was decided. In *Muhlker v. New York & Harlem Railroad Co.*,[23] a four-Justice plurality (a fifth Justice concurred without an opinion[24]) concluded that a state court violated the

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14. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (1788).

15. U.S. CONST. art. IV, § 4.

16. U.S. CONST. amend. X.

17. Sauer v. City of New York, 206 U.S. 536 (1907).

18. *Id.* at 542.

19. *Id.* at 547.

20. *Id.* at 548 (emphasis added).

21. *Id.*

22. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (noting that Justice Holmes's "exposition" expanded the takings doctrine).

23. Muhlker v. N.Y. & Harlem R.R. Co., 197 U.S. 544 (1905).

24. *Id.* at 571 (Brown, J., concurring).

Contract Clause of the United States Constitution when it held that a railroad could deprive property owners of light and air easements by elevating its tracks.[25] However, Justice Holmes issued a dissent that three other Justices joined. He stressed that "I know of no constitutional principle to prevent the complete reversal of the elevated railroad cases to-morrow [sic], if it should seem proper to the [New York] Court of Appeals."[26] Then, focusing on the property owner's takings claim, Justice Holmes explained that "the plaintiff's rights, however expressed, are wholly a construction of the courts. I cannot believe that . . . we are free to go behind the local decisions on a matter of land law . . . ." [27]

In numerous subsequent cases, the Court reaffirmed the right of state courts to modify or even overrule their prior property law decisions without violating the Constitution. For example, in *Tidal Oil Co. v. Flanagan*, the litigants disputed who owned two tracts of land.[28] When the case reached the Supreme Court, Tidal Oil Company alleged that the Oklahoma Supreme Court had changed its prior rulings concerning the sale of a minor's property in such a manner that deprived the company of its due process right to the property.[29] The Supreme Court rejected the argument. Citing a string of its prior decisions, the *Tidal Oil* Court reiterated that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."[30]

Two succeeding cases corroborate the States' paramount role in determining state property law, while indicating that the Court would only consider examining those determinations under extraordinary circumstances: *Fox River Paper Co. v. Railroad Commission of Wisconsin*,[31] and *Broad River Power Co. v. South Carolina*.[32] The Court in *Fox River* reviewed whether a law requiring dam operators to allow the State to acquire the dam after thirty years violated "the rights vested in riparian owners" to use water power, and therefore amounted to "a taking of property without due process."[33] The state court had rejected that claim, determining that the riparian owner's right was subordinate to that of the State to control its navigable waters, and that the State could prohibit the dam, or permit it with

25. *Id.* at 570–71 (plurality opinion).
26. *Id.* at 574 (Holmes, J., dissenting).
27. *Id.* at 575–76.
28. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924).
29. *Id.* at 449.
30. *Id.* at 450.
31. Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 657 (1927).
32. Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930).
33. *Fox River*, 274 U.S. at 652–54.

restrictions such as this condition.[34] The Court upheld the state decision, reiterating the need to defer to state court determinations of state law: "We are not concerned with the correctness of the rule adopted by the state court, *its conformity to authority*, or its consistency with related legal doctrine."[35] The Court went on to say that it is for "the state court[s] . . . to define rights in land located within the state, and the *Fourteenth Amendment*, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent."[36]

In *Broad River*, the Court reiterated *Fox River's* observations, explaining that, so long as "there is no evasion of the constitutional issue," the Court will uphold the state court decision.[37] The "Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."[38]

The Court once again emphasized the central role of state courts in defining state property rights in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*[39] In that case, the Montana Supreme Court overruled a prior holding concerning the right of parties to recover freight overcharges.[40] A question before the United States Supreme Court was whether the Takings Clause prevented the state court from only applying its new rule prospectively.[41] Writing for the Court, Justice Cardozo explained that it was up to the state court, because "the federal constitution has no voice upon the subject."[42] Whether the new decision is based on the common law or on statute, a state court has the option of applying the prior law to past activities, or

> [o]n the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.[43]

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34. *Id.* at 654.
35. *Id.* at 657 (emphasis added) (citation omitted).
36. *Id.* (emphasis added). For an analysis of how the Court can respond to a state court's attempt to forestall its review of a constitutional question, *see infra* Part IV.
37. *Broad River*, 281 U.S. at 540. *See infra* Part IV.
38. *Id.* at 541.
39. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365–66 (1932).
40. *Id.* at 360–61.
41. *Id.* at 361.
42. *Id.* at 364.
43. *Id.* at 365.

All of these cases underscore the central role of state courts in determining their state's property rights. They highlight why, under our federal structure, absent extreme circumstances (addressed later in this Essay) federal courts should not review state court property law determinations.

III. A JUDICIAL TAKINGS DOCTRINE WOULD HAVE DISREGARDED THE COMMON LAW

In addition, a judicial takings doctrine would ignore the evolving nature of the common law. An excellent example of this can be seen by looking at the legal evolution that took place in the area of law reviewed in *Stop the Beach Renourishment*, that is, the law governing riparian property rights and boundaries.

For the first "two generations" of our nation's existence, courts in the United States followed the English rule under which the sovereign owned the beds of tidal waters, while the nontidal rivers of England could be privately owned.[44] This rule made sense in a relatively small country whose rivers became largely unnavigable beyond the reach of the tide. But it made no sense in the United States, where large navigable freshwater rivers and lakes were the principal highways of commerce. Therefore, the Court saw that the circumstances of this new land required that rivers which would have been considered proprietary in England should be recognized as navigable and subject to sovereign ownership in the United States.[45]

Consequently, as the Court later observed in *Barney v. Keokuk*, in 1851 it overruled years of precedent in *Genesee Chief v. Fitzhugh*[46] to hold that non-tidal waters may be navigable for commerce clause purposes.[47] As a result, lands that were free of any easements before *Genesee Chief* became subject to a dominant federal navigable servitude that enables the government to construct channels and similar navigational improvements without compensating landowners.[48] Moreover, as explained in *Barney*, the change meant that "it would now be safe" for States to decide that title itself

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44. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1877) (discussing development of sovereign ownership rule).

45. *Id.*

46. Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

47. *Barney*, 94 U.S. at 338 (discussing *Genesee Chief*).

48. *See* United States v. Cherokee Nation of Okla., 480 U.S. 700, 704, 707–08 (1987) (explaining that the federal government is not liable for a Fifth Amendment taking where it constructs a channel in the bed of a navigable stream because any private ownership of the stream is subject to a dominant federal servitude).

in these non-tidal waters turned on whether they were navigable for Commerce Clause purposes.[49] Thus, in addition to becoming subject to a federal servitude, in many cases lands that may have been deemed private just after the American Revolution became sovereign public lands "two generations" later following the High Court's eventual adaptation of the common law to the needs of the New World.[50]

A unanimous Court again recognized the dynamic nature of the common law in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*.[51] There, Justice Brandeis explained that courts administering the common law have the right to alter prior decisions "to conform with changing ideas and conditions" and may do so "without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions."[52]

More recently, the Supreme Court even acknowledged this central attribute of the common law in the criminal law context, where the consequences of any alteration can be particularly severe. In *Rogers v. Tennessee*, the petitioner stabbed an individual, who died 15 months later.[53] The state court then convicted the petitioner of murder. Under the State's "year and a day" common law rule, however, no person could be convicted of murder unless the victim died within a year and a day of the act.[54] The Tennessee Supreme Court nevertheless upheld the conviction. It did so by abolishing the common law rule, finding that "the original reasons for recognizing the rule no longer exist."[55] The United States Supreme Court affirmed.[56]

In affirming, the Court explained that "our case law system" contains "divergent pulls of flexibility and precedent."[57] As such, strict "limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system."[58] The Court reasoned that this is especially so "[i]n the context of common law doctrines," where "there often arises a need to clarify or even to reevaluate

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49. *Barney*, 94 U.S. at 338.
50. *Id.*
51. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930).
52. *Id.* at 681 n.8.
53. Rogers v. Tennessee, 532 U.S. 451 (2001).
54. *Id.* at 453–55.
55. *Id.* at 455.
56. *Id.* at 456.
57. *Id.* at 461 (internal quotation marks and citation omitted).
58. *Id.*

prior opinions as new circumstances and fact patterns present themselves."[59]

Finally, the Court has recognized this critical aspect of the common law in the takings context. In *United States v. Causby*, for example, the Court rejected a takings claim based upon the ancient common law doctrine that land ownership extended skyward without limits, explaining that the doctrine did not apply to a world in which "[t]he air is a public highway."[60] Subsequently, Justice Scalia, writing for the majority in *Lucas v. South Carolina Coastal Council*, similarly observed that under the common law, "changed circumstances or new knowledge may make what was previously permissible no longer so."[61] Likewise, Justice Kennedy's concurring opinion in *Lucas* stressed that "[t]he Takings Clause does not require a static body of state property law . . . ."[62] A judicial takings doctrine, however, would chafe against this core attribute of the common law. It would threaten to freeze the common law in time.

III. A JUDICIAL TAKINGS DOCTRINE WOULD HAVE BEEN IMPRACTICAL TO IMPLEMENT

In some ways, however, the most troubling aspect of the new doctrine would have been its practical implications. There are many, including the following:

A. Various Jurisprudential Doctrines Would Preclude Lower Federal Courts from Hearing Judicial Takings Claims Against State Courts

The Eleventh Amendment and judicial immunity each prevent lower federal courts from hearing takings claims against state courts. When government "takes" property, it is required to pay compensation. The Takings Clause does not prohibit improper acts, but rather mandates compensation for proper acts. See, for example, the Court's most recent affirmation of this core concept in *Lingle v. Chevron U.S.A., Inc.*[63] The Eleventh Amendment, however, bars federal court compensation claims against States.[64] On top of that, judicial immunity would bar a suit against a

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59. *Id.*
60. United States v. Causby, 328 U.S. 256, 261 (1946).
61. Lucas v. S.C. Coastal Council, 505 U.S 1003, 1031 (1992) (citation omitted).
62. *Id.* at 1035 (Kennedy, J., concurring).
63. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005).
64. U.S. CONST. amend. XI. *See, e.g.,* Seven Up Pete Venture v. Schweitzer, 523 F.3d 948, 956 (9th Cir. 2008); DLX, Inc. v. Kentucky, 381 F.3d 511, 526 (6th Cir. 2004); State Contracting & Eng'g

state court and its judges for monetary relief.[65] Intriguingly, Justice Scalia's *Stop the Beach Renourishment* opinion avoids these central problems by declaring that damages are "even rare for a legislative or executive taking"[66] and implicitly will never be imposed in a judicial takings suit. That approach would resolve the Eleventh Amendment and immunity problems, although it would also appear to undermine the Court's prior determination that parties have the right to compensation for temporary takings.[67]

Federal district court review of state court decisions would additionally be prohibited by the *Rooker–Feldman* doctrine. Under that doctrine, United States district courts lack subject matter jurisdiction over challenges to final state court decisions.[68] The doctrine applies even if the "challenges allege that the state court's action was unconstitutional."[69] Under the *Rooker–Feldman* doctrine, while parties may appeal a state court decision to the State's highest court, and then to the United States Supreme Court if a federal question is presented, "horizontal" review of a state court decision in federal court is unavailable.[70]

Justice Scalia acknowledges this problem, explaining that a party would be limited to petitioning the Supreme Court for a writ of certiorari.[71] He raises new problems, however, by going on to suggest that a *non-party* might somehow "challenge in federal court the taking effected by the state supreme-court opinion . . . ."[72] If this concept had been adopted by a

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Corp. v. Florida, 258 F.3d 1329, 1337–38 (Fed. Cir. 2001); Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1277 (11th Cir. 1998); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 94 F.3d 996, 1005 (5th Cir. 1996), *rev'd on other grounds sub nom* Phillips v. Wash. Legal Found., 524 U.S. 156 (1998); Citadel Corp. v. P.R. Highway Auth., 695 F.2d 31, 33 n.4 (1st Cir. 1982); Garrett v. Illinois, 612 F.2d 1038, 1039 (7th Cir. 1980).

65. *See* Mireles v. Waco, 502 U.S. 9, 11 (1991) (per curiam) ("[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages.").

66. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2607 (2010) (Scalia, J., plurality opinion).

67. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321–22 (1987) (holding that simply invalidating a county ordinance, without fair value payment for the period of the taking, "would be a constitutionally insufficient remedy"). Justice Scalia's position that damages for takings are rare may be based upon, and therefore support, cases such as those holding that permit delays due to governmental positions that courts subsequently reverse are normal and therefore are not temporary takings. *See, e.g.,* Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1190 (Cal. 1998) (holding that "a delay in the issuance of a development permit" exemplifies "a normal delay rather than a temporary taking").

68. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283–84 (2005).

69. *Feldman*, 460 U.S. at 486; Rooker v. Fidelity Trust Co., 263 U.S. 413, 415–16 (1923).

70. *Rooker*, 263 U.S. at 416.

71. *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (Scalia, J., plurality opinion).

72. *Id.* at 2609–10.

majority of the Court, litigators and lower courts would no doubt have faced years trying to sort out questions such as who could be sued for such a taking and when a claim would be ripe.

B. The United States Supreme Court Could Itself Be Subject to Judicial Takings Claims

Logically, and disturbingly, a judicial takings doctrine would apply to the United States Supreme Court. Although *Stop the Beach Renourishment* focused on whether a State's highest court imposed a taking, there is no justification for applying the Takings Clause to state courts but not to federal courts. If the Takings Clause is in part directed to the judiciary, then it must apply to the federal judiciary, including the Supreme Court, because the Clause covers federal actions.[73] Yet the High Court has periodically faced new circumstances calling for it to reexamine long-settled property laws, and thereby issue decisions that arguably, to use Justice Scalia's proposed judicial takings test, "declare[] that what was once an established right of private property no longer exists . . . ."[74]

For example, this Essay previously outlined how the Supreme Court altered the laws governing the ownership of lands underlying the nation's waters that were navigable but non-tidal.[75] For two generations, those lands were often privately owned. Then, in 1851 the Court overruled years of precedent and held in *Genesee Chief v. Fitzhugh* that non-tidal waters may be deemed "navigable" for Commerce Clause purposes.[76] As a result, private lands that were free of easements became burdened by a dominant federal navigable servitude. Moreover, as previously explained, the change enabled individual States to find that they, rather than private parties, held title to these lands.

The Supreme Court has also revised its choice of law on riparian boundaries to the detriment of landowners. In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co*., the Court explained that "from 1845 until 1973," it had let the States apply their own boundary laws in determining the private ownership of land along a State's navigable waters when the location of the waters shifted.[77] Then, in 1973 it issued a decision

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73. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11–12 (1990) (explaining that the United States Claims Court [now the United States Court of Federal Claims] hears and determines takings claims against the federal government).

74. *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (Scalia, J., plurality opinion).

75. *See supra* text accompanying notes 44–50.

76. Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457 (1851).

77. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 382 (1977).

holding that, for States admitted after the original thirteen States, federal common law determined ownership in most of these disputes.[78] As a result, some parties lost their established right to real property. (The Court reversed itself again four years later in *Corvallis Sand*.[79])

Similarly, in *United States v. Causby*, the Court determined that "[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . . But that doctrine has no place in the modern world."[80] Due to the Court's alteration of the land owner's property right, government could allow airplanes to occupy what had once been private property without violating the Takings Clause. As the Court explained:

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[81]

When the Court issues decisions such as these that extinguish private property rights, can losing parties or others allege that the Court took their property? If so, that would not only create a troubling opportunity for parties to have a second bite at the apple; it would also raise its own host of procedural and practical problems.

C. The Court of Federal Claims Could Be Overwhelmed by Takings Suits against Other Federal Courts

Besides subjecting United States Supreme Court decisions to unprecedented and awkward review, a judicial takings doctrine could overwhelm the Court of Federal Claims by requiring it to revisit countless numbers of other federal court decisions. Disgruntled parties could freely assert that the lower federal courts—or even appellate courts—took their property by abruptly departing from past precedent. *Brace v. United States* highlights this problem.[82] In *Brace*, a litigant brought suit in the Court of

78. *Id.* at 369–70 (explaining its holding in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)).
79. *Id.* at 370.
80. United States v. Causby, 328 U.S. 256, 260–61 (1946).
81. *Id.* at 266.
82. Brace v. United States, 72 Fed. Cl. 337 (2006).

Federal Claims seeking compensation because an order of a federal district court had allegedly taken his property. The Court of Federal Claims, however, rejected the argument that a court order could itself impose a taking. In addition to citing numerous holdings of the Supreme Court and of lower courts, *Brace* explained that "were the court to accept plaintiff's syllogism, it would constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law."[83]

In *Stop the Beach Renourishment*, Justice Breyer suggested that a judicial takings doctrine might lead large numbers of losing parties to challenge state court decisions in federal court.[84] *Brace* indicates that perhaps thousands of dissatisfied federal litigants could likewise seek to keep their challenges alive by filing takings lawsuits against federal courts.

D. Courts and Litigants Would Be Entangled with Procedural Issues

Finally, the creation of a judicial takings doctrine would have sparked numerous procedural battles as the courts and litigants tried to determine how these claims should be brought. For example, would the taking occur when (1) the highest available court fails to meet the judicial takings test (whatever it is), (2) the injured party then seeks compensation through a new lawsuit, and (3) the court then denies compensation as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*?[85] Would a judicial taking be ripe as soon as the highest available court does not meet the judicial takings test? Could a temporary judicial taking occur when a trial court fails to meet the test, even if its decision is reversed on appeal? If compensation were held to be an available remedy, what party is liable for just compensation? For example, where the "judicial taking" is the result of a decision benefiting one private party over another private party, does the party that benefited owe damages?[86] Does the trial court owe damages? The appellate court? All

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83. *Id.* at 359 (citation omitted).

84. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2618–19 (2010) (Breyer, J., concurring in part and concurring in the judgment).

85. Williamson Cty. Reg'l. Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). *Williamson County* explained that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

86. *See*, *e.g.*, Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944). In that case, an estate liquidation decision had a posture similar to that in *Stop the Beach Renourishment* except that the

courts that ruled against a party? If a court is potentially liable, would due process require the litigant asserting a judicial takings claim to name the court as a party? Would the Court of Federal Claims have jurisdiction to hear judicial takings claims against a federal appellate court, or even the Supreme Court? Would compensation be barred because the alleged judicial taking was not "authorized" by Congress or by the state legislature?[87] The courts would have been plagued with these and no doubt many other questions if the Court had created a judicial takings doctrine.

Given these and numerous other constitutional, doctrinal, and practical problems, it is highly improbable that Justices Breyer, Ginsburg, Kennedy, or Sotomayor would ever embrace this new doctrine. Therefore, unless newly appointed Justice Elena Kagan is sympathetic to the concept, the judicial takings doctrine likely suffered a quiet death in *Stop the Beach Renourishment*.

But the discussion does not stop there. As we shall see, if a state court ever took the radical step of manufacturing new property law concepts out of whole cloth in order to evade the Takings Clause, the Supreme Court has a well established vehicle for checking that abuse.

IV. THE SOLUTION FOR EXTREME CASES: SUPREMACY CLAUSE REVIEW

During oral argument in *Stop the Beach Renourishment*, Justice Breyer suggested that there must be a constitutional remedy for the following hypothetical:

> [Suppose a person] owns 40 acres in the middle of Vermont and the State wants to build a nuclear power plant, and they say, you have to pay us. No, says the State. And the court of the State upholds it on the ground there is an implicit easement under Blackstone to take land for power plants without paying for it; it's called the power plant easement.[88]

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underlying dispute was between two private parties rather than between a private party and a public entity. *Id.* at 36; *Stop the Beach Renourishment*, 130 S. Ct. at 2592. In both cases, the state's highest court upheld state statutes against takings challenges, reasoning that prior court decisions did not provide the challenging party the property right that it claimed. *Demorest*, 321 U.S. at 47–49; *Stop the Beach Renourishment*, 130 S. Ct. at 2612–13.

87. *See* Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974) (explaining that a government action that results in a taking must have been properly authorized).

88. Transcript of Oral Argument at 46, Stop the Beach Renourishment, Inc. v. Florida, 130 S. Ct. 2592 (No. 08-1151) (2010).

There is a remedy for Justice Breyer's hypothetical that avoids the pitfalls of a judicial takings doctrine: Supremacy Clause review.[89]

In the theoretical event that a state court redefined property in an objectively indefensible attempt to evade a takings claim, the Supreme Court can evaluate the proper interpretation of state law that should have been applied. In that circumstance, the state court would effectively be failing to review a federal claim as required by the Supremacy Clause and the Court could utilize its appellate authority to direct the state court to interpret state property law correctly.[90] That would not, of course, amount to a judicial taking or other constitutional violation. Rather, just as an appellate court's alteration of a lower court decision does not create a cause of action against the lower court, the Supreme Court's ruling would not create a judicial taking or any other type of claim against the state court. Instead, the Court would be exercising its supervisory role over the judicial system, in accordance with the Supremacy Clause, to stop a state court's attempt to evade its duty to follow the Constitution.

Any such review, however, would need to be limited to particularly extraordinary situations. In contrast to most constitutional rights that are federally created and that exist independently of any state law, the Fifth Amendment's property protections are necessarily bound up with a State's definition of property. The federalism reasons outlined earlier for rejecting a judicial takings doctrine therefore also call for a very high threshold before the Supreme Court reviews a state judicial determination concerning a State's property law. To avoid excessive interference with this area of law traditionally reserved to the States, the Court should utilize a very deferential standard. It might, for example, borrow the "shocks the conscience" test used in substantive due process cases.[91] Alternatively, it could use the standard articulated in *Rogers v. Tennessee*, where the Court explained that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given

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89. U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

90. *See, e.g.*, Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 171 (2002).

91. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009) (citations omitted) (applying the "shocks the conscience" standard to a due process claim involving judicial recusal); United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 401–02 (3d Cir. 2003) (applying the "shocks the conscience" standard to a substantive due process land-use claim in a Third Circuit opinion authored by Justice Alito).

retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'"[92]

Highly deferential Supremacy Clause review would avoid the pitfalls of a judicial takings doctrine, or even due process review. Losing parties would not be given a second bite at the apple through a new judicial takings (or due process) lawsuit.[93] The problematic question of who pays compensation, and the doctrinally awkward need to take compensation out of the Takings Clause, would disappear because the Supreme Court on review would merely reverse the state court decision.

CONCLUSION

Takings law was once characterized as incoherent and virtually indecipherable. As one scholar observed, "[i]t is by now axiomatic that regulatory takings jurisprudence [prior to Lingle] has been 'muddled,' 'confused,' and 'a constitutional quagmire.'"[94] That changed with the Court's decision in *Lingle v. Chevron U.S.A., Inc.*, which provided much needed clarity by disentangling the Takings Clause from the Due Process Clause.[95] This turned a perplexing area of the law into one that is now more coherent as a doctrine and more workable in practice. If the *Stop the Beach Renourishment* Court had embraced judicial takings, however, it would have returned takings law to "the lawyer's equivalent of the physicist's hunt for the quark."[96] From this practitioner's point of view, we can all rest a bit easier for having dodged that bullet.

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92. Rogers v. Tennessee, 532 U.S. 451, 462 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)).

93. Justice Scalia's *Stop the Beach Renourishment* opinion indicates that parties might be barred from bringing federal suits against state courts, but he fails to address new federal takings lawsuits against federal courts. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2609–10 (2010) (Scalia, J., plurality opinion).

94. Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. ENVTL. L.J. 63, 63 (2008) (quoting Mark W. Gordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L. 1 (2006)).

95. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005).

96. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199 n.17 (1985) (quoting C. HARR, LAND-USE PLANNING (3d ed. 1976)).