

## NOTES

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# STOP THE REACH: SOLVING THE JUDICIAL TAKINGS PROBLEM BY OBJECTIVELY DEFINING PROPERTY

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### INTRODUCTION

The Supreme Court's Takings Clause jurisprudence has evolved to require compensation, not just for eminent domain, but also for governmental regulations<sup>1</sup>—a shift that has roughly coincided with the Supreme Court's evolving understanding of the limits on state and federal government power. After the New Deal, the scope of constitutionally permissible exercises of governmental power has dramatically expanded.<sup>2</sup> Takings Clause jurisprudence, in developing from mere compensation for physical appropriations to cover various forms of regulatory takings, has functioned as an important safety valve<sup>3</sup> to the growing dominance of collective interests, enshrined into law at the expense of individual property rights.<sup>4</sup> The doctrine of judicial takings could serve a similarly important function in limiting the reach of

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1 See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

2 See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118–25 (1942) (invalidating the commerce clause doctrine articulated in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 64–65 (1824)).

3 See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that the aim of the Takings Clause is to prevent the 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.”).

4 Importantly, some have viewed the Takings Clause as not only a safety valve for governmental oppression, but as a means of obtaining economically efficient outcomes, and that such efficiency calculations should guide our takings doctrines. See, e.g., Christopher Serkin, *Transition Relief from Judge-Made Law: The Incentives of Judicial Takings*, 21 *WIDENER L.J.* 777, 778 (2012) (“On the one hand, the absence of compensation may induce risk-averse property owners to underinvest in their property. On the other, compensation may create a kind of moral hazard, allowing property owners to discount or ignore risks that they should, in fact, consider. . . . [T]he Takings Clause functions as a form of transition relief, and examines how protecting property owners from the costs of legal change can induce inefficient investment incentives.”).

lower courts that refuse to protect private property in their application of the law, but in order for the Court to instantiate a unified judicial takings doctrine, it must first settle a presuppositional question that has, perhaps unknowingly, deeply divided the Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>5</sup>—namely, how should a court define property?

The Fifth Amendment to the Constitution states that “private property [shall not] be taken for public use, without just compensation.”<sup>6</sup> The increasing number of regulatory encroachments on property by the modern state has not nullified the utility of the Takings Clause because the courts have adopted a more nuanced understanding what property actually is—a “bundle of rights,” rather than a “thing.”<sup>7</sup> The question of eminent domain is, “Has a physical object or plot of land been taken?”<sup>8</sup> But the question of regulatory takings is broader: “Have enough sticks in the bundle of property rights been taken so as to conclude that the thing in question has in effect been taken?”<sup>9</sup> The “bundle of rights” theory of property conceptually expands the reach of the Takings Clause. Consequently, just compensation is available to property owners in the face of a growing public sector, despite the fact that many government actions do not involve physical appropriations.<sup>10</sup>

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5 560 U.S. 702 (2010).

6 U.S. CONST. amend. V.

7 It may be that the bundle of rights theory was contrived in order to undermine the more “absolutist” conception of property articulated by Blackstone and secured by the English common law—to change “American law and politics to adapt to changing economic and social conditions to achieve social justice.” Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247–53 (2007) (arguing for the necessity of the bundle theory over the Blackstonian physicalist theory in order to justify socially desirable governmental encroachments upon private property). But even if that is the case, a movement away from the “physicalist” notion of property rights, conceptually focusing on the discrete rights inherent in the thing rather than the thing itself, has paradoxically unchained property law to adapt its protections for the individual to modern circumstances—to expand to encompass, for example, “intangible property such as business goodwill, trademarks, trade secrets, and shares of corporations,” among other things. *See id.*

8 *See Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015) (holding that the Takings Clause protects both real and personal property from physical appropriation without just compensation).

9 *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–17 (1992) (holding that regulations that deprive property of all beneficial use are “the equivalent of a physical appropriation”).

10 This does not do violence to the original meaning of the Takings Clause, but rather adapts the Clause to reality, which is that modern regulatory acts can be substantially the same thing as a physical appropriation. *See generally Lucas*, 505 U.S. 1003 (providing per se compensation for a taking of the right to use); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (providing per se compensation for a taking of the right to exclude). *But see* James E. Holloway & Donald C. Guy, *The Use of Theory Making and Doctrine Making of Regulatory Takings Theory to Examine the Needs, Reasons, and Arguments to Establish Judicial Takings Theory*, 14 FLA. COASTAL L. REV. 191, 204 (2013) (“Justice Holmes stated that ‘this [doctrine of regulatory takings goes] beyond any of the cases decided by this

Moreover, in developing the doctrine of “regulatory takings” over time, the Court has paid no attention to which branch of government effects the taking—the sum total of its concern has been whether private property has been taken for public use, in which case the Takings Clause applies.<sup>11</sup> Therefore, the proposed doctrine of judicial takings, proffered by Justice Scalia in his plurality opinion in *Stop the Beach Renourishment*, is actually a rather humdrum application of the doctrine of *regulatory takings* in the judicial context.<sup>12</sup> As Professor Ilya Somin put it rather succinctly, “Although the definition and enforcement of a judicial takings doctrine poses genuine challenges, these difficulties are fundamentally similar to those presented by other takings claims.”<sup>13</sup> Nevertheless, both Justices Scalia and Kennedy in *Stop the Beach Renourishment*, writing separately, declined to explicitly define property in the same way as previous regulatory takings cases. Rather than focusing on essential characteristics of property, such as the right to exclude or use, the Justices deferred in varying degrees to state definitions of property.<sup>14</sup>

There are three potential approaches to defining property in a Takings Clause analysis. The first might be called the Positivist Approach, where the history of lower-court precedents, defining a state common law right as “A,” are treated by the Supreme Court as dispositive on what property rights actually exist within the state, such that when the petitioner claims that his common law rights were actually “B” before the judgment, the Court must defer to the state court’s interpretation and deny relief. The Positivist Approach is self-defeating, leading to what Professor Merrill calls the “positivist trap,”<sup>15</sup> where the application of regulatory takings in the judicial context would

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Court.’ Justice Holmes concluded that the takings issue in *Pennsylvania Coal Co.* was [a] unique and . . . new takings theory.” (footnote omitted) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (“The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.” (footnote omitted)).

11 See Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 96 (2011) (“In *Stop the Beach Renourishment*, Justice Scalia cites the case of *PruneYard Shopping Center v. Robins*, in which the Court concluded that a state property-law ruling violated the First Amendment rights of protestors. The text of the Fifth Amendment does not distinguish between courts and legislatures any more than that of the First Amendment.” (footnotes omitted)).

12 Some have attempted to argue that the judicial branch is different enough from the other branches to justify refusing to extend the doctrine of regulatory takings to the judiciary. See John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 487–88, 493 (2010).

13 Somin, *supra* note 11, at 106.

14 See *infra* Sections III.B, C.

15 Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 922 (2000).

become a theoretical impossibility.<sup>16</sup> Justice Kennedy flirts with this approach, as evidenced by his willingness to accept the right of state courts to “change” the common law.<sup>17</sup>

The second might be called the Undefined Approach, where the history of lower-court precedents, defining the common law rights as “A,” are measured against the Court’s own definition of what property rights, “B,” existed before the judgment. In this approach, the Court reserves the right to define property in whatever manner it chooses. Justice Scalia adopts this approach, leaving open the question how “B” should be defined—either as an “established” common law property right, or something else entirely.<sup>18</sup>

The third might be called the Definitional Approach, where the history of lower-court precedents, defining the common law rights as “A,” are measured against the Court’s own definition of what objective property rights, “B,” existed before the judgment. The Court here would define B *neither* as simply an “established” right at the state level, *nor* as merely something in which the claimant has a reasonable economic expectation. Instead, the Court would set forth a definition of property that includes primarily (1) objective, essential qualities of property, and secondarily (2) established principles of property within the state’s judicial precedent.<sup>19</sup>

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16 See, e.g., 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, 42 (2011) (“Only if these common-law property rights have constitutional status does the takings inquiry make sense. If littoral rights were just a creature of the state, such that they could be created or cancelled at will, then the entire structure of littoral rights, indeed all property rights, would come tumbling down. . . . [The state] could create or displace any system of entitlements, whether on land or water, by a simple assertion of collective political will.”).

17 See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 736 (2010) (Kennedy, J., concurring) (“State courts generally operate under a common-law tradition that allows for incremental modifications to property law.”); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–35 (1992) (Kennedy, J., concurring) (“[I]f the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. . . . The Takings Clause does not require a static body of state property law.”); Nestor M. Davidson, *Judicial Takings and State Action: Rereading Shelley After Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL’Y 75, 76–77 (2011) (“On the one hand, private property is understood as relatively fixed according to long-standing common-law doctrine that reflects almost pre-political norms of ownership and exclusion—a view to which Justice Scalia seems to subscribe. On the other hand, some Justices seem to embrace a more legal realist approach that recognizes . . . the inherent centrality of the state in defining and moderating this aspect of private ordering.”); John G. Sprankling, *The Property Jurisprudence of Justice Kennedy*, 44 MCGEORGE L. REV. 61, 68 (2013) (noting that Justice Kennedy “forg[es] a rough compromise between natural law and legal positivism”).

18 See *Stop the Beach Renourishment*, 560 U.S. at 715; *id.* at 735 (Kennedy, J., concurring).

19 However, these are not hermetically sealed categories, as natural rights often have an ancient legal pedigree. See Epstein, *supra* note 16, at 48–49 (“The 1904 Farnham treatise, for example, contains references to rights that are *jure naturae*, by the right of nature. ‘The right to future alluvial formation or batture is a vested right, inherent in the property itself, and forming an essential attribute of it, resulting from natural law . . . .’ This exten-

The Definitional Approach potentially resolves the dispute between Justices Scalia and Kennedy about whether to apply the Due Process Clause or the Takings Clause when something that looks like a judicial taking occurs. Moreover, it addresses the concerns and reservations held by both Justices in their opinions.

Justice Kennedy primarily fears that allowing courts to overturn settled common law principles, provided they give just compensation, would grant license to lower courts to ignore the common law.<sup>20</sup> However, the Definitional Approach would allow the Court to use a “sliding scale”: ordinary judicial takings would receive compensation, while extraordinary judicial takings—those takings that are completely arbitrary or irrational—could simply be reversed as a matter of due process. This would satisfy Justice Kennedy’s desire to prevent lower-court abuses, while rendering moot his arcane dispute with Justice Scalia over whether the common law can “change.”<sup>21</sup> Likewise, Justice Scalia’s fear of ad hoc substantive due process balancing tests<sup>22</sup> would be partially allayed, since only the most egregious takings of common law property rights would become the subject of a Due Process Clause analysis.<sup>23</sup> All other such takings would fall squarely within the Takings Clause, a more conceptually manageable rule.<sup>24</sup>

Justice Kennedy also fears the potential scope of judicial takings and the impact that the doctrine would have on the freedom of states to develop their common law of property.<sup>25</sup> Admittedly, the Definitional Approach would give judicial takings a generous reach; however, this reach would go no

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sive reliance on the natural law dates back to Roman times, where the laws of alluvion and avulsion were part of the natural law as defined by Gaius and Justinian in their respective Institutes.” (footnote omitted) (quoting 1 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 73, at 330 n.3 (1904)).

20 See *Stop the Beach Renourishment*, 560 U.S. at 738 (Kennedy, J., concurring) (“[I]t is conceivable that some judges might decide that enacting a sweeping new rule to adjust the rights of property owners in the context of changing social needs is a good idea. Knowing that the resulting ruling would be a taking, the courts could go ahead with their project, free from constraints that would otherwise confine their power.”).

21 See *id.* at 722 (plurality opinion) (“[T]he Framers did not envision the Takings Clause would apply to judicial action . . . since the Constitution was adopted in an era when courts had no power to ‘change’ the common law.”); cf. *id.* at 736 (Kennedy, J., concurring) (“[The] common-law tradition . . . allows for incremental modifications to property law.”).

22 See *id.* at 724 (plurality opinion) (criticizing Justice Kennedy’s “extremely vague applications of substantive due process”).

23 It should be noted that the Takings Clause already involves ad hoc balancing, as well as conceptual *ipse dixit*—in particular, deciding the spatial denominator within the property against which the regulatory taking will be judged for purposes of a per se takings analysis. See *infra* Section I.A. Therefore, adding an additional layer of judicial “gut checking” for the most outrageous abuses of judicial authority might not be altogether unpalatable for a Justice who appears to accept current Takings Clause jurisprudence.

24 A takings analysis begins by asking whether a per se taking has occurred, and if not, applies a three-factor balancing test. See *infra* Section I.C.

25 See *Stop the Beach Renourishment*, 560 U.S. at 736 (Kennedy, J., concurring).

further than prior regulatory takings cases.<sup>26</sup> Moreover, providing compensation for judicial appropriations of property—those that, according to the sliding scale, stop short of an egregious overthrow of a common law right<sup>27</sup>—would not necessarily stifle common law development. Rather, compensation would force the government to pay property owners when a court refused to recognize property interests that were clearly definable, either by reference to essential characteristics of property or state judicial precedent.

The future of judicial takings may rest on the ability of the Court to define property in a robust and objective way.<sup>28</sup> Property has essential characteristics that make it easily identifiable, the most significant of which are the rights to exclude and use. However, even when a property right does not fit within a neat categorical definition, should that right have a long, well-established pedigree in state court precedent,<sup>29</sup> that property right is similarly within the capacity of the reviewing court to identify. And once it is determined that, prior to the judgment, the petitioners possessed a clearly defined property right, and that after the judgment, they were divested of that right, then a regulatory taking has occurred. Then the legal question boils down to compensation. In other words, the initial definitional question is essential to the question whether there is any judicial taking at all.

In this Note I propose a unified judicial takings doctrine that accounts for all of the relevant concerns dividing Justices Scalia and Kennedy in *Stop the Beach Renourishment*. Part I addresses the evolution of the Court's regulatory takings jurisprudence. Part II surveys the Court's definition of property in the Due Process arena. Part III analyzes the dispute between Justices Scalia and Kennedy in *Stop the Beach Renourishment* and proposes a compromise judicial takings theory—a “sliding scale” test—that might unify the two factions. Part IV addresses potential criticisms of the Definitional Approach.

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26 The Definitional Approach, as this Note understands it, merely defines property in the same manner as prior regulatory takings cases—placing a primary emphasis on objective, essential qualities of property, such as the right to exclude and use.

27 For a possible example of an overthrow of established property principles, see generally *State v. Shack*, 277 A.2d 369 (N.J. 1971) (holding that there is no right to exclude government officers seeking to provide public services to migrant workers housed on private property). *But see* Stephanie Stern, *Protecting Property Through Politics: State Legislative Checks and Judicial Takings*, 97 MINN. L. REV. 2176, 2188–89 (2013) (“When state court holdings are truly radical, they are often narrowed over time as subsequent cases carve out exceptions and limit the precedent. For example, the activist nature of *State v. Shack* and its sharp departure from precedent are renowned, but not the decision's erosion in a line of subsequent New Jersey cases.” (footnote omitted)).

28 Other solutions for resolving this dispute have been proposed: one possibility might be to use judicial takings for an intentional seizure of private property, but due process for unintentional and/or irrational seizures. *See* Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 305 (2012).

29 *See Stop the Beach Renourishment*, 560 U.S. at 728 (plurality opinion) (noting that “judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking”).

## I. THE DEFINITIONAL APPROACH IN TAKINGS CLAUSE DOCTRINE

Given that judicial takings would be a species of regulatory takings,<sup>30</sup> it is helpful to set judicial takings in the context of the Court's evolving regulatory takings jurisprudence. The story of judicial takings begins with the first ever extension of the Takings Clause from eminent domain to mere regulatory actions. The simplest application of the Takings Clause involves a physical appropriation of tangible property. It involves no philosophical speculation or conceptual line drawing—either a government has taken possession of property, or it has not. With eminent domain, property is very easily defined; it is a physical object or parcel of land. The owner is divested of every one of his property interests: to exclude, use, abandon, destroy, transfer, etc. However, the doctrine of regulatory takings is not so clean cut and poses unique conceptual challenges in its application.

### A. *Pennsylvania Coal and the Takings Clause Transformation*

In the case of *Pennsylvania Coal Co. v. Mahon*,<sup>31</sup> Pennsylvania imposed a regulation forbidding the mining of certain coal pillars so as to prevent subsidence of the ground above the coal mine.<sup>32</sup> The regulation was clearly within the police powers of the state, enforced for the safety of those residing above the coal mine.<sup>33</sup> The regulation, however, decreased the economic value of the coal mine.<sup>34</sup> The mining company in *Penn Coal* purchased subsurface mineral rights for the sole purpose of extracting the minerals for sale on the market; therefore, when the government declared that certain portions of its physical property could no longer be used for mining, those portions became utterly valueless to the coal company.<sup>35</sup> While the government had not entered onto the property and taken physical possession of the coal pillars, its actions had the same effect—*with respect to the coal pillars*, the government had completely divested the property owner of the right to use the property.<sup>36</sup> On this basis, a majority of the Court, led by Justice Holmes, declared the government regulation to be a taking.<sup>37</sup>

The dissent in *Pennsylvania Coal* was not convinced.<sup>38</sup> From the dissent's perspective, the governmental regulation had only affected a small portion of the property.<sup>39</sup> Thus, applying the Takings Clause in similar circumstances would unduly burden the police power of a state, since the state government would have to compensate property owners for *any* action that even partly

30 See *supra* text accompanying notes 11–13.

31 260 U.S. 393 (1922).

32 See *id.* at 412–13.

33 See *id.* at 413.

34 *Id.* at 414.

35 See *id.* at 414.

36 See *id.*

37 *Id.* at 414–15.

38 See *id.* at 416–18 (Brandeis, J., dissenting).

39 See *id.* at 419.

reduced its economic value.<sup>40</sup> As we will see in later cases, this concern about an overly expansive doctrine of regulatory takings remains a cardinal fear of the Court: if the only property interest that is being affected is the right to *use*, the court is hesitant to find a taking unless the right to use is *entirely* divested.<sup>41</sup> However, this creates what might be called a numerator-denominator problem: if the denominator is the *entire* property, a divestment of the right to use a *portion* of the property is not necessarily a taking; but, if the denominator is only a *portion* of the property, the divestment of *that portion* of the property is necessarily a taking—because it takes the *entire* property under consideration. How does the Court initially determine which denominator to use? There is no principled way to answer this question. Making the denominator too large would undermine the ability of the courts to require compensation for regulatory takings, but making the denominator too small would impose too great a burden on states in the legitimate exercise of their police power. So it is with regulatory takings, that when the right to *use* property is at stake, it is inherently an ad hoc inquiry.<sup>42</sup>

### B. *Definitional Clarity and the Doctrine of Per Se Takings*

The Supreme Court further developed regulatory takings in the context of the right to use in the case of *Lucas v. South Carolina Coastal Council*.<sup>43</sup> In that case, the state of South Carolina passed a law prohibiting all property development on those portions of beachfront properties beyond a certain line.<sup>44</sup> The trial court found that this permanently reduced the value of the property beyond the line to zero,<sup>45</sup> but the South Carolina Supreme Court reversed.<sup>46</sup> The U.S. Supreme Court then reversed the South Carolina Supreme Court, agreeing with the trial court that this regulation was in fact a taking, since it was the functional equivalent of a physical appropriation.<sup>47</sup> The Court did, however, issue a caveat: if the restriction “inhere[s] in the title itself,” or is part of “background principles of the State’s law of property and nuisance [that] already place upon land ownership,” then the deprivation of economic use is not automatically a taking.<sup>48</sup> This caveat makes eminent sense, as there is no moral or common law right to use property in a way

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40 *See id.*

41 *See infra* Section I.B.

42 *See generally* Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25 (2013) (commenting at length on the ad hoc nature of much of the Court’s Takings Clause jurisprudence).

43 505 U.S. 1003 (1992).

44 *See id.* at 1008–09.

45 *Id.* at 1009.

46 *Id.*

47 *Id.* at 1017–19.

48 *Id.* at 1029.

that is a nuisance to others. Therefore the law of nuisance, even if it reduces the value of property to zero, cannot be a taking.<sup>49</sup>

A violation of the right to exclude, however, does not involve the ad hoc conceptual line drawing of *Penn Coal*. In the case of *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>50</sup> a government regulation called for the installation of cable boxes on the roofs of private residences to expand access to cable.<sup>51</sup> The Court concluded that the government action authorizing a permanent physical occupation on the property—even on a small portion of the property—was a regulatory taking on its face,<sup>52</sup> because it divested the owner of the right to exclude,<sup>53</sup> as well as every other property right in the bundle of rights.<sup>54</sup> As the Court put it, a physical occupation does not remove one stick from the bundle, but cuts through the entire bundle.<sup>55</sup> Thus a regulation that deprives a property owner of the right to exclude begins to look much more like eminent domain.

### C. Penn Central *Balancing: The Ad Hoc Alternative*

When not applying the per se takings test—either a destruction of all economic value or a permanent physical occupation—the Court falls back onto an ad hoc balancing test. In the case of *Penn Central Transportation Co. v. New York*,<sup>56</sup> a zoning ordinance declared Penn Central Station a historic landmark, placing limits upon additional construction on the property.<sup>57</sup> The owners of Penn Station were planning to construct a high rise on top of the station for the purpose of adding additional office space, but the regulation divested the owners of the right to build in the air space above the property,<sup>58</sup> a right traditionally vested in property owners under the *ad coelum* doctrine. The Court ruled that the relevant denominator for analyzing the takings claim was not the air space, but the entire property,<sup>59</sup> and as a result

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49 The Court's early attempts at defining the limits of regulatory takings cleaved closely to the law of nuisance. See generally *Miller v. Schoene*, 276 U.S. 272 (1928) (holding that if the use of one property destroys another property deemed to be more valuable to the public, the state may regulate the former, but must pay compensation).

50 458 U.S. 419 (1982).

51 *Id.* at 423–24.

52 See *id.* at 426–430 (distinguishing between “a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.”); see also *id.* at 434 (finding no per se taking because the physical occupation was not permanent (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980))).

53 *Id.* at 433 (“[T]he landowner’s right to exclude [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

54 *Loretto*, 458 U.S. at 435.

55 *Id.*

56 438 U.S. 104 (1978).

57 *Id.* at 107–18.

58 *Id.* at 115–18, 130.

59 *Id.* at 130–131.

found that the government had not deprived the property (that is, the whole property) of all economic value.<sup>60</sup>

Finding no complete diminution of value, the Court went on to consider, through a fact-bound inquiry,<sup>61</sup> (1) the economic impact of the regulation on the claimant, (2) the degree of interference with investment-backed expectations, and (3) the character of the regulatory action.<sup>62</sup> Therefore, every takings analysis involves two steps: first, an analysis of whether there is a per se taking under *Loretto* and *Lucas*, and second, if there is no per se taking, whether the government sufficiently interfered with the property owner's legitimate economic expectations in the property to warrant compensation.

#### D. *The Established Precedent of Defining Property in Regulatory Takings*

The Court thus has a long history of, in the context of regulatory takings, defining property in an objective way. Essential characteristics of property form the backbone of the regulatory takings doctrine; economic expectancies in the property are a secondary concern. While the application of regulatory takings involves a conceptual challenge in determining where to set the property denominator in the takings analysis, once the Court has set the denominator, it begins its application of the Takings Clause by defining the protected property interests at stake in a clear and self-evident way—the right to exclude and use. The Court's takings jurisprudence appears to privilege traditional, objective understandings of property, and this, as we will see in the following Part, is consistent with its understanding of property in the realm of due process, which has moved decidedly away from the Positivist Approach toward a more full-throated Definitional Approach.

However, in spite of its long-standing confidence in defining property in the per se takings context, the Court in *Stop the Beach Renourishment* conspicuously shied away from the definitional prong in its newest adaptation of regulatory takings, the doctrine of judicial takings.<sup>63</sup>

## II. THE DEFINITIONAL APPROACH IN DUE PROCESS DOCTRINE

Before considering how the Court neglected to define property in the *Stop the Beach Renourishment* case and the impact that this has had on the uncertain future of the judicial takings doctrine, it is also helpful to consider the Court's checkered history of wrestling with the problem of how to define property in the realm of due process.

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60 See *id.* at 136–38.

61 See *id.*

62 *Id.* at 124.

63 This is particularly vexing given the fact that Justice Scalia in his plurality opinion, while beginning his analysis with a citation to *Loretto*, see *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010), subsequently ignores the right to exclude and use in putting forth his proposed judicial takings doctrine. See *infra* Sections III.A, B.

A. *The Rise and Fall of Pure Positivism in Due Process*

The Constitution itself uses the word “property” in both the Takings and Due Process Clauses,<sup>64</sup> but it was not until 1972 that the Court began to explicitly consider “property” as a prong in a due process or takings analysis—that is, whether there is any constitutionally cognizable property involved in a dispute.<sup>65</sup> This change was precipitated by a judicial revolution in *Goldberg v. Kelly*,<sup>66</sup> where the Court eschewed the old rights-privileges distinction and began to recognize a vested property right in so-called “new property”: economic expectancies created by positive law.<sup>67</sup>

In *Board of Regents of State Colleges v. Roth*,<sup>68</sup> the Supreme Court concluded that “property interests are not created by the Constitution, but rather are created (and their dimensions defined by) nonconstitutional sources such as state law.”<sup>69</sup> *Roth* solidified the “new property” revolution; though the Court denied a due process claim to a non-tenured public university professor who was fired without notice or a hearing, it strongly affirmed its belief that “property” was not tied down to any objective definition.<sup>70</sup> In striking consequentialist language, the Court declared that “[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”<sup>71</sup> While the Court conceded that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . [or] a unilateral expectation of it[,] . . . [but] a legitimate claim of entitlement to it,”<sup>72</sup> it nevertheless declined to tie down the definition of property to any essential characteristics inhering in the property itself, such as the right to exclude or use.<sup>73</sup> Instead, the *Roth* Court defined property according to the “independent source . . . [of] state law.”<sup>74</sup> This created what Professor Merrill calls the “positivist trap,” whereby “the procedures prescribed by nonconstitutional law qualify the scope of the property right, and

64 U.S. CONST. amend. V.

65 See Merrill, *supra* note 15, at 887–88.

66 397 U.S. 254 (1970).

67 See Merrill, *supra* note 15, at 887, 918.

68 408 U.S. 564 (1972).

69 See Merrill, *supra* note 15, at 892.

70 See *id.* at 918–22. Indeed, the reason *Roth* failed in his claim was purely positivist: there was no state law guaranteeing non-tenured professors notice and a hearing. See *Roth*, 408 U.S. at 566–67.

71 *Roth*, 408 U.S. at 577.

72 *Id.*

73 See Merrill, *supra* note 15, at 922 (“There is . . . a faint echo of the vested rights doctrine that played such a large role in nineteenth-century jurisprudence regarding constitutional property: Entitlements are claims against the government that are ‘vested’ as opposed to claims that are ‘mere expectancies.’ Other than these hints . . . however, the overwhelming thrust of *Roth* was to suggest that constitutional property is defined exclusively by its source [of nonconstitutional law] . . . as opposed to its content.” (citation omitted)).

74 *Roth*, 408 U.S. at 577.

hence compliance with these procedures automatically satisfies” the constitutional requirement.<sup>75</sup>

The positivist trap ultimately proved unworkable.<sup>76</sup> In a dramatic reversal, Justice Byron White in *Cleveland Board of Education v. Loudermill*<sup>77</sup> announced that the Court would no longer define property solely on the basis of the existing contours of state positive law:

[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty.<sup>78</sup>

Unfortunately, the Court in *Loudermill* declined to define property on the basis of certain essential characteristics. Instead, it deferred to the right of the legislature to create “new property.” However, once that “new property” came into existence through positive law, the Court would treat its existence as an objective and unalterable reality—unalterable, at least, without process. The Court reasoned, “The right to due process ‘is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.’”<sup>79</sup>

The Court failed to articulate a full appreciation of the fact that property is a pre-political institution that is neither created nor conferred by legislative power and that the Due Process and Takings Clauses were designed to protect *that* institution from government action seeking to divest it, by whatever means—including defining it out of existence through changes in state law.<sup>80</sup> However, the Court helpfully shied away from its purely Positivist Approach, and reasserted its right to define “property” for itself. The Court

75 Merrill, *supra* note 15, at 892; see also *id.* at 923 (“In other words, *Roth* appeared to require the Court to go along with any and all contractions or expansions on the domain of property dictated by nonconstitutional law.”). This, Professor Merrill notes, “would simply transform due process into the principle of legality,” *id.* at 924, which is a form of “procedural nihilism.” *Id.* at 926.

76 See *id.* at 922–30.

77 470 U.S. 532 (1985).

78 *Id.* at 541 (emphasis added).

79 *Id.* (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

80 While technically a Due Process case, *Loudermill* is helpful for comprehending the stakes involved with judicial takings. If all the Due Process Clause requires is that states comply with their own process requirements in divesting property, then a state could abolish its property protections without any constitutional limitations. Likewise, if all the Takings Clause requires is that the states not divest property rights that they themselves have recognized, then all the states have to do is cease recognizing (or never recognize) a property right to avoid paying compensation. This “pure positivism” renders the relevant constitutional text a nullity.

presumed that, given the word “property” appears in the Constitution, the word must have some substance independent of state law.<sup>81</sup>

### B. *Defining Property out of the Positivist Trap*

In 1998, the Court issued two important decisions that struggled with how to define the word “property” in the Constitution. In *Phillips v. Washington Legal Foundation*,<sup>82</sup> the Court wandered further out of the positivist trap. The case concerned “rules requiring lawyers to place client funds in [Interest on Lawyer Trust Accounts], with the interest going to charitable foundations that fund legal services for the poor.”<sup>83</sup> The question presented was whether the interest earned on the accounts was a property interest of the client or the lawyer for purposes of the Takings Clause.<sup>84</sup> More specifically, the issue was, as Professor Merrill put it, a “brainteaser”: “[W]hether the fruits of *X*’s property that may only be enjoyed by *Y* are nevertheless the property of *X*.”<sup>85</sup> In solving the problem, the Court looked—as required by the positivist rule in *Roth*—to “independent source[s] such as state law” and concluded that the property interest was the client’s.<sup>86</sup>

This ruling, however, appeared to be erroneous.<sup>87</sup> While the “English common law since at least the mid-1700’s” supported the outcome,<sup>88</sup> rules issued by the Texas Supreme Court in 1984 seemed to indicate the property interest was held by the lawyer.<sup>89</sup> This peculiar misapplication of the positivist approach to defining property appears to have been a quiet rebellion by the Rehnquist Court against the positivist trap. The Court insisted that “[w]hile the interest income at issue here may have no economically realizable value to its owner, *possession, control, and disposition are nonetheless valuable rights that inhere in the property.*”<sup>90</sup> Notwithstanding its putatively positivist rule of decision, the Court emphasized possession, control, and disposition—that is, the right to exclude<sup>91</sup>—ultimately grounding its takings analysis in a Definitional Approach to property. Moreover, this decision would prove consistent with the logic of *Loretto*. In *Loretto*, a violation of the right to exclude in the form of a permanent physical occupation automatically triggers a per se taking, regardless of the extent of economic diminution in value,<sup>92</sup> and in

81 See *Loudermill*, 470 U.S. at 541.

82 524 U.S. 156 (1998).

83 Merrill, *supra* note 15, at 896.

84 *Phillips*, 524 U.S. at 164 n.4 (quoting Petition for Writ of Certiorari at i, *Phillips*, 524 U.S. 156 (No. 96-1578)); Merrill, *supra* note 15, at 896.

85 Merrill, *supra* note 15, at 896.

86 *Phillips*, 524 U.S. at 160, 164 (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)); see Merrill, *supra* note 15, at 896–97 (quoting *Phillips*, 524 U.S. at 164).

87 See Merrill, *supra* note 15, at 897.

88 *Phillips*, 524 U.S. at 165.

89 See Merrill, *supra* note 15, at 897–98.

90 *Phillips*, 524 U.S. at 170 (emphasis added); see Merrill, *supra* note 15, at 898.

91 See *infra* text accompanying notes 122–25.

92 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982).

*Phillips*, the right to exclude is evidence of the existence of property for purposes of due process, as a matter of constitutional law even if the thing itself has no economic value.<sup>93</sup>

In the case of *Eastern Enterprises v. Apfel*,<sup>94</sup> decided the same year as *Phillips*, Congress required coal mining companies to contribute to a health care fund for workers and their families.<sup>95</sup> The law required Eastern Enterprises to pay Apfel an additional amount beyond what was originally agreed upon in his labor contract,<sup>96</sup> and the Court concluded that the law was a regulatory taking.<sup>97</sup> Notable was Justice Breyer's dissent, where he emphasized the fact that there was no physical property at issue, and that all prior takings cases involved physical property, intellectual property, or a specific fund of money.<sup>98</sup> Justice Breyer would have required that all subsequent takings claims involve an identifiable property right, rather than merely "general liabilities that reduce net worth or general wealth."<sup>99</sup> Regardless of the merits of Justice Breyer's suggestion that the scope of the Takings Clause be narrowed to certain understandings of property, his dissent was properly concerned with applying a Definitional Approach to the property prong of a takings claim.

One year after *Eastern Enterprises*, the Court once more wrestled with this issue of defining property in two different cases. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>100</sup> the Court was faced with determining whether a state statutory false advertising claim is property.<sup>101</sup> College Savings Bank had issued certificates of deposit to finance college education, and the Florida Prepaid Postsecondary Education Expense Board began to offer a similar product.<sup>102</sup> College Savings Bank sued the government under the Lanham Act for an infringement of its pat-

93 *Phillips*, 524 U.S. at 169–70; Merrill, *supra* note 15, at 898 ("The most persuasive thing the [*Phillips*] Court said in support of its judgment was that physical things can be property, even if they have no economic value.").

94 524 U.S. 498 (1998).

95 *Id.* at 514–15; Merrill, *supra* note 15, at 900.

96 *E. Enters.*, 524 U.S. at 516–17; Merrill, *supra* note 15, at 900–01.

97 *E. Enters.*, 524 U.S. at 538. In what was perhaps a foreshadowing of his eventual position in *Stop the Beach Renourishment*, Justice Kennedy concurred in the judgment—delivering the necessary vote for a five-Justice majority—concluding that the law was not a taking, but instead a violation of substantive due process. *See E. Enters.*, 524 U.S. at 540, 547 (Kennedy, J., concurring); Merrill, *supra* note 15, at 902. Justice Kennedy noted that the doctrine of regulatory takings, which is already conceptually challenging, is even more arbitrary where there is no clearly defined property interest at stake. *E. Enters.*, 524 U.S. at 542. This was a prescient observation, since the legal quagmire of *Stop the Beach Renourishment* appears to have been precipitated by either an inability or refusal of both Justices Kennedy and Scalia to objectively define the property at stake.

98 Merrill, *supra* note 15, at 901 (citing *E. Enters.*, 524 U.S. at 554 (Breyer, J., dissenting)).

99 *Id.* at 904.

100 527 U.S. 666 (1999).

101 *See id.* at 669.

102 Merrill, *supra* note 15, at 908; *see Coll. Sav. Bank*, 527 U.S. at 670–71.

ent, under the theory that Congress could overcome state sovereign immunity under its Section 5 power of the Fourteenth Amendment.<sup>103</sup> However, in attempting to make its due process claim, College Savings Bank seemed to have difficulty explaining exactly what property interest was at stake, vacillating back and forth between describing the property as the good will of the company, lost future revenues, and the very cause of action created by the Lanham Act itself.<sup>104</sup> The Court once more wandered off of its native positivist territory and articulated a forceful Definitional Approach to the constitutional “property” prong:

The hallmark of a protected property interest is the right to exclude others. That is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” That is why the right that we all possess to use the public lands is not the “property” right of anyone—hence the sardonic maxim, explaining what economists call the “tragedy of the commons,” *res publica, res nullius*.<sup>105</sup>

Justice Scalia further addressed the claim that College Savings Bank had a property interest in future revenue and indicated that its fatal “flaw,” rendering it something other than property, was that it did not include the right to exclude others.<sup>106</sup> The Justice explained that “business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense—and it is only *that*, and not any business asset, which is impinged upon by a competitor’s false advertising.”<sup>107</sup> This “distinction between the assets of a business (= property) and the activity of doing business (≠ property) was,” Professor Merrill contends, “rather obscure.”<sup>108</sup> It is perhaps merely an observation on behalf of the Justice that “the law of property requires *possession*, but the law of tort (specifically, the action for trespass on the case) will protect interests that fall short of possessory property rights.”<sup>109</sup> In other words, the Court was once again emphasizing the importance of possession—a concept that encompasses the right to exclude.<sup>110</sup> Even in the realm of due process, the Court was not amused by definitions of property moored in mere economic expectancies, and wished to see an essential property interest—something that can be used, and most importantly, something from which the world can be excluded—before it determined that “property,” as defined by the U.S. Constitution, was actually at stake.

Professor Merrill argues that Justice Scalia’s approach in *College Savings Bank* was something of an innovation:

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103 See *Coll. Sav. Bank*, 527 U.S. at 669–70; Merrill, *supra* note 15, at 908–09.

104 Merrill, *supra* note 15, at 909.

105 *Coll. Sav. Bank*, 527 U.S. at 673 (footnote omitted) (citation omitted) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

106 *Id.* at 675; Merrill, *supra* note 15, at 910.

107 *Coll. Sav. Bank*, 527 U.S. at 675.

108 Merrill, *supra* note 15, at 911.

109 *Id.* at 911 n.100 (emphasis added).

110 See *infra* text accompanying notes 122–25.

[N]o previous decision of the Court had offered such an unqualified endorsement of the centrality of the exclusion right. The right to exclude has always been described as “one of the most essential sticks in the *bundle of rights* that are commonly characterized as property.” And indeed, no prior decision had appeared to assert in such an unqualified fashion that the definition of property is a matter of direct interpretation of the constitutional language.

. . . Justice Scalia made no effort to reconcile the articulation of a federal definition of constitutional property with the traditional understanding, stated as orthodoxy as recently as *Phillips*, that property rights are created and their dimensions defined by independent sources such as state law.<sup>111</sup>

It is true that *Roth* and its progeny extended the property Clauses of the Constitution to cover so-called “new property,” economic expectancies created by positive law. However, notwithstanding Justice Scalia’s deviation from recent Court precedent, his Definitional Approach to the “property” prong in the Due Process analysis, placing a heavy emphasis on the right to exclude, seems to be more faithful to the original meaning of the word “property” as it was used at the time of the ratification of the Constitution and the Fourteenth Amendment.<sup>112</sup> Regrettably, Justice Scalia would not show such firmness in defining property in *Stop the Beach Renourishment* as he did in *College Savings Bank*.

The same year as *College Savings Bank*, the Court decided *Drye v. United States*.<sup>113</sup> *Drye* seemed to synthesize the Court’s recent revolution away from pure positivism toward something of a more Definitional Approach. *Drye* owed \$350,000 in taxes, for which several tax liens were filed, and during this time his mother died intestate, leaving him with an estate valued at \$233,000.<sup>114</sup> *Drye* disclaimed the inheritance under Arkansas law, causing his sister to inherit the property, who subsequently formed a spendthrift trust, naming *Drye* as the lifetime beneficiary.<sup>115</sup> The IRS sought to seize the trust property, claiming that the property “had been funded by property belonging to *Drye*—that is to say, the money he stood to inherit had he not

111 Merrill, *supra* note 15, at 912 (footnote omitted) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

112 See, e.g., Epstein, *supra* note 16, at 73 (“Use of the words ‘private property’ in the Takings Clause is clear evidence that the Framers did not regard the institution as subject for degradation by legislation or judicial administration. They were all firmly in the natural law camp . . .”); Sprankling, *supra* note 17, at 66 (“[John Locke’s] natural law theory posits that property rights arise in nature, independent of government. . . . Under this view, government exists to protect property rights that arise through natural law.”). But see *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823) (“As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie . . .”); Sprankling, *supra* note 17 (noting that contemporaries of Locke, such as Thomas Hobbes, adopted a purely positivist view of property rights).

113 528 U.S. 49 (1999).

114 *Id.* at 52.

115 *Id.* at 53–54.

disclaimed.”<sup>116</sup> Thus the issue in the case was whether “an Arkansas heir who exercises the right to disclaim an inheritance has a ‘property’ right in the disclaimed inheritance.”<sup>117</sup> Drye rested his case on what he thought was dispositive state law,<sup>118</sup> but Justice Ginsburg, writing for a unanimous Court, declined to hold that state law was dispositive, announcing instead:

We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as “property” or “rights to property” within the compass of the federal tax lien legislation.<sup>119</sup>

This, Professor Merrill notes, required the Court to “identify an appropriate federal definition of property.”<sup>120</sup> Justice Ginsburg concluded that “the critical question is ‘the breadth of control’ the taxpayer exercises over a resource,”<sup>121</sup> noting that under Arkansas law,

the heir inevitably *exercises dominion* over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does. This *power to channel* the estate’s assets warrants the conclusion that Drye held “property” or a “righ[t] to property” subject to the Government’s liens.<sup>122</sup>

The “power to channel,” which is the “exercise[ ] [of] dominion” over property, sounds strikingly similar to the right to exclude articulated in *College Savings Bank*.<sup>123</sup> And, as Professor Merrill notes, both the “power to channel” and the “right to exclude” can be analogized to a “gatekeeper” function in property rights, which is the “the right to determine who has access to particular resources and on what terms.”<sup>124</sup> Thus, while the Court does not ignore the relevant state law, when the claimant before it sought a vindication of “property” rights as protected by the Federal Constitution, the Court once more claimed its right to define what property is in fact, apart from any dispositive reliance on state positive law.

116 Merrill, *supra* note 15, at 914.

117 *Id.*

118 See *Drye*, 528 U.S. at 57; Merrill, *supra* note 15, at 914.

119 *Drye*, 528 U.S. at 58.

120 Merrill, *supra* note 15, at 915. Consequently, under the logic of *Drye*, if the Court may define property for purposes of federal law, surely it reserves the right to define property for purposes of constitutional law, given that the word “property” appears in the Constitution, and that the Constitution is no less the “supreme Law of the Land” than a federal statute. U.S. CONST. art. VI, cl. 2.

121 Merrill, *supra* note 15, at 915 (quoting *Drye*, 528 U.S. at 61). The relevant portion of *Drye* reads “the breadth of *the* control.” *Drye*, 528 U.S. at 61 (emphasis added).

122 *Drye*, 528 U.S. at 61 (emphases added) (citation omitted).

123 Merrill, *supra* note 15, at 915 (quoting *Drye*, 528 U.S. at 61).

124 *Id.* at 915–16 (quoting Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, at 740 n.37 (1998)).

C. *The Due Process Definitional Approach: Context for Judicial Takings*

In the cases of *Phillips*, *Eastern Enterprises*, *College Savings Bank*, and *Drye*, the Court abandoned the Positivist Approach: the Court committed itself to analyzing whether actual property was at stake and ventured into formulating a coherent definition of property independent of state law, so as not to render the constitutional protections void in the face of changes in the positive law. As we will see, this Definitional Approach is absolutely essential in the context of a judicial taking. From a theoretical standpoint, the common law of property does not change but merely adapts its principles to new situations through analogical reasoning. In practice, however, judges innovate all the time, and sometimes in a dramatic fashion. Thus, to say that a state could avoid a taking by simply declaring through the courts that a property right that once existed no longer exists, or never existed in the first place,<sup>125</sup> would resign the reviewing court to the positivist trap—a form of takings nihilism. If property is merely a function of the state’s will to power, “judicial takings” is a contradiction in terms. But if property has essential characteristics that can be defined apart from state law, then “judicial takings” is a straightforward application of settled constitutional law.

Yet when presented with the opportunity to address the issue of judicial takings in *Stop the Beach Renourishment*, to apply a Definitional Approach consistent with precedent by defining property in the same way as prior regulatory takings and due process cases—in terms of the right to exclude or use—the Supreme Court blinked.

III. THE *STOP THE BEACH QUAGMIRE*: TAKINGS OR DUE PROCESS?

A. *Stop the Beach Renourishment: The Riparian Rights Hypothetical*

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>126</sup> the State of Florida owned the submerged land off the coast of its beaches in public trust.<sup>127</sup> The mean high water line formed the boundary between the private property on the beaches and the state’s submerged property, a line that shifted over time.<sup>128</sup> The legislature passed a bill that fixed the property line, and after fixing this line, provided that the state would dredge up sand to raise the state-owned submerged land above the ocean tide, cutting off the beachfront property owners from their direct connection to the ocean.<sup>129</sup> The statute expressly abrogated future rights to accretion and future liability from erosion.<sup>130</sup> It preserved, however, all

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125 Justice Potter Stewart once warned, rather prophetically, “[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.” *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967).

126 560 U.S. 702 (2010).

127 *Id.* at 707.

128 *Id.* at 707–08.

129 *Id.* at 709–10.

130 *Id.* at 710.

other riparian rights, including rights to access, use, and view the water.<sup>131</sup> The Florida Supreme Court declared that under Florida law, future accretion is a “contingent” right, rather than a vested right, and that contact with the water is not a right.<sup>132</sup> Petitioners claimed on certiorari that the right to future accretion and the right to contact with the water were established by law, and that the refusal to protect them was a judicial taking, requiring compensation.<sup>133</sup>

While the Supreme Court concluded that no judicial taking had occurred,<sup>134</sup> the Justices were hopelessly divided on their reasoning why, and their divisions revealed deep disagreements, even among the Justices who would have overruled a decision of the Florida Supreme Court that divested property owners of their rights. While both Justice Scalia in his plurality opinion and Justice Kennedy in his concurrence agree that the potential taking involved in *Stop the Beach Renourishment* would have been egregious enough to reverse, the Justices disagreed over whether to reverse the ruling as a judicial taking or as a violation of the Due Process Clause.

Justice Scalia concluded that if the common law right to future accretion and contact with the water was established Florida law, a decision of the Florida Supreme Court, upholding and applying the law in defiance of this established right, would amount to a taking, since the judicial opinion would have the effect of turning private property, by *ipse dixit*, into public property.<sup>135</sup> Justice Kennedy, due to various jurisprudential fears, opposed this adaptation of regulatory takings doctrine. His proposed solution—finding a violation of the Due Process Clause rather than the Takings Clause<sup>136</sup>—indicates that he too is willing to grant some protection for property rights in a judicial takings context, provided the constitutional remedy gives state governments the freedom and flexibility to alter the legitimate economic expectations of owners in property through common law adjudication.<sup>137</sup>

The means of resolving this disagreement may be found in defining property. If the Court were to define property in the same way as prior regulatory takings cases, it might be possible for Justices Scalia and Kennedy to agree upon a coherent judicial takings doctrine that addresses the fears of each.

### B. *Wading Through Justice Scalia’s Undefined Approach*

Justice Scalia begins his opinion in *Stop the Beach Renourishment* with a seemingly axiomatic proposition: “Generally speaking, state law defines property interests.”<sup>138</sup> In support of this he cites *Phillips*, a peculiar authority

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131 *Id.* at 708, 710.

132 *Id.* at 712.

133 *Id.*

134 *Id.* at 733.

135 *Id.* at 713–15.

136 *Id.* at 735, 737.

137 *See id.* at 736.

138 *Id.* at 707.

given that, as discussed above, *Phillips* asserts a putatively positivist rule while ultimately relying on a Definitional Approach to property.<sup>139</sup> In any event, the proposition is not incorrect—property law is a state subject matter—but that is only half of the equation. While state law generally defines property interests, it does not (at least *in toto*) define what *property is* as a matter of constitutional law. The absence of this second half of the equation in Justice Scalia’s opinion contributes to the doctrinal chaos that follows.

In setting forth his rule of decision, Justice Scalia cites several takings cases, notably *Loretto* and *Lucas*, in order to describe what amounts to a taking of “property,” yet he only explicitly mentions the right to exclude once, and in passing.<sup>140</sup> Rather than drawing deeply on the definitions of property implicit and explicit in prior takings and due process cases, Justice Scalia jumps ahead to define the core of a judicial takings claim: the divestment of an established common law right.<sup>141</sup> If a state court has in the past held, or referred to in dicta, the existence of a common law property right, such that the matter of its existence is “settled,” then the court, in interpreting a state law, effects a taking when it declines to acknowledge or vindicate that right.<sup>142</sup>

No doubt the rule seems to be a sensible guarantor of compensation for previously held entitlements, as far as it goes,<sup>143</sup> but the Justice’s proposed rule of decision very nearly falls into the positivist trap. Citing *Webb’s Fabulous Pharmacies, Inc. v. Beckworth*,<sup>144</sup> Justice Scalia declared that “a State, by *ipse dixit*, may not transform private property into public property without compensation,”<sup>145</sup> but property for the Justice, at least as he defines it in the judicial takings context, has no fixed meaning.<sup>146</sup> One property right may be “established” in one state but not in another. Property rights enjoyed in fact, such as the ancient riparian rights to future accretion and access to the water, may be denied in due course if an insufficient amount of judicial ink has been spilled on the subject. In this positivist world, the reviewing judge does not look to whether an essential property interest, such as the right to

139 See *supra* Section II.B.

140 *Stop the Beach Renourishment*, 560 U.S. at 713–14.

141 *Id.* at 715.

142 *Id.* at 728 (plurality opinion).

143 But see Michael J. Fasano, *A Divided Ruling for a Divided Country in Dividing Times*, 35 VT. L. REV. 495, 503 (2010) (“[A]ny experienced property law practitioner will tell you that a good amount of property law—especially some of the most fundamental aspects—simply is not established in the fashion that *Stop the Beach Renourishment* seems to require. It is, instead, accepted as self evident, often arising from the common law of England—such as the law involving joint tenancies. If, as a result, the rights established by such principles are not protected rights, much of the significance of *Stop the Beach Renourishment* is illusory.”).

144 449 U.S. 155 (1980).

145 *Stop the Beach Renourishment*, 560 U.S. at 715 (quoting *Beckworth*, 449 U.S. at 164) (alteration in original).

146 As Justice Scalia put it: “The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.” *Id.* at 732.

exclude or use, has been divested, but merely considers whether the sovereign has deigned to recognize the property's existence.

Justice Scalia's view of judicial takings is therefore underinclusive: it covers some, but not all, judicial takings. While Justice Scalia insists that reviewing courts have the right to define "property" as a matter of federal and constitutional law,<sup>147</sup> he shies away from the boldness of his definitional approach in *College Savings Bank*.<sup>148</sup> And nature abhors a vacuum: Justice Scalia's lack of clarity in defining property might have opened the door to unhelpful—indeed, counterproductive—counter-theorizing on the part of Justice Kennedy.

### C. *Searching for a Solution: Justice Kennedy's Due Process Dilemma*

Justice Kennedy recognizes that it is possible for something that looks like a "judicial taking" to occur, but declines to extend the doctrine of regulatory takings to the judicial context.<sup>149</sup> In part, this is because of a disagreement over the nature of the common law. For Justice Scalia, the common law does not change: rights that have once been acknowledged to exist have always existed and will always exist, and as new circumstances present themselves, these entitlements are merely "clarified."<sup>150</sup> This was, at least, the view at the time of the founding period.<sup>151</sup> But Justice Kennedy insists that the common law does change through "incremental modifications."<sup>152</sup> Whether this dispute reflects a semantic difference—"clarify" versus "change"—or a belief on the part of Justice Kennedy that the courts ought to be free, when necessary, to cease to acknowledge the existence of a prior right through clever judicial reasoning, is not entirely clear. One thing does seem clear, however: Justice Kennedy fears a takings doctrine that limits the flexibility of state courts to adapt to new factual circumstances once they know that their decisions are subject to a takings review.<sup>153</sup>

If even the smallest change in state positive law could give rise to a takings claim, then the state government would indeed be paralyzed in its adjudication. This is an entirely justifiable fear, one articulated as far back as *Penn Coal*, when the doctrine of regulatory takings first emerged.<sup>154</sup> Yet it is

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147 See *id.* at 726 n.9.

148 See *id.* ("It is true that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. . . . The test we have adopted, however (deprivation of an *established* property right), contains within itself a considerable degree of deference to state courts."); *cf. supra* Section II.B.

149 See *Stop the Beach Renourishment*, 560 U.S. at 735–37 (Kennedy, J., concurring).

150 See *id.* at 722 (plurality opinion).

151 *Id.*

152 *Id.* at 736 (Kennedy, J., concurring).

153 See *id.* at 736–37.

154 In that same vein, some fear that property rights encourage stasis, and therefore in order to make room for "inevitab[le]" change that is required to solve social problems *ex ante*, collective interests must at times be permitted to legitimately trump this "intractable"

a fear that only arises when a takings analysis is utterly detached from fixed definitions of property: if there is a per se taking (permanent physical occupation, or complete diminution of economic value) in the regulatory takings context, even Justice Kennedy would acknowledge the need for compensation. It is only in the realm of mere economic expectancies that the takings analysis must be sensitive to the needs of the state.<sup>155</sup>

Conversely, Justice Kennedy fears the opposite extreme: the Supreme Court handing state courts a blank check to trample common law rights.<sup>156</sup> As discussed above, Justice Kennedy appears comfortable with adaptations in the common law. He is, however, in agreement with the plurality that a reviewing court must not tolerate radical changes—such as setting aside an established property right.<sup>157</sup> But Justice Kennedy concludes that if such a dramatic holding were to occur, then the Court should simply invalidate the decision as a violation of substantive due process.<sup>158</sup> Concerning what standards the Court will use to determine whether the lower court decision is sufficiently “arbitrary or irrational” to merit due process reversal, the Justice’s opinion is silent<sup>159</sup>—a fact brought into high relief by Justice Scalia’s plurality opinion.<sup>160</sup> Be that as it may, Justice Kennedy fears that allowing the decision to rest, provided there was compensation, would signal to state judges that the Court will acquiesce in radical judicial innovations that unsettle well-established common law rights.<sup>161</sup>

As a practical matter, such radical decisions, so shocking to the sensibilities as to be obviously wrong, are hard to conceive—perhaps because they are so rare.<sup>162</sup> Moreover, since Justice Kennedy articulates no standards for this substantive due process analysis, it is unclear if the Court would *ever* imple-

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individual liberty. Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2015–17 (2013).

155 See *supra* Section I.C. In arguing for substantive due process in the place of takings, Justice Kennedy notably cites his *Eastern Enterprises* concurrence. See *Stop the Beach Renourishment*, 560 U.S. at 736 (Kennedy, J., concurring). As noted above, see *supra* text accompanying note 98, Kennedy rightly observes in *Eastern Enterprises* that it is the lack of an identifiable property interest in the regulatory takings context that makes the takings analysis particularly challenging. See *supra* Section II.B. Justice Kennedy insists on cleaning the muddy waters of regulatory takings with the muddier doctrine of substantive due process, but he could instead define the property interest at stake in the takings claim and obtain the doctrinal clarity that he so desires.

156 *Stop the Beach Renourishment*, 560 U.S. at 737–39 (Kennedy, J., concurring).

157 See *id.* at 735–37.

158 *Id.*

159 *Id.* at 737 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005)).

160 *Id.* at 719–22 (plurality opinion).

161 *Id.* at 737–39 (Kennedy, J., concurring).

162 See Stern, *supra* note 27, at 2188 (“[T]he target of the *Stop the Beach* plurality—the wholesale elimination of established common law property rights—appears to be an unusual occurrence. Even among the small group of cases commonly understood as activist, most are less radical, or produce more ephemeral changes, than commonly assumed.” (footnote omitted)).

ment such a failsafe.<sup>163</sup> Still, it is a rational fear; the Supreme Court generally defers to state supreme courts on matters of state law,<sup>164</sup> but what happens when the state supreme court becomes absolutely lawless and engages in what looks like an extreme judicial taking? Some remedy, it would seem, must be available for the abused property owners, and a doctrine of judicial takings may not be enough to deter some state judges from engaging in lawless adjudications.

#### D. *Both-And: Creating a Unified Judicial Takings Doctrine*

It should come as no surprise that Justice Kennedy, a judge enamored with ad hoc balancing tests,<sup>165</sup> leapt for a substantive due process solution, and that Justice Scalia, a judge impatient with unprincipled standards that grant judges excessive leeway,<sup>166</sup> fiercely criticized this proposal. However, perhaps this seemingly insurmountable difference in judicial philosophy is not an “either-or” problem, but an opportunity for a “both-and” solution. The above discussion reveals two primary concerns raised by the Justices: (1) judicial takings are real, but if the property being taken is not more precisely defined, compensation could become too commonplace; and (2) there must be a remedy for judicial takings, but in some cases, that remedy may need to be more forceful than mere compensation. There is then at least one solution that could achieve a unified judicial takings doctrine: (1) use a Definitional Approach to define property in the context of judicial takings, and (2) when there is a judicial taking, use a “sliding scale” method to determine whether the remedy ought to be compensation or complete reversal as a matter of due process. This two-step approach might result in more judicial takings than Justice Kennedy would prefer, and it would lead to more ad hoc balancing than Justice Scalia would like, but it would be a sensible, workable compromise that fully addresses the most pressing concerns of both.

### IV. STOP THE REACH: SOLVING JUDICIAL TAKINGS BY DEFINING PROPERTY

#### A. *Would the Definitional Approach “Freeze” the Common Law or Impose a Uniform National Property Law?*

The Definitional Approach, defining property according to objective, essential principles of property, is perhaps the only way to bridge the divide between Justices Scalia and Kennedy in *Stop the Beach Renourishment*. However, it is not without its potential criticisms. Critics of a robust judicial takings doctrine—echoing Justice Kennedy—fear that defining property

163 See *Stop the Beach Renourishment*, 560 U.S. at 724 (plurality opinion).

164 See E. Brantley Webb, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1192 (2011) (noting the existence of “more than a century of Supreme Court deference to state courts in [the area of property]”).

165 See, e.g., Sprankling, *supra* note 17, at 62 & n.7.

166 See, e.g., *Stop the Beach Renourishment*, 560 U.S. at 724; Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia’s Shifting Sands*, 35 VT. L. REV. 423, 431–34 (2010).

according to essential characteristics would “freeze” the common law by privileging traditional notions of property rights and punishing the implementation of newer property innovations.<sup>167</sup> They also have a federalism concern: that defining property in a way that is independent of state law would impose one version of property law on all fifty states.<sup>168</sup> However, these critiques are in a certain sense a non sequitur—they exaggerate the possible consequences of judicial takings while ignoring the question whether the constitutional text defines property for purposes of the Takings Clause. Notwithstanding the present-day reliance on “new property,” the Constitution adopted powerful protections for private property *as understood at the time of the founding*. The original meaning of the word “property” in the Constitution incorporates objective conceptions of property<sup>169</sup> in much the same way as the Second Amendment, as Justice Scalia contends in *District of Columbia v. Heller*,<sup>170</sup> incorporates natural law understandings of the individual right to bear arms.<sup>171</sup> Because the Takings Clause, now binding against the states,<sup>172</sup> affirmatively protects a certain understanding of property, regulatory takings must necessarily impose a degree of uniformity upon state property law, privileging essentialist conceptions of property. And indeed, so far the doctrine of regulatory takings *has* privileged “old property” by paying special attention to the rights to exclude and use.<sup>173</sup> The doctrine of judicial takings would continue the work done by regulatory takings, protecting the natural rights of individuals in the face of changing state law.

That is not to say the unified judicial takings doctrine proposed in this Note would undermine “new property”—it simply would not extend the same degree of takings protection to property that does not include certain essential characteristics, consistent with the Court’s fear, from *Penn Coal* onward, that a judicial takings doctrine that swept too broadly might unduly

167 See David S. Wheelock, *Every Grain of Sand: Would a Judicial Takings Doctrine Freeze the Common Law of Property?*, 61 DUKE L.J. 433, 433–34 (2011).

168 See Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1693–701 (2007); Wheelock, *supra* note 167; see also Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1287 (2014) (arguing that property is an institution created by and adapted to the democratic process).

169 Professor Treanor marshals substantial historical evidence to argue that the doctrine of regulatory takings in general is inconsistent with the original meaning of the Takings Clause. Treanor, *supra* note 10, at 782. He contends that the framers were not motivated primarily by Lockean liberalism. *Id.* at 818. Instead, many framers embraced a republican ideology, believing that the political majority has a right to take property, *id.* at 818, 821–22, but that the political process cannot be completely trusted when exercising the power of eminent domain. See *id.* at 825, 836. However, Professor Treanor concedes that many framers were influenced by liberalism, *id.* at 823–24, and thus viewed property as a pre-political institution, *id.* at 818. He also concedes that the Takings Clause was at least a synthesis of liberalism and republicanism. *Id.* at 819.

170 554 U.S. 570 (2008).

171 See *id.* at 592–95; Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1238–42 (2012).

172 See *Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 236 (1897).

173 See *supra* Section I.B.

burden the states' police powers. The Definitional Approach establishes a floor of what property actually is, while states would remain free to create "new property" entitlements in addition to "old property" objective rights. However, "when so-called 'new property' is involved [in a takings case], state law [would be] the final arbiter on what it includes."<sup>174</sup>

### B. *Property, the Definitional Approach, and Original Meaning*

The natural law of property, as understood by the founding generation,<sup>175</sup> William Blackstone,<sup>176</sup> John Locke,<sup>177</sup> and secured by the English common law, was rooted in the immutable right of ownership.<sup>178</sup> It was also grounded in a theology of moral duty: people have a moral duty not to trespass upon, to be a nuisance to, or to steal, those things that belong to others, therefore justifying the owner's moral right to exclude and use.<sup>179</sup> Thus,

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174 Robert H. Thomas, *Recent Developments in Regulatory Takings Law: What Counts as "Property?"*, 34 NO. 9 ZONING & PLAN. L. REP. 1 (2011) (observing that after the *Stop the Beach Renourishment* decision, "[t]he Ninth Circuit . . . distinguish[ed] between 'new property' (public employment, welfare assistance, state licenses, etc.) and 'old property' (which includes the more traditional forms of property based in the common law)," concluding that "[s]tate law defines the former, and thus can curtail or limit it with little constitutional interference, while federal courts applying the constitution make the final call on the latter" (quoting *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200–01 (9th Cir. 1998))); see *Vandever v. Lloyd*, 644 F.3d 957, 963 n.4 (9th Cir. 2011) ("We . . . note that a federal court remains free to conclude that a state supreme court's purported definition of a property right really amounts to a subterfuge for removing a pre-existing, state-recognized property right. That is, we need not take a state court at its word as to the kind of analysis that it is performing.").

175 See Somin, *supra* note 11, at 94 ("[T]he dominant view during the Founding era was that private property is a natural right that no government agency has the power to change.").

176 See 2 WILLIAM BLACKSTONE, COMMENTARIES \*1–2 ("[T]he right of property . . . [is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." (emphasis added)).

177 See JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 19 (C.B. Macpherson ed., Hackett Publishing Co., Inc. 1980) (1689) ("Whatsoever then . . . [man] hath mixed his labour with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men." (fourth emphasis added)).

178 See Somin, *supra* note 11, at 94–95 ("James Madison, the principal drafter of the Takings Clause, described 'the personal right to acquire property' as a 'natural right' that 'gives to property, when acquired, a right to protection, as a social right.' In his famous 1792 essay on property, written the year after the enactment of the Bill of Rights, Madison emphasized that '[g]overnment is instituted to protect property of every sort' . . ." (citation omitted)).

179 See 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 217 (1787) ("The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If 'Thou shalt not covet,' and

while property has always been a domain of state law, it was against the backdrop of the Union's collective understanding of objective property rights that the Congress passed, and the states ratified, the Fifth Amendment. In the same way that the Second Amendment incorporates into the Constitution as binding the natural right to individually bear arms, so the Takings Clause incorporates a binding moral norm of property as something involving essential rights that inhere in the property itself—perhaps most important of which are the right to exclude and use.<sup>180</sup>

Early proponents of the doctrine of judicial takings recognized just how important this point is to the doctrine. Since the common law “recognizes the right of courts to revisit prior judicial decisions and change them where they believe appropriate[,] . . . [u]nder a strict positivist view of property, . . . property rights are subject to modification by the courts.”<sup>181</sup> If this were accepted, we would be forced to conclude that “no property is ‘taken’ when the courts change the law because change is an intrinsic and recognized element of the entire common law system.”<sup>182</sup> Moreover, it could be further argued that if property is a political institution (rather than a pre-political one), states condition the right to hold property on the possibility that the courts will change that right at will.<sup>183</sup> For this reason, the judicial takings doctrine “highlight[s] the vacuity of positive property . . . [W]hether an action constitutes a regulatory taking will often depend on whether a relevant court chooses to say that the plaintiff previously held a property right.”<sup>184</sup> Thus, defining property is the paramount challenge of regulatory takings. The courts have repeatedly grappled with the question in both regulatory takings<sup>185</sup> and due process<sup>186</sup> cases, but they simply dropped the ball with judicial takings. Therefore, it may be that the only way to arrive at a unified judicial takings doctrine is for the Court to go back to first principles and once again take up a fundamental question: what is property?

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‘Thou shalt not steal,’ were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.”); 1 *Kings* 21 (retelling the story of King Ahab’s unjust, uncompensated appropriation of Naboth’s vineyard, and subsequently, YHWH’s judgment against the King).

180 See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1523–24 (1990) (noting that “[a]lthough, over the last two hundred years, the Supreme Court has repeatedly declared that the Constitution itself does not define property but rather adopts state law (and presumably federal law where applicable), the Constitution does not mandate this position,” but allows for “a normative definition under which property would be defined by the Constitution itself” (citations omitted)).

181 *Id.* at 1527.

182 *Id.* at 1527–28.

183 See *id.* at 1528.

184 *Id.* at 1537. This observation beautifully captures the core of Justice Kennedy’s concern in *Eastern Enterprises*, which is that without a clear definition of the property at stake, regulatory takings involve an inherently problematic inquiry. See *supra* Section II.B.

185 See *supra* Part I.

186 See *supra* Part II.

## CONCLUSION

The issue of judicial takings may not stop with obscure and unresolved areas of the common law, such as beachfront property. Rather, judicial takings could conceivably become the newest legal front in the realm of regulatory takings.<sup>187</sup> Given that the doctrine of judicial takings need only involve an application of prior regulatory takings principles in the judicial context, there is every reason for the Court to endeavor to develop a unified judicial takings doctrine that could equip reviewing courts and signal to lower state courts that sloppy or crafty opinions that fail to accord proper respect to essential property rights, as well as those property rights established in state law, will be at least compensated—and, if serious enough, overturned. But in order to formulate this unified judicial takings doctrine, the Court must first define property. As one scholar has observed,

The . . . relevant question for judicial takings . . . is whether the Court is willing to recognize a constitutionally protected property right that is not recognized by positive law. . . . If the Court is not willing, the concept of judicial takings . . . may be ethereal at best.<sup>188</sup>

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187 See Shapiro & Burrus, *supra* note 166, at 429–30 (2010) (“[I]magine . . . that Susette Kelo never had an opportunity to have her claim heard in the first place because the Connecticut Supreme Court eviscerated her rights through a novel interpretation of state property law—that, say, a deed only grants ownership to a particular size and quality of land, not a fixed location. That would have been a judicial taking . . . . [W]ithout proper higher court review, judicial redefinitions of property rights could destroy the Takings Clause through the back door.”). For a series of concrete hypotheticals of potential judicial takings situations, see D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 906–10 (2011). For an analysis of the procedural difficulties in prosecuting a judicial takings claim, see Scott Stevenson, *Muddying the Waters: Stop the Beach Renourishment and the Procedural Implications of a Judicial Takings Doctrine*, 42 STETSON L. REV. 785, 820 (2013) (concluding that “Justice Scalia’s judicial takings doctrine” may prove to be nothing more than “a mere abstraction—a dusty footnote in the legal casebooks of the future”). For an analysis of the sufficiency of state property protections in the absence of a judicial takings doctrine, see Stern, *supra* note 27, at 2193 (“On the whole . . . state courts exercise a high baseline of restraint with respect to property rights through doctrines and norms that serve the prophylactic purpose now envisioned for judicial takings.”).

188 Steven J. Eagle, *Judicial Takings and State Takings*, 21 WIDENER L.J. 811, 845–46 (2012) (quoting Thompson, Jr., *supra* note 180, at 1527).

