JUDICIAL TAKINGS AND STATE TAKINGS

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Judicial Takings and State Takings

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Abstract

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, a Supreme Court plurality asserted that takings liability could arise from judicial acts, as well as from state or local legislation and executive agency decisions. The Plurality’s rationale supporting “judicial takings” was that the Just Compensation Clause of the Fifth Amendment applies to State acts, not to particular State actors.

This Article starts by reviewing the doctrinal bases for the Stop the Beach plurality opinion. It provides prudential reasons why rulings affecting property rights might be legitimate under state law, but nevertheless constitute compensable takings under the federal constitution. It then analyzes the implications of the “state acts and not state actors” doctrine to existing regulatory takings law. Viewed through the lens of “state acts,” the rationales of the Supreme Court’s Williamson County “state litigation” prong and its Dolan “legislative vs. adjudicative” bifurcation are undermined. Similarly, takings distinctions pertaining to whether small-scale rezonings are “legislative” or “quasi-judicial” acts are drawn into question.

JEL Categories: K11.

I. Introduction

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, a Supreme Court plurality resurrected the concept that a compensable taking of property could result from judicial acts, as well as those of the legislative and executive branches. The principal bases for this contention are that the Constitution’s text indicates that takings are done by the State, as opposed to a particular branch or agency of gov-

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1 Stop the Beach Renourishment v. Fla. Dept. of Envtl Prot., 130 S.Ct. 2592 (2010).
ernment, and that it is prudential that judicial acts not be immunized from takings liability.

Discussion of the principle that takings are attributable to the State as a whole provides an opportune occasion to reconsider the role that judges now play in takings. More generally, it provides a needed opportunity to review the doctrinal vagueness and encrustation of arcane procedure that mark takings determinations by all State actors.

In *Stop the Beach*, the Supreme Court unanimously upheld a decision of the Florida Supreme Court that ownership of littoral land did not include a right to touch the water. However, in parts of Justice Scalia’s opinion joined only by Chief Justice Roberts and Justices Thomas and Alito, Scalia asserted that judicial delineations of property rights might constitute judicial takings. That proposition had been described most explicitly in a 1967 concurring opinion by Justice Stewart, in *Hughes v. Washington*, and was the subject of a seminal and euphoniously titled 1990 article by Professor Barton Thompson. Since *Stop the Beach*, the judicial takings literature has substantially grown.

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2 Justice Stevens recused himself, apparently because he owned a Florida beachfront condominium.

3 Walton County v. Stop Beach Renourishment, 998 So.2d 1102 (Fla. 2008).

4 This article does not consider the merits of the littoral owners’ claimed rights. The state high court’s ruling, denying such rights, reversed a well-reasoned opinion of the court of appeal. *Save Our Beaches, Inc. v. Fla. Dept. of Envtl Prot.*, 27 So.3d 48 (Fla. App. 2006). For a cogent critique of the U.S. Supreme Court’s holding, see 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, 62-67 (2011) (criticizing Justice Scalia’s easy acceptance of the crucial case *Martin v. Busch*, 112 So. 274 (Fla. 1927), wherein Florida built up the submerged sea bed and successfully claimed ownership of the resulting beach for itself under common law avulsion).


This Article focuses largely on the ramifications of Justice Scalia’s assertion that the focus of a takings inquiry must be upon the State’s act, and not the State actor. The tension between the Supreme Court’s current regulatory takings jurisprudence, which does distinguish among government actors, and the Stop the Beach plurality, which does not, provides a needed opportunity to reexamine some of the convolutions marking regulatory takings doctrine.

II. The Nature of the Judicial Taking

In considering judicial takings, as well as State takings more generally, a useful starting point is the Supreme Court’s statement that the Takings Clause “does not proscribe the taking of property; it proscribes taking without just compensation.”

A. The Nature of Property

The dual roles of States with respect to private property sometimes conflict. As Stop the Beach noted, “[g]enerally speaking, state law defines property interests.” However, government officials are both regulators and potential condemnors. They might constrain property use to prevent harm, or, alternatively, condemn property to achieve a public good. Since regulation does not require compensation and condemnation does, government discretion should be anchored, as Lucas v. South Carolina Coastal Council, put it, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.

No such objective referent is provided by the ad hoc, totality of the circumstances regulatory takings test propounded by the Supreme Court in Penn Central Transportation Co. v. City of New York. While legislators and officials have no clear guide to discern-

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8 Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 ((1985)).
11 Id. at 1029.
ing compensable takings from non-compensable regulation, judges have the additional option to engage in what Michael Berger termed “definitional takings.”

While Stop the Beach raises the judiciary’s relation to property, we must consider this in the context of the State’s relation to property. Felix Cohen’s well-known formulation is emblematic of the positivist view that property is created by government: “To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state.”

Cohen thus illustrates the realist perception that that “property is an inherently three-part relationship between the entitlement holder, the state, and everyone else.” Indeed, the term “entitlement holder” evokes a tenurial grant. However, fee simple ownership is a rejection of the feudal approach, in which their subjects held of the king. The difference is not a minor one, since only the draw of fee simple) title that was required to lure settlers from Europe to the American colonies.

While government has an important role in shaping the institution of property, the American tradition does not augur in favor of simple positivism. George Mason’s Virginia Declaration of Rights recognized among “inherent rights . . . the enjoyment of life and liberty, with the means of acquiring and possessing property . . .” Likewise, James Madison, declared that “[g]overnment is instituted to protect property of every sort; . . . this being the end of government, that alone is a just government, which impartially se-

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13 Michael M. Berger, Rails-to-Trails Conversions: Has Congress Effected a Definitional Taking?, INST. ON PLAN., ZONING, AND EMINENT DOMAIN §§ 8.01-.08 (1990).
15 Davidson, supra note 7, at 80.
18 George Mason, The Virginia Declaration of Rights, Art. I, June 12, 1776 (“That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”)
cures to every man, whatever is his own.” 19 Contemporary scholars have deemed private property the “guardian of every other right,”20 in addition to its being the “great focus” of the Framers.21 This prepolitical approach to property22 regards the “endorsement” of property by the State in harmony with Madison’s admonition that government is obligated to “impartially secure” property.

Thus, while the law has an important role in delineating “property” in a given context, it does not intrinsically write with a freer hand than when dealing with other rights enumerated in the Constitution or the Bill of Rights. American jurists, unlike the Lord Chancellor in Gilbert and Sullivan’s Iolanthe, do not “embody the Law.”23

Implicitly recognizing concerns about “definitional takings,”24 the Supreme Court, in Palazzolo v. Rhode Island,25 stated that a State cannot define existing property rights out of existence, even as against post-enactment purchasers.26 The reason Justice Kennedy’s Palazzolo opinion noted that States could not put “so potent a Hobbesian stick into the Lockean bundle”27 was that John Locke saw the individuals as vesting power in

20ELY. supra note 17.
21 JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 92 (1990) (“The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.”).
23 IOLANTHE, reprinted in TREASURY OF GILBERT & SULLIVAN (Martyn Green, ed. 1961) at 284. (“The Law is the true embodiment Of everything that's excellent. It has no kind of fault or flaw, And I, my Lords, embody the Law.”).
24 See Michael M. Berger & Gideon Kanner, The Need for Takings Law Reform: A View From the Trenches, 38 SANTA CLARA L. REV. 837, 842 (1998) (noting that the National Trails System Act “redefined the concept of ‘abandonment of railroad use’ to not include tearing up the tracks and replacing the trains with joggers,” and citing Berger, supra note 13.
26 Id. at 626.
27 Id. at 627.
the State to defend their rights, whereas Thomas Hobbes saw the alternative of anarchy to constitute the “war of all against all,” thus justifying a state in which the monarch exercised absolute power.

The jurisprudence of property rights has been shaped by courts through almost a millennium of accretion, in the common law tradition. Under a pre-political or natural rights view of property law, “judges are rightly seen as custodians of a customary system of property rights that were created by common practice long before there were any courts to enforce the rules in question.” While the courts did not enforce natural law as such, they did adhere to the principles the emanated from it.

Although Erie terminated the use by federal courts of a general common law in dealing with non-statutory claims, federal courts regularly delve into matters as expres-

28 See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (proclaiming “lives, liberties, and estates, which I call by the general name, ‘property.’”).


30 See generally, Hage v. United States, 35 Fed. Cl. 147 (1996). The determination of whether a takings claimant has a property interest “is based upon long and venerable case precedent, developed over the last two centuries. It is further clarified in the light of our law’s Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decision-making builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates.” Id. at 151.

31 Epstein, supra note 4, at 38.

32 Id. at 48 & n.44. But see, John F. Hart, Human Law, Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789---1835, 45 SAN DIEGO L. REV. 823, 833 (2008) (asserting that early judicial opinions that seemed to rely on higher law or the social compact in their reasoning "actually referred to such concepts in an ultimately historical, verifiable sense," and went outside the text of state constitutions "only to draw on the purported rights of Englishmen or on principles purportedly shared in common by the American written constitutions as a group.").

33 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
sive conduct and criminal law,\textsuperscript{34} and the Supreme Court has stated that the Takings Clause should not be treated as a “poor relation.”\textsuperscript{35} While the determination of state takings law by state courts is conclusive, their determination of the Federal Constitution’s Takings Clause is not. Our federal system leads to a state supreme court being “rendered less than supreme in the articulation of its own doctrine.”\textsuperscript{36}

**B. Judicial Takings is Not a New Idea**

In his plurality opinion in *Stop the Beach*, Justice Scalia asserted:

The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the government actor (“nor shall private property be taken” (emphasis added)). There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.\textsuperscript{37}

*Stop the Beach* reiterated that “the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking.”\textsuperscript{38} “The Takings Clause, unlike, for instance, the Ex Post Facto Clauses . . . is not addressed to the action of a specific branch or branches. It is concerned with the act, not the government actor.”\textsuperscript{39}

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\textsuperscript{34} QQ.

\textsuperscript{35} Dolan v. City of Tigard, 512 U.S. 374 (1994) “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .” Id. at 392.

\textsuperscript{36} Epstein, *supra* note 4, at 38.

\textsuperscript{37} 130 S.Ct. at 2601 (Citing *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of certiorari).

\textsuperscript{38} Id. at 2602.

\textsuperscript{39} Id. at 2601.
Furthermore, as Professor Richard Epstein noted, *New York Times Co. v. Sullivan*\(^{40}\) “upended huge bodies of the state common law of defamation on constitutional grounds, even though the First Amendment applies explicitly only to acts of Congress.\(^{41}\) Yet, the Supreme Court, speaking through Justice William J. Brennan, resisted any invitation to apply it only to state statutes and not to state common-law rules.”\(^{42}\)

The idea that a judicial action could result in a compensable taking is not new. The Supreme Court deemed judicial disregard of the principle of accession a compensable taking in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*,\(^{43}\) where the Florida high court arrogated to the State the interest generated by a private litigant’s interpleader deposit.\(^{44}\) The Court accepted the same principle with regard to commandeering interest on client trust funds in *Brown v. Legal Foundation of Washington*.\(^{45}\) Similarly, in *PruneYard Shopping Center v. Robins*,\(^{46}\) the Court decided on the merits the contention that a California Supreme Court decision extending the right of free expression to privately owned shopping centers constituted a taking.

**C. Hughes v. Washington and Stevens v. City of Cannon Beach**

The judicial takings debate largely has been shaped by non-dispositive opinions in two Supreme Court cases, *Hughes v. Washington*,\(^{47}\) and *Stevens v. City of Cannon Beach*.

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\(^{41}\) Epstein, supra note 4, at 58 (citing *New York Times Co.*, 376 U.S. at 265).

\(^{42}\) *Id.*


\(^{44}\) *Id.* (noting that a Florida statute provided that “[a]ll interest accruing from moneys deposited . . . shall be deemed income of the office of the clerk of the circuit court,” and that, while this language “might prompt one to conclude” that it referred only to “interest on funds clearly owned by the county,” the state supreme court “ruled that it applies to interest earned on deposited private funds.”).

\(^{45}\) *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). The Court ruled against the petitioner on the ground that the interaction of federal banking and the state Interest on Lawyers Trust Accounts (IOLTA) regulations resulted in no monetary loss. *Id.* at 234.

\(^{46}\) *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Beach.\textsuperscript{48} In Hughes, as Justice Stewart’s concurrence noted, prior to Washington’s admission to the Union, federal law gave littoral owners the right of accretion.\textsuperscript{49} If the new state constitution unambiguously stated that accretions would belong to the state, he added, the Court would face the “exceedingly difficult” question of “[d]oes such a prospective change in state property law constitute a compensable taking?”\textsuperscript{50}

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. . . .

. . . To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.\textsuperscript{51}

In Stevens, the landowners purchased a beachfront parcel in 1957. After their application to construct a seawall on the dry sand was denied in 1989, they sued in inverse condemnation.\textsuperscript{52} The Supreme Court of Oregon upheld the denial on the grounds that the seawall would exclude public access, contrary to the public’s customary rights, as deter-

\begin{itemize}
\item[49] Hughes, at 294-95 (Stewart, J., concurring).
\item[50] Id. at 295 (Stewart, J., concurring).
\item[51] Id. at 296-97 (Stewart, J., concurring) (emphasis added).
\item[52] Stevens, 510 U.S. at 1332.
\end{itemize}

In the Oregon Supreme Court, the State defended the trial court’s injunction in *Thornton* on grounds that the public had acquired a prescriptive easement over the landowner’s dry sand area for recreational purposes. However, Justice Scalia related, the Oregon high court found a “‘better legal basis’” for affirmance, “and decided the case on an entirely different theory:”

The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

However, between *Thornton* and *Stevens*, the Oregon Supreme Court ruled, in *McDonald v. Halvorson*, that “‘nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of ‘custom’ to the right to recreational use of the entire Oregon coast,’” and that “‘there may also be [dry-sand] areas to which the doctrine of custom is not applicable.” Yet, in *Stevens*, the Oregon Supreme Court ignored *McDonald*, and quoting *Thornton* extensively. It “framed the issue,” Justice Scalia stated, “as the continuing validity of *Thornton* in light of *Lucas*.“ He continued:

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by

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53 462 P.2d 671 (Or. 1969).
54 Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S.Ct. 332 (1994) (Scalia, J.) (dissenting from denial of cert.).
55 114 S.Ct. at 1332.
56 *Id.* at 1332 (quoting Stevens v. City of Cannon Beach, 462 P.2d at 676).
57 McDonald v. Halvorson, 780 P.2d 714 (Or. 1989).
58 *Id.*, at 359, 780 P.2d, at 724.
59 Stevens v. City of Cannon Beach, 114 S.Ct. at 1334 (1994) (Scalia, J.) (dissenting from denial of cert.).
invoking nonexistent rules of state substantive law. . . . No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. . . .

It is by no means clear that the facts—either as to the entire Oregon coast, or as to the small segment at issue here—meet the requirements for the English doctrine of custom. The requirements set forth by Blackstone included, \textit{inter alia}, that the public right of access be exercised without interruption, and that the custom be obligatory, \textit{i.e.}, in the present context that it not be left to the option of each landowner whether he will recognize the public's right to go on the dry-sand area for recreational purposes. In \textit{Thornton}, however, the Supreme Court of Oregon determined the historical existence of these fact-intensive criteria (as well as five others) in a discussion that took less than one full page of the Pacific Reporter. That is all the more remarkable a feat since the Supreme Court of Oregon was investigating these criteria \textit{in the first instance}; the trial court had not rested its decision on the basis of custom and the State did not argue that theory to the Supreme Court.\textsuperscript{60}

\textit{Stevens} plausibly explains Justice Scalia’s strong views on judicial takings.\textsuperscript{61}

\textbf{D. Regulations Deemed Illegitimate Might be Legitimate Takings}

If we are to judge an act by its primary intent rather than by its secondary effects,\textsuperscript{62} we might conclude that a novel approach used to solve what a state judge considered a pressing problem should be considered as responsive to state needs under the state constitution. The fact that the decision might be considered a judicial taking under the Takings Clause of the Federal Constitution could make the holding a compensable act, but not necessarily an illegitimate one.

In his opinion in \textit{Stop the Beach}, Justice Kennedy quoted from his opinion in \textit{Eastern Enterprises}.\textsuperscript{63} “‘Given that the constitutionality’ of a judicial decision altering

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1334-35 (internal citations omitted).
\item See also, David L. Callies & J. David Breemer, \textit{Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)Use of Landowners Investment Backed Expectations}, SF64 ALI-ABA 191 (May 3, 2001) (parsing Blackstone’s requisites for custom and expressing conclusions similar to Justice Scalia’s.
\end{enumerate}
\end{footnotesize}
property rights ‘appears to turn on the legitimacy’ of whether the court’s judgment eliminates or changes established property rights ‘rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.’”

However, although *Eastern Enterprises* involved an arrogation of money not connected with any particular fund, the plurality deemed it to constitute a taking.

**E. States Should Not Judge Their Own Cause**

Lord Coke enunciated the fundamental principle of law that “no one should be a judge in his own cause.” James Madison also warned that, in such a situation, the judge’s “interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” To be sure, as the Supreme Court quoted Blackstone, “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”

The problem of potential bias of state court judges, which I would define here as the proclivity of judges to perceive acutely the state’s needs, arises in the takings context because property rights generally are neither federal in origin nor rigidly defined. As the Supreme Court stated in *Board of Regents of State Colleges v. Roth*, [p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent

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64 Id. at 2614-15 (Kennedy, J., concurring in part and concurring in judgment).
65 *Eastern Enters.*, at 521-22.
66 Dr. Bonham's Case, (1609) 77 Eng. Rep. 646 (K.B.) (disqualifying judge who personally would receive fines he assessed).
69 The possible bias of federal judges is beyond the scope of this article.
70 *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).
source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”

The malleability of the “independent source” is the central issue. Perhaps more than typical citizens, judges have perceptions of what the public good might require. The eagerness of the Oregon Supreme Court to adopt a sweeping theory of public rights in *Stevens*, bereft of views of counsel or of courts below, suggests a feeling that judges to “embody the law,” or, at the least, are acting with undue expedience. Judge Alex Kozinski has suggested a less kindly way to view the matter: “When we act like politicians we can expect to be treated like politicians.” Notably, on this score, judges in many states are elected as politicians. A decade ago, in *Republican Party of Minnesota v. White*, the Supreme Court held that a state rule “prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.” Thus, “judicial candidates are to be treated no differently than legislative candidates; the voters are entitled to know the candidates’ views on the issues and they are expected to support or oppose a candidate on that basis.”

F. Are Courts Authorized Condemnors?

One argument against a doctrine of judicial takings, raised in *Stop the Beach* by Justice Kennedy, is that state legislative and executive officials are accountable to the voters for their spending decisions, but that judges are not under this constraint. “Courts, unlike the executive or legislature, are not designed to make policy decisions

71 *Id.* at 577.

72 *See, supra*, note 23 and associated text.

73 *See* Kisbey v. State, 682 P.2d 1093, 1095 (Cal. 1984) (observing “the life of the law is not logic, but expedience.”).

74 United States v. Burdeau, 180 F.3d 1091, 1094 (9th Cir. 1999) (Kozinski, J., dissenting).


76 *Id.* at 788.


about ‘the need for, and likely effectiveness of, regulatory actions.’”79 This, he suggests, would put the Court on a “strong footing” if it used due process analysis.80

The fact that judges might not have explicit powers to condemn under state law does not necessarily vitiate judicial takings claims. The case law regarding unauthorized takings in other contexts is mixed.81 In *Fountain v. Metropolitan Atlanta Rapid Transit Authority*,82 the Eleventh Circuit noted that the Ninth Circuit, in *Jacobson v. Tahoe Regional Planning Agency*,83 had dismissed an inverse condemnation claim because the agency lacked condemnation powers.

We cannot agree with the Ninth Circuit’s decision in Jacobson because we believe that application of the rule in that case would undermine the force of the just compensation clause. If a private party were unable to seek redress under the just compensation clause when an official agency acts outside its statutory powers and takes property for public use, the state would be able to escape liability under the just compensation clause by taking property through agencies without statutory powers of eminent domain. We think that the threat of this kind of shell game ought to be avoided, and we are not particularly worried about the niceties of payment for the alleged taking. It is enough for our purposes that MARTA has allegedly deprived appellant of his property for public use without just compensation.84

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79 Id. at 2615 (Kennedy, J., concurring in part and concurring in judgment) (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005)).

80 Id.


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


84 Fountain, 678 F.2d at 1044.
G. Judicial Takings, Shelley v. Kraemer, and State Action

In *Shelley v. Kraemer*, the Supreme Court held that judicial enforcement of a racially restrictive private covenant constituted state action, and thus violated the Equal Protection Clause of the Fourteenth Amendment. While *Shelley*'s goals were laudable, albeit subsequently made unnecessary by federal antidiscrimination laws, its broader implications are troubling for individual liberty. As Professor Shelley Ross Saxer noted, *Shelley* conflated constitutionally protected private rights with government conduct. “[R]etaining *Shelley*'s state action theory can potentially subject other individual liberties and freedoms of private action to offensive, but constitutionally protected, private action.”

Professor Nestor Davidson recently asserted “the framework the [*Stop the Beach*] plurality deployed to find judicial opinions subject to review under the Takings Clause resonates strongly with the Court's earlier approach to state action in *Shelley*. He added that “[t]he enforcement of the restrictive covenants represented an instance in which ‘the States have made available to [private] individuals the full coercive power of government,’ and, accordingly, ‘the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.’”

Professor Davidson observed that the Court “has never fully embraced the implications of this view of the state role in defining private property and in fact rarely recog-
nizes state action in other circumstances that might logically dictate a straightforward application of *Shelley*. As a result, *Shelley* has largely been limited to its own context.91

The fundamental reason why *Stop the Beach* should not be taken as resurrecting the notion that all judicial actions pertaining to rights are state actions is the practical necessity for the Supreme Court, in adopting judicial takings, limit the concept through a formula such as Justice Scalia’s cabining of judicial takings to require a change in the law92 previously “established,”93 and not a clarification of a previously ambiguous law.94 In other words, the enforcement of property rights is different from the modification of property rights. To be sure, the line between “clarification” of rights and modification of rights may require interpretation. However, the adoption of Justice Stewart’s judicial takings standard, requiring “sudden” and “unpredictable” change,95 should greatly facilitate this task.

**H. Private-to-Private Transfers**

Professor Benjamin D. Barros has argued that the Just Compensation Clause should apply to private-public transfers, but not private-private transfers.96 In his paradigmatic example, a judicial reinterpretation results in the destruction of an easement, thereby benefitting the owner of the previously servient land.97 He argues that such a transfer “preserves the interests as private property, albeit in a different private owner.”98

Professor Barros may be right in many (or most) instances, but the transfer of private property from *A* to *B* has been constitutionally suspect in American jurisprudence for

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91 Id. at 77.
93 Id.
94 Id. at 2610.
96 Barros, supra note 7, at 919-932.
97 Id. at 919-20.
98 Id. at 920.
over two hundred years. The widespread use of condemnation for retransfer of property from one private individual to another for economic revitalization that achieved public notoriety in *Kelo v. City of New London* is a contemporary example.

The best answer to Barros’s point might be adoption of a definition of judicial takings, such as that proposed by Justice Stewart, that excludes routine adjustments in property law as it affects the relative rights of private individuals.

### I. An Appropriate Test for Judicial Takings

While the establishment of judicial takings as part of the Supreme Court’s regulatory takings doctrine would await a case in which proponents could muster a majority, it is useful to examine the tests set forth by Justice Stewart in *Hughes v. Washington*, and Justice Scalia for the plurality in *Stop the Beach*.

Justice Scalia stated that a judicial taking would require a change in the law, which was not merely a clarification of a previously ambiguous law. Also, the detrimentally affected property right must have been “established.” These terms are susceptible to much interpretation. Undoubtedly, Scalia is a devotee of clear rules rather than vague standards. However, to say that his *Stop the Beach* plurality opinion “announces what amounts to a single, sweeping principle: every judicial change in the legal status...

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99 *See* Calder v. Bull, 3 Dall. 386, 388 (1798) (“[A] law that takes property from A. and gives it to B: It is against all reason and justice . . . “).


101 *See* supra note 51 and associated text.


105 *Id.* at 2610.

106 *Id.*

quo is a taking**108 seems, even from the perspective of police power hawks, unduly overheated.

Justice Stewart’s “sudden” and “unpredictable” change standard,109 seems susceptible to more objective interpretation. It might well overlap with Justice Scalia’s test, in practice.110 Justice Stewart’s test might be more rooted in the common law, as a judgment that there was a judicial taking should be steeped in careful analysis of the law and its progression. This was the kind of analysis employed by Justice Scalia in his dissent in Stevens.111 It also, ironically, was the type of analysis used by Professor Richard Epstein to impeach the Court’s unanimous holding that the renourishment in Stop the Beach did not constitute a taking.112

III. The Need for a Unified Takings Standard

Justice Scalia’s assertion in Stop the Beach that “[t]he Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking”113 encompasses “the State” without limit, and includes determinations of the locality’s chief executive, as well as those of administrative agencies, boards, and commissions.

Justice Scalia’s explanation that “[t] would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat”114 is equally applicable to all state actors. Under this rationale, “there is no need for a unique test for

**108 Echeverria, supra note 7, at 477.
109 See, supra note 51 and associated text (quoting passage).
110 This raises the question of why, in Stop the Beach, Justice Scalia did not accept Justice Stewart’s test, especially given that it probably was more congenial to Justice Kennedy, who could have supplied a fifth vote. See Echeverria, supra note 7, at 480 (providing interesting conjecture, albeit inconclusive).
111 Stevens v. Cannon Beach, 510 U.S. 1207 (Scalia, J., dissenting from denial of certiorari).
112 See Epstein, supra note 4.
113 Stop the Beach Renourishment v. Fla. Dept. of Env't Prot., 130 S.Ct. 2592, 2602 (2010) (plurality opinion).
114 Id. at 2601.
judicial takings. A judicial action should be considered a taking under the Just Compensation Clause if the equivalent action would be a taking if performed by the legislature or the executive branch.”

Professor John Echeverria opined that, for property rights advocates, “the most important feature of the judicial takings concept might not be its applicability to certain court rulings, but the opportunity it presents to revisit takings doctrine generally.” Whatever one’s view on the relationship between property rights and government regulation, however, a coherent takings jurisprudence would let individuals and government departments know what their rights are, and would permit an expeditious and inexpensive resolution of disputes.

A. Balancing Tests and the Rule of Law

Under Justice Scalia’s plurality view, a judicial taking requires a change in the law, and not a clarification of a previously ambiguous law. Furthermore, the modified or eliminated property right must have been “established.” As Professor D. Benjamin Barros noted, “Because the burden is on the property owner, ambiguity and indeterminacy in the state’s property law help the state and hurt the property owner.”

Ambiguity and indeterminacy are fostered by what Justice O’Connor termed the “polestar” of the Supreme Court’s takings jurisprudence, the ad hoc, multifactor test of

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115 Barros, supra note 7, at 917.
116 Echeverria, supra note 7, at 481.
118 Id. at 2610.
119 Id.
120 Barros, supra note 7, at 934. There is, however, some caselaw supporting the proposition that ambiguous zoning ordinances should be strictly construed. See Daniel A. Himebaugh, Tie Goes to the Landowner: Ambiguous Zoning Ordinances and the Strict Construction Rule, 43 URB. LAW. 1061 (2011).
Penn Central. "When people cannot ascertain what they can and cannot do with their own property in an economically rational manner . . . that is but another way of saying that they cannot tell what they own, and hence that they may actually own nothing of value."  

Balancing tests are “likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberation too nakedly. The views of Justice Scalia on this point are insightful:

When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: "Well, that earlier case had nine factors, this one has nine plus one." Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.

The common-law, discretion-conferring approach is ill suited, moreover, to a legal system in which the supreme court can review only an insignificant proportion of the decided cases . . . The fact is that when we decide a case on the basis of what we have come to call the "totality of the circumstances" test, it is not we who will be "closing in on the law" in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts. To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.  

But it is no more possible to demonstrate the inconsistency of two opinions based upon a "totality of the circumstances" test than it is to demonstrate the

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123 Berger & Kanner, supra note 24, at 883.
125 Scalia, supra note 107, at 1178.
inconsistency of two jury verdicts. Only by announcing rules do we hedge
ourselves in.\textsuperscript{126}

B. The Williamson County State Litigation Prong

A prime example of the need for takings law reform is mentioned first in this Ar-
ticle because of the ironic conflation of the role of state judges that it engenders. This is
the “state litigation” prong of \textit{Williamson County}.\textsuperscript{127} In that 1985 case, the Supreme
Court established that the claim of a state regulatory takings would be “ripe” for review
by federal courts only after the plaintiff had received a “final decision” of what develop-
ment the state agency would allow.\textsuperscript{128}

More germane here, “[a] second reason the taking claim is not yet ripe is that res-
pondent did not seek compensation through the procedures the State has provided for
doing so.”\textsuperscript{129} At the time \textit{Williamson County} was decided, many states did not have pro-
cedures for paying just compensation in regulatory takings cases,\textsuperscript{130} and the Supreme
Court’s admonition that claimants seek compensation was entirely sensible. Most direct-
ly, if a permit applicant regarded an agency’s final decision on the scope of permissible
development to be a taking, it could then demand compensation. The agency’s negative
response would complete the process of seeking compensation from the alleged inverse
condemnor and its being denied. However, state courts interpreted the requirement as
permitting the state to require to the owner to litigate the denial of compensation all the
way to the state supreme court, if it would hear the case.\textsuperscript{131}

The anomalous result, insofar as consideration of judicial takings is concerned, is
that the state judiciary is not adjudicating a federal takings claim. Instead, its determina-
tion is the last step in the taking without compensation itself.

\textsuperscript{126} Id. at 1180.
\textsuperscript{127} Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S.
\textsuperscript{128} Id. at 186.
\textsuperscript{129} Id. at 194.
\textsuperscript{130} QQ.
\textsuperscript{131} QQ.
The Alice-in-Wonderland quality of the state litigation requirement was epitomized in the Supreme Court’s opinion in *San Remo Hotel*.\(^{132}\) There, the Court refused to make allowance for the fact that the property owner’s federal takings claim was litigated in state court totally involuntarily.\(^{133}\) The result is that the very state proceedings necessary to “ripen” the plaintiff’s federal takings claim result in issue preclusion, so that the plaintiff’s substantive arguments cannot be heard in federal court.

An opinion concurring in the judgment by Chief Justice Rehnquist, joined by Justices O’Connor, Kennedy, and Thomas, explained why the *Williamson County* state litigation requirement “may have been mistaken.”\(^{134}\) The Chief Justice added: “The Court today makes no claim that any such longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed. . . .”\(^{135}\)

**C. Applying Dolan to All State Actors**

In *Dolan v. City of Tigard*,\(^{136}\) the Supreme Court held that a municipality’s “adjudicative decision” conditioning a development permit upon the applicant’s granting it an interest in land would be permissible where there was “rough proportionality” between the interest sought and the burdens upon the locality resulting from the development. The city would have to make “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”\(^{137}\)

The Court noted that the regulations it had upheld in earlier cases differed in that they “essentially legislative determinations classifying entire areas of the city, whereas

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\(^{132}\) *San Remo Hotel*, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

\(^{133}\) *Id.* at 336-48 (affirming application of the full faith and credit statute, 28 U.S.C. § 1738).

\(^{134}\) *Id.* at 348 (Rehnquist, C.J., concurring in judgment).

\(^{135}\) *Id.* at 350 (Rehnquist, C.J., concurring in judgment).


\(^{137}\) *Id.* at 391.
here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.”

The Court never has defined what an “exaction” is, although lower courts have supplied useful tests. The significance of the fact that Mrs. Dolan “deeded portions of the property” also is unclear, and states have split on whether an exaction of money counts as an exaction under Dolan. After Ehrlich v. City of Culver City was remanded by the U.S. Supreme Court “in light of” Dolan, the Supreme Court of California concluded that Dolan applied to the monetary exaction demanded as a condition for issuance of a development permit. The exaction, “but for the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.” The cases are mixed, with additional states supporting this view, and others holding that Dolan applies only to exactions of real property.

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138 Id. at 385.
139 See, e.g., Town of Flower Mound v. Stafford Estates Ltd. P’ship, 135 S.W.3d 620, 625 (Tex. 2004) (“any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction.”); and more specifically, B.A.M. Development L.L.C. v. Salt Lake County, 87 P.3d 710, 715 (Utah Ct. App. 2004) (“Development exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project.”)
140 50 Cal.Rptr.2d 242 (1996).
142 Id. at 252.
144 E.g., Flower Mound, 135 S.W.2d at 637 (citing Ehrlich); Home Builders Ass'n v. City of Beavercreek, 729 N.E.2d 349, 354–356 (Ohio 2000); Northern Ill. Home Builders Ass’n v. County of DuPage, 649 N.E.2d 384, 388-89 (Ill. 1995).
Subsequently, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Court stated that the rough proportionality test is “not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.”

In *Lambert v. City and County of San Francisco*, a permit also was denied where there was substantial support for the claim that it would have been granted if an exaction had been paid. In dissenting from denial of certiorari, Justice Scalia, joined by Justices Kennedy and Thomas, noted that the California court of appeal concluded “‘San Francisco did not demand anything’” from petitioners, but that “in the next breath found it ‘somewhat disturbing that San Francisco’s concerns about congestion, parking and preservation of a neighborhood *might have been overcome* by payment of [a] significant sum of money.’” The dissenting state appellate judge found, in Scalia’s words, that “the court's refusal to apply *Nollan* and *Dolan* might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met.” He added: “There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference.”

The most convincing illustration of the inequity of the “adjudicative determination” limitation in *Dolan* is that it permits legislators to engage in activities that patently would constitute takings if done by administrators in their name. In *Parking Association of Georgia, Inc. v. City of Atlanta*, impending summer Olympic Games led the city to impose requirements that downtown surface parking operators devote a substantial part

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147 *Id.* at 703.
149 *Id.* at 1550.
150 *Id.* at 1551.
151 *Id.* at 1550 (Scalia, J., dissenting from denial of cert.) (quoting Lambert v. City & County of San Francisco, 67 Cal.Rptr. 562. 569 (Cal. App. 1997) (emphasis by Justice Scalia).
152 515 U.S. 1116 (1995) (denying cert.)
of their lots to landscaping, that they then would have to purchase. The city argued that the Dolan “individualized determination” and “rough proportionality” standards were inapposite, since the city had made a “legislative determination.” Justice Thomas, joined by Justice O’Connor, dissented from denial of certiorari.

It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

D. Resolving the Disparity Between Small- and Large-Scale Rezoning

In City of Eastlake v. Forest City Enterprises, Inc., the Supreme Court stated:

Although this Court has decided only a handful of zoning cases, literally thousands of zoning disputes have been resolved by state courts. Those courts have repeatedly identified the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels. In the former situation there is generally great deference to the judgment of the legislature; in the latter situation state courts have not hesitated to correct manifest injustice.

The Court stated that this distinction was “plainly drawn” by the Supreme Court of Oregon in Fasano v. Board of County Commissioners, where that court stated:

“Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the

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153 Id. at 1117.
154 Id. at 1116 (Thomas, J. dissenting from denial of cert.).
155 Id. at 1117-18.
157 Id. at 683-84.
158 Fasano v. Board of County Comm’rs, 507 P.2d 23 (Or. 1973), overruled on other grounds Neuberger v. City of Portland, 607 P.2d 722 (Or. 1980).
permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.\textsuperscript{159}

On the other hand, in the leading case \textit{Arnel Development Co. v. City of Costa Mesa},\textsuperscript{160} the Supreme Court of California adhered to its “established rules that zoning amendments are legislative,”\textsuperscript{161} even though the amendment in that case covered only three parcels comprising 68 acres.\textsuperscript{162} Another method of division is to treat all comprehensive plan amendments as legislative in nature, and other zoning changes as administrative (quasi-judicial).\textsuperscript{163}

It is clear that there is “manifest injustice” when local legislative bodies use small-scale rezoning to favor an individual landowner whose parcel now has more valuable use than permitted others in the area. This can more readily occur, since there is not the public debate that typically accompanies comprehensive rezoning. On the other hand, especially in homogeneous communities, zoning changes typically reflect the wishes of the majority of residents, at the cost of owners of undeveloped parcels.

The legislative/adjudicative distinction in rezoning cases may well be dysfunctional, with a uniform standard the better alternative.\textsuperscript{164} On the other hand, abuses might be prevented through the development of judicial standards for regulatory takings less vague than the \textit{Penn Central} ad hoc multifactor test.\textsuperscript{165}

\textsuperscript{159} \textit{Id.} at 26.
\textsuperscript{160} 620 P.2d 565 (Cal. 1980) (en banc).
\textsuperscript{161} \textit{Id.} at 569.
\textsuperscript{162} \textit{Id.} at 566.
E. Compensation versus Invalidation

Another problem asserted respecting judicial takings, but applicable to regulatory takings generally, is the proper remedy to employ when a government determination subsequently is adjudicated a compensable taking. In *Stop the Beach*, Justice Scalia averred:

Justice Kennedy worries that we may only be able to mandate compensation. That remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking. If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question.166

Professor John Echeverria found this formulation “arresting.” Quoting the Supreme Court in *First English*, he wrote “[i]f there is one thing we think we know about takings law, it is that . . . the purpose of the Takings Clause is ‘to secure compensation in the event of an otherwise proper interference amounting to a taking.’”167 Echeverria noted that there are narrow exceptions to the principle that takings be remedied by compensation only, such as where appropriate level of compensation impossible to calculate,168 or the taking itself would be of money.169

*First English* did require some compensation, but mostly accepted the principle of invalidation. The Court there stated “invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.”170 It added that “a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a ‘tempo-

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167 Echeverria, supra note 7, at 482 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis in original)).
170 First English, 482 U.S. at 332.
ary’ taking be deemed a permanent taking.” 171 The First English remedy, permitting government to truncate what where intended as permanent regulations and to pay only “temporary” takings damages for the time the regulation was in place, is not functionally dissimilar from invalidation.

I have argued elsewhere 172 that the ability of condemnors to reverse their actions subsequent to a judicial takings determination essentially means that the condemnation was of a contingent nature. What the State actually condemns might more accurately be described as an interest determinable at its pleasure, 173 or, alternatively, an interest that included the contract right of a “put option” to retransfer the property to the condemnee. The result is that the condemnee is not free to commit the condemnation award proceeds without fear that government could unwind its acquisition, possibly years after the fact. Such interests may be taken by eminent domain, but the condemnation award then should include additional sums for arrogation of the owner’s rights to find replacement premises and treat the condemnation as final.

IV. Conclusion

In Barton Thompson’s 1990 Judicial Takings article, he declared:

The Court’s current fixation on “essential” or core property rights (e.g., the right to exclude others from one’s property or to pass the property on at death) also suggests the importance of normative images of property even within the Court’s overall positivist framework. The Court, in short, seems willing to support positive property rights only when they also fit the Court’s normative image of what should be protected. 174

The Court did not then, nor has it since, explained why the rights to blockade one’s property from others or to alienate it are the core rights. To be sure, exclusion and

171 First English, at 317.
172 Steven J. Eagle, Just Compensation for Permanent Takings of Temporal Interests, 10 FED. CIR. B.J. 485 (2001).
174 Thompson, supra note 6, at 1527 (case citations omitted).
alienation are important rights. However, “property’s right to exclude is always grounded in a general normative interest in use.”

“[W]hen property consists of a right to determine exclusively the use of an external asset, ‘[l]inguistically, exclusion plays a role largely as an adjective of the rights of acquisition, use and disposal, and substantively, exclusion is, for the most part, only a corollary of’ the normative use interests that justify the rights of acquisition and possession associated with property at law.” Along these lines, Justice Homes noted in Pennsylvania Coal that “‘the right to coal consists in the right to mine it.’”

To give Professor Thompson the last word, “[t]he more relevant question for judicial takings, however, 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, as we shall see, may be ethereal at best.”

178 Thompson, supra note 6, at 1527.