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NOTE

IF YOU BUILD IT, HE WILL COME:¹ JUDICIAL TAKINGS AND A SEARCH FOR COMMON GROUND

Ian M. Frame[†]

I. INTRODUCTION

The United States Constitution is a document that has been, and continues to be, the subject of infinite debate and interpretation. At the center of this debate are questions that initially seem deceptively simple, but they have given way to a wealth of legal debate and a vast amount of jurisprudential opinion. The outcome of these debates plays an instrumental role in our everyday lives, affecting everything from civil liberties to a citizen's rights in private property and the extent to which those rights can be disrupted by state intervention.

The Constitution is a document of enumerated powers.² Commensurate with the principles of federalism, those powers that are not specifically ceded to the federal government are left to the states and to the people.³ This dynamic alone has been the subject of many contentious debates.⁴

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1. The title is derived from the film *FIELD OF DREAMS*. See *FIELD OF DREAMS* (Universal Studios 1989). In the film, while working in his cornfield, the lead character, played by Kevin Costner, hears voices saying "If you build it, he will come." Convinced that these voices desire him to build a baseball field, Costner plows over the majority of his cornfield to build a baseball field. Once the field is finished, famous baseball players from years past come to use the field as their own, depriving the lead character of his ability to produce corn. During the film, the baseball players, while letting other in, refuse to allow Costner to enter the area behind the outfield perimeter.

2. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

3. The Tenth Amendment explicitly provides that those powers that are not given directly to the federal government by the Constitution are reserved for the states and the people. U.S. CONST. amend. X. This amendment was implemented to preserve the freedom and independence of the sovereign states. See *United States v. Sprague*, 282 U.S. 716, 733 (1931).

4. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (beginning its discussion of the extent of the power granted to the federal government under the Commerce Clause by

Those powers expressly given to the federal government are divided among the three equal branches: executive, legislative, and judicial.⁵ Implicit in these powers are the functions of government that each branch was created to perform. As Alexander Hamilton wrote:

The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse.⁶

Additionally, the Constitution can be described as a system of restraints placed upon the functions of government.⁷ These restraints can operate internally by putting restrictions on the operations and overt reach of government control. These restraints can operate externally by prohibiting the addition of government functions, laws, and controls that may conflict with the Constitution, unless their validity is satisfied in the form of a constitutional amendment or a constitutional convention.

The text of the Constitution contains express language stating the powers and restraints that operate on each branch of government. Ambiguity exists, however, where the text does not specifically direct the power or restraint toward one particular branch. The question then becomes, to which branch does the ambiguous clause or provision apply?

While the Takings Clause of the Fifth Amendment succinctly provides an object and purpose, thus justifying its presence, it is silent on which branch of government it restrains.⁸ This overt silence has led to much debate as to which branch the Takings Clause applies and as to the real

recognizing the principle of the enumerated powers); *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 547-48 (1985) (discussing the extent of governmental power and its limitations on the federal government); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (discussing the extent of the power granted to the federal government under the Commerce Clause).

5. See U.S. CONST. art. I-III.

6. THE FEDERALIST NO. 78 (Alexander Hamilton).

7. *Garcia*, 469 U.S. at 528, 552.

8. See U.S. CONST. amend. V. The Fifth Amendment does not operate in reference to any specific branch of government. It simply prohibits the act of taking private property "for public use, without just compensation." *Id.*

object of its carefully crafted language.⁹ This Note addresses the topic at the forefront of the Takings Clause debate, namely, whether the Takings Clause should be extended to the judicial branch through what is commonly called the Judicial Takings Doctrine.

This Note focuses on the seminal case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*¹⁰ (hereinafter “*Stop the Beach*”), which articulates support for the Judicial Takings Doctrine. In Part II, this Note examines the background of *Stop the Beach* and related jurisprudence that reveals how the United States Supreme Court has handled similar issues. In Part III, this Note discusses the theory of judicial takings and analyzes what benefits and detriments the adoption of the Judicial Takings Doctrine may trigger. It also explores whether a Due Process analysis may provide sufficient protections in place of the Judicial Takings Doctrine. In Part IV, this Note addresses the questions largely unanswered by the Court and proposes a manageable standard to determine whether a judicial decision has deprived a person of an established property right. Finally, this Note discusses where the theory of judicial takings stands after *Stop the Beach* and discusses whether a subsequent court would stand on strong ground in adopting it.

II. BACKGROUND

A. *The Takings Clause*

The Takings Clause provides that “private property [shall not] be taken for public use without just compensation.”¹¹ The Clause is not addressed toward any specific branch of government; it is concerned merely with the act of taking property.¹² There is no textual justification for saying that the state’s power to take property shall vary by branch.¹³

9. See J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747 (2005); W. David Saratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487 (2004); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

10. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010).

11. See U.S. CONST. amend. V. This Note does not seek to address what just compensation would constitutionally entail. Nevertheless, limited treatment will be given to the notion that within the confines of the Constitution, courts lack the tools to grant just compensation.

12. *Penn. Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

13. *Id.*

The common taking occurs when a state exercises its power of eminent domain by seizing private property for public use and providing the owner with just compensation.¹⁴ A taking also occurs when the government uses its own property in a way that destroys private property rights.¹⁵ The Takings Clause applies as fully to the landowner's riparian water rights as it applies to the landowner's estate in land.¹⁶ States also effect a taking when private property is re-characterized as public property.¹⁷ This could occur when a court orders a party to deposit a sum of money into a state account held for the party's creditors with a state statute mandating that interest earned on that account be withheld from the party.¹⁸

Initially, the Bill of Rights applied exclusively to the federal government, not to state governments.¹⁹ Beginning with the adoption of the Fourteenth Amendment in 1868, the United States Supreme Court steadily declared certain provisions of the Bill of Rights applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.²⁰ It was not until 1897, however, that the Supreme Court declared that the Takings Clause of the Fifth Amendment should be extended to the states.²¹

B. Property Rights of Florida Riparian Owners

Under Florida law, the State owns, in trust for the public, the land permanently submerged beneath navigable waters and the foreshore, which is the land between the low-tide line and the mean high-water line.²² This is commonly referred to as the Public Trust Doctrine. The State has the power

14. *Stop the Beach*, 130 S. Ct. at 2601.

15. *See* *United States v. Causby*, 328 U.S. 256, 261-62 (1946) (holding that a taking has occurred when the government takes an easement over property to fly low-flying military aircraft over it, which in this instance, rendered the property uninhabitable due to the amount of noise from the aircraft).

16. *See* *Yates v. Milwaukee*, 77 U.S. 497, 504 (1871).

17. *See* *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 163-65 (1980).

18. *Id.*

19. *Barron v. Baltimore*, 32 U.S. 243, 247 (1833).

20. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Gitlow v. New York*, 268 U.S. 652 (1925).

21. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) (holding that the Takings Clause of the Fifth Amendment mandates that the states provide just compensation when they take private property for public use, which was the first in a continuing line of cases that extend provisions of the Constitution to the states).

22. FLA. CONST. art. X, § 11.

to sell this land, but only when doing so is in the public's interest.²³ Additionally, the law may authorize the private use of the public trust land, but only when the use does not conflict with the interests of the public.²⁴ Under Florida law, the mean high-tide line, which is subject to statutory limitations, is the boundary between private beachfront and State-owned land.²⁵ These provisions represent a codification of Florida common law represented by Article X of the Florida Constitution.²⁶

In Florida, beachfront property owners, or littoral owners, have certain additional property rights established under common law; some of these rights are the right to access the water, the right to enjoy an unobstructed view of the water, and the right to receive accretions to their littoral property.²⁷ An accretion is the addition of sand or sediment to waterfront land that occurs gradually and imperceptibly—so slowly that one could not see the change occurring, though the change is noticeable over a period of time.²⁸ When an accretion occurs, the littoral owner has a right for the property line to adjust according to the new mean high-tide line.²⁹

It is important to note that an accretion is different from an avulsion. An avulsion occurs when there is a “sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.”³⁰ When this occurs, a littoral owner will not retain the right to have the mean high-tide line continue as his property line.³¹ An avulsion can also occur through artificial means.³² An artificial avulsion takes place when a property owner or state actor suddenly and perceptively expands land mass over an area that was once water.³³ Concerning the consequence of nullifying a property owner's right to accretions, current

23. *Id.*

24. *Id.*

25. *Id.*

26. FLA. CONST. art. X.

27. *See Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 500, 507 (Fla. 1918).

28. *Bd. of Trs. of Internal Improvement Trust Fund v. Sand Key Ass'n, Ltd.*, 512 So. 2d 934, 936, 941 (Fla. 1987) (holding that a property owner who receives an accretion by artificial causes is entitled to that accretion even if he is not the party who participated in the actions that caused the accretion).

29. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2598 (2010).

30. *Sand Key Ass'n*, 512 So. 2d at 936.

31. *Stop the Beach*, 130 S. Ct. at 2598.

32. *Id.* at 2611.

33. *Id.*

Florida law does not distinguish between treating artificial avulsions and ordinary avulsions differently.³⁴

C. The Beach and Shore Preservation Act

The Beach and Shore Preservation Act provides the State with the authority to engage in renourishment projects for the benefit of its citizens and establishes specific guidelines for initiating a project.³⁵ When a beach restoration is undertaken, the Florida Board of Trustees of the Internal Improvement Trust Fund sets an erosion-control line.³⁶ The erosion-control line must be set in reference to the existing mean high-water line, although in theory it can be located seaward or landward of that.³⁷ Once the erosion-control line is recorded, upland owners no longer have the right to have their property line increase with the mean high-water line through accretion.³⁸ Since the renourishment project reclaims or adds a perceptible amount of land to the beachfront, it is likened to artificial avulsion, and a property owner will no longer have the right to the close boundary he once shared with the water.

*D. Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*³⁹

In *Stop the Beach*, the United States Supreme Court examined Florida's power to restore beaches through a process called renourishment.⁴⁰ Renourishment allows the State to deposit sand on eroded beaches (restoration) and to maintain the deposited sand (nourishment).⁴¹ The cause of action in *Stop the Beach* originated when the City of Destin and Walton County applied for permits to restore 6.9 miles of beach that had been eroded by a series of hurricanes.⁴² The project would add seventy-five feet of dry sand beach seaward of the mean high-tide line, effectively

34. *Id.*

35. FLA. STAT. §§ 161.011 et. seq. (2002).

36. FLA. STAT. § 161.161(3)-(5) (2002).

37. FLA. STAT. § 161.161(5) (2002).

38. FLA. STAT. § 161.191(2) (2003).

39. *Stop the Beach*, 130 S. Ct. 2592.

40. *Id.* at 2600-01.

41. FLA. STAT. § 161.021(3), (4).

42. *Stop the Beach*, 130 S. Ct. at 2600.

depriving the littoral owner of his property line's close proximity to the water line and permanently severing any future right to accretions.⁴³

Stop the Beach Renourishment, Inc., (hereinafter "Petitioner") is a nonprofit corporation formed by individuals who own beachfront property bordering the project area that the State sought to address.⁴⁴ Petitioner brought an administrative action to challenge the proposed project. Petitioner's administrative action ultimately was rejected, and the permits to begin the renourishment project were issued to the City of Destin and Walton County.⁴⁵ Petitioner then brought an action in state court, challenging the State's actions on constitutional grounds.⁴⁶ Petitioners argued that the State's actions of beach renourishment would constitute an unconstitutional taking without just compensation in violation of the Takings Clause of the Fifth Amendment.⁴⁷

The Court of Appeal found that Petitioners were denied two littoral rights that had existed under riparian common law: the right to receive accretions to their property and the right to have the contact of their property with the water remain intact.⁴⁸ The Court of Appeal found that this constituted an unconstitutional taking that could not stand unless the State could show it had an actual property interest in upland property or initiated eminent domain proceedings.⁴⁹ On appeal, the Florida Supreme Court was asked to resolve the following question: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?"⁵⁰ The Florida Supreme Court responded in the negative.⁵¹ A rehearing was denied, and the United States Supreme Court granted certiorari.⁵²

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Save our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot., 27 So. 3d 48, 56 (Fla. 2006). The named petitioner, Save our Beaches, Inc., was the other party challenging the Florida administrative action. Both challenging parties are non-profit groups composed of private property owners.

47. *Id.*

48. *Id.* at 59.

49. *Id.* at 60.

50. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008).

51. *Id.* at 1121.

52. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot., 130 S. Ct. 2592, 2600 (2010).

The Supreme Court held in an 8-0 decision, from which Justice Stevens abstained,⁵³ that the State's actions did not constitute a taking.⁵⁴ Thus, the Court affirmed the decision of the Florida Supreme Court. The basis for the United States Supreme Court's decision was that a taking cannot occur unless it can be shown that littoral property owners had rights to future accretions and contact with the water that were superior to the State's right to fill in its submerged land.⁵⁵ Under Florida property law, the State, as owner of land seaward of the mean high-tide line, has the right to fill that land, notwithstanding possible interference with the rights of the littoral landowners.⁵⁶ Since renourishment constitutes an avulsion that exposes land seaward of the littoral property, that land belongs to the State, even though it interrupts the littoral owner's contact with the water.⁵⁷ Because the littoral owner will no longer have the right to have his property line maintained at the mean high-tide line, he will no longer have the right to accretions.

The Court admitted that the result may seem counter-intuitive on its face.⁵⁸ "After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion."⁵⁹ The Court made the distinction that while this was an artificial avulsion, there was nothing in prior Florida law that gave different legal treatment to an artificial avulsion in contrast to one occurring naturally.⁶⁰ Additionally, the Court stated that there is jurisprudence suggesting they should be treated the same.⁶¹ Notably, the Court did not render a judgment

53. It is noted that Justice Stevens's recusal from this decision is due to his ownership of beach-front property in Florida. See Lisa McElroy, *The last week of opinions in plain English*, SCOTUSBLOG (June 23, 2010, 8:56 AM), <http://www.scotusblog.com/2010/06/the-last-week-of-opinions-in-plain-english/>.

54. *Stop the Beach*, 130 S. Ct. at 2613.

55. *Id.* at 2611-13.

56. See *Hayes v. Bowman*, 91 So. 2d 795, 799-800 (Fla. 1957).

57. See *Bryant v. Peppe*, 238 So. 2d 836, 837 (Fla. 1970).

58. *Stop the Beach*, 130 S. Ct. at 2612.

59. *Id.*

60. *Id.*

61. *Id.* ("Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction, and *Martin* suggests, if it does not indeed hold, the contrary."); see also *Martin v. Busch*, 112 So. 274, 287 (1927) (holding that the draining of a state-owned swamp that borders a property owner's land constitutes an avulsion that does not vest the upland owner with title to the newly exposed land).

on whether an artificial avulsion could ever constitute a taking—leaving open the possibility that a higher degree of property deprivation might merit revisiting the issue.

Property law is a product of the common law, and property rights “extend only as far as state property law says they do.”⁶² States have a great deal of discretion in deciding how far they will extend property rights.⁶³ Since the Takings Clause protects property rights only as established under State law, the Court found it was not free to decide how these property rights ought to have been established.⁶⁴

Petitioner also argued that the Florida Supreme Court’s decision constituted a taking of Petitioner’s littoral rights, contrary to the Fifth and Fourteenth Amendments to the United States Constitution.⁶⁵ This issue was the source of vigorous disagreement among the members of the Court. Not only was there no clear majority, but the Justices’ opinions were also very different in character and substance.⁶⁶

The plurality opinion, authored by Justice Scalia, supported a Judicial Takings Doctrine.⁶⁷ The plurality justified this approach by implementing a textual analysis. “There is no textual justification for saying that . . . a State’s power to expropriate private property without just compensation varies according to the branch . . . it would be absurd to allow a State to do by judicial decree what the *Takings Clause* forbids it to do by legislative fiat.”⁶⁸ The plurality also articulated that “if a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause.”⁶⁹ Under this test, if it were found that a court rendered a decision that violated the Takings Clause,

62. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 833-34 (2006) (“For most purposes we still adhere to the view that state law, not federal law, is the primary source and determinant of the scope and limits of property.”).

63. *See id.* at 834.

64. *Stop the Beach*, 130 S. Ct. at 2612.

65. *Id.* at 2600.

66. *Id.* at 2592, 2596, 2613, 2618 (providing examples of the plurality and concurring opinions of Justices Scalia, Kennedy, and Breyer).

67. *Id.* at 2597 (Scalia, J., plurality opinion).

68. *Id.* at 2601 (emphasis added).

69. *Id.* at 2601.

then there would be no need for compensation because the decision would simply be invalid.⁷⁰

The remaining Justices took markedly different directions on the issue of the Takings Clause. A concurring opinion, authored by Justice Kennedy, endorsed a Due Process Clause analysis as an alternative to a Judicial Takings Doctrine: “The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the Due Process Clause.”⁷¹

The other concurring opinion, authored by Justice Breyer, agreed that no taking had occurred, but refused to adopt either approach taken by the rest of the Court. Justice Breyer argued that it was unnecessary for the Court to establish a specific standard of analysis for resolving the issue.⁷² Despite the divergence in methodology represented by the plurality and concurring opinions, a six-member majority of the Court felt that there should be a remedy when it is held that a judicial decision eliminates or substantially changes an established property right.⁷³ This stands for the proposition that judicial development of the common law has the ability to violate the Constitution in the same way that a legislative or executive development could.

E. The Judicial Takings Doctrine

The modern basis for the Judicial Takings Doctrine is grounded in a textual approach to interpretation. The text of the Takings Clause is not directed toward any particular branch of government and is concerned only

70. Notably, the plurality’s test for the Judicial Takings Doctrine did not include a manageable standard that a subsequent court could use to determine whether a property owner suffered a deprivation of established property rights. This lack of a manageable standard will be discussed more extensively in Part III.C.

71. *Stop the Beach*, 130 S. Ct. at 2615 (Kennedy, J., concurring).

72. *Id.* at 2618 (Breyer, J., concurring) (reasoning that since the Court unanimously agreed that no taking had occurred, the question of what should occur when it is found that a judicial decision has changed or destroyed a once established property right should be left for another day).

73. This assertion is represented by Justice Scalia’s and Justice Kennedy’s opinions. *Id.* at 2615 (Kennedy, J., concurring); *Id.* at 2615 (Scalia, J., plurality opinion). The fact that a majority of the Court agreed that there should be a remedy when it is found that a judicial decision eliminates a property right supports the notion that the application of a doctrine that limits a judicial change in property law is an idea that the court endorsed.

with the act of taking rather than with the branch performing the act.⁷⁴ Since the State's power to expropriate private property does not vary according to which branch performs the act, the argument follows that the restrictions of the Takings Clause should be applied neutrally to restrain any branch of government from committing acts that effect a taking.⁷⁵

From a textual perspective, it is unlikely that the authors of the Bill of Rights considered the applicability of the Takings Clause provisions to the judiciary.⁷⁶ The original understanding was too narrow to raise the issue.⁷⁷ The Takings Clause addressed not an indirect, regulatory taking that a judicial property change resembles, but rather a traditional exercise of eminent domain.⁷⁸ That the power of the purse was vested exclusively in the legislature⁷⁹ gives rise to the notion that the founders did not foresee the judiciary as having the ability to effectuate a full constitutional taking. How could a branch of government provide for just compensation if it is without authority to do so? This is not meant to postulate that the founders believed the Takings Clause provisions to be inviolable by the judiciary, but simply that a taking could not occur under the judicial branch because the judiciary was without the tools or authority to provide for just compensation.

The first case to suggest that takings protections were applicable to the judiciary was also the case that established that the Due Process Clause of the Fourteenth Amendment is applicable to the states—*Chicago, Burlington & Quincy Railroad Co. v. Chicago*.⁸⁰ In that case, the United States Supreme Court unanimously held that the takings protections applied to the courts:

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the [F]ourteenth [A]mendment of the [C]onstitution of the United States, and the affirmance of such judgment by the highest court of the state is a

74. See U.S. CONST. amend. V; see also *Stevens v. Cannon Beach*, 114 S. Ct. 1332, 1334-35 (1994) (Scalia, J., dissenting from denial of certiorari).

75. See, e.g., *Stop the Beach*, 130 S. Ct. at 2601.

76. Thompson, *supra* note 9, at 1458.

77. *Id.*

78. *Id.*

79. See U.S. CONST. art. I, § 8.

80. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

denial by that state of a right secured to the owner by that instrument.⁸¹

In *Muhlker v. New York & Harlem Railroad*,⁸² the Supreme Court was asked to review a New York Court of Appeals decision that denied the plaintiff recovery in a dispute over easements.⁸³ The plaintiffs were property holders who sought to enjoin the defendants from building an elevated railway that would violate the plaintiffs' property easements to light, air, and access.⁸⁴

The Supreme Court reversed the New York Court of Appeals, holding that the elevated railway took the plaintiffs' property and impaired their contractual rights, which flowed from deeds to the street that had been conveyed by a predecessor-in-interest to the city, providing that an elevated railway would not burden the property.⁸⁵ In Justice McKenna's plurality opinion, the Court implied that courts could not constitutionally strip owners of their property in the name of judicial expediency in overruling prior precedents.⁸⁶ In *Muhlker*, the plaintiffs challenged the New York statute that authorized construction of the elevated railway rather than the New York Court of Appeals' decision disavowing and distinguishing its prior precedents.⁸⁷ In this context, Justice McKenna's opinion can be interpreted as "addressing not the power of state courts to change property law, but rather their power to insulate a legislative taking from constitutional review by asserting that a property right never existed."⁸⁸

This opinion was contrasted by the concurring opinion of Justice Holmes, who strongly objected to the possibility that a federal court should have the power to interfere in a matter directly related to state law.⁸⁹ Justice Holmes opined that property law was a "construction of the courts," and that state courts should be free to change the law at will without constitutional restrictions.⁹⁰ The view expressed by Justice Holmes stands

81. *Id.* at 241.

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

83. *See id.* at 563.

84. *Id.* at 545.

85. *Id.* at 568.

86. Thompson, *supra* note 9, at 1464.

87. *Muhlker*, 197 U.S. at 561.

88. Thompson, *supra* note 9, at 1464.

89. *Muhlker*, 197 U.S. at 572-73.

90. Thompson, *supra* note 9, at 1465.

for the proposition that there are no constitutional restrictions on a state court's changing of existing state property law.⁹¹ It has been noted that Justice Holmes's position may be more complex.⁹² Significantly, Justice Holmes noted that if the change in law had been a result of a legislative, rather than a judicial, action he still would not have found a taking.⁹³ This suggests that Justice Holmes espoused that a particularly high threshold must be met before a taking will occur.

A few decades later, the Court transitioned to a view consistent with Justice Holmes's opinion in *Muhlker*.⁹⁴ In the 1930s, the idea that judicial changes in the law could affect a taking was strongly rejected.⁹⁵ In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,⁹⁶ the Court emphasized in dicta that mere changes in the law did not present a constitutional question and that "constitutional restrictions on changes in the common law were inconsistent with the very nature of common law."⁹⁷

Only two years after *Hill*, the Court again considered the question of whether a judicial change in property law by a state court can create a constitutional issue. In *Great Northern Railway v. Sunburst Oil & Refining Co.*,⁹⁸ the Court found that a change in the law, without more, did not present a constitutional issue.⁹⁹ In *Great Northern Railway*, Justice Benjamin Cardozo found that a state court could overrule a prior case only prospectively.¹⁰⁰

Professor Barton H. Thompson opined that by the end of the New Deal, it seemed that the Court had disposed of the concept of judicial takings.¹⁰¹ The Supreme Court rejected the argument that courts could take property by changing the law. Nevertheless, the Supreme Court continued to follow the *Muhlker* view that the Court could reconsider a state court decision if a

91. *Id.*

92. Sarrat, *supra* note 9, at 1504.

93. *Id.*

94. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); *see also* Thompson, *supra* note 9, at 1465.

95. Thompson, *supra* note 9, at 1465.

96. *Brinkerhoff-Faris*, 281 U.S. 673.

97. Thompson, *supra* note 9, at 1466; *see also Brinkerhoff-Faris*, 281 U.S. at 681 n.8.

98. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932).

99. Thompson, *supra* note 9, at 1467.

100. *Sunburst Oil*, 287 U.S. at 358.

101. Thompson, *supra* note 9, at 1467.

property holder challenged a legislative or executive action as a taking and the state court ruled there was no property to take.¹⁰²

After *Great Northern Railway*, the idea of judicial takings lay dormant for more than three decades until the Supreme Court breathed new life into the theory. In *Hughes v. Washington*,¹⁰³ the Court was asked to determine whether a property owner or the State took possession to an accretion that had been gradually deposited on the portion of the owner's property abutting the ocean.¹⁰⁴ The Supreme Court held that the ownership was an issue of federal law, not state law; and under federal law, the plaintiff was the proper owner of the accretions.¹⁰⁵

Concurring in the opinion, Justice Potter Stewart wrote that the majority opinion was based upon insufficient analysis.¹⁰⁶ Justice Stewart argued that ownership was an issue of state law; the Fourteenth Amendment restricts states from taking property without just compensation "no less through its courts than through its legislature," and the Washington Supreme Court was bound to observe a 1946 state decision that said accretions belong to the adjoining land owner.¹⁰⁷

After *Hughes*, the Court has been hesitant to take up judicial takings to any great degree. In *PruneYard Shopping Center v. Robins*,¹⁰⁸ the United States Supreme Court was asked to review a California Supreme Court decision that required public shopping centers to permit political petitioners on their premises, contrary to earlier precedent.¹⁰⁹ The plaintiff challenged the decision under the Takings Clause and argued that the California Supreme Court's decision constituted a judicial taking.¹¹⁰ The United States Supreme Court declined to adopt a judicial takings test and decided the case using a conventional takings standard.¹¹¹ The Court

102. *Id.*; see also *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42-43 (1944); *Broad River Power Co. v. South Carolina*, 282 U.S. 187, 191 (1930); *Fox River Paper Co. v. R.R. Comm'n*, 274 U.S. 651, 654-57 (1927).

103. *Hughes v. Washington*, 389 U.S. 290 (1967).

104. *Id.* at 290-91.

105. *Id.* at 291.

106. *Id.* at 298 (Stewart, J., concurring); see also Thompson, *supra* note 9, at 1468.

107. *Hughes*, 389 U.S. at 298 (Stewart, J., concurring); see also Thompson, *supra* note 9, at 1468.

108. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

109. *Id.* at 79-80; see also Thompson, *supra* note 9, at 1469.

110. *PruneYard*, 447 U.S. at 74.

111. *Id.* at 82-84.

concluded that although there had been a taking of property, since the value and use of the shopping center were not unreasonably impaired, it did not constitute a judicial taking.¹¹² While the Court did not rule on the claimed taking by “judicial reconstruction” of the state’s laws, it did suggest that a taking by judicial action is conceivable.¹¹³

In 1992, the Court in *Lucas v. South Carolina Coastal Council*¹¹⁴ considered whether a State law that denied a property owner all beneficial economic use of his land would constitute a taking in violation of the Fifth Amendment.¹¹⁵ In *Lucas*, the petitioner had purchased coastal property with the intention of building homes on it as other neighboring owners had done.¹¹⁶ After the petitioner purchased the property, the South Carolina legislature passed a law that prohibited significant construction on his land, rendering his property valueless.¹¹⁷ While the Supreme Court ultimately overturned South Carolina’s law as an unconstitutional per se taking, the Court left an interesting exception to the rule intact.¹¹⁸ The exception provides that if the property owner never had the right to engage in the desired use of the property according to the background principles of the state’s property law, then just compensation need not be provided.¹¹⁹

The Court’s opinion in *Lucas* is particularly important to note when approaching the idea of judicial takings addressed in *Stop the Beach*. While the *Lucas* Court addressed the issue of background principles when reviewing state property law, it did not determine what exactly constitutes background principles and which branch can provide these principles.¹²⁰

III. ADEQUACY OF REMEDIES: JUDICIAL TAKINGS V. DUE PROCESS

The decision in *Stop the Beach* offers two distinct options that subsequent courts could adopt when considering whether a state court’s action has constituted a taking in violation of the Takings Clause. Many

112. *Id.* at 88.

113. *See* *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

114. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

115. *Id.* at 1006-07.

116. *Id.*

117. *Id.* at 1007.

118. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1378-79 (1996).

119. *Id.* at 1010; *see also* Sarrat, *supra* note 9, at 1489.

120. Bederman, *supra* note 118.

recent Supreme Court cases, including *Lucas* and *Stop the Beach*, have focused on a state legislature's actions that restrict a property owner's right to develop or enjoy coastal property.¹²¹ With the continuing development of private property on the nation's coastlines and the growing movement to preserve environmental and aesthetic elements of our seashores, the balance between these interests will likely rest in judicial determinations and the methodology that subsequent courts choose to adopt. These judicial determinations have compelling implications in the subject of private property rights and economic stability.

The remainder of this Note will not seek to strike a balance between these competing interests. This Note instead focuses on the two competing methodologies articulated in *Stop the Beach* to assess whether a state court's ruling has deprived an owner of a property right: Judicial Takings and Due Process. Significantly, this Note addresses the doctrine of artificial avulsion and incorporates the doctrine into the methodological analysis.

A. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*

The Judicial Takings Doctrine argued for in *Stop the Beach* is easily explained. If it is found that a court deprives an individual of an established property right, then the court has effected a taking.¹²² Under this test, if it is determined that a court's action constitutes a taking, no compensation will be considered, and the lower court's ruling will be overturned.¹²³

Ostensibly, *Lucas* and *Stop the Beach* share many similarities regarding the circumstances that brought the cases to court. Both cases were initiated because of an alleged deprivation of property rights by each case's respective state legislature. While the *Lucas* Court found that the legislature's actions were per se unconstitutional, the door left open by the Court is arguably the same door that enabled the Florida legislature to implement the renourishment process that led to the dispute in *Stop the Beach*.¹²⁴

121. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2599 (2010); see also *Lucas*, 505 U.S. at 1007.

122. *Stop the Beach*, 130 S. Ct. at 2601.

123. *Id.*

124. This is demonstrated by the Court's silence in *Lucas* as to what exactly the background principles are that define whether a property owner has the right to engage in a particular use of his land and whether that right is established. These background principles are important factors when determining whether a property owner has an established right

The test proposed by the plurality in *Stop the Beach* outlined two prongs that must be considered when determining whether a court's action constitutes a taking: deprivation and an established property right.¹²⁵ Additionally, the plurality posits that the test incorporates a considerable degree of deference to state courts:¹²⁶ "A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court."¹²⁷

On its face, this test makes sense because the Takings Clause protects *property rights* only as established according to state law, not according to how the courts think property rights should be established.¹²⁸ The test stands for the proposition that if a property right is in dispute, then it will neither be interpreted as an established property right nor will the property owner be afforded the benefit of using the Judicial Takings Doctrine.

While courts will defer to state property law, the courts will not defer to state judges whose challenged decisions deprive claimants of established property rights.¹²⁹ This is because an alleged Takings Clause violation is a question of law under the Federal Constitution. Similarly, in a situation where it is alleged that a state has violated an individual's right to Due Process, there is no deference afforded to a state court's decision that interprets the Federal Constitution.¹³⁰

Notably, the Court did not articulate a test to determine whether a deprivation of a property right has occurred. In balancing the interests of a property owner and the state, it is crucial to determine whether an actual deprivation of property occurred. In *Stop the Beach*, the Court did not need to approach the question of what degree of deprivation is needed to constitute a taking of an established property right. The Court found that Petitioner had no established property right for the property to maintain contact with the water line, meaning that Petitioner did not have a right of

to engage in a particular use of his land and the corollary question of how to determine if the state has deprived him of that right.

125. *Stop the Beach*, 130 S. Ct. at 2608.

126. *Id.*

127. *Id.* at 2608 n.9.

128. *Id.* at 2612.

129. *Id.*

130. *Id.*

which it could be deprived.¹³¹ Part IV further discusses this crucial distinction.¹³²

B. Implementation of a Judicial Takings Doctrine

Until *Stop the Beach*, little modern jurisprudential authority advocated a Judicial Takings Doctrine. Accepting a Judicial Takings Doctrine would present the corollary question of what remedy should be applied. Within the confines of judicial authority, it is difficult to imagine a court-provided remedy outside of a simple reversal of the lower court's decision. This is because the judiciary lacks the ability to provide for compensation.¹³³ Absent legislative intervention providing for a specific remedy, the judicial branch would likely be confined to prudential remedies without a compensation element.

Legislation-driven alternatives proposed by scholars could provide different remedies to the problem of compensation if it is found that a judicial action constitutes a taking. Professor Thompson theorized about three such alternatives. First, the state court could decide not to change the law at all.¹³⁴ Second, the legislature could adopt an "automatic compensation approach."¹³⁵ Under this approach, the court would make a change in the law and would grant an order for the legislature to provide just compensation.¹³⁶ Finally, the legislature could adopt a "legislative choice approach."¹³⁷ The court would issue a ruling contingent on the legislature's taking action within a prescribed period of time.¹³⁸ If the legislature did not act to provide just compensation, the decision would not take effect.¹³⁹

Adding a compensation element to the Judicial Takings Doctrine would streamline the process, creating efficiencies within the judicial and legislative branches. If a taking is found, then it is possible that the judiciary could dispose of the issue without the need to send it back to the legislature

131. *Id.* at 2612-13.

132. *See infra* Part IV.

133. *See* U.S. CONST. art. I, § 9, cl. 7.

134. *See* Thompson, *supra* note 9, at 1513.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

or agency for additional consideration. This approach, however, would constitute a massive delegation of legislative power to the judiciary. Adding a compensation element would give the judicial branch the power to make legislative decisions based on the underlying public policy issues at stake. Any approach like this would have to originate in the legislature and would present serious constitutional questions that are beyond the scope of this Note.

C. *Judicial Takings as a Remedy to Economic Deprivation*

In *Stop the Beach*, the Justices unanimously agreed that Florida's renourishment process created an artificial avulsion and did not constitute a taking.¹⁴⁰ The question of whether an artificial avulsion could ever constitute a taking was not presented, and the Court did not make a determination, express or in dicta, on whether a state-created artificial avulsion could ever constitute a taking.¹⁴¹ The implications from *Stop the Beach* are that the Court intentionally left this question open for another day and that a state-sanctioned act may constitute a taking if a greater deprivation of private property can be shown.

Stop the Beach was a facial challenge to the Beach and Shore Preservation Act.¹⁴² In addition to the facial challenge, Petitioners alleged that the Florida Supreme Court's decision constituted a taking in violation of the Takings Clause of the Fifth and Fourteenth Amendments.¹⁴³ Petitioners did not allege any quantifiable amount of economic deprivation as a result of the decision.

If a similar case presented itself where a property owner could prove a quantifiable economic deprivation, then the Court might be more inclined to grant relief. Instead of a group of private property owners, as in *Stop the Beach*, what if the Court were presented with a petitioner who operated a large full-service luxury resort? Further, assume this resort owner contends that the resort's attraction is cabana-style beach house rentals only twenty-five feet from the high tide marker. Additionally, the resort owner can prove that an artificial avulsion, adding several feet of public beach between the water and his property, will result in substantial economic hardship for the

140. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2612 (2010).

141. *See generally Stop the Beach*, 130 S. Ct. 2592.

142. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008).

143. *Stop the Beach*, 130 S. Ct. at 2600.

resort. Under this hypothetical, assume that the Florida Supreme Court ruled that the State's actions did not constitute a taking and that the Florida Supreme Court grounded its decision in a determination that an artificial avulsion does not constitute a taking.

In this hypothetical, the Supreme Court of Florida followed the *Lucas* Court's background principles test and determined that an artificial avulsion does not constitute a taking as the linchpin in depriving the resort owner of economic recourse.¹⁴⁴ Notably, the court's decision interpreting, and arguably changing state common law, resulted in the alleged taking.¹⁴⁵ Under the test proposed in *Stop the Beach*, the court has not necessarily deprived a person of an established property right. The court, in this hypothetical, merely clarified a previously unclear property entitlement; therefore, the court cannot be said to have violated the Takings Clause of the Fifth Amendment.¹⁴⁶

The distinction between *Stop the Beach* and the hypothetical lies in the ability to quantify actual economic deprivation. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁴⁷ Additionally, a regulation that deprives a property owner of all economically beneficial use of his property will constitute a taking.¹⁴⁸ While the hypothetical presents an alleged judicial taking, not a regulatory taking, the plurality in *Stop the Beach* argues that there is no reason to treat either form of taking differently.¹⁴⁹

The question thus becomes: under the judicial takings test in *Stop the Beach*, can a proven quantifiable economic deprivation be a basis for a judicial takings remedy? Additionally, it is unclear under the test whether economic deprivation should be analyzed under the deprivation portion of the test, under the established property right portion, or both. The test articulates that if a property right is in doubt, it will not be an established property right and deference will be given to the state court.¹⁵⁰ It is not clear

144. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

145. This is because the state court interpreted state law and stated that an artificial avulsion does not constitute a taking. The holding is now based on an interpretation of state law that is not grounded in common law.

146. *Stop the Beach*, 130 S. Ct. at 2609.

147. *Lucas*, 505 U.S. at 1014.

148. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987).

149. *See, e.g., Stop the Beach*, 130 S. Ct. at 2601, 2609 (holding that "there is no textual justification for saying that the existence or scope of a State's power to expropriate private property without just compensation varies according to the branch").

150. *See id.* at 2608 n.9.

whether the plurality's test would be suitable for scrutinizing quantifiable economic deprivation.¹⁵¹ If economic deprivation is not given recognition within the judicial takings test, the test would prove to be an under-inclusive and inadequate remedy.

While *Lucas* specifically concerned a regulation that eliminated all reasonable economic use of a property and rendered the property valueless, it did not answer the question of whether deprivation of *any* quantifiable economic use of the property would constitute a taking. Additionally, the concurring opinion notes the importance of incorporating reasonable expectations into the analysis, specifically the reasonable expectations of the property owner in terms of use of the land.¹⁵²

Under the presented hypothetical, it could be argued that the resort owner has a reasonable expectation to operate his business without disruptive changes in the character and nature of his property. There is a tendency toward circularity in these types of arguments since an owner's reasonable expectations are often shaped by what courts allow "as a proper exercise of governmental authority."¹⁵³ Nevertheless, determining a property owner's reasonable expectations may not be a completely circular endeavor since these constitutionally protected expectations "are based on objective rules and customs that can be understood as reasonable by all parties involved."¹⁵⁴

D. Substantive Due Process

The Supreme Court recognizes that the Due Process Clause is a limitation on judicial power.¹⁵⁵ Additionally, the "Court has long recognized that property regulations can be invalidated under the Due Process Clause."¹⁵⁶ Justice Kennedy used these two accepted premises as the basis for his argument that substantive Due Process would provide a remedy when a judicial decision eliminates or substantially changes established property rights.¹⁵⁷ Justice Kennedy stated: "The Court would be on strong footing in ruling that a judicial decision that eliminates or

151. See *infra* Part IV.

152. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

153. *Id.* at 1034.

154. *Id.* at 1035.

155. *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, J., concurring).

156. *Id.* (offering a string cite of supporting cases dating back to 1922).

157. *Id.* at 2615.

substantially changes established property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the Due Process Clause.”¹⁵⁸

Courts, unlike the legislative and executive branches, were not designed to make policy decisions about expropriation.¹⁵⁹ In his concurrence, Justice Kennedy argued that the separation-of-powers principles implicitly place limitations on the courts.¹⁶⁰ Justice Kennedy reasoned that the Due Process limitation exists because the legislative and executive branches are accountable for takings in their political capacity.¹⁶¹

Considering Justice Kennedy’s analysis, it is plausible that a Due Process Clause challenge could be maintained under the hypothetical presented in Part III.C. The success of this challenge, however, will hinge on whether the Court determines that the state court’s action is arbitrary or irrational.¹⁶² Depending on how the Court applies the test, this may be a particularly difficult standard to satisfy.

Justice Kennedy’s Due Process Clause analysis ostensibly validates it as an adequate substitute for the Judicial Takings Doctrine. The disconnect in the analysis seems to come in deducing that since property regulations can be invalidated through the Due Process Clause, so can judicial decisions.¹⁶³ This is a precarious deduction given the vast wealth of Due Process Clause jurisprudence.

Additionally, the Court has long held that substantive Due Process rights do not include economic liberties.¹⁶⁴ If substantive Due Process rights extended to an alleged judicial change in property law affecting economic rights, it would signal a wholesale reversal in modern Due Process Clause jurisprudence. The plurality in *Stop the Beach* stated that if a subsequent court accepted Due Process as a remedy, it would be “a step of much greater

158. *Id.* at 2614 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)).

159. *Id.* at 2615.

160. *Id.* at 2605 (plurality opinion).

161. *Id.* at 2613 (Kennedy, J., concurring).

162. *Id.* at 2615; *see also Lingle*, 544 U.S. at 548 (Kennedy, J., concurring) (stating that the decision “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process”).

163. *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, J., concurring).

164. *Id.* at 2606; *see also Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949).

novelty, [with a] much more unpredictable effect, than merely applying the Takings Clause to judicial action.”¹⁶⁵

This unpredictability would be compounded by the need to protect state property law that operates within the bounds of the Constitution from unwarranted judicial action that could interfere with a state’s sovereign authority to enact common law. The need for a system of review that affirmatively accounts for economic deprivation signals that a review under the Due Process Clause would be unpredictable at best and wholly inadequate at worst.

If Justice Kennedy’s arbitrary and irrational standard were adopted, it is unclear how the standard would be implemented and what guidance a reviewing court would have in reviewing a lower court’s decision. Presumably, the burden of establishing that the court acted in an arbitrary and irrational way would be allocated to the party complaining of the property deprivation.¹⁶⁶ In many cases that adopt this test, the controversies result from a state or government regulation that has only an *indirect* economic effect on the challenging party.¹⁶⁷ Judicial decisions that have a detrimental economic effect on property should be held to a higher standard than what a Due Process review can provide.

IV. PROPOSAL

The viability of the Judicial Takings Doctrine depends largely on whether the Court specifically tailors the doctrine to target judicial decisions that trigger an actual substantive change in state property law. An important consideration when making a decision regarding the applicability of the Judicial Takings Doctrine is a proper determination of whether a judicial decision actually changed a law or merely interpreted it within proper judicial parameters.

In applying the judicial takings test, the Court should first decide whether the lower court’s ruling affected an established property right. In doing so, the Court should consider the property owner’s reasonable expectation to this right in accordance with established state property law.¹⁶⁸ This would provide an important baseline for incorporating economic

165. See *Stop the Beach*, 130 S. Ct. at 2606.

166. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

167. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 485 (1955) (discussing a law forbidding opticians from fitting or duplicating lenses without a prescription from an optometrist or ophthalmologist).

168. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

deprivation into the analysis. A property owner's expectation of economic stability, in the face of state or court intervention with established property law, is an important factor in determining reasonable expectations under the *Lucas* framework.¹⁶⁹

Second, to achieve the purported benefits of a Judicial Takings Doctrine and to shield it from the potential usurpation of legislative power, the Court should adopt a manageable standard to determine whether a deprivation occurred. Adopting a manageable standard to determine whether a deprivation occurred will retain the core of the plurality's judicial takings test in *Stop the Beach*.¹⁷⁰ A manageable standard will supplement the test by ensuring that the degree of economic deprivation is a relevant factor in determining whether a deprivation has occurred. In making this determination, the Court should give consideration to the following relevant factors: the degree of deprivation,¹⁷¹ the departure from state common law,¹⁷² and judicial decisions as a legislative taking.¹⁷³

A. Degree of Deprivation

An important consideration in the analysis of whether a judicial taking occurred is the degree of deprivation that a property owner realized as a result of the court's decision. While a legislature or administrative body may look at several considerations in making a legislative determination, including how the law or rule will be applied prospectively, a court's resources limit it from making broad, exploratory investigations. Therefore, a court has the potential to inflict a greater deprivation of property rights by its ruling, well beyond its original intent.

This factor would prove crucial to the determination because it would incorporate the important element of economic deprivation. Under this factor, a court would consider the economic deprivation that a property owner suffered, or will prospectively suffer, as a result of a judicial change in property law. Commensurate with the plurality's position in *Stop the Beach*,

169. *Id.* at 1019 n.8.

170. The manageable standard proposed in this Note does not seek to redefine the *Stop the Beach* plurality's judicial takings test. This Note's proposal only clarifies what a deprivation can be and ensures that quantifiable economic deprivation will be given consideration. If adopted, this proposal would provide subsequent courts with clarification on how to determine a judicial deprivation of an established property right.

171. *See infra* Part IV.A.

172. *See infra* Part IV.B.

173. *See infra* Part IV.C.

if it is found that a state court's decision constituted a taking, then its decision will be overruled.¹⁷⁴

B. Departure from State Common Law

A measurable departure from established state common law would trigger a presumption that the judicial decision went beyond mere interpretation of existing common law principles. This factor would be important because it would value the court's role as an unbiased interpreter of the law, rather than as an extra-judicial, legislative body.

Under the *Lucas* framework, the test would analyze the background principles of common law and would determine whether the judicial interpretation of those principles coincides with current state common law.¹⁷⁵ If it is determined that the court's interpretation of the background principles is inconsistent with state common law, then a Judicial Takings Test would be implemented to determine whether a taking occurred as a result of that interpretation.¹⁷⁶

C. Judicial Decision as a Legislative Taking

If it is determined that a court's action would constitute a taking if taken by the legislature, then that court decision should be reversed as a violation of the Takings Clause. This inquiry would be dispositive in determining whether a judicial decision constitutes a taking. This test would ensure that a judicial action is not insulated from a constitutional objection. This test is presented with the caveat that a state retains the power, and the right, to legislatively create state-specific property law.

If a state were to create a statute, like the court did through judicial action under the hypothetical in Part III.C,¹⁷⁷ then that statute could be challenged only as a traditional taking. The remedy would not lie within the Judicial Takings Doctrine because no court actually changed or substantially modified a state law.

174. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2607 (2010).

175. *Lucas*, 505 U.S. at 1003.

176. Admittedly, this is a subjective determination open to a great degree of interpretation. The author does not affirmatively support or envision an objective test that could adequately take into account all of the considerations needed in making this determination.

177. See *supra* Part III.C.

V. CONCLUSION

Adoption of the Judicial Takings Test, outlined in Part IV,¹⁷⁸ would not change the result in *Stop the Beach*. Petitioner in *Stop the Beach* did not have an established right to accretions or independent contact with the water that superseded the State's right to maintain the coastlines.¹⁷⁹ Within the background principles of Florida law and without a greater deprivation, it would be unreasonable to conclude that a private property owner's interest in maintaining, in perpetuity, an unchanging boundary with the water would rise to the level of being a reasonable expectation.

Even within the confines of Florida property law, it is possible that a similar property deprivation could render a different result. For instance, a different result could be reached in the case of a property owner who could prove a quantifiable economic deprivation, coupled with a reasonable expectation under *Lucas*, that his property rights would remain undisturbed by state action.¹⁸⁰ If nothing else, the Court's opinion in *Stop the Beach* sends a clear message to state courts that their actions concerning property law are not immune from constitutional scrutiny.

While a Due Process Clause analysis presents an attractive option for challenging a court decision that changes or substantially alters a state property law, its jurisprudential viability is problematic and any remedy it could provide is uncertain.

The Takings Clause "provides an explicit textual source of constitutional protection' against a particular sort of government behavior."¹⁸¹ Since the Takings Clause provides an explicit constitutional protection from government action that affects property, courts should not be permitted to use the generalized notion of substantive Due Process to analyze these claims.¹⁸²

A narrowly tailored Judicial Takings Doctrine has the potential to provide an additional protective measure against a measurable judicial change in property law. Additionally, it would create assurance and predictability for businesses and other investors who want to purchase and develop property on the nation's coastline or waterways.

178. See *supra* Part IV.

179. *Stop the Beach*, 130 S. Ct. at 2612-13.

180. *Lucas*, 505 U.S. at 1035.

181. See *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1994)).

182. *Id.*; see also *Graham*, 490 U.S. at 395.

It is significant that in *Stop the Beach*, six of the eight voting Justices held that if it is found that a judicial change in property law deprives an owner of a right the owner once had, then there is a remedy. Adoption of a Judicial Takings Doctrine, as outlined in Part IV, will provide a certain remedy, which takes into account economic deprivation while leaving intact a state's sovereign right to enact substantive property law.

