A STRUCTURAL APPROACH TO JUDICIAL TAKINGS

by
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The Supreme Court has never extended the Takings Clause of the Fifth Amendment to apply to state court actions, but it came close in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. *This Note takes a structural approach to judicial takings to determine if they are justified, and, if not, to determine what different approach would be warranted. After introducing a structural theory of incorporated rights, the Note examines whether the original meaning of the Takings Clause, viewed through the twin lenses of structural federalism and the Fourteenth Amendment, supports the concept of a judicial taking. It also looks at the different considerations at play when determining whether a state common-law court has taken property. In sum, the Supreme Court's current non-trespassory takings jurisprudence is structurally sound, but extending that jurisprudence to state court decisions is not. This Note concludes that another doctrine, Due Process, provides better protection against state court "takings."*

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I. INTRODUCTION

Over the last century, the Supreme Court has developed what may charitably be referred to as a confusing and complicated approach to non-trespassory takings.[1] The narrow focus of this Note is to examine judicial takings, the idea that a state court can "take" property under the U.S. Constitution when it changes a common-law rule of property. I contend that our nation's federal structure, and the special nature of common-law courts, should prevent the Supreme Court from extending the Takings Clause to govern the actions of state courts. A judicial takings doctrine has the power to upset the balance of interests evident in current takings jurisprudence and to introduce another level of jurisprudential confusion into an already confusing landscape.

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[1] *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 827 (2006) (referring to it as a "muddle"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (referring to it as a "mess").

The Court has stated firmly, and repeatedly, that states define the law of property.[2] For the greater part of most states' history, that definition has come from the courts, operating in the common-law fashion.[3] State legislatures—though certainly not novices at property law[4]—have a relatively slim pedigree regulating property rights compared to courts that have been continuously applying concepts that originated far before our nation was founded.[5] Those considerations should not be overlooked in trying to determine if a judicial takings doctrine is justified.

My approach to the propriety of judicial takings is structural. A structural approach to incorporated rights—considering original meaning, federalism, and the Fourteenth Amendment—can explain the content of those rights. In regards to the Takings Clause, extending that protection to state-court actions would upset the delicate structural balance the Court has achieved. Judicial takings upset this balance in three ways: they are (1) inconsistent with the original meaning of the Fifth and Fourteenth Amendments, (2) inconsistent with "our federalism,"[6] and (3) inconsistent with separation-of-powers principles. They also offer the additional detriment of adding another patch to the already patchwork doctrine of takings. Instead of furthering that folly, it is time to take another approach to policing state courts. While the Takings Clause may be an inappropriate vehicle for policing state court interpretations of state property law, the Due Process Clause already serves as a bulwark against common-law judicial activism. It should continue to do so.

This Note takes a broad approach to focus on its narrow question. Part II introduces the concept of judicial takings. Part II.A focuses on the

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[2] *See, e.g.*, Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.").

[3] "Land law was the kernel and core of the common law." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 230 (2d ed. 1985). Much of the law of property was inherited from the English common law; lawyers in the founding generation relied on Blackstone's Commentaries as their primary source of what that law entailed. *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 249–51 (1966); BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 29–30 (2001); *see also* FRIEDMAN, *supra*, at 58–65, 234–45. Indeed, Blackstone devoted one of his four books, his longest, to property law. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES. Until the beginning of the twentieth century, the common law was supreme; legislation was typically deployed in a "revisionary capacity." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3–4 (1982). Even the codes adopted by many states in the nineteenth century were merely restatements of the common law. *Id.* at 5.

[4] *See* FRIEDMAN, *supra* note 3, at 234 ("Land-law reform was well under way even before the Revolution. After the Revolution, legislatures carried on the work of dismantling the feudal past.").

[5] *See* CALABRESI, *supra* note 3, at 5–6; HOGUE, *supra* note 3, at 250–51. *See generally* SIEGAN, *supra* note 3.

[6] Younger v. Harris, 401 U.S. 37, 44 (1971).

modern theory of judicial takings from Justice Stewart's concurrence in *Hughes v. Washington* through Justice Scalia's dissent in *Stevens v. City of Cannon Beach*. Part II.B lays out the Court's most recent case on the matter, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Quality*, examining the various theories and approaches used in that case.

Part III introduces the structural approach to incorporated rights used to examine judicial takings. Part IV applies that approach to the Court's takings jurisprudence. Part IV.A examines the history of eminent domain and the original understanding of the Takings Clause in its scope and application. Part IV.B addresses the framers' concerns over state sovereignty and their means of protecting it, considerations that have been nearly nonexistent in takings discussions.[7] Part IV.C addresses how the Fourteenth Amendment altered the balance between state sovereignty and individual rights, and what effect that rebalance had on states' power of eminent domain. Part IV.D examines the Supreme Court's recent cases to show how the above-outlined interests are accounted for in the Court's non-trespassory takings jurisprudence.

Part V applies that analysis to judicial takings, with a twist. Part V.A examines the added dimension present in a judicial takings doctrine: the separation of powers between common-law courts and state legislatures. Part V.B analyzes judicial takings in the context of all of the above structural interests to show that judicial takings are not sound and are out of line with the body of the Supreme Court's takings jurisprudence.

Part VI shows how fears of out-of-control state courts can be assuaged without trampling on state interests: through the Due Process Clause. Due Process is a far more appropriate vehicle to police state common law courts than the Takings Clause.[8]

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[7] Two Supreme Court cases, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), do reflect a concern on the Court for federalism in the takings context, though only in providing procedural protections; they require that alleged takings effected by state actors (state agencies or legislatures) be reviewed by state actors (state agencies or courts) before federal courts may get involved. *See* Josh Patashnik, Note, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 268–72 (2012) (describing the procedural effects of those cases).

[8] Since I first began this Note in the Spring of 2011, the field has filled considerably with commentary on both sides of the debate. *See, e.g.*, Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520 (2011); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305 (2012); Symposium, *Judicial Takings: Exploring the Boundaries of the Fifth Amendment*, 6 DUKE J. CONST. L. & PUB. POL'Y 1 (2011); Symposium, Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 61 SYRACUSE L. REV. 203 (2011); David S. Wheelock, Note, *Every Grain of Sand: Would a Judicial Takings Doctrine Freeze the Common Law of Property?*, 61 DUKE L.J. 433 (2011). I can only hope that this contribution will add something of value to the debate. As far as I can tell, no commentator yet has addressed how a judicial takings doctrine would run against the structural currents inherent in the Court's own takings jurisprudence. The closest is Elizabeth B. Wydra, *Constitutional Problems with Judicial Takings Doctrine*

II. THE CONCEPT OF JUDICIAL TAKINGS

A judicial taking is not like other takings. Put simply, a judicial taking occurs when a state court changes the state common law of property, one that is either a reversal of a course already pursued,[9] thus confounding reasonable expectations, or when a state court declares private property to be public property by invoking "nonexistent" rules of state property law.[10] Until *Stop the Beach Renourishment*, discussed below in detail, there had been no determination of what extent of change was required for the change to constitute a judicial taking (and indeed no accepted judicial takings doctrine). But the idea that a change in the common law of property constitutes a judicial taking is sufficient to introduce the background.

A. *Early Modern Judicial Takings*

The course of modern judicial takings[11] began with Justice Stewart's concurrence in *Hughes v. Washington*.[12] The State of Washington claimed as its property all the accretions that had come to Hughes's property since Washington's establishment as a state in 1889.[13] The Supreme Court of Washington had held that the land was owned by the State.[14] The United States Supreme Court held, in the main opinion, that the matter was controlled by federal common law, and that federal law dictated that Hughes owned the accretions because her title bypassed the State of Washington.[15]

Justice Stewart wrote a concurring opinion. He agreed that federal common law "originally" governed the extent of Hughes's title, but, for him, that was not the end of the matter.[16] He believed that Washington

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and the Supreme Court's Decision in Stop the Beach Renourishment, 29 UCLA J. ENVTL. L. & POL'Y 109 (2011), though her piece examines only some of the issues contained herein and does not look at *Stop the Beach Renourishment* as an unwarranted extension of the Court's own takings jurisprudence.

[9] This was the situation as described by Justice Stewart in *Hughes v. Washington*, 389 U.S. 290, 294–95 (1967) (Stewart, J., concurring).

[10] This was the situation framed by Justice Scalia in his dissent from the denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting).

[11] Some early twentieth-century cases explored the issue, but "by the end of the New Deal, the concept of judicial takings seemed dead." *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1463–67 (1990) (describing cases).

[12] *See Hughes*, 389 U.S. at 294–98. There were earlier cases that dealt with the idea of judicial takings, but they had, in general, avoided the issue until the idea was (almost) flatly rejected. *See* Thompson, *supra* note 11, at 1463–68.

[13] *Hughes*, 389 U.S. at 291.

[14] *Id.*

[15] *Id.* Hughes's title traced back to the federal government before the establishment of the state.

[16] *Id.* at 294 (Stewart, J., concurring).

was fully within its powers to "terminate[] the right to oceanfront accretions"[17] because "the law of real property is . . . left to the individual States to develop and administer."[18] Because of this, Hughes could not claim to be immune from changes in Washington's property laws.[19] But, he continued, "[l]ike any other property owner, . . . Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation."[20]

Justice Stewart determined that it was the Supreme Court of Washington that had effected the actual taking, rather than the executive branch or the legislature.[21] He surmised that if the constitution of Washington had contained an unambiguous right-to-future-accretions clause, then the Court would have to decide whether that provision constituted a taking and then whether that taking ran "with the land."[22] But, lacking such an unambiguous provision, the Court would normally accept the Washington Court's decision on the matter as conclusive as a matter of state law, unless it constituted "a sudden change . . ., unpredictable in terms of the relevant precedents."[23] This exception to the usual deference given to a state court's determinations of its state's law[24] was required because a state could not take property "by the simple device of asserting retroactively that the property it has taken never existed at all."[25] And applying that test, he determined that this was an "unforeseeable change" in the state's property law and thus a taking,[26] because a state could not take property without compensation, "no less through its courts than through its legislature."[27]

Justice Stewart's concurrence reinvigorated the idea of judicial takings, but did not launch a new doctrine of jurisprudence.[28] The Supreme Court avoided the issue in the one case where it was squarely presented,[29] and declined other offers to consider the issue[30] until *Stop the Beach Renourishment.*

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[17] *Id.* at 294–95.

[18] *Id.* at 295.

[19] *Id.*

[20] *Id.* (citing Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236–41 (1897)).

[21] *See id.* at 295–96.

[22] *Id.* His second question presaged the issue the Court would decide years later in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

[23] *Hughes*, 389 U.S. at 296.

[24] *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.").

[25] *Hughes*, 389 U.S. at 296–97.

[26] *Id.* at 297.

[27] *Id.* at 298.

[28] Thompson, *supra* note 11, at 1468–69.

[29] *See id.* at 1469–70 (discussing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

In 1990, Professor Barton Thompson published what is considered to be the seminal article on judicial takings, appropriately titled *Judicial Takings*.[31] He found that there were no "easy answers" in the language or history of, or decisions based on, the takings provision of the U.S. Constitution.[32] He noted that despite the lack of answers, there was a tension in the Court's jurisprudence between a state court's ability to redefine property rights between private parties, but its inability to do so in order to validate a legislative or executive act that would otherwise be a taking.[33] In order to determine the validity of a judicial takings doctrine, he examined the "normative pulls and counterpulls that have shaped our takings jurisprudence,"[34] and sought to consider the practical implications while defining what exactly would constitute a judicial taking.[35]

He argued that the following reasons "pull" towards a doctrine of judicial takings:

(1) If the reason for the compensation requirement in general is rights-oriented—either the right to non-consensual interference with one's property or the right not to bear an inordinate burden of the cost of government—then it does not matter which branch of government is doing the taking; it is all the same to the property owner.[36]

(2) Demoralization costs, a major justification for just compensation in general,[37] though perhaps lessened by perception about the judicial process, are still present when a court changes property law to property holders' detriment, and thus militate against exempting judicial decisions from takings protections.[38]

(3) The same majoritarian fears that lead to the need to constrain the "politically accountable" branches with a just compensation requirement are just as present in the judiciary as in the other branches of government.[39]

(4) Because of the broad impact of judicial changes to property law, courts will consistently mis-value the cost to property holders of the changes, just as the legislature and the

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[30] *See id.* at 1471–72; *see also* Stevens v. City of Cannon Beach 510 U.S. 1207 (1994) (denying a petition for a writ of certiorari on a judicial takings issue). Justices Scalia and O'Connor dissented from the denial. *Id.* at 1207–12.

[31] *See* Thompson, *supra* note 11.

[32] *Id.* at 1472.

[33] *Id.*

[34] *Id.* at 1454.

[35] *Id.* at 1454–55.

[36] *Id.* at 1473–75.

[37] *See generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[38] Thompson, *supra* note 11, at 1477–81.

[39] *Id.* at 1482–89.

executive do without a just compensation requirement.[40] Applying the requirement to courts would force these decisions out of the courts and into the legislature where such "fiscal illusion" would be less likely.[41]

(5) Because courts are more responsive to politically powerful groups and individuals, judicial decisions do present a danger of discriminating among property owners, something a compensation requirement mitigates.[42]

(6) Regardless of the effectiveness of any practical remedy, a judicial takings doctrine would be a clear statement to the courts that they should consider the costs of their actions like any other branch of government.[43]

Against those normative "pulls" are arrayed several "counterpulls":

(1) "[I]f the takings protections were applied to judicial changes, the courts would be barred from revising property law to meet societal and technological changes."[44] The fear here, what Thompson refers to as the civic counterpull, is that imposing compensation requirements on the courts would constrain their ability to adapt the law to changing societal situations.[45]

(2) Because "the development and specification of property law is a matter for state courts, . . . federal courts should not interfere with this process through assertion of the takings protections."[46]

(3) "By recognizing judicial takings, we risk making every property law case into a constitutional law case" because whenever a party loses a property case they will claim that the state court "took" their property by changing the law, thus dramatically increasing the workload of the federal courts.[47]

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[40] *Id.* at 1489–92.

[41] *Id.* at 1492.

[42] *Id.* at 1492–95.

[43] *Id.* at 1495–96.

[44] *Id.* at 1499.

[45] *See id.* at 1499–1502. Thompson notes that this counterpull is not logically limited to the courts; it applies equally to the other branches of government and thus undercuts regulatory takings jurisprudence generally, rather than judicial takings in particular. *Id.* at 1502–09. But common-law courts operate on the assumption that the law is subject to change in a fundamentally different way than legislatures do, which I will elaborate upon later. *See infra* Part V.A.

[46] *Id.* at 1509. Thompson dismisses this counterpull for the same reason as the previous one: it provides no principled basis for distinguishing between courts and the other branches of government. *Id.* at 1509–11.

[47] *Id.* at 1511. But Thompson notes that, given the limitations on collateral attacks of state court judgments in federal district courts and the discretionary nature of Supreme Court review, this concern should not be "overdramatized." *Id.* at 1512.

On balance, Thompson concluded that these factors "pulled" towards a judicial takings doctrine.[48] He proposed three possible remedies: the court's change in the law could be voided;[49] the court could order the legislature to provide compensation for the change in the law or statutorily override its decision ("automatic compensation");[50] or the court could condition its change in the law on the legislature's providing compensation, so that if the legislature did not, the change in the law would not occur ("legislative choice").[51] And he noted the problems of defining what would constitute a judicial taking, which are present because courts *define* property in the first place.[52] Thompson did not ultimately define a judicial taking, leaving that issue to the courts.[53] His work seems to have elicited little comment at the time.[54]

In 1994, Justice Scalia made known, in a dissent from a denial of a petition for certiorari, that he accepted the possibility that a court could take property.[55] *Stevens v. City of Cannon Beach* began when a couple who owned property along Cannon Beach, in the city of the same name, applied to build a seawall on the dry-sand portion of their property.[56] They were denied a permit and sued the City on an inverse condemnation theory.[57] The trial court dismissed the complaint on the grounds that it failed to state a claim,[58] citing a 20-year-old Oregon Supreme Court case, *State ex rel. Thornton v. Hay*.[59] That dismissal was affirmed by both appellate courts of Oregon.[60] The couple petitioned for certiorari, alleging that the state courts unconstitutionally took their property without just compensation.[61]

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[48] *Id.* at 1541.

[49] *Id.* at 1513.

[50] *Id.* at 1514–20.

[51] *Id.* at 1520–21.

[52] *Id.* at 1522–23.

[53] *See id.* at 1522–41.

[54] A search on Westlaw for secondary sources referring to Professor Thompson by name or citing to his article yields just 20 results in the years between 1990 and 1994, and none of those examine his work in any depth.

[55] *See* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207–14 (1994) (Scalia, J., dissenting from the denial of certiorari).

[56] *Id.* at 1207.

[57] *Id.* at 1207–08.

[58] *Id.* at 1208.

[59] *Id. Thornton* decided that the doctrine of custom established that the public had a "superior right" to the dry-sand area of the beach as to the owners of the disputed property. State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969). That case involved, like *Stevens*, the ability of an owner to fence off the dry-sand area of the beach. *Id.* at 672.

[60] *Stevens*, 510 U.S. at 1208.

[61] *Id.*; *see also* Petition for Writ of Certiorari at iii, *Stevens*, 510 U.S 1207 (No. 93-496) (question two).

Justice Scalia would have granted certiorari, though not on the takings issue.[62] But despite his reticence, he took the opportunity to comment that "if it cannot fairly be said that an Oregon doctrine of custom," the basis on which the state court had decided the case, "deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking."[63] He believed that the case raised "serious" Fifth Amendment issues because it involved a holding of "questionable constitutionality" and because it represented a "landgrab [that] may run the entire length of the Oregon coast."[64] And, most relevantly, he asserted that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without [just] compensation."[65] Such a retroactive assertion that "the property . . . taken never existed at all"[66] was unsupportable and unconstitutional. In the context of what he was writing, Justice Scalia did not need to address what would constitute a judicial taking, and so did not.[67]

B. Stop the Beach Renourishment *and Competing Theories of Judicial Takings*

Sixteen years after *Stevens*, the Supreme Court had the opportunity to confront the idea of judicial takings head-on, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[68] Though the outcome—that no taking of property occurred—was unanimous, the justices split 4–4 over whether such a taking *could* occur. Justice Scalia's opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, accepted the premise that a court could take property.[69] Justice Kennedy, joined by Justice Sotomayor, advocated for a

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[62] *See Stevens*, 510 U.S. at 1214.

[63] *Id.* at 1212.

[64] *Id.* Petitioners' claim rested on the assertion that the doctrine of custom in Oregon law was a "fiction" deployed to meet the facts in *Thornton*. *Id.* at 1213; *see* Petition for Writ of Certiorari, *supra* note 61, at 21–38. Justice Scalia, though not explicitly agreeing with that characterization, gave it some support, writing that the Oregon courts' "vacillations on the scope of the doctrine of custom . . . reinforce a sense that the court is creating the doctrine rather than describing it." *Stevens*, 510 U.S. at 1212 n.4.

[65] *Id.* at 1212 (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

[66] *Id.* (quoting Hughes v. Washington, 389 U.S. 290, 297 (1967) (Stewart, J., concurring)).

[67] Justice Scalia's opinion seems to have elicited more response than Professor Thompson's article did. Westlaw shows 42 secondary sources citing to his opinion through 1997, at least one of those in depth. *See, e.g.*, Peter C. Maier, Note, Stevens v. City of Cannon Beach*: Taking Takings into the Post-*Lucas *Era*, 22 ECOLOGY L.Q. 413 (1995).

[68] 130 S. Ct. 2592 (2010).

[69] *Id.* at 2602 (plurality opinion).

substantive due process approach to the issue,[70] while Justices Breyer and Ginsburg would not have addressed the issue because it was "better left for another day."[71] An understanding of this case will show that a judicial takings approach, as advocated by Justice Scalia, would unduly interfere with the ability of states to govern themselves through their property law and constrain courts' execution of their duties.[72]

1. The Facts

Beach erosion is a fact of life for those who live close to the shore.[73] Florida, with the longest coastline in the lower forty-eight states, is particularly susceptible to erosion through hurricanes.[74] Its Beach and Shore Preservation Act serves as its means of protecting from erosion and restoring those beaches already eroded.[75] Under the Act, an eligible town or county can apply to the state for the necessary permits to restore beach sand that has been eroded.[76] Most pertinent to *Stop the Beach Renourishment*, the state sets, during the beach restoration process, a permanent "Erosion Control Line" (ECL) that divides public property from private property thereafter.[77] It must accurately reflect the mean high-water line, the traditional measure that divided public from private property, and to the extent that it does not, an owner must be compensated through condemnation proceedings.[78]

In 2003, in the aftermath of Hurricane Opal and several others, the City of Destin and surrounding Walton County applied for such permits to restore nearly seven miles of beach.[79] The project envisioned adding some 75 feet of dry sand seaward of the ECL.[80] Two groups of beachfront property owners, "Save Our Beaches" (SOB) and "Stop the Beach Renourishment," (STBR) filed administrative challenges to the project.[81]

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[70] *Id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

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

[72] The sections below only examine the opinions of Justice Scalia and Justice Kennedy. Justice Breyer objected on prudential grounds to considering the judicial takings issue at all. *Id.*

[73] *See* Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 713, 718 (2011). I rely on that article's excellent summary of the facts and law leading up to the proceedings in the Supreme Court to fill in the gaps in the Court's opinion.

[74] *Id.* at 721.

[75] *Id.*; *see also* FLA. STAT. ANN. §§ 161.011–.45 (West 2012).

[76] Blumm & Dawson, *supra* note 73, at 722–26.

[77] *Id.* at 722.

[78] *Id.* at 722–23; *see also* FLA. STAT. ANN. § 161.141. Notably, the statute requires compensation if the owner is deprived of property by the placement of the ECL, but does not require the owner to pay for any additional property that he gains from the placement.

[79] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600 (2010); Blumm & Dawson, *supra* note 73, at 725–26.

[80] *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

[81] Blumm & Dawson, *supra* note 73, at 727–29.

One of those administrative claims challenged the placement of the ECL.[82] It was determined that the ECL would be seaward of the mean high-water line, and as such, STBR and SOB claimed, would affect the landowners' rights to accretion.[83] The administrative judge ruled that any infringement would have been reasonable, and was therefore acceptable under the statute.[84] Permits were approved, and the landowners' groups challenged the decision in the state district court of appeal.[85]

That court accepted the challengers' arguments, finding that the administrative order had eliminated two littoral rights: property owners' right to accretions, and their right to maintain their properties' contact with the water.[86] It held that this was an unconstitutional taking of property and set aside the order, but certified the question of whether the Beach Act "unconstitutionally deprive[d] upland owners of littoral rights without just compensation" to the Florida Supreme Court.[87]

The Florida Supreme Court answered in the negative.[88] It held the right to accretions to be a future contingent interest rather than a vested property right, and held that the right of contact with the water was concomitant with the right of access, which the Act did not infringe.[89] STBR asked for rehearing, claiming that the court's act of defining these rights *itself* effected a taking under the Fourteenth Amendment, but that request was denied.[90] The United States Supreme Court granted certiorari to consider the question.

2. *Justice Scalia's Opinion: A Change in the Law Is a Taking*

Justice Scalia wrote the opinion for the court, but only as to the facts and the conclusion.[91] Otherwise, he spoke for a plurality of four justices: himself, the Chief Justice, and Justices Thomas and Alito.[92] The opinion begins by reciting the Court's takings jurisprudence[93] before making a subtle beginning to his analysis: "The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act . . . ."[94] Then he makes the bold statement: "It would be absurd to

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[82] *Id.* at 728.
[83] *Id.*
[84] *Id.* at 729.
[85] *Stop the Beach Renourishment*, 130 S. Ct. at 2600.
[86] *Id.*
[87] *Id.* (quoting Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008)).
[88] *Id.*
[89] *Id.*
[90] *Id.* at 2600–01.
[91] *Id.* at 2597.
[92] *Id.*
[93] *Id.* at 2601.
[94] *Id.*

allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[95]

This statement is concerning for more than just the fact that it proposes to bring courts under the purview of the Takings Clause. It is a strictly textual interpretation of a provision of the Constitution, an arena where history has often played a large role in Justice Scalia's jurisprudence.[96] Indeed, Justice Scalia advocates for an historical textualism that analyzes the constitution textually, but in the context of the time of the Founding,[97] a time when a "taking" could only be effected by a legislature.[98] Unlike other "common" words in the Constitution, "take property" had a specific and well-understood meaning at the time that the Fifth Amendment was ratified.[99] Under that analysis, the power of eminent domain cannot be attributed to a court; it is the branch that "say[s] what the law is."[100] It does not have the power to take.

Regardless, Justice Scalia goes on: "the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."[101] "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[102] This is

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[95] *Id.* His statement in *Stevens*, that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without [just] compensation" accurately previewed what he was to write here. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from the denial of certiorari).

[96] *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2797–99 (2008) (applying historical analysis to the Second Amendment); Crawford v. Washington, 541 U.S. 36, 42–43 (2004) (applying historical analysis to the Confrontation Clause of the Sixth Amendment); Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring) ("[T]he Constitution [does not] mean[] what we think it ought to mean. . . . [I]t means what it says."); United States v. Williams, 504 U.S. 36, 47–52 (1992) (evaluating role of the grand jury in historical context). Scholars have, however, noted that in at least one arena—affirmative action—Justice Scalia makes the mistake of "neglecting originalism" in his opinions. Ilya Somin, *Originalism and Affirmative Action*, VOLOKH CONSPIRACY (Sept. 7, 2012), http://www.volokh.com/2012/09/07/originalism-and-affirmative-action (discussing David Gans & Adam Winkler, Online *Fisher* Symposium: *Affirmative Action Is Consistent with Original Meaning*, SCOTUSBLOG (Sept. 5, 2012), http://www.scotusblog.com/2012/09/online-fisher-symposium-affirmative-action-is-consistent-with-original-meaning).

[97] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[98] *See infra* Part IV.A.; *see also generally* Treanor, *supra* note 1.

[99] *See infra* Part IV.A.

[100] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[101] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010).

[102] *Id.*

the basis of his version of a judicial taking: a per se taking occurs if an established right is destroyed or made worthless.[103]

This is further reinforced by later statements in the opinion. In his words, a judicial taking requires "the elimination of an established property right."[104] "[I]nsofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right."[105] The Court entertained a prolonged discussion of Florida property law, and determined that, while the exact status of the rights at issue were unclear, there were no *established* rights that were taken by the Florida Supreme Court,[106] and thus there was no taking in this case.[107]

The result is not surprising. The Florida court's decision was "consistent with the[] background principles of state property law."[108] While there was not clearly a right to accretions under these facts, nor clearly *no* right to accretions under these facts, the Court could not say that the Florida court committed a taking when it did not destroy an existing right. "Even if there might be different interpretations of . . . Florida property-law cases . . ., we are not free to adopt them. The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."[109]

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[103] This seems to imply that courts can effect *Lucas* takings, where all of a property's economic value is wiped out, but not *Penn Central* takings, where property is only deprived of most of its economic value. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (setting out the test where complete deprivation of economic value is a taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–35 (1978) (setting out the ad hoc test for determining whether a taking occurs when a property is deprived of only some of its economic value).

[104] *Stop the Beach Renourishment*, 130 S. Ct. at 2608.

[105] *Id.* at 2609.

[106] *Id.* at 2611–13.

[107] *Id.* at 2613.

[108] *Id.* at 2612; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[109] *Stop the Beach Renourishment*, 130 S. Ct. at 2612. Interestingly, this approach seems quite similar to the "unreasonable application of clearly established federal law" standard under which federal courts review state-court applications of federal law in habeas corpus cases. *See* Antiterrorism and Effective Death Penalty Act of 1996, § 104(3), 28 U.S.C. § 2254(d)(1) (2006). The main, and concerning, difference here is that review for a judicial taking would allow a federal court to determine the reasonableness of applications of established *state* law. It essentially allows a federal "overseer" to determine when a state court is unreasonably interpreting its own law. As one pair of commentators put it: "[B]oth Congress and the federal judiciary have respected the autonomy of state courts and tailored their interventions to avoid federal review of state constructions of state law. It would be odd indeed if, without any prompting from Congress or evidence that state courts have frequently changed state property rights in ways detrimental to rightholders, the federal courts were to fashion a more intrusive regime of federal review for judicial takings." Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 130 (2011).

Considering the possible yoke the Court *could* have placed on states, this could be interpreted as an even-handed result. It leaves states free to interpret (*i.e.*, define, expand, and narrow) the rights in their property law and to create new ones. It probably leaves state courts free to restrict granted rights so long as they are not destroyed. It leaves states free to fill in gaps in property law. It protects the landowner from losing his property rights in state court in the name of the public good. But a great deal of criticism has been leveled at this opinion.[110] And while that criticism is well-deserved—and will be reiterated below—the sky is not falling. If the worst effect of this opinion is that landowners are protected against courts "do[ing] by judicial decree what the Takings Clause forbids [the state] to do by legislative fiat,"[111] then the consequence is not necessarily negative. Many landowners would feel comforted that their rights may not be destroyed by a court after relying on that court's law to guide their conduct. But that does make the opinion correct.

3. Justice Kennedy's Approach: A Substantive Due Process Judicial "Taking"

Justice Kennedy rejected Justice Scalia's approach. He found the power of eminent domain one to be exercised by the legislature and executive, the politically accountable branches of government.[112] He believed that a judicial decision that resulted in the deprivation of property would be best set aside as a violation of due process.[113] "The Due Process Clause . . . is a central limitation upon the exercise of judicial power."[114] He found it "natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights."[115]

"The usual due process constraint is that courts cannot abandon settled principles."[116] A judicial decision that "eliminate[d] or substantially change[d] established property rights" would be "'arbitrary or irrational' under the Due Process Clause."[117] Thus, it would be invalid. Justice Kennedy points out that, if the Takings Clause were the control mechanism on state courts, it would not proscribe them from eliminating property rights, so long as compensation was paid, because takings are "otherwise constitutional."[118] It would lead to the curious result of

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[110] *See, e.g.*, Blumm & Dawson, *supra* note 73; Symposium, Stop the Beach Renourishment: *Essay Reflections from Amici Curiae*, 35 VT. L. REV. 413 (2010).

[111] *Stop the Beach Renourishment*, 130 S. Ct. at 2601.

[112] *Id.* at 2613–14 (Kennedy, J., concurring in part and concurring in the judgment).

[113] *Id.* at 2614.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 2615.

[117] *Id.* (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005)).

[118] *Id.* at 2614.

allowing a court to make "sweeping" changes in property law, confident that any person suffering from negative effects would be compensated.[119]

This leads to an interesting conundrum. If a takings claim is available when a court eliminates an established property right, is a claim that the court violated the Due Process Clause also available? Prior decisions recognize that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use" when a suit can be brought to obtain compensation.[120] Does the Takings Clause make a due process violation in the context of property law "otherwise constitutional," or does the Due Process Clause proscribe the taking of private property by a court at all? Justice Scalia seems to provide a response, albeit indirectly: "If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse [its] judgment . . . ."[121] But the Takings Clause does not proscribe taking property; it merely requires that compensation be paid. If the Court would refuse to allow the "taking" to occur at all, that is no different from saying that the court in question had no power to take it at all. That is a due process issue.

What the plurality's theory proposes to do, then, is to bring courts in line with the other institutions of government when approaching a taking. Justice Kennedy's substantive due process inquiry is a far more appropriate vehicle than bringing state courts under the umbrella of the Takings Clause. Indeed, insofar as the Takings Clause is an aberrant member of the incorporated-rights club, his approach is far more consistent with the ideals and intent of those who drafted the Constitution, the Bill of Rights, and the Fourteenth Amendment.

III. A STRUCTURAL THEORY OF INCORPORATED RIGHTS[122]

Rights are inherently structural. In other words, the structure of our federal government is not complete without a consideration of rights. Rights place additional limits on the exercise of governmental powers beyond the usually considered "structural" limitations (Article I, etc.). This is not news. What is noteworthy about rights in the federal constitution is that their conception is tied into structural issues: the process of incorporating rights into the Due Process Clause of the Fourteenth Amendment is a means of expanding federal control, by removing some defined scope of power from the states, at the expense of

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[119] *Id.* at 2616.

[120] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984), *quoted in Stop the Beach Renourishment*, 130 S. Ct. at 2617.

[121] *Stop the Beach Renourishment*, 130 S. Ct. at 2607 (plurality opinion).

[122] This is, of necessity, a brief overview of my theory as to why the Court establishes constitutional "floors" rather than constitutional "mandates" or even "aspirations." I hope to elaborate on the bases underlying this structural theory in later work.

state power. The progression of incorporation shows that the government of limited powers is meant to remain that way. I believe that incorporated rights can be explained by just such a "structural theory."

This structural theory of incorporated rights proceeds with three primary considerations. The original understanding of the right at the time of the founding forms the core of the right, the fundamental right. The reason for this is that when the Constitution was ratified, the states were more homogeneous in the laws they applied: all rights flowed from the common law of England.[123] Applying those fundamental rights to the states requires that they be limited to their fundamental cores to achieve deference to state sovereignty to reflect our federalism. After the passage of the Fourteenth Amendment, it became necessary to counterbalance that deference with an understanding of how the federal structure changed. Examining rights through the lenses of federalism and the Fourteenth Amendment allows us to see the floor that the Constitution sets, and how the Court sets it by adhering to principles of federalism.

Consequently, to understand *why* the current core of an incorporated right is what it is, one must first determine what it was understood to be at the Founding, before state experimentation *began at all*. This helps to explain why Originalism is such a powerful analytical tool in constitutional interpretation: it is the baseline from which a court can begin to determine the effects of time on that understanding.

Second, one must determine how, and if, structural federalism, seen through the lens of the Fourteenth Amendment, has altered the understanding of that right as it should be applied to the states.[124] This framework reveals that the "baseline" or "floor" conception of federal constitutional rights exists because it is mandated by our federalism, not necessarily because the Court believes that the rights should be cabined as such.[125]

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[123] This is not to say that state law across the states has not been similar in the years since. Examples abound of efforts to make state law uniform: the Uniform Commercial Code (adopted at least in part in all 50 states), the Uniform Trust Code (adopted in some 26 states), the Model Penal Code (adopted in some 20 states, and used as a model in almost all states), and the Restatements. But that is an imposed uniformity. The states in 1787 all drew from the same source: English Common Law.

[124] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (describing when the federal government may abrogate state sovereign immunity under the Eleventh Amendment); Printz v. United States, 521 U.S. 898 (1997) (describing to what degree the federal government may prescribe the actions of state law enforcement officials).

[125] Furthermore, I would argue that courts should not go beyond deferential rights standards; if the people of a particular state want greater protections for their civil liberties, their state constitution can always build on federal protections. This is evident in the jurisprudence of Oregon. The Oregon Constitution often grants greater rights than the federal constitution; it is an example of rights federalism in action. Of course, this goes hand-in-hand with the conception of a limited federal government. Limited rights against the federal government necessitate a limited federal government in order to protect civil liberties: a government that does little has little chance to violate a person's civil rights. Notably, Americans trust their state

The next Part elucidates this idea further by examining the Takings Clause through this framework.

IV. THE INTERSECTION OF PROPERTY AND INCORPORATED RIGHTS: APPLYING THE STRUCTURAL THEORY TO TAKINGS JURISPRUDENCE

As relevant to the Takings Clause, I will examine the original understanding of the eminent domain power and the Takings Clause, the federal structure of our government, and the effect the Fourteenth Amendment has had on that structure to explain some of the Court's current takings jurisprudence. This Part lays out those factors in detail.

A. Eminent Domain and the Takings Clause

The structural analysis starts "at the very beginning" of eminent domain because it is a "very good place to start;"[126] indeed it is the necessary starting point. Understanding the foundations of eminent domain and the Takings Clause tells us about the core of the right to just compensation and serves as the baseline for an examination of the structural issues in the theory of judicial takings. It will also show how far that doctrine strays from the original intent.

1. A Brief History of Eminent Domain[127]

The Magna Carta was quite possibly the first English document to express the need for just compensation when the sovereign seized property.[128] That chapter provided:

> No constable or other bailiff of ours shall take grain or other chattels of any one without immediate payment therefor in money, unless by the will of the seller he may secure postponement of that [payment].[129]

That requirement for "immediate payment" upon seizure of "grain or other chattels" is a forbearer to the modern just compensation requirement. Though the section is short and simple, it encapsulated the idea that property could not be taken freely by the sovereign without compensation. Pursued with the other chapters as a remedy to King

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governments far more than the federal government. *See* Richard Florida, *Why Americans Still Trust Their Local Government, Even as Faith in Washington Crumbles*, ATLANTIC CITIES (Sep. 26, 2012), http://www.theatlanticcities.com/politics/2012/09/why-americans-still-trust-their-local-government-even-faith-washington-crumbles/3417.

[126] Richard Rodgers & Oscar Hammerstein II, *Do–Re–Mi*, *in* THE SOUND OF MUSIC (1959).

[127] I rely heavily in this section on Professor William Stoebuck's thorough article on the subject, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

[128] *See* MAGNA CARTA, ch. 28 (1215), *translated in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 115, 120 (Carl Stephenson & Frederick George Marcham eds. & trans., rev. ed. 1972).

[129] *Id.* (alteration in original).

John's violations of custom and common law,[130] it also represents a popular restriction on the power of the sovereign, much as our Bill of Rights does. But as Professor Stoebuck demonstrated, this is a limitation on the king's *prerogative* power rather than on the eminent domain power: "Prerogative belonged to the king, eminent domain, to the legislative branch."[131] The barons imposed this restriction on the king's seizure of chattels; he had no power to take land.[132] This limitation does, however, show that compensation and the power to take were concerns the barons wished to address.

The first evidence of Parliament's exercise of eminent domain comes from 1427, when Parliament authorized sewer commissioners to take land in order to build new sewers as needed.[133] Stoebuck refers as well to an earlier statute from 1285 that imposed a requirement on landowners to trim roadside brush so that robbers could not hide there.[134] He classifies this as an exercise of the police power, despite its imposition of a restriction on land, a potential early example of what we would call an uncompensated regulatory taking.[135] Later English statutes continued the practice of appropriating land and paying compensation for it.[136]

Hugo Grotius coined the term eminent domain in the seventeenth century to describe the sovereign's power to seize land for its use.[137] It allowed a sovereign to destroy or appropriate a subject's property for "direct need" and when it could be used to "public advantage."[138] It also required the state "to make good at public expense the damage" caused by the seizure.[139] This is the classic power of eminent domain, used whenever the public found it desirous to make the seizure.[140] This accords with the current understanding of the constitutional limits on exercises of eminent domain. A "body politic" can seize (take) property from an individual whenever the public, as expressed through the body politic, finds it in the public's advantage to do so.[141] As such, eminent domain was thought of as an "exclusive function of the legislative branch."[142]

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[130] SIEGAN, *supra* note 3, at 6.

[131] Stoebuck, *supra* note 127, at 564.

[132] *Id.*

[133] *Id.* at 565; *see also* Statute of Sewers, 1427, 6 Hen. 6, c. 5 (Eng.).

[134] Stoebuck, *supra* note 127, at 565 n.47; *see also* Statute of Winchester, 1285, 13 Edw., c. 5.

[135] Stoebuck, *supra* note 127, at 565 n.47.

[136] *Id.* at 565–66.

[137] *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, ch. XX, § 7, at 807 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

[138] *Id.*

[139] *Id.*

[140] *See id.*

[141] *See* Kelo v. City of New London, 545 U.S. 469, 477–83 (2005).

[142] Stoebuck, *supra* note 127, at 566.

This conception of eminent domain as a legislative power springs from our ideas about representative government,[143] a point made by both John Locke and William Blackstone. "The supreme power cannot take from any man any part of his property without his own consent."[144] This comment by Locke is often understood to be referring to taxation.[145] But it has independent relevance as an expression of the nature of eminent domain. In Locke's conception, "the preservation of property [is] the end of government."[146] It would be hard to conceive of Locke approving of a government that could take, without compensation, the very private property it was created to protect.[147] Thus, when he writes that the government cannot take property without a man's consent, he is referring to all property, not just taxes.

The necessary consent, to Locke, is made by proxy through a person's representative; necessarily that representative would be a member of a "variable assembly."[148] The "variable" requirement makes the representative politically accountable to those whose property he takes. In contrast, a "lasting assembly," for example, the House of Lords, could not take property because there could be no effective consent in such a situation (no political accountability).[149] Again, though he explains that he is referring to the tax power when discussing consent,[150] his statements embrace the appropriation of real property as well.

Blackstone also states the inviolability of property quite clearly: "So great . . . is the regard of the law for private property, that it will not authorise the least violation of it; . . . not even for the general good of the whole community."[151] But he has one caveat: "[T]he legislature alone can . . . compel the individual to acquiesce" in giving up his property, so long

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[143] *Id.*

[144] JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government*, *in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 3, § 138 (J.W. Gough ed., rev. ed. 1948) (1690).

[145] *See* Stoebuck, *supra* note 127, at 567. *But see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 12–15 (1985) (discussing this passage in the context of takings of private property).

[146] LOCKE, *supra* note 144, at § 138.

[147] This view underlies libertarian theories of eminent domain. *See, e.g.*, EPSTEIN, *supra* note 145, at 3–7.

[148] LOCKE, *supra* note 144, at § 138.

[149] *Id.* This idea is reflected in the structure of our own federal government: "All Bills for raising Revenue [i.e., taking property in the form of taxes] shall originate in the House of Representatives." U.S. CONST. art. I, § 7, cl. 1. The House was originally the "variable assembly" because it was elected directly by the people and so directly accountable to them. The Senate was a sort of "lasting assembly" because it was elected by state legislatures and not directly accountable to the people.

[150] LOCKE, *supra* note 144, at § 140.

[151] 1 WILLIAM BLACKSTONE, COMMENTARIES *139 (St. George Tucker ed., William Young Birch & Abraham Small, Philadelphia 1803) [hereinafter TUCKER'S BLACKSTONE].

as a full indemnification is made for it.[152] This is a distinct and different power from the king's prerogative power, which could destroy or take personalty *without* compensation,[153] the exercise of which chapter 28 of the Magna Carta was directed against.[154]

Other eighteenth century writers read similarly. Montesquieu wrote that "it is never in the public good for an individual to be deprived of his goods, or even for the least part of them to be taken from him by a political law or regulation."[155] And when the government needed an individual's land for public purposes, it was required to pay compensation for the seizure.[156] John Jay wrote to the same effect that "the Practice of impressing Horses, Teems, and Carriages by the military . . . without any Authority from the Law of the Land" was a violation of a person's "undoubted Right and unalienable Priviledge . . . not to be divested . . . of Life, Liberty, or Property, but by Laws to which he has assented, either personally or by his Representatives."[157]

It is interesting to synthesize these views. The power to tax, one which Locke insisted may be done only by representative assemblies, seems to require no compensation because it is an exercise of the prerogative power, an original power of the king. The power of eminent domain, which requires compensation, is an original power of the legislature. Locke's great contribution is that *any* power to seize a man's property should be exercised by the legislature, while Blackstone and early American cases reflect the understanding that compensation needed to be paid whenever real property was seized.

That understanding is confirmed by at least some early cases. One of the most famous, *Vanhorne v. Dorrance*, an early Pennsylvania case, stated it succinctly: "The preservation of property then is a primary object of the social compact . . . ."[158] No person could be "called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value."[159] As authority, the *Vanhorne* court stated that a seizure without compensation had never been performed by Parliament, even "with all their boasted

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[152] *Id.*

[153] Stoebuck, *supra* note 127, at 562–63.

[154] *See supra* notes 128–29 and accompanying text.

[155] MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 26, ch. 15, at 510 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). The translation in *The Founders' Constitution* reads differently: "it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law . . . ." 5 THE FOUNDERS' CONSTITUTION 311 (Philip B. Kurland and Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONSTITUTION].

[156] MONTESQUIEU, *supra* note 155, bk. 26, ch. 15, at 510.

[157] John Jay, A Hint to the Legislature of the State of New York, *in* 5 FOUNDERS' CONSTITUTION, *supra* note 155, at 312 (emphasis omitted).

[158] Vanhorne v. Dorrance, 28 F. Cas. 1012, 1015 (C.C.D. Pa. 1795) (No. 16,857).

[159] *Id.*

omnipotence."[160] It further noted that "the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action."[161] This shows that early judges of the states believed that the power of eminent domain, as Locke, Montesquieu, Jay, and Blackstone all had stated, was lodged in the legislature because of its representative qualities and accountability. Though the "despotic power . . . of taking private property . . . exists in every government . . ., it cannot be lodged any where with so much safety as with the legislature."[162] And its decision was not grounded only in the constitution of Pennsylvania; the exercise of eminent domain without compensation was "inconsistent with the principles of reason, justice, and moral rectitude" as well.[163]

The judges in *Lindsay v. Commissioners*,[164] a South Carolina case, relied on common law principles as well. Though the four judges split on the compensation issue, they all agreed that the state had an inherent power to take property to build roads for public use. Two judges found there to be no right to compensation, but found that the state's sovereign power embraced the power of eminent domain, going so far as to write that the constitution of South Carolina "was not declaratory of any new law" on this point, but merely "confirmed all the ancient rights and principles."[165] Further, they wrote that this power was and should be vested in the legislature.[166] The judges who would require compensation cited to Blackstone for this requirement, while also admitting of the state's ability to exercise the power and assuming its vestment in the legislature.[167]

What these cases and the early understandings about eminent domain show is that it was fundamentally a legislative power. Furthermore, eminent domain was not a constitutional power, but a power given by natural law.[168] The understanding that the just-compensation requirement merely codified pre-existing law informs the next section.

2. *The Takings Clause*

The Takings Clause of the Fifth Amendment is best read in conjunction with the Due Process Clause that precedes it: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[169] Given the preceding discussion of pre-constitutional

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[160] *Id.*
[161] *Id.* at 1016.
[162] *Id.* at 1015.
[163] *Id.*
[164] 2 S.C.L. (2 Bay) 38 (1796).
[165] *Id.* at 56–57.
[166] *Id.*
[167] *Id.* at 58–61.
[168] Stoebuck, *supra* note 127, at 555.
[169] U.S. CONST. amend. V.

understandings of eminent domain, it was most likely intended to "codify" the common law requirement of compensation for the federal government.[170] But another explanation is that it was meant to preserve the "unenumerated but inherent powers of government—the police power and the power of eminent domain."[171] It acts as a sort of exception to the Due Process Clause: in this limited instance, compensation will be required even though a person was given due process of law.[172]

The clause resonated with the understanding of eminent domain at the time. The common law required that compensation be made when a person's land was taken by the government.[173] This resonance may have made the clause somewhat self-evident, necessitating little debate. Indeed, little attention was paid to the Takings Clause when the House of Representatives approved the Fifth Amendment.[174] Professor Amar credits Madison's "clever bundling" as being partially responsible for this, but also notes that this was a restriction solely aimed at the federal government.[175] As the federal government had only limited grants of power over property rights,[176] there was little reason to fear that it would take property willy-nilly without compensation. Furthermore, conceptions over the federal government's role in the federal system[177] may have reduced the framers' concerns over the national government's propensity to take. With little expectation that the federal government would do much of anything, there was little to fear.

But assuaging the fears of citizens that a distant, powerful national government would abuse the property rights of disfavored groups, especially through a powerful military impressing goods, may have been a motivating factor.[178] This harmonizes well with the Second and Third Amendments, which also gave citizens rights to protect themselves against the federal government:[179] the right to bear arms and the right

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[170] SIEGAN, *supra* note 3, at 108; *see also* 1 TUCKER'S BLACKSTONE, *supra* note 151, at 305–06. Tucker believed that the main object of the clause was to prevent "illegal impressment" of goods by the army or other public bodies, an idea he may have gotten from John Jay. *Id.*; *see supra* note 157 and accompanying text.

[171] SIEGAN, *supra* note 3, at 108.

[172] *Id.* at 110–12.

[173] *See* 1 TUCKER'S BLACKSTONE, *supra* note 151, at *138–39; *see also supra* text accompanying notes 158–63.

[174] *See* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 180 (Helen E. Veit et al. eds., 1991).

[175] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 77–79 (1998).

[176] Congress could establish post offices and post roads, and purchase land for the seat of the federal government and military installations. U.S. CONST. art. I, § 8, cl. 7, 17.

[177] *See* discussion *infra* Part IV.B.1.

[178] AMAR, *supra* note 175, at 79–80; *see also* Jay, *supra* note 157, at 312.

[179] *See* AMAR, *supra* note 175, at 80.

against quartering troops.[180] Given the pre-constitutional consensus on compensation, the lack of attention to the Takings Clause, and the Second and Third Amendments, the Takings Clause may have been included merely as a gesture to calm fears about the federal government.

But if it was meant to preserve the power of eminent domain, then another possible reason for the inclusion of the Takings Clause in the Bill of Rights was the possibility that a government that had no inherent sovereign power would not be constrained by a common law that only applied to an inherent sovereign power.[181] A clever legislature could readily find a reason to appropriate property without compensation and justify it under the Necessary and Proper Clause.[182] The inclusion of the Takings Clause forestalled that possibility.

Read in conjunction with Locke and Article I of the constitution, the Takings Clause provides further support that the legislature was the appropriate body to invoke the eminent domain power. Locke's theory provides that only a representative body can seize a person's property.[183] The Takings Clause requires that compensation be made when this is done.[184] Article I, section 9 of the U.S. Constitution provides that no money "shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," thus restricting the power of the purse to Congress.[185] Consequently, only Congress could exercise the eminent domain power, because only Congress could appropriate the money necessary to make compensation. This accords with Blackstone, who states that only Parliament could exercise the eminent domain power.[186]

This understanding resonates with the text of the Takings Clause. The Takings Clause does not impose a prohibition but a condition: property shall not be taken without just compensation.[187] It conditions the exercise of the power on the availability of compensation. If

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[180] U.S. CONST. amends. II, III. The Second Amendment has recently seen a revitalization as a protection against government regulation. *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); District of Columbia v. Heller, 128 S. Ct. 2783 (2008). The Third Amendment has not, but then again, few Americans have ever encountered troops knocking on their doors demanding quarter.

[181] The common law had been interpreted to mandate compensation for the taking of property. SIEGAN, *supra* note 3, at 109. But as a government of limited powers, the federal government has no common-law authority "inherent" in it in regards to the states; it only possesses the powers it has been given. *See* U.S. CONST. art. I, § 1; United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812).

[182] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and *all means* which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (emphasis added)).

[183] *See supra* notes 143–50 and accompanying text.

[184] U.S. CONST. amend. V.

[185] U.S. CONST. art. I, § 9, cl. 7.

[186] 1 TUCKER'S BLACKSTONE, *supra* note 151, at *139.

[187] *See* U.S. CONST. amend. V.

compensation cannot be made, the power cannot be used; but that does not mean that the power does not exist. It only means that it cannot be exercised. The power remains, able to be used when compensation is available.

But what happens when compensation can *never* be made? A court has no funds with which to compensate for a taking. The Clause is founded on the assumption that compensation can be made—it is tied to the exercise of the power of the purse, a legislative function.[188] A court, having no purse from which to draw, cannot have the power to take. If it does not have the power, then it cannot exercise it. Though this may seem to be a formalistic distinction, it is an important one to make because the remedy for an uncompensated taking is not return of the property but compensation. Without the ability to pay compensation, another remedy is required, like an injunction, or, in the case of an alleged judicial taking, reversal.[189]

B. Protecting State Sovereignty and Individual Rights: Structural Federalism and the Tenth Amendment

The original structure of the federal government and the addition of the Tenth Amendment both worked to ensure a division of power between the national government and those of the states. "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived."[190] "Federalism secures the freedom of the individual,"[191] and also "preserves the integrity, dignity, and residual sovereignty of the States."[192] It prevents citizens from having "to rely solely upon the political processes that control a remote central power,"[193] and allows them to appeal to their (more responsive) state governments to secure their liberties. Federal infringement on state power does not just harm state governments, but also harms individuals by constraining the power of the states to assure citizens' liberty.[194] A doctrine that constrains the exercise of the state judiciary with respect to one of its most basic legal functions—refining state property law—

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[188] *See supra* note 185 and accompanying text.

[189] That is ultimately what Justice Scalia recognized, somewhat paradoxically, as the appropriate remedy for a judicial taking: not compensation, as the Takings Clause would allow, but reversal. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2607 (2010) (plurality opinion).

[190] Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *See id.* at 2366 ("[A]ction that exceeds the National Government's enumerated powers undermines the sovereign interests of States.").

oversteps the boundaries the Framers placed between the federal government and the states.

1. The Original Structure

"A division of sovereignty has been evident in American federalism from its inception."[195] Articles I, II, and III gave powers to the national government, while simultaneously placing some restrictions on states.[196] In the original constitution, nowhere was state power abrogated except when—and as—specified.[197] The original design placed more power in the national government than the Articles of Confederation had, but it still respected state sovereignty.[198] States would "clearly retain all the rights of sovereignty which they before had, and which were not, by [the Constitution], *exclusively* delegated to the United States."[199]

This initial design has been described as reserving great power to the states, and giving very little to the national government: "[W]hen one took a sober look at the respective responsibilities of national and state government, it was hard to escape the conclusion that national legislation would be no more than a thin template floating lightly above a broad base of state activity."[200] Very few who signed the constitution expected that the national government would do very much.[201]

In the field of property law, the constitution did not envision national restrictions being imposed. Tench Coxe, a delegate to the constitutional convention, noted that the "lordship of the soil" would remain "in full perfection with every state."[202] State power was understood to "extend to all the objects, which . . . concern the lives, liberties, and properties of the people."[203] Other framers declared in the state ratifying

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[195] Jack N. Rakove, *American Federalism: Was There an Original Understanding?*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES 107, 111 (Mark R. Killenbeck ed., 2002).

[196] *See* U.S. CONST. arts. I–III.

[197] *See id.* art. I, § 10.

[198] *See* THE FEDERALIST NO. 45, at 288–93 (James Madison) (Clinton Rossiter ed., 1961).

[199] THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2577 (2012) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.").

[200] Rakove, *supra* note 195, at 116.

[201] *Id.*; *see* THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed. 1961) (noting that in a large republic, there were likely to be many competing interests, and thus less opportunity for any faction to develop, therefore making it "less probable that a majority . . . will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other").

[202] Rakove, *supra* note 195, at 116 (emphasis omitted).

[203] John Choon Yoo, *Federalism and Judicial Review*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES 131, 165 (Mark R. Killenbeck ed., 2002) (quoting THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed. 1961)) (internal quotation mark omitted).

conventions that the federal government could not invade a state's authority to establish common-law rules governing property, contracts, trusts and estates, and other local matters."[204] Those statements, combined with the understanding that the federal government was to be one of limited/delegated powers,[205] kept the newly created national government firmly out of the realm of property.

Indeed, the states were meant to serve as "an important bulwark" against the possibility of the federal government exceeding its enumerated powers.[206] At the time, it was more likely that a citizen would be a Virginian than an American, and that he would respect his state's law before that of the national government. "Allowing states to regulate much of the daily lives of their citizens would make those citizens more loyal to the state governments," and more likely to oppose a radical expansion of federal power.[207] The original design helped to keep the federal government small.

2. The Tenth Amendment

The Tenth Amendment worked to keep the federal government small as well. The Framers, Madison in particular, opposed a Bill of Rights for the federal government.[208] They had several reasons. Primarily,

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[204] *Id.* at 166.

[205] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2577 (2012) ("The Federal Government 'is acknowledged by all to be one of enumerated powers.' That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers." (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819))).

[206] Yoo, *supra* note 203, at 167. This structure was also reflected in the distribution of power between the federal courts and state courts: federal courts were meant to act as the primary bulwark in the federal system against federal encroachment on state's rights. *See id.* at 145. For a time, they failed at that task. Article III gave the federal courts the power to decide cases that arose in states concerning federal law. U.S. CONST. art. III, § 2. But the Judiciary Act also empowered them to decide issues of state law on the grounds of state law. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. Federal courts promptly began to ignore state common law, as it was not considered "law" at all. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) (holding that the common law of a state was not "law" within the meaning of the Judiciary Act). Judges at the time believed that the common law was derived from a common set of "general law" principles. *See id.* at 18–19. *See generally* O. W. HOLMES, JR., THE COMMON LAW (Boston, Little, Brown, & Co. 1881). Those principles did not change from state to state, unless a state had enacted a positive statute to change it. Thus federal judges applied "general principles," ignoring state law, not for structural reasons, but because they believed that there was only one body of common law. The Supreme Court corrected that error in 1938, leading to a revived respect for state sovereignty and returning federal courts to their original mission. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702–04 (1974).

[207] Yoo, *supra* note 203, at 167.

[208] *See NFIB*, 132 S. Ct. at 2577–78 ("[T]he Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, 'the Constitution

they thought it unnecessary. Considering the limited powers the national government was expected to exercise, civil liberties simply wouldn't enter into its purview.[209] They also worried that by enumerating rights, those that were not enumerated would no longer be considered rights.[210]

The Bill of Rights was ultimately not an expression of individual rights, but an expression of federalism: it restricted the ability of the federal government to act, while allowing the states greater freedom in dealing with their citizens.[211] The Tenth Amendment provided federalism's ultimate safeguard: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[212] This prohibition kept the national government firmly out of states' business. It acted as an "exclamation point to the concept of limited federal powers embodied in the original text of the Constitution."[213] It reaffirmed the states' position as sovereigns, and though that balance would lead to abuses and civil war, it was the balance intended by the framers.[214]

"In fact, these two issues—federalism and individual rights—were theoretically closely intertwined, as both raised the same fundamental questions concerning the limits of the federal government's enumerated powers and the institutional means necessary to enforce them."[215] Some powers were given to the federal government, some to the states, and

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is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.'" (quoting THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed. 1961))). Madison himself described them as "parchment barriers." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 325–26 (1996).

[209] *See NFIB*, 132 S. Ct. at 2578; RAKOVE, *supra* note 208, at 288, 316.

[210] RAKOVE, *supra* note 208, at 329. Though apocryphal, a quote from the television show "The West Wing" sums up these concerns nicely: "If we list a set of rights, some fools in the future are going to claim that people are entitled only to those rights enumerated and no others." *The West Wing: The Short List* (NBC television broadcast Nov. 24, 1999).

[211] AMAR, *supra* note 175, at xii; Yoo, *supra* note 203, at 169–70.

[212] U.S. CONST. amend. X.

[213] MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 44 (1995); *see also* Printz v. United States, 521 U.S. 898, 919 (1997) ("Residual state sovereignty[,] . . . implicit . . . in the Constitution's conferral upon Congress of . . . only discrete, enumerated [powers] . . . was rendered express by the Tenth Amendment[] . . . ."); United States v. Butler, 297 U.S. 1, 68 (1936) ("To forestall any suggestion [that federal power was not limited to expressly granted powers], the Tenth Amendment was adopted.").

[214] New scholarship also suggests that federalism can empower minorities, rather than oppress them as it has in the past. *See generally* Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY: A J. OF IDEAS, Spring 2012, at 37.

[215] Yoo, *supra* note 203, at 149.

some reserved by the people.[216] In this tripartite division of powers, property law was one power left to the states.[217]

In modern times, the Tenth Amendment briefly became a tool to affirmatively restrict the federal government from encroaching on state sovereignty.[218] That usage was short-lived, and the Court settled back on a use of the Tenth Amendment as a structural safeguard vindicated through the political process.[219] But that brief usage of the Tenth Amendment as an affirmative safeguard, enforceable by the people against the federal government, shows how important the restriction is. And in the realm of property, where the Court has consistently maintained that property is the purview of the states,[220] the restriction is even more important. If property law is state law, and if the federal government has no business interfering where it has not been allowed to legislate, then the federal government has no power to interfere with a state's definition of property. As addressed in the next section, this is an issue that has never seriously been examined by the Supreme Court, but the original structure and the Tenth Amendment militate against extending the Takings Clause protection to court decisions.[221]

C. "Phantom Incorporation," Due Process, and the Fifth Amendment

The focus of the protection of rights began to change with the ratification of the Fourteenth Amendment.[222] That amendment "altered substantially the balance of federalism"[223] to the point where state constitutions, once the bulwark of a citizen's life, now have been rendered nearly irrelevant in many states.[224] As Justice Powell explained,

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[216] *See* AMAR, *supra* note 175, at 121.

[217] *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977); Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring).

[218] *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 842 (1976).

[219] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985). *But see* New York v. United States, 505 U.S. 144, 188 (1992) (holding under the Tenth Amendment that the federal government "may not compel the States to enact or administer a federal regulatory program").

[220] *See* United States v. Craft, 535 U.S. 274, 278 (2002) (reiterating that state law defined property rights in the context of determining federal tax liability on that property); Drye v. United States, 528 U.S. 49, 58 (1999) (state law defines property for federal tax purposes); *Corvallis Sand & Gravel Co.*, 429 U.S. at 378.

[221] Indeed, it advocates against *any* kind of federal takings doctrine applied to the states. But, since the federal just-compensation requirement is not going to just go away, that original intent counsels caution about extending the takings doctrine to the courts, given how far removed the judicial takings theory is from the original intent of the protection.

[222] AMAR, *supra* note 175, at xiii.

[223] Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring).

[224] *See* Charles G. Douglas III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1140 (1978) (discussing the "federalization" of rights).

"it strains credulity to believe that [the Fourteenth Amendment] w[as] intended to deprive the States of all freedom to experiment with variations . . . ."[225] He believed that, in the context of criminal procedure, states should be free from national restraints in order to experiment with new procedures that may be proven effective:

> In an age in which empirical study is increasingly relied upon as a foundation for decisionmaking, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this country, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused.[226]

The same holds true in the context of property.[227] Property law is generally state law,[228] so when a uniform federal takings doctrine restricts the ability of a state to "experiment" with its property law, especially that learned through experience, it freezes that law. Instead of 50 laboratories

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[225] *Johnson*, 406 U.S. at 376.

[226] *Id.* (footnote omitted).

[227] Justice Alito noted in *McDonald* that Justice Powell's deciding opinion in *Johnson/Apodaca* is the lone outlier amongst all the cases that apply rights contained within the Bill of Rights against the states identically as against the federal government. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.14 (2010). But Justice Powell's concurrence gains heft when considered in the takings context: some evidence suggests that Congress explicitly rejected enforcing a Takings Clause analogue against the states. *See* Alan T. Ackerman, *The Interplay Between the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's Takings Clause: Is the Supreme Court's Test for "Public Use" Merely Rational Basis?*, *in* A.L.I.-A.B.A. COURSE OF STUDY: EMINENT DOMAIN AND LAND VALUATION LITIGATION *209, *216 (2011), *available* at Westlaw, SS035 ALI-ABA 209 (citing Davidson v. New Orleans, 96 U.S. 97, 105 (1878)). Indeed, Professor Mark Rosen has suggested that some constitutional principles are appropriate to "tailor" to the level of government involved. *See* Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005). Given the differences between municipal, state, and federal governments, constitutional rules applied to one may be ill-fitting when applied to another, and therefore tailoring could better allow each level of government the freedom to meet the practicalities of a given situation.

[228] Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977). That case also specified the exception to that general principle: when "some other principle of federal law requires a different result," federal law controls. *Id.*; *see* Hughes v. Washington, 389 U.S. 290, 291 (1967) (holding that federal property law controlled the extent of Hughes's title).

moving down different paths, the nation is left with 50 idle states, unable to move forward *or* backward.[229]

Unlike in so many other areas of Fourteenth Amendment incorporation jurisprudence, there has been no extended discussion concerning the incorporation of the Takings Clause. In *Penn Central*, the Court stated that the Fifth Amendment had been incorporated against the states in *Chicago B & Q*, a case from 1897.[230] Yet unlike in later cases, most recently *McDonald v. City of Chicago*, in neither *Penn Central* nor *Chicago B & Q* had the Court "engage[d] in the sort of Fourteenth Amendment inquiry required by [its] later cases."[231] It did not determine whether the compensation requirement was "fundamental to our scheme of ordered liberty and system of justice."[232] If it had, it may have discovered that the right protected only takings of real property by legislatures,[233] rather than regulatory takings or judicial takings.

The absence of an informed argument over the incorporation of the Takings Clause makes it hard to determine exactly what right individuals have against their states. A textualist would say that the right is what it says: no "property [shall] be taken for public use, without just compensation."[234] Because there is no textual limitation concerning who can take, any branch of government can take property. But an originalist would have a different interpretation: because the original intent of the Takings Clause was to prevent Congress from taking real property and chattels,[235] that is the extent of the right. And an originalist may also note that the power of eminent domain, as indicated by Justice Holmes, had always been qualified to allow states to forego compensation for valid exercises of the police power even when the result was a decrease in the

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[229] This can have very real effects on peoples' lives (and not just for the property owners). Consider that in Oregon, the land along the coast from the high tide line to the vegetation line is considered subject to a public access easement under the doctrine of custom. *See* State *ex rel.* Thornton v. Hay, 462 P.2d 671, 672–73 (Or. 1969). In other states, much of that same land may be privately owned, and the public excluded. *See, e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869, 1873 (2000) ("At one extreme are states, such as Connecticut, where privately-owned dry sand beaches are not open to public use."). Access to that resource varies widely in those states, while in Oregon a person driving down Route 101 can readily find a pullout and a path to the beach.

[230] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897), for the proposition that the Fourteenth Amendment incorporates the Takings Clause of the Fifth Amendment against the states).

[231] McDonald v. City of Chicago, 130 S. Ct. 3020, 3031 (first alteration in original) (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008)) (internal quotation marks omitted).

[232] *Id.* at 3034 (emphasis omitted) (citing Duncan v. Louisiana, 391 U.S. 145, 149 & n.14 (1968)).

[233] *See supra* Part IV.A.

[234] U.S. CONST. amend. V.

[235] *See supra* Part IV.A.2; s*ee also* Treanor, *supra* note 1, at 797.

value of the affected property.[236] Because there has been no reasoned discussion by the Supreme Court, there is no consensus on what "fundamental right" applies to the states. As a result, there is only one line of doctrine for both Fifth and Fourteenth Amendment takings, without a determination as to whether there should be.

That was not always so; as Professor Karkainnen argues persuasively in his article, *The Police Power Revisited*,[237] the Court has "muddled" two separate lines of takings jurisprudence together: substantive due process cases involving state regulation, decided under the Fourteenth Amendment, and Fifth Amendment cases involving takings of property by the federal government.[238] By conflating these two lines of cases, the Court has "eviscerated the states' police power defense" in regulatory takings cases.[239] In doing so, the Court "diminished the role of state property law in defining the content and limits of property entitlements against which a 'taking' would be measured"[240] and left claimants (and state defendants) with "no principled way to determine the baseline of property rights"[241] from which to determine whether a taking has occurred. This has profound implications for any potential judicial takings doctrine because courts have always been subject to the limits of due process, but the Takings Clause has not constrained them.

Before the late twentieth century, the notion that the police power provided a defense to some claims—here, that some exercises of government power that alter property rights were legitimate exercises of the state's power to ensure the common good[242]—was well-established.[243]

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[236] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see also infra* notes 247–49 (discussing *Pennsylvania Coal Co. v. Mahon* and the police power defense).

[237] Karkkainen, *supra* note 1.

[238] *Id.* at 831. Professor Stoebuck also differentiates between taking under eminent domain and objectionable exercises of the police power, the latter being not takings as such but violations of due process. Stoebuck, *supra* note 127, at 571.

[239] Karkkainen, *supra* note 1, at 831. This police-power defense is, to a certain extent, available to the federal government as well. *See* Champion v. Ames (*The Lottery Case*), 188 U.S. 321, 356 (1903) ("[T]he power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution."); *In re* Debs, 158 U.S. 564, 599 (1895) ("[W]hile [the federal government] is a government of enumerated powers, it has within [those] powers all the attributes of sovereignty . . . .").

[240] Karkkainen, *supra* note 1, at 831.

[241] *Id.*

[242] *See, e.g.*, New Orleans Pub. Serv., Inc. v. City of New Orleans, 281 U.S. 682, 687 (1930) ("It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law.") (citing Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 251 (1897)).

[243] Karkkainen, *supra* note 1, at 874; *see also* Mugler v. Kansas, 123 U.S. 623, 669 (1887) (stating that legislation that restricts the use of property does not violate the Fourteenth Amendment "unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police

Only when the government went too far did it exceed that boundary because "there is a limit to the valid exercise of the police power by [a] State."[244] Notably, this concept is not limited to "takings" cases: *Lochner* dealt with employment conditions in a bakery.[245] Thus, when a claimant believed that a state law unfairly deprived him of property, the state could respond that it was exercising its police power and thus did not violate the Fourteenth Amendment.

In *Pennsylvania Coal v. Mahon*, a "conventional substantive due process case" rather than a takings case,[246] Justice Holmes made explicit the connection between the police power and eminent domain: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[247] The police power "qualified" the "seemingly absolute" right to compensation for deprivations of property;[248] it was a matter of degree just how far a regulation had to go before it would be considered as an exercise of the state's power of eminent domain.[249] Put simply, an action that was not considered an exercise of the police power could be a valid exercise of the eminent domain power, subject to a compensation requirement. Drawing that line is a due process issue.[250]

In contrast, the Fifth Amendment protected individuals' property, defined by state law, from being taken by the federal government.[251] As noted above, this clause was probably understood at the time of its enactment to ensure that the common-law rules of eminent domain—a power only exercised by a legislature over real property in exchange for compensation—would extend to Congress.[252] As such, its purpose was

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regulation, to deprive the owner of his liberty and property, without due process of law").

[244] Lochner v. New York, 198 U.S. 45, 56 (1905); *see also Mugler*, 123 U.S. at 661 ("There are, of necessity, limits beyond which legislation cannot rightfully go.").

[245] *See Lochner*, 198 U.S. at 53. Many other cases dealing in substantive due process have nothing to do with property. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding a Texas law criminalizing sodomy to violate substantive due process); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding an Oregon law compelling parents to send their children to public school to violate substantive due process).

[246] Karkkainen, *supra* note 1, at 866.

[247] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[248] *Id.*

[249] *See id.* at 413 ("[S]ome values are enjoyed under an implied limitation and must yield to the police power[, but when] the extent of the diminution . . . reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."); *see also* Karkkainen, *supra* note 1, at 867.

[250] *See* Karkkainen, *supra* note 1, at 898 ("[T]he [due process] analysis center[s] on the extent of the claimant's legitimate property entitlements in light of the state's reserved power to regulate.").

[251] *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247–48 (1833).

[252] *See supra* Part IV.A.

fairly narrow: to protect the landed class from uncompensated seizures by the growing un-landed majority that could exercise power through a distant central government.[253] But most importantly, unlike in the due process context where the police power was an inherent limitation on property rights, "federal regulations were *not* understood to operate as an inherent limitation on property rights,"[254] and so could amount to a taking *even if* the exercise of federal power was legitimate.[255] The federal government simply did not have the reserved police power that the state did in regards to that state's property law.

With the merger of those two lines of cases in *Penn Central*, the Court essentially eliminated the police power defense,[256] while retaining a pale semblance of it in the *Penn Central* prong for "legitimate state action," which itself only applies when the taking is not total.[257] This retention reflects some amount of deference to a state's ability to exercise its sovereign police power, but not as much as was available even under the due process analysis. In short, it is the Fifth Amendment that is unduly constraining state governments, not the Fourteenth.

Furthermore, though the purpose of the Fourteenth Amendment can be stated broadly as "protecting minorities against . . . majoritarian government,"[258] there is substantial disagreement about what that means: was the Fourteenth Amendment meant to incorporate all of the rights in the Bill of Rights against the states, or only some?[259] This disagreement over the original intent of the Fourteenth Amendment has characterized the scholarship and cases on the subject.[260] At this point, it is difficult, if not impossible, to know what the Amendment's framers intended. It is

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[253] Karkkainen, *supra* note 1, at 845; Treanor, *supra* note 1, at 848–51.

[254] Karkkainen, *supra* note 1, at 859 (emphasis added). The federal government has power *approaching* a police power, but Congress remains restricted to legislating within its enumerated powers. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.").

[255] Karkkainen, *supra* note 1, at 859.

[256] *Id.* at 875–78.

[257] *See infra* Part IV.D.2.

[258] AMAR, *supra* note 175, at 215.

[259] *See* Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1054 (2000) (describing this disagreement as "the most durable and ceaselessly provocative controversy in American constitutional law"). This disagreement extends to the Supreme Court, though it has settled on the practice of "selective incorporation," incorporating rights one at a time. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–36 (2010).

[260] *Compare, e.g.*, AMAR, *supra* note 175, at xiv (arguing that the Fourteenth Amendment incorporated the entire Bill of Rights), *with, e.g.*, RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) (arguing that the Fourteenth Amendment incorporated none of the Bill of Rights).

also immaterial: the Fourteenth Amendment has effectively "federalized" rights law in the United States.[261]

But its framers may not have intended that result in regards to eminent domain law. During the drafting process, the Judiciary Committee proposed and rejected an amendment that paralleled the language of the Fifth Amendment Takings Clause.[262] This could indicate, as Berger writes, that "blanket adoption of the first eight Amendments" is at odds with the intent of the Fourteenth Amendment's drafters.[263] But it could also mean that those same drafters believed that it was unnecessary to include such language because it was inherent in the Amendment itself.[264] It truly is unclear, but decided as it was in the shadow of a line of cases holding that the Bill of Rights did not apply to the states,[265] it would be logical to look for a clear legislative statement to abrogate those decisions. Without such a clear statement, inferring that Congress meant to abrogate a consistently applied body of law seems to be one inference too many.[266]

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[261] Douglas, *supra* note 224, at 1140. Justice Douglas argued that this "federalization" led to a "rapid withering" of state constitutional decisions. *Id.* This is lamentable because principles of federalism allow state courts to insulate their decisions from U.S. Supreme Court review by creating their own law to apply to situations. *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural." (citations omitted)). For example, in Oregon, search and seizure law is governed almost exclusively by state constitutional rules; the Fourth Amendment is almost entirely absent. *See* Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 OR. L. REV. 819, 851 (2008) (describing how the Oregon Supreme Court has "declared not only the independence of the Oregon Constitution, but also its primacy" and how "[r]esort to the state constitution . . . became common, especially in search and seizure cases.").

[262] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 162 (2d ed. 1997) (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 42 (1962)).

[263] *Id.*

[264] *See* Wildenthal, *supra* note 259, at 1071 (noting that John Bingham and the Republican proponents of the Fourteenth Amendment believed that "the original Bill of Rights already applied directly to the states, and hence that *Barron v. Baltimore* was wrongly decided" (footnote omitted)).

[265] *See, e.g.*, Spies v. Illinois, 123 U.S. 131, 166 (1887) (holding that the Bill of Rights operated only on the federal government); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176–77 (1872) (same); Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment operated only on the federal government).

[266] Although, maybe it is inappropriate to expect the drafters of the Fourteenth Amendment to have spoken in clear and specific terms; theirs was an age of soaring rhetoric, after all. The civil rights laws and the Sherman Act are two examples from that era of laws written in a general manner that were likely intended to be given broad application by the courts.

This confusion[267] cautions against stretching the Takings Clause even farther in an arena where the Court has assumed that the Takings Clause has independent validity.[268] Without reasoned debate about how the right to compensation applies against the states, the nature of that right vis-à-vis the states is unclear. This counsels against most applications of federal takings law to state law inverse condemnation, but especially against extending the protection even farther to encompass judicial takings. A state's common law of property is arrived at in a fundamentally different way than its regulatory law.[269] Common-law courts are fundamentally pragmatic; they are not "super-legislature[s],"[270] much as they may be derided as such.[271] Courts decide law based on facts;[272] hence the expression "bad facts make bad law."[273] Crafting legal rules in response to the facts of a case makes for a very different experience than a legislature promulgating positive law.

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[267] I do not dispute that this disagreement is entirely academic. Most of the rights in the Bill of Rights may currently be applied against the states, and no smoking gun discovery is going to change that. The disagreement is useful, however, when considering the propriety of extending a doctrine into uncharted territory.

[268] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (The Fifth Amendment "of course is made applicable to the States through the Fourteenth Amendment.") (citing Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 238–39 (1897)).

[269] *See* HOLMES, JR., *supra* note 206, at 1 ("The life of the law has not been logic: it has been experience.").

[270] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 843 n.1 (1987) (Brennan, J., dissenting) (quoting Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 423 (1952)); Glen Erickson, Letter to the Editor, *Federal Courts Must Be Reined In*, HJNEWS.COM (Nov. 11, 2011, 12:15 AM), http://news.hjnews.com/opinion/article_de119b9a-0bf0-11e1-912a-001cc4c03286.html. *See generally* Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

[271] They often receive this treatment from both sides of the political spectrum, depending on whether the critic agrees with the outcome or not. *Compare* Dahlia Lithwick, *Activist Judges? What's in a Name?*, SEATTLEPI.COM (Aug. 17, 2004, 10:00 PM), http://www.seattlepi.com/local/opinion/article/Activist-judges-What-s-in-a-name-1151894.php (deriding conservative activist judges), *with* Thomas L. Jipping, *Disorder in the Court: Activist Judges Threaten Justice*, LAW ENFORCEMENT ALLIANCE OF AM., http://www.leaa.org/Shield%202000/activistjudge.html (deriding liberal activist judges).

[272] *See, e.g.*, U.S. CONST. art. III, § 2 (case-or-controversy requirement for federal courts).

[273] Former Justice David Brewer put it slightly differently: "hard cases make bad precedents." D. J. BREWER, PROTECTION TO PRIVATE PROPERTY FROM PUBLIC ATTACK 16 (New Haven, Conn, Hoggson & Robinson 1891). The *Lucas* case may be a good example of this. The trial court made a factual finding that the regulation at issue had rendered Lucas's properties "valueless." Petition for Writ of Certiorari at App. 37, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (No. 91-453). Findings of fact are binding on appeal, if unchallenged or if supported by evidence. Thus, if not for that finding, the case may have come out very differently: the Fifth Amendment may have mandated a "5%" rule rather than a "total loss" rule, or the Court may have rejected a *per se* rule completely.

Due process is a more reasoned course in that situation because its limitation involves no "incorporation"; it is independently effective. Furthermore, due process recognizes, in the police power, states' ability to provide for the "welfare of society."[274] In the context of common-law rules, like property, that is a job for courts.

D. The Structural Approach in Takings Jurisprudence: A Brief Outline

Though the Court has muddled together due process and takings protections for property, the hybrid doctrine that has emerged has some vestiges of each in it. I concede that it is probably too late to have these constitutional analyses disaggregated from each other and applied properly as separate protections. Because of that, this Part examines the Supreme Court's takings jurisprudence to explain how it balances the structural factors discussed above (the original meaning of takings protections, structural federalism, and the Fourteenth Amendment's effect on those protections). In regards to takings, the structural approach shows that the very muddle decried by commentators is nothing less than the outcome of our federal system and its bifurcated system of sovereignty.

In these subparts, I will briefly outline the takings tests in the context of physical takings and regulatory takings and show how they accommodate each of the factors mentioned above.[275]

1. Physical Appropriation

As noted above, common law had long recognized a requirement of compensation when government exercised its eminent domain power.[276] The Takings Clause constitutionalized this requirement.[277] In the case of a physical appropriation, there is little room for structural federalism or the Fourteenth Amendment to have much effect: the outcome has been so clear for so long. But even considering that history, state sovereign interests could have allowed for *de minimis* appropriations of some physical property. When a state has a considerable need for a very small amount of an individual's property, his individual right to that property could surely be outweighed by the state's interest; federalism could have allowed states that much under the police power. The Supreme Court has not so held, though.

Loretto confirmed that any "permanent physical occupation . . . authorized by government" effects a taking under the Fifth and

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[274] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

[275] Other kinds of takings are not considered here because of judicial takings' strong resemblance to regulatory takings. It is unlikely that a court would condition a discretionary benefit on an owner giving up property, *see, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994), or would create a nuisance that interfered with an owner's enjoyment of his property, *see* United States v. Causby, 328 U.S. 256 (1946).

[276] *See supra* Part IV.A.1.

[277] *See supra* Part IV.A.2.

Fourteenth Amendments.[278] Such an action was a taking "without regard to the public interests that it may serve."[279] In *Loretto*, New York law provided that a landlord could not interfere with a cable company's "installation of cable television facilities upon his property."[280] Teleprompter had installed cables and "two large silver boxes" prior to Loretto's purchase of the building.[281] After discovering them, Loretto brought suit alleging that the installation constituted a trespass and that she was owed compensation for a taking, notwithstanding the authorizing statute.[282] The Supreme Court agreed.[283]

The Court surveyed its case history and determined that "when the 'character of the government action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation" regardless of the public interest served.[284] The Court then discussed the issue of individual rights, saying that "appropriation is perhaps the most serious form of invasion of an owner's property interests."[285] When the government permanently occupies a person's property, it "does not simply take a . . . 'strand' from the 'bundle' of property rights: it chops right through the bundle, taking a slice of every strand."[286]

Looking at this case through the structural approach, original meaning controls the day. The state may have a substantial interest in restricting or curtailing some of the strands; the Court does discuss the state's "public interest" in authorizing the taking. And the Fourteenth Amendment's effect on the Takings Clause may be weak. But chopping through the whole bundle of rights *to any extent* is simply too invasive on a property owner's rights for the latter two factors to have any effect. Compensation for a physical appropriation is structurally sound because the individual's interest in compensation, reflected in the original understanding of the Takings Clause, so clearly outweighs the state's interest in its exercise of sovereign power and even outstrips the possibility that the Takings Clause was not meant to be incorporated.

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[278] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). Of course, *Loretto* is not a pure physical-appropriation case, in that the state action involved was the regulation that allowed a private party to physically appropriate Loretto's property. *Id.* at 421–24. But, even so, it serves as a good vehicle to discuss physical appropriation.

[279] *Id.* at 426.

[280] *Id.* at 423 n.3 (quoting N.Y. EXEC. LAW § 828 (McKinney 1981)).

[281] *Id.* at 422.

[282] *Id.* at 424.

[283] *Id.* at 421.

[284] *Id.* at 434–35 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[285] *Id.* at 435.

[286] *Id.*

2. Regulatory Takings

Oliver Wendell Holmes's famous quote that a regulation that goes "too far" requires compensation[287] is a fantastically insufficient test for determining when a regulatory taking has occurred;[288] but it is an accurate statement of what one is. A regulation that goes too far impinges on an individual's property rights out of proportion to the state's sovereign interest in imposing the regulation. When a court finds a "taking" under such a circumstance, it makes a judgment that the state has gone far enough to step beyond the permissible application of its sovereign interest to trigger the Takings Clause protection. "Too far," under the structural approach, is thus the point at which federal intervention to protect individual property rights at the expense of state interests becomes warranted.

The Court in *Penn Central* gave birth to the "ad hoc" inquiry that is applied to almost all regulatory takings.[289] That inquiry balances the protection of individual property rights against state interests. The Court listed several factors: the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,"[290] "the character of the governmental action,"[291] whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose,"[292] and whether the regulation provides reciprocity of advantage.[293] These factors—which have been described as containing components of substantive due process[294]—reflect the structural issues that are most concerning in the judicial takings theory.

The first factor is used as a proxy for an individual's rights in his property. The Court does not explicitly state this, but an "adverse economic impact" is assumed to be some restriction on a claimant's use of property. But instead of delving into the realm of state property law to determine whether an interest has been taken or restricted, resulting in

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[287] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[288] Hence the muddle that has resulted from trying to interpret Holmes's phrase. Notably, the Court has stated, in the context of criminal sentencing, that "[w]ith *too far* as the yardstick, it is always possible to disagree with [trial court sentencing] judgments and never to refute them." Blakely v. Washington, 542 U.S. 296, 308 (2004) (majority opinion by Scalia, J.). So too with determinations of when a taking occurs; one person's *too far* is another's *not far enough*.

[289] *Penn Cent. Transp. Co.*, 438 U.S. at 124.

[290] *Id.*

[291] *Id.*

[292] *Id.* at 127.

[293] *See id.* at 133–35; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488–92 (1987) (explaining that reciprocity of advantage reflects a concern that individuals not be made to shoulder burdens when the benefit accrues to the public as a whole).

[294] *See* Karkkainen, *supra* note 1, at 877–78.

an adverse economic impact, the Court uses this proxy, assuming that a claimant is entitled to capture full market value.[295]

The remaining three factors represent the interests I have laid out above. As the character of the state action approaches physical appropriation, it implicates the original understanding of eminent domain more and more, and so may be regulated as such. Though the Court has great respect for state sovereignty,[296] and a state has great leeway to regulate under its police power, that power hits a limit when the originally understood power of eminent domain is exercised. Thus, if the character of the action moves too far in the direction of "physical invasion by government," then there could be an exercise of power equivalent to eminent domain.[297]

The "public purpose" factor requires deference to state actions that are for legitimate purposes, and not merely for convenience. Federalism respects states' rights to regulate in their citizens' interest. But if no substantial public purpose is effectuated by the regulation, then the action may be beyond the bounds of the police power.[298] And at that point, federalism has no persuasive force.[299]

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[295] *See id.* at 890.

[296] *See* Younger v. Harris, 401 U.S. 37, 44 (1971) ("What the concept [of 'Our Federalism'] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

[297] *Penn Cent. Transp. Co.*, 438 U.S. at 124; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[298] *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 490 (a valid exercise of the state's police power does not require compensation). In the context of physical takings, the Court generally allows a state legislature to determine what actions satisfy the requirement, "affording legislatures broad latitude in determining what public needs justify the use of the takings power." Kelo v. City of New London, 545 U.S. 469, 480–83 (2005). Justice Kennedy, concurring in *Kelo*, observed that the deference given to legislative actions in the public purpose sphere was consonant with a substantive due process analysis. *See id.* at 490 (Kennedy, J., concurring) ("This Court has declared that a taking should be upheld as consistent with the Public Use Clause as long as it is 'rationally related to a conceivable public purpose.' This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses." (citations omitted) (quoting Haw. Hous. Auth. V. Midkiff, 467 U.S. 229, 241 (1984))).

[299] *See* Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("Federalism . . . has no inherent normative value: It does not . . . blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."). When it is unclear how much power citizens have taken from states and given to the federal government, Justice Blackmun's admonition against "blindly protect[ing] the interests of States" loses some of its force, as prudence cautions against assuming too much transfer of power. The federal need to enforce individual rights is lessened when the state already has means for protecting individuals' rights.

"Reciprocity of advantage," with its undertones of avoiding arbitrary discrimination, reflects Fourteenth Amendment concerns. The federal constitution gains more authority to impose its own standards when the action is discriminatory. It represents a pure form of why the federal government may intervene in a state's business at the heart of the Fourteenth Amendment. The greater the reciprocity of advantage, i.e., the more the public as a whole is burdened or benefited by this regulation, then the more the regulation can be construed as a valid exercise of the police power. When there is little reciprocity, there is a greater chance that the regulation is meant to target a minority group and be a tool for the majority to oppress,[300] rather than a legitimate exercise of power. Though this is generally an equal protection issue,[301] the factor exists here to validate the exercise of the police power. Thus, the ad hoc inquiry in *Penn Central* allows a court to balance the structural interests separately in each case that comes before it.

In contrast, the test in *Lucas*, the other major test-setting case for regulatory takings, assumes the balance of interests is dictated, as in *Loretto*, by the fact that the state action is equivalent to an original-meaning taking. The Court held that "where regulation denies *all economically beneficial or productive use* of land," there is a taking.[302] This, like permanent physical invasions, is another situation for "categorical treatment."[303] And, much like in *Loretto*, the interests skew heavily in favor of the individual and against the state. Insofar as total deprivation of normal economic value is akin to "chop[ping] through the bundle" of rights,[304] this situation is no different from a physical invasion.[305] There is

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[300] *See Penn Cent. Transp. Co.*, 438 U.S. at 147 (Rehnquist, J., dissenting) ("[A] multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other 'landmarks' in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed.").

[301] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (holding that an amendment to the Colorado constitution forbidding anti-discrimination legislation on behalf of homosexuals violated the Equal Protection Clause).

[302] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (emphasis added).

[303] *Id.*

[304] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). Indeed, it is probably more akin to burning the bundle.

[305] This assumes, of course, that economic value is a good proxy for property rights. There is disagreement on that point. *See* Karkkainen, *supra* note 1, at 890; *see also* Jeffrey D. Jones, *The Public's Interest in "Private" Employment Relations*, 16 LEWIS & CLARK L. REV. 657, 672 (2012) (noting the constitutional implications of defining economic value as private property when that value is defined to "suggest a point in the process of private activity where a titleholder fully and rightfully expects to absorb all losses and so also to succeed to all gains related to the risks of an enterprise"). This economic conception of property may be part of what has confused takings jurisprudence over the years: "As the definition of property was expanded to include not only various uses of land, but also stable market values as well as expectations of

no room for federalism concerns or the Fourteenth Amendment to have any effect. The original meaning comes down to the present undiluted.

Tahoe-Sierra's "whole-parcel rule" reinforces this interplay of interests.[306] That case rejected the contention that property rights, which the court had already determined could not be conceptually severed when dealing with regulatory takings,[307] could not be temporally severed, and thus a temporary moratorium on use could not give rise to a total taking.[308] The embrace of the "whole parcel" concept reiterates that the exercise of eminent domain through regulation occurs when the bundle of rights is chopped through, not when the bundle is severed or individual rights partially curtailed. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking . . . ."[309] In the terms I am discussing, since it does not look like an original-meaning taking, the factors are not *per se* balanced and so must be weighed under *Penn Central*.

Palazollo v. Rhode Island[310] reflects the structural approach as well, by preventing the state from "resetting" the bundle of rights when a new person purchases it. There, the Court held that Palazollo's takings claim was not barred when he purchased his property *after* the enactment of the regulation alleged to cause the taking.[311] Though the State argued that the new owner took title with notice of the limitation, the Court rejected the State's absolute ability to "put so potent a Hobbesian stick

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future income from property, *virtually every governmental activity was rendered capable of being regarded as a taking*." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870–1960, at 15 (1992) (original emphasis omitted; current emphasis added). By calling value property for takings purposes, the evaluation of government regulation moved out of the due process realm (where it belonged) and into the takings realm, a jurisprudential structure unable to support it.

[306] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002) (temporal restrictions on use are analyzed in the context of the entire time of ownership).

[307] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987) ("[O]ur takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights" such as the support estate in Pennsylvania law.); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'").

[308] *Tahoe-Sierra Pres. Council*, 535 U.S. at 331, 342.

[309] *Allard*, 444 U.S. at 65–66.

[310] 533 U.S. 606 (2001).

[311] *Id.* at 629–30.

into the Lockean bundle."[312] The Court could not allow a state "to put an expiration date on the Takings Clause."[313] Such a power would be far too deferential to a state's ability to define and enforce property rules.[314]

But the Court did not reject the possibility of considering how notice of the regulation affected the buyer's reasonable investment backed expectations in a *Penn Central* analysis.[315] That would continue to allow the proper balancing of factors that would vindicate either property rights or state sovereignty.

Though the cases discussed above cover a range of situations, the touchstone for all of them remains the same: if a regulation goes "too far" it becomes a taking.[316] And "too far" can be determined by a consideration of the structural factors at work in our federal system of government.

V. THE STRUCTURAL APPROACH IN JUDICIAL TAKINGS

A. The Added Dimension to Judicial Takings: Common-Law Courts Are Not Legislatures

There is an added element when considering the structural implications of judicial takings: common-law courts. Courts are not legislatures; they operate differently and have different powers. The common law of property has evolved over the last several hundred years into a body of law that defines property.[317] Though the legislature can and does redefine property, the great majority of takings cases deal not with wholesale redefinitions of property, but with restrictions on existing property. Common-law courts *define* an individual's property rights. The legislature restricts those rights, or at least tends to.

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[312] *Id.* at 627.

[313] *Id.*

[314] *Palazollo* can be criticized on that ground because it allows a person to buy a valueless property and reap a windfall by bringing a takings claim. But the windfall does not occur because the subsequent owner brings a takings claim; the windfall occurs because the original owner sold at a loss by failing to value the likely success of a takings claim. The rule of *Palazzolo* preserves the right to challenge a regulation as a taking in court, whoever happens to own it when the claim is brought. But once the claim is brought, the taking is either completed by compensation or found never to have occurred in the first place. The rule prevents the government from regulating those who cannot fight back and allowing the subsequent buyers to reap windfalls because the original owners did not have the resources to fight. The state's sovereignty is not challenged; only an avenue to exploitation is removed.

[315] *Id.* at 633 (O'Connor, J., concurring).

[316] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[317] Property is not the stuff owned by an individual. In a legal sense, property consists of the rights bestowed by society upon an individual in relation to a certain physical object or location. *See* United States v. Craft, 535 U.S. 274, 278 (2002). What often is forgotten is that society, through law, creates property. And society can take it away.

Professor Thompson, in his famous article on judicial takings, dismisses the concern that courts are fundamentally different from legislatures.[318] But this ignores the fact that the common law develops differently from statutory law and that the differences in that development lead to different outcomes.

1. Common Law and Positive Law

The common law, including the common law of property, is very different from the positive law enacted by statutes and regulations. It is fluid and changing, a determined process of "enlightened gradualism."[319] The common law "is the creation of law by the inductive process."[320] "All of our laws change over time, property laws included. . . . Property is an evolving institution."[321] Indeed, the common law itself is an evolving institution. "[C]ommon law rules are not completely certain. The institutional principles of adjudication make the content of the law depend in part on moral norms, policies, and experiential propositions that have a requisite degree of support."[322] It is impossible at any one moment to fix what the common law will be in the future; it is only possible to say what it is now.[323] Judges "mould the law to suit not the dry bones of the past, but the living flesh and blood of their time."[324] In contrast, statutes look to the future to establish rules governing future behavior. The "fundamental difference" is between the common law's "conceptual system" and statute law's "textual system."[325]

This difference renders the common law fungible in comparison to statutory law. Sheer rigidity and adherence to precedent are not controlling[326] because the "final cause of law is the welfare of society";[327] in more modern terms, that goal can be described as the "reconciliation of the public welfare with private rights."[328] "[W]hen a rule, after it has been

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[318] *See* Thompson, *supra* note 11, at 1498–1512.

[319] M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 557 (1996).

[320] Arthur L. Corbin, *What Is the Common Law?*, 3 AM. L. SCH. REV. 73, 75 (1912). This contrasts with the *deductive* process of creating statutory law.

[321] Eric T. Freyfogle, *What Is Land? A Broad Look at Private Rights and Public Power*, PLAN. & ENVTL. L., June 2006, at 3, 6.

[322] MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 157 (1988).

[323] *Id.* at 154 (The common law "consists of the rules that would be generated at the present moment by application of the institutional principles of adjudication.").

[324] Corbin, *supra* note 320, at 75.

[325] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 247 (1990); *see also* Madden, *supra* note 319, at 561.

[326] *See* CARDOZO, *supra* note 274, at 44–45 (discussing the example of "the rule which permits recovery with compensation for defects in cases of substantial, though incomplete performance"). That concept may mean different things to different parties, but "as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped." *Id.* at 35.

[327] *Id.* at 66.

[328] Madden, *supra* note 319, at 575.

duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment."[329] "The rule that misses its aim cannot permanently justify its existence."[330] Because of those considerations, common law rules change with the circumstances.[331]

Very few common law rules "are completely certain."[332] "[C]ertainty generally is [an] illusion,"[333] and so "[c]ourts do not regard the common law as consisting only of those legal rules that are completely certain, any more than scientists regard the rules of nature as consisting only of those scientific rules that are completely certain."[334] Uncertainty is integral to the common law. It has allowed the common law to adapt as society has changed over the last 800 years.[335]

That uncertainty is a necessary part of the common law. "The Supreme Court has long recognized that common law courts have the power, without triggering the Takings Clause, to modify legal rules over time 'in light of changed circumstances, increased knowledge, and general logic and experience.'"[336] Considering that uncertainty, uncertain legal rules are still "consistent with reliable planning, because with few exceptions reliable planning does not depend on certainty, but on a reasonable degree of likelihood and the capacity to estimate probability."[337] An individual who buys a parcel of land along the Florida shore may be just as likely to lose his accreted land because of a hurricane as because of the opinion of the Florida Supreme Court. It is impossible for the common law to be certain.

It is also possible that the common law—based as it is on principles, rather than rules—promotes greater justice than statute law *because* of its uncertainty. Statute law is a collection of rules; therefore, it necessarily contains gaps. Those gaps are exploitable, and given the current trend towards narrow interpretation of statutes, they are not closed by interpretation. This leads to gamesmanship in a morally uncertain area, because, though there may be a guiding principle to statute law, there is no room for it to be "read in" to the statute. This is not a fault or flaw, but it is the nature of statutes. The common law avoids this amoral gamesmanship by giving itself fungibility. When law is guided by principle rather than by rules, any person who goes before a court will

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[329] CARDOZO, *supra* note 274, at 150.

[330] *Id.* at 66.

[331] Madden, *supra* note 319, at 590 & n.165.

[332] EISENBERG, *supra* note 322, at 157.

[333] O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

[334] EISENBERG, *supra* note 322, at 157.

[335] Madden, *supra* note 319, at 556.

[336] John D. Echeverria, Stop the Beach Renourishment*: Why the Judiciary is Different*, 35 VT. L. REV. 475, 480 (2010) (quoting Rogers v. Tennessee, 532 U.S. 451, 464 (2001)).

[337] EISENBERG, *supra* note 322, at 158.

know that if she has acted in a moral way, in adherence to the principle of the law rather than the letter, she may be spared. When the same person goes before a court where a statute either applies or does not by its letter, then it either applies or does not. The principle guiding that statute is irrelevant.[338] By constraining the ability of courts to define property law in a way that promotes justice among citizens, judicial takings ignore one of the foundations of common law: principled decision-making.

Furthermore, the Supreme Court has stated that a person has no property right in a rule of common law.[339] This squares with the notion that the common law is fundamentally uncertain. In that context (a legislature abrogating a rule of common law), "the law itself . . . may be changed at the will . . . of the legislature," though property rights may only be taken away by due process of law.[340] This establishes that there can be no right to common-law rules. The law itself is distinct from the rights it grants; one cannot hold a right in the law itself. Thus, a doctrine that freezes the progress of the common law and allows for no change to the rules is anathema to the common law.[341] The doctrine of judicial takings proposed by Justice Scalia would do exactly that.

Some commentators have complained that state definitions of property subjects owners in different states to "different" takings clauses,[342] but this problem is only a reflection of "Our Federalism."[343] Many laws vary depending on one's address,[344] including the common law.[345] The Takings Clause protects property owners from takings of their property.[346] Though in the Founders' time, property law may have been more constant from state to state, it was still declared by the courts of the states, not the federal government.[347] The Takings Clause did not change that.[348]

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[338] This is most obvious in examples of tax-avoidance.

[339] Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 88 n.32 (1978) (quoting Second Employers' Liability Cases, 223 U.S. 1, 50 (1912)).

[340] *Second Emp'rs*, 223 U.S. at 50 (second omission in original) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[341] It is also anathema to *positive* law: "Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation shall be, every generation must work out for itself." CARDOZO, *supra* note 274, at 87.

[342] *See, e.g.*, Samuel C. Kaplan, *"Grab Bag of Principles" or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 503 (1998).

[343] Younger v. Harris, 401 U.S. 37, 44 (1971).

[344] Even federal constitutional law varies depending on one's address. Material is obscene only if it is considered "patently offensive" by "contemporary community standards." Miller v. California, 413 U.S. 15, 36–37 (1973). There is a healthy dose of respect for federalism in this application.

[345] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[346] U.S. CONST. amend. V (stating "nor shall private property be taken").

[347] *See* FRIEDMAN, *supra* note 3, at 237–38.

[348] *See supra* Part IV.A.2.

2. Separation of Powers: Courts Are Not Legislatures

When England was first united, the King held all the powers of government.[349] In the first Magna Carta (King John's 1215 charter), there was a provision that provided for a review mechanism, a body of 25 barons to review actions of the King that were alleged to be contrary to the charter.[350] Though this provision did not make it into what is now seen as the "definitive" Magna Carta, the one executed by King Henry II in 1225,[351] it provides a very early, possibly the first, example of the concept of checks and balances in our common-law history, which is now embodied in separation of powers.[352]

Montesquieu is famous for theorizing that sovereign power should be separated into three parts—legislative, executive, and judicial[353]—and that those powers should not be held by the same institution.[354] He stated that there would be no liberty when "the three powers are united."[355] Combining the powers resulted in a republic becoming a monarchy, and a monarchy a despotism, where the ruler's word was law, rather than being controlled by law.[356] When framing the federal constitution, the Founders sought to avoid this result by building the concept of separation of powers into the structure of the federal government.[357] But separation of powers is not a uniquely federal institution; states engage in it as well.

Early American state experience tended to embrace separated powers in name but reject it in fact. The Virginia Constitution of 1776,

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[349] "The first Angevin rulers . . . created the legal system . . . . Exceptional power in the hands of English rulers enabled them to operate centralized administrative machinery, and royal power, combined with administrative skill, moved in the direction of absolutism." HOGUE, *supra* note 3, at 33.

[350] MAGNA CARTA, ch. 61, *supra* note 128, at 125–26.

[351] *See* MAGNA CARTA (1225), *translated in* KATHERINE FISHER DREW, MAGNA CARTA 139 (2004).

[352] Though the government of the Roman Republic operated in a separated fashion for some time, with a senate, an assembly, and an executive (consuls), Roman ideas concerning law had limited influence on the early English common law and structure of government. *See* HOGUE, *supra* note 3, at 22–24. *See generally* ANDREW STEPHENSON, A HISTORY OF ROMAN LAW 96–119 (1912).

[353] MONTESQUIEU, *supra* note 155, bk. 11, ch. 6, at 156–57.

[354] *Id.* at 157.

[355] *Id.*

[356] *Id.*

[357] *See* U.S. CONST. arts. I, II, III (defining each branch of government). It has been observed that this theory has been imperfectly put into practice: "[T]he United States does not have the separation of powers, but rather separate institutions sharing powers." Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1101 (2004) (citing RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960)). The Supreme Court has helped the theory along by denying review of "political questions," instances where one branch of government has the absolute right to exercise a power free from interference by the judiciary, thus allowing for some true separation of powers. *See* Baker v. Carr, 369 U.S. 186 (1962).

for example, provided that "Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other."[358] But the constitution also provided that the Governor "be chosen annually, by joint ballot of both Houses," and that all judges be chosen similarly by "joint ballot" in both Houses.[359] Thomas Jefferson noted that, ultimately, "[a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body."[360] He advocated for a government "which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."[361] Without barriers dividing the powers, "concentrating these in the same hands is precisely the definition of despotic government."[362] Constitution-writing efforts over the next decade resulted in the governmental framework we now see as effectively separated powers,[363] embodied most prominently in the federal constitution. But many states explicitly separate the powers of government into different branches as well.[364]

This distribution of judicial and legislative power has a direct effect on how courts operate. Historically, when statutes (the work of the legislature) came into conflict with the common law (the work of the courts), courts interpreted the statute narrowly to restrict its impact beyond what was intended.[365] But, as states have created more statutory law, courts have begun generally to defer to the legislature to a greater extent.[366] But in areas where the legislature has not legislated,[367] or in areas of traditional court power,[368] courts have tended to retain their independence.

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[358] VA. CONST. ¶ 24 (1776).

[359] *Id.* ¶¶ 29, 35.

[360] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (London, 1787).

[361] *Id.*

[362] *Id.*

[363] *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1704–06 (2012).

[364] Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1553 & nn.42–46 (1997) (citing examples in eastern states' constitutions).

[365] *Id.* at 1556; *see also* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, app. C at 522 (1960) (setting out the derogation canon, and its counterpoint).

[366] Peters, *supra* note 364, at 1556.

[367] One such area, drawing an example cogent to this Note, is the Florida law of accretions and avulsions at issue in *Stop the Beach Renourishment*. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2611–14 (2010).

[368] Statutory interpretation itself is one such area. In Oregon, the interpretation of statutes was, for a time, a point of disagreement between the courts and the legislature. The Oregon Supreme Court had adopted a strict textual approach to statutory interpretation in *Portland General Electric Co. v. Bureau of Labor & Industries*

As Justice Marshall famously wrote, it is the work of courts to say "what the law is," through interpretation and creation, and not to rewrite the law midstream.[369] One of Parliament's powers was the right of eminent domain.[370] It was not a judicial power; it was not an executive power.[371] Thus, it was impossible for a court to take property because it defined property.[372] A judicial takings doctrine would encroach on the judiciary by ascribing to it a power that it does not possess.[373]

B. The Structural Approach in Judicial Takings

Having taken a structural approach to some of the Supreme Court's takings doctrine, this Note will begin to wrap up by doing the same for judicial takings. In the regulatory takings arena, individual rights often lose out to a state's ability to create positive-law rules that regulate land

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(*PGE*), 859 P.2d 1143 (Or. 1993). The legislature, displeased that the *PGE* method gave too little weight to evidence of legislative intent like hearings, committee reports, and debates, passed a law "intended to ease the unyielding . . . constraint that *PGE* appeared to have placed on the court's ability to even review and consider otherwise pertinent legislative history." State v. Gaines, 206 P.3d 1042, 1049 (Or. 2009); *see* OR. REV. STAT. § 174.020 (2011). The Court responded by narrowly interpreting *that* law to allow, but not require, a court to examine legislative history, reaffirming its responsibility for "fashioning rules of statutory interpretation." *Gaines*, 206 P.3d at 1050. This legislative–judicial tug-of-war demonstrates the issues inherent in separating powers, but also its strength. The Court's insistence on defining the method of interpretation was a way of preserving a crucial judicial function—statutory interpretation—from legislative interference.

[369] Marbury v Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[370] Stoebuck, *supra* note 127, at 566.

[371] Executive agencies can exercise the eminent domain power, but only when it has been delegated to them. *See, e.g.*, Kohl v. United States, 91 U.S. 367, 374–75 (1876) (act of Congress that gave Secretary of Treasury the right to purchase land gave him the power to acquire it by eminent domain); *cf., e.g.*, Boom Co. v. Patterson, 98 U.S. 403, 406 (1879) ("The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations . . . .").

[372] This is not necessarily the position of the Supreme Court. It recognizes that such post-hoc rationalization could lead to harsh outcomes. "No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation." Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from the denial of certiorari) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)). But, if a court is being true to its duty to "say what the law is," the post-hoc action is not rationalization but mere statement.

[373] Of course, there is a counter-argument to be made here that judicial takings is just going full circle: if the sovereign is the taker, and the sovereign has been split into separate portions of power, every piece should be able to take, and thus every piece is liable for a taking. But this argument would misunderstand the reason that a legislature, and not the executive or judiciary, can take in the first place. *See* LOCKE, *supra* note 144, at § 138 (founding his theory of eminent domain on the people's consent through their representatives in the legislature).

use and otherwise circumscribe use of property.[374] In the physical takings arena, individual rights prevail over government interests because a physical taking is a more direct and less general interference in property rights.[375] The structure of our federal system, which respects state sovereignty and individual rights, balances those interests to achieve, in those two spheres, a delicate middle course. Judicial takings would upend that delicate balance.

1. History

As shown above, the eminent domain power resides in the legislature. As Locke demonstrated, the reason for this is that the legislature can only take when it has consent from the public to do so, and the legislature is the manner in which the public gives its consent. There is no indication from the history that the founding generation considered any kind of taking other than physical appropriation. Though this has not prevented the development of a regulatory takings jurisprudence, it has cabined it. A valid but burdensome regulation is not a taking because it is not the functional equivalent of an exercise of the eminent domain power. Thus, that jurisprudence has developed to reflect what the Founders would have considered a taking had they foreseen that the modern state would exercise as much control over property as it does.

Further, the history of separation of powers shows that certain powers reside in different branches. Courts have common-law-making power, whereas legislatures have statute-making power, as well as the eminent domain power. The courts do not have the eminent domain power and thus cannot exercise it. As Justice Holmes reasoned, a taking does not occur merely because a law exceeds the power of the state to enact; a taking occurs when a law is fundamentally equivalent to the exercise of eminent domain.[376] A court does not exercise that power; when it refines the common law of property, it is doing just that: refining. It may go so far as to *redefine*, but such changes are a fundamental element of the common law.

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[374] *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1261–62 (Fed. Cir. 2009) (reduction in market value of company's eggs due to USDA regulations not a compensable taking under *Penn Central*); McAndrews v. Fleet Bank of Mass., 989 F.2d 13, 17–18 (1st Cir. 1993) (landlord's inability to exercise termination-upon-insolvency clause in lease due to federal law not a compensable taking under *Penn Central*); MacLeod v. Cnty. of Santa Clara, 749 F.2d 541, 549 (9th Cir. 1984) (denial of permit to engage in timber cutting not a compensable taking under *Penn Central*).

[375] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[376] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

2. Federalism

Federalism has been dismissed as an irrelevant structural concern for a judicial takings doctrine.[377] But the mere fact that federalism principles do not prevent the Takings Clause from applying to the states *at all* does not mean that federalism has no place in the equation. On the contrary, federalism principles dictate that the Court exercise restraint in this situation.

The Founders meant for states to control their property law, and, as early decisions show, the Fifth Amendment was not meant to restrain the states.[378] Indeed, compensation for exercises of eminent domain was considered to be a natural right, so fundamental that rarely was a constitutional provision required to enforce it in state courts.[379] Moreover, the Tenth Amendment showed that the founding generation was serious about keeping the federal government out of the business of state law.

But the Fourteenth Amendment altered the federal–state balance of power—though perhaps not as to property. The main purpose of the Fourteenth Amendment was to protect minority groups from controlling majorities in the states, a task at which many states had failed. Though there is confusion over whether the protections of the Bill of Rights were meant to apply to the states because of this amendment,[380] there are indications that the states' power of eminent domain was not meant to be affected.[381] Indeed, given the overriding purpose of the Amendment to prevent majority–minority conflict vis-à-vis *legislative* power, the courts' law-making power would seem to be constrained only by the requirements of due process and equal protection. The content of those phrases would therefore determine the constraints on courts' ability to refine state property law, rather than the Takings Clause itself.

3. The Fourteenth Amendment and "Phantom Incorporation"

And it is precisely the content of those two phrases that has created problems: the so-called "incorporation debate."[382] Regardless of which side of that debate has the better hand, the Supreme Court has pursued a course of selective incorporation.[383] And in that course, it has often

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[377] Thompson, *supra* note 11, at 1509.

[378] *See, e.g.*, Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247 (1833); *see also supra* Part IV.A.2.

[379] *See* Treanor, *supra* note 1, at 785 ("[T]he political process determined when compensation was due. . . . Precedents for the Fifth Amendment's Takings Clause were relatively few in number and narrow in application.").

[380] *See* Wildenthal, *supra* note 259, at 1054 (describing this disagreement as "the most durable and ceaselessly provocative controversy in American constitutional law").

[381] *See supra* notes 262–63 and accompanying text.

[382] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1195–96 (1992).

[383] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–36 (2010).

considered and decided whether to incorporate provisions of the Bill of Rights against the states based on the reasoned arguments of counsel on whether the right is "fundamental to *our* scheme of ordered liberty."[384] But no such arguments were ever made in regards to the Takings Clause. Incorporation in that instance was assumed.[385]

This has a profound effect on a decision to extend the Takings Clause into a realm unsupported by history and where it would substantially interfere with a court's ability to pursue its centuries-old improvement of the common law of property. It would be unwise, to say the least, to extend a protection whose limits at the state level have never been determined into an arena where those protections may not apply and are, in fact, confounded by the nature of the law it applies to.

4. The Nature of the Common Law

The common law is changeable and uncertain; that is something that every common-law lawyer knows. That uncertainty is a fundamental feature of the common law: it allows judges to adapt the law to serve the best interests of society as time moves forward. In other contexts—indeed in all except property—the courts could continue to adapt to changing circumstances. But here, a judicial takings doctrine would dictate that the court "pay[] for the change."[386]

Though there are some special reasons for certainty in the realm of property, those reasons are also applicable to other endeavors where there would be no requirement to pay for a change in the law. Certainty is desirable in business as well as in property issues, but that has not prevented businesses from functioning under threat of the equitable doctrine of "piercing the corporate veil."[387] The same holds true in tort. It is unprincipled to single out common-law rules of property for this special protection while potentially frustrating tort victims' recoveries by changing their common-law rules. By the same token as the police power, it is often true that court decisions that alter property law are legitimate

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[384] *Id.* at 3034.

[385] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (applying principles of "the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment"). *See generally* Karkkainen, *supra* note 1 at 875–78 (analyzing how federal courts have incorporated the Takings Clause against states).

[386] Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[387] Its "inherent imprecision . . . has resulted in a doctrinal mess." Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010). It has not however, prevented businesses from incorporating; Oregon, for example has approximately 240,000 corporations and limited liability companies currently registered. OR. SECRETARY OF STATE, BUSINESS REPORT (Sept. 2012), *available at* http://filinginoregon.com/pages/forms/business/statistics/2012/0912.pdf. That is approximately 1 limited liability entity for every 16 people in the state. *See Oregon Quick Facts*, U.S. CENSUS BUREAU (last updated Sept. 18, 2012), http://quickfacts.census.gov/qfd/states/41000.html (showing the population of Oregon).

responses to changing circumstances. As Justice Holmes wrote: "The life of the law has not been logic: it has been experience."[388]

5. Counter-Arguments

As the preceding sections show, many factors counsel against adopting a judicial takings doctrine. But there are arguments for a Scalia-style judicial taking. If a state court issued a decision that *destroyed* a long-established property right or *made a parcel of property valueless*, then the effect is no different than that of a classic *Lucas* taking or physical appropriation. The structural considerations are no differently aligned because the state has, in essence, exercised the power of eminent domain to deprive a citizen of property.

That argument however, overlooks the distinction between legislatures and courts. Uncertainty is embedded in the common law; it is an embodiment of principles, rather than a collection of "sacred" texts.[389] Legislatures write laws to establish certainty; citizens can look to the laws and know what they can and cannot do.[390] Citizens cannot truly look to the opinions of the courts and expect the same certainty; rarely is it given. Therefore, it is impossible to evaluate changes in common-law rules without accounting for that inherent uncertainty. Judicial takings would take that uncertainty out of the common law of property, but it would do so at the expense of society while upending the nature of the common law. That is truly going "too far."

VI. DUE PROCESS PROVIDES THE NECESSARY CHECK ON JUDICIAL REVISIONS OF THE COMMON LAW

While a judicial takings doctrine is undesirable, that does not mean that courts have the authority to alter the common law of their states in wild and unpredictable ways. The core tenets of due process have always protected persons from such arbitrary and capricious exercises of power.[391] They can continue to do so.

Substantive due process has expanded in recent years to protect many unenumerated rights that the Court has concluded are deserving

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[388] HOLMES, JR., *supra* note 206, at 1.

[389] *See* EISENBERG, *supra* note 322, at 154–61. Eisenberg refers to this as the "generative conception" of the common law; the common law can answer all questions because it consists of principles rather than rules, whereas statutes, being rules rather than principles, cannot. *Id.* at 159.

[390] For this reason, common-law crimes have fallen out of fashion; because "the law must be made on a case to case basis," they are often too indefinite and too vague to be enforceable. Ashton v. Kentucky, 384 U.S. 195, 198 (1966) (quoting Ashton v. Commonwealth, 405 S.W.2d 562, 571 (Ky. Ct. App. 1965) (Moremen, C.J., dissenting)). Crimes are now contained in statutes even when they originated in the common law. *See, e.g.*, Schad v. Arizona, 501 U.S. 624, 641 (1991) (Arizona felony-murder statute found its basis in common-law felony-murder).

[391] *See generally* Chapman & McConnell, *supra* note 363.

of protection from legislative interference.[392] This trend has not been universally applauded, particularly by those who believe that the original understanding of the Due Process Clause is confined to procedure.[393] But there is no need for a vague, rights-based substantive due process to protect persons from sudden judicial changes to property law; the historical understanding of the Due Process Clause of the Fourteenth Amendment contains protections against judicial flights of fancy.[394]

Professors Nathan Chapman and Michael McConnell recently wrote that, historically, due process was essentially a form of separation of powers.[395] It prevented legislatures from acting as courts.[396] By extension, such a conception of due process can be used to police judicial "takings" because it comports both with the idea that a non-trespassory taking occurs when law goes "too far" and with the structural approach to judicial takings.

When a court changes a property law in an arbitrary or unexpected fashion, it is essentially exercising the eminent domain power of the legislature and venturing beyond its boundaries. Radical judicial changes in the law impinge on the legislature's ability to make prospective laws. A common law court has the power, even the duty, to "say what the law is"[397] and develop it over time. But radical, prospective changes in property law are the province of the legislature, and can fundamentally be exercises of eminent domain. When a court alters the property law of a state to such a dramatic extent, it is engaging in the use of legislative power, and so violates due process by violating the separation of powers inherent in every republican system.

All the factors discussed in detail above that counsel against judicial takings are actually aligned with a due process approach to judicial law-changes. Judicial law changes are nothing like an original-meaning taking: they are not usually the kind of physical appropriation that exercises of eminent domain looked like. Federalism is respected by allowing state courts to develop their law, so long as they avoid unexpectedly trampling on the rights of individuals.[398] Fourteenth Amendment protections are respected because only unpredictable law

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[392] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating state law that made homosexual intimate sexual activities a crime); Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (invalidating state law that allowed a court to permit visitation to children by "any person"); Roe v. Wade, 410 U.S. 113, 164 (1973) (invalidating state law prohibiting abortion except when necessary to save a mother's life).

[393] *See* Chapman & McConnell, *supra* note 363, at 1676 & n.5.

[394] *See id.* at 1679–80; *see also* Wynehamer v. People, 13 N.Y. 378, 398 (1856) (due process protects citizens against deprivation of rights by "any branch of the government").

[395] Chapman & McConnell, *supra* note 363, at 1677–80.

[396] *Id.* at 1677.

[397] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[398] I think of this as the version of federalism espoused in dissent by Justice Blackmun in *Coleman v. Thompson*, 501 U.S. 722, 758–59 (1991).

changes will be prevented, decisions that could very well be discriminatory. The common-law tradition is respected by allowing its further development of property law. And separation of powers is respected by not imputing to another branch a power it does not possess. In sum, due process suffers none of the failings that judicial takings would, and could be just as effective without having to impose a doctrinal framework on judges that would be ill-suited to the task.[399]

VII. CONCLUSION: RESTRAINING COURTS WITHOUT CONSTRAINING THEM

Those who seek a judicial takings doctrine have a point that I agree with: it is unfair for a property owner to suddenly lose his or her property (or rights therein) on account of a court's decision, and then to pile on the indignity by denying compensation for it. I would not want to be in that property owner's shoes. But the answer is not to create a judicial takings doctrine and grant compensation under one of the schemes that Professor Thompson proposes.[400] The answer lies in applying the more appropriate doctrine: due process.

As discussed above, due process has been used to address a number of ills created by legislatures.[401] It can also be used to police the boundaries of a court's power.[402] Justice Kennedy, concurring in *Stop the*

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[399] Even Justice Stewart's concurrence in *Hughes v. Washington* is more accurately described as a due process opinion rather than a takings opinion, though, admittedly, he used language from both throughout: "To the extent that the decision of the Supreme Court of Washington on that issue 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." 389 U.S. 290, 398 (1967) (Stewart, J., concurring) (emphasis added). The language used here smacks of due process.

[400] *See* Thompson, *supra* note 11, at 1513–22.

[401] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating state law that made homosexual sodomy a crime); Troxel v. Granville, 530 U.S. 57, 61, 72–73 (2000) (invalidating state law that allowed a court to permit visitation to children by "any person"); Roe v. Wade, 410 U.S. 113, 164 (1973) (invalidating state law prohibiting abortion except when necessary to save a mother's life). *But see* Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (upholding state law that required a prescription for an optician to fit new lenses into a person's eyeglasses frames because there was a rational basis for the law). The trend that emerges from these cases is that the Supreme Court protects personal rights, but not economic rights; that is, except property rights in the takings context. *See* KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 495 (4th ed. 2011) ("[Justice] Stone warned legislators [, in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938),] that . . . the Court was going to devote greater attention to the operation of legislation that affected individual noneconomic rights . . . while . . . assert[ing] a theory of judicial restraint and deference on matters of economic regulation.").

[402] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment) ("The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power.").

Beach, proposed just such a mechanism. A due process approach would give the reviewing court a greater flexibility in deciding the case: the inquiry would not be whether property was taken (a question that *depends* on determining whether a right existed, whether it was altered, and then whether that alteration was a taking), but whether the legal change occurred in a way that was so unexpected that it rose to the level of a denial of due process.

Though not a simpler inquiry, it avoids the assumption that the court can exercise the power of eminent domain while also avoiding compounding the error of phantom incorporation by bypassing the takings question entirely. A court, which defines property, would not take property, but would "eliminate[] or substantially change[] established property rights, which are a legitimate expectation of the owner" in an "arbitrary or irrational" manner instead.[403] And when that occurred, an owner could seek a remedy under due process.

Such a remedy would prevent courts from arbitrarily rewriting state property law while also allowing them to make beneficial changes to the law without having to determine a method of compensation for every property owner affected. It would give state courts the necessary freedom to shape the common law to respond to the demands of an ever-changing world, as they have done throughout history. As for the individual, he is left where he was before: subject to the common law of property in his state and protected by the due process of law.

[403] *Id.* at 2615.