PROPERTY RIGHTS, THE "GANG OF FOUR"
& THE FIFTH VOTE:
STOP THE BEACH RENOURISHMENT, INC. V. FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
(U.S. SUPREME COURT 2010)

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INTRODUCTION

In 2010, the Supreme Court of the United States decided the case of Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.1 Justice Antonin Scalia announced the judgment of the Court.2 All Justices agreed that Florida had not violated the Takings Clause of the Federal Constitution's Fifth Amendment.3 But then, in a plurality opinion, Justice Scalia—joined by Chief Justice Roberts and Justices Thomas and Alito—proposed profound changes in the law of "regulatory takings."4 The four Justices embraced the views advanced twenty-five years before by Professor Richard Epstein, which undertook to provide constitutional protection "to each part of an endowment of private property . . . equal to the protection it affords the whole—no more and no less."5

As the spokesman for the Court's four property rights absolutists, Scalia advanced two novel legal propositions. First, he argued that federal courts had the power to collaterally attack and reverse state court decisions which evaded the requirements of the

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

2 Id. at 2597.

3 Id. at 2613. "Justice Stevens took no part in the decision . . ." Id.

4 See id. at 2601-10 (plurality opinion). Scalia was joined by Chief Justice Roberts and Justices Thomas and Alito. Id. at 2597.

Takings Clause with pretextual background principles of the state's law of property. Second, he opined that each of the "essential sticks in the bundle of rights that are commonly characterized as property" was a separate, distinct property right, and that any deprivation of an "established property right" was a compensable taking under the Fifth and Fourteenth Amendments. If the "Gang of Four" can find a fifth vote, the law of regulatory takings will be radically revised.

I. REGULATORY TAKINGS

States create real property by granting parcels of land to private persons. The "bundle of sticks" that the private owner receives represents "the extent to which an owner may use or dispose of the property in question." One stick is the right to

6 See Stop the Beach, 130 S. Ct. at 2608-10 (plurality opinion).
8 Stop the Beach, 130 S. Ct. at 2608 (plurality opinion).
9 See id. at 2601-02, 2605, 2608-10.
10 See Larry M. Elkin, Will Conservatives Challenge Land-Use Rules?, PALISADESHUDSON.COM, http://www.palisadesudson.com/2010/06/will-court-conservatives-challenge-land-use-rules/ (last visited Feb. 9 2012) (explaining that Roberts, Thomas, Scalia, and Alito share a common view about private property costs and takings); see also Stop the Beach, 130 S. Ct. at 2597 (illustrating that Roberts, Thomas, Scalia, and Alito share a common view about private property costs and takings by joining together in a takings case).
12 Constitutional takings jurisprudence applies to personal property and intellectual property as well as real property. See, e.g., Ruckelshaus v. Monsanto, 467 U.S. 986, 990 (1984) (trade secrets); Andrus v. Allard, 444 U.S. 51, 65-68 (1979) (personal property). Stop the Beach Renourishment and most cases, however, deal with land. See, e.g., Stop the Beach, 130 S. Ct. at 2600-01 (dealing with beach property in Florida); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006-07 (1992) (dealing with beach property in South Carolina). While traditionally the same takings jurisprudence applies to all types of property, there has been some intimation that personal property is less worthy of constitutional protection. See Lucas, 505 U.S. at 1027-28.
exclusive use; another, the right to income; another, the right to alienate; and yet another, the right to transfer at death. Owners of land abutting tidewaters have additional sticks in their bundle, including the right to access the water and the right to any gradual sedimentary accretions that raise the edge of their property above the water level.

Once private property has been created, the States may not take it back unless they pay for it. According to the constitutional proscription known as the Takings Clause, "[p]rivate property [shall not] be taken . . . without just compensation." But on the other hand, state governments retain a residual "police power" to govern men and things. What if the State, in the exercise of this regulatory power, limits the owner's use and enjoyment of his land and takes some of the property's market value? Must compensation be paid? Such is the regulatory taking conundrum.

Under the original understanding of the Fifth Amendment, real property was considered to be taken only when a state's agents physically occupied the premises or ousted the titleholder from possession. There was no such thing as a regulatory taking. Things changed in the twentieth century.

A. Pennsylvania Coal Co. v. Mahon (U.S. Supreme Court 1922)

Onerous state and local regulations sometimes deprived landowners of their reasonable investment-backed expectations.

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16 Andrus, 444 U.S. at 66.
17 JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 10-11 (2d ed. 2005).
19 JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 31.02(A)(2) (2d ed. 2008).
20 SINGER, supra note 17, at 174.
21 U.S. CONST. amend. V (made applicable to the states through Amendment XIV); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010) (plurality opinion).
22 U.S. CONST. amend. V.
23 The License Cases, 46 U.S. (5 How.) 504, 527 (1846).
Justice Oliver Wendell Holmes Jr. lamented this "petty larceny of the police power,"\(^\text{25}\) and in 1922, he penned an opinion designed to correct the situation. In the case of *Pennsylvania Coal Co. v. Mahon*,\(^\text{26}\) a Pennsylvania statute had prohibited a coal company from mining a coal seam it owned under streets and buildings.\(^\text{27}\) Although the company was not dispossessed, it suffered a significant economic loss because, "[f]or practical purposes, the right to coal consists in the right to mine it."\(^\text{28}\)

Justice Holmes, writing for the Court's majority,\(^\text{29}\) opined "that while property may be regulated to a certain extent, if [the] regulation goes too far, it will be recognized as a taking."\(^\text{30}\) He ruled that the coal company was constitutionally guaranteed compensation.\(^\text{31}\) In the twentieth century, it had come to pass that there was such a thing as a regulatory taking.

During the next half-century, the holding in *Pennsylvania Coal Co.* was more or less forgotten or ignored—a clever trope, but not one demanding vigilant judicial oversight.\(^\text{32}\) The Supreme Court of the United States made little effort to protect investment-backed expectations.\(^\text{33}\) The Court left to various state courts the

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\(^{27}\) Id. at 412-13; see 52 PA. STAT. ANN. § 1407(a)-(b) (West 1966).


\(^{29}\) Id. at 412.

\(^{30}\) Id. at 415.

\(^{31}\) See id. at 413-15; U.S. CONST. amend. V.

\(^{32}\) See Sam Evans, *Voices from the Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 521, 569 (2010) ("Darren Botello-Samson found only a single case in which a taking was found that actually survived appeal.").

\(^{33}\) See Palazzolo v. Rhode Island, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring) (noting that if investment-backed expectations are given too much significance in takings law, the state wields too much power).
determination of when police power regulations went "too far" so as to amount to unconstitutional takings.34

B. Penn Central Transportation Co. v. City of New York (U.S. Supreme Court 1978)

Things changed in 1978 when the Supreme Court of the United States developed a balancing test that measured when "a state statute that substantially furthers important public policies [might] so frustrate distinct investment-backed expectations as to amount to a 'taking.'"35 In Penn Central Transportation Co. v. City of New York,36 the city's landmark preservation agency denied Penn Central's request for permission to build a fifty-five story office tower in the air column atop Grand Central Station.37 Penn Central's loss was in the $40 to $50 million range.38

The land beneath Grand Central Station was still used as a rail yard, and the station building itself served as a passenger depot and commercial rental space.39 The Court's majority engaged in an "essentially ad hoc, factual inquiry" and weighed three factors: (1) the economic impact, (2) the extent of interference with investment, and (3) "the character of the governmental action."40 It concluded, utilizing the balance, that the public benefits of landmark preservation outweighed the private economic burden on Penn Central and that no compensation was due for the "partial taking."41

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34 See Kathryn E. Kovacs, Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County, 26 ECOLOGY L.Q. 1, 2 (1999) (outlining a problem that developed after a Supreme Court decision forced plaintiffs to file takings claims in state courts).
36 Id. at 104.
37 Id. at 116-17.
38 See id. at 116 ("UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter.").
39 Id. at 115.
40 Id. at 124.
41 Penn Central, 438 U.S. at 124.
42 Id. at 131, 138.
Associate Justice William Rehnquist dissented.\textsuperscript{43} He pointed out that there had been, "in a literal sense," a taking of Penn Central's air rights.\textsuperscript{44} He argued "that a strong public desire to improve the public condition is not enough to warrant" the imposition of a "multimillion dollar loss" on Penn Central.\textsuperscript{45}

\textbf{C. The Rehnquist Court}

Rehnquist—who had been appointed to the Court in 1972\textsuperscript{46}—would serve first as Associate Justice and then as Chief Justice until his death in 2005.\textsuperscript{47} During his thirty-three year tenure, he advocated the protection of private property.\textsuperscript{48} During his years as an Associate Justice, none of the other Supreme Court Justices consistently joined him in these efforts,\textsuperscript{49} but things changed in the aftermath of Ronald Reagan's election.

In his 1981 presidential address, President Ronald Reagan proclaimed that "government is not the solution to our problem; government is the problem."\textsuperscript{50} The economic way to discourage governments from overusing their police power was to force them

\textsuperscript{43} Id. at 138 (Rehnquist, J., dissenting). Rehnquist was joined in dissent by Chief Justice Burger and Justice Stevens. \textit{Id.}
\textsuperscript{44} Id. at 143.
\textsuperscript{45} Id. at 147, 152.
\textsuperscript{46} See \textit{Members of the Supreme Court of the United States}, \textit{SUPREME COURT OF THE UNITED STATES}, \url{http://www.supremecourt.gov/about/members_text.aspx} (last visited February 9, 2012) (showing date of appointment).
\textsuperscript{49} See R. Ted Cruz, \textit{In Memoriam: William H. Rehnquist}, 119 \textit{HARV. L. REV.} 1, 10-11 (2005) (noting that Rehnquist dissented alone so often that he was nicknamed "The Lone Ranger").
\textsuperscript{50} President Ronald Reagan, \textit{First Inaugural Address} (Jan. 20, 1981) (transcript available at \url{http://www.reagan.utexas.edu/archives/speeches/1981/12081a.htm}) (speaking with regard to what he perceived, at that time, as an economic crisis).
to internalize the cost of their regulations, both public and private.\(^\text{51}\)

In 1986, Reagan put in place two jurists intent on accomplishing this goal when he elevated Rehnquist to the Chief Justiceship and appointed Antonin Scalia as an Associate Justice.\(^\text{52}\) Scalia shared Rehnquist's commitment to the proposition that "the term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].'"\(^\text{53}\) This tandem team would consider more than thirty regulatory takings cases—most of which were decided by a 5-to-4 or 6-to-3 majority—with Rehnquist and Scalia sometimes winning and sometimes losing, but invariably favoring an expanded takings jurisprudence.\(^\text{54}\)

II. JUDICIAL PROCESS

Justice Scalia also had strong feelings about the judicial process that the Court ought to use when deciding cases. In a 1989 article in the University of Chicago Law Review, he observed that by "making the mode of analysis relatively principled or relatively fact-specific, the courts can either establish general rules or leave ample discretion for the future."\(^\text{55}\) He favored clear, previously enunciated "bright-line" rules of law so as to promote equal

\(^{51}\) See Richard A. Posner, Economic Analysis of Law 58 (4th ed. 1992) ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing its taking power.").

\(^{52}\) Bernard Weinraub, Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen for Court, N.Y. Times, June 18, 1986, at Al.


treatment and predictability rather than discretionary choices based only upon a judge's sense of fairness and justice.\textsuperscript{56}

The multifactor, ad hoc balancing test set forth in \textit{Penn Central}\textsuperscript{57} was exactly that type of judicial decision-making which Scalia disavowed. He therefore undertook not only to expand the scope of the Takings Clause, but also to make its application more principled and less fact-specific. In Scalia's view, justice would be better-served if the ad hoc balancing approach used in \textit{Penn Central} were replaced with clear-cut rules of compensability.\textsuperscript{58}

One such bright-line principle had already been created. When a government action results in permanent physical occupation of the private owner's land, it is per se compensable.\textsuperscript{59} Scalia was on the lookout for more opportunities to create more clearly defined categories of compensability.

\textbf{A. Lucas v. South Carolina Coastal Council}

\textit{(U.S. Supreme Court 1992)}

In 1992, Scalia mustered a majority and created a new bright-line rule in \textit{Lucas v. South Carolina Coastal Council}.\textsuperscript{60} A setback line established by the South Carolina Coastal Council precluded any construction on the landowner's two beachfront building lots and rendered them "valueless."\textsuperscript{61} Even though the landowner conceded that the prohibition on construction was necessary to "prevent a great public harm,"\textsuperscript{62} Scalia disdained any balancing of public benefit and private loss.\textsuperscript{63} Instead, he framed a new absolute rule: Regulations that "den[y] all economically beneficial or productive use of land" are "compensable without case-specific

\textsuperscript{56} Id. at 1778-79.
\textsuperscript{57} See \textit{Penn Central}, 438 U.S. at 124.
\textsuperscript{58} See \textit{Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.}, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).
\textsuperscript{59} See \textit{Loretto}, 458 U.S. at 426.
\textsuperscript{61} Id. at 1006-07.
\textsuperscript{62} Id. at 1022 (quoting Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), rev'd, 505 U.S. 1003 (1992)).
\textsuperscript{63} Id. at 1024-25.
inquiry into the public interest advanced in support of the restraint."\textsuperscript{64} "Total takings" are per se compensable.\textsuperscript{65}

Justice Scalia, with some apparent reluctance, qualified his total takings rule with an exception. A confiscatory regulation might be "newly legislated or decreed (without compensation) [if it] inhere[d] in the title itself [or] in the restrictions that background principles of the [s]tate's law of property and nuisance already place[d] upon land ownership."\textsuperscript{66}

\textbf{B. Background Principles of State Law}

This exception left Scalia with a concern. While under the federal system the Supreme Court of the United States had the final say as to the meaning of the Fifth and Fourteenth Amendments,\textsuperscript{67} it was the various states' high courts that had the final say as to the inherent title limitations and background principles of their property law and their nuisance law.\textsuperscript{68} What was to prevent a state court from defeating "the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all"?\textsuperscript{69} Who was to make sure that the common law courts acted on principle when they concluded that an apparently confiscatory regulation was excused by the background principles that the state's law of property had already placed upon land ownership?\textsuperscript{70} A state court's "runaway" common law jurisprudence\textsuperscript{71} might trump Scalia's per se takings rule if it were

\begin{itemize}
  \item \textsuperscript{64} \textit{Id.} at 1015.
  \item \textsuperscript{65} See Robert Meltz, \textit{Takings Law Today: A Primer for the Perplexed}, 34 \textit{ECOLOGY L.Q.} 307, 328-29 (2007).
  \item \textsuperscript{66} \textit{Lucas}, 505 U.S at 1029.
  \item \textsuperscript{67} See, e.g., \textit{Id.} at 1007 (showing that the Supreme Court of the United States has final authority over matters arising under the Fifth and Fourteenth Amendments).
  \item \textsuperscript{68} See Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting).
  \item \textsuperscript{69} Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).
  \item \textsuperscript{70} See McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003).
  \item \textsuperscript{71} Todd Brower, \textit{Communities Within the Community}, 7 J. LAND USE & ENVTAL. L. 203, 270 (1992).
\end{itemize}
permitted to, "by ipse dixit, . . . transform private property into public property." 72

C. Judicial Takings

Justice Scalia was well aware of the problem. In the aftermath of the Lucas case, he remained on the lookout for an opportunity to provide some principles as to how the Supreme Court of the United States might prevent state courts from rendering the Lucas opinion a "nullity" by invoking nonexistent "background law." 73 The Court missed its first opportunity in 1994 in the case of Stevens v. City of Cannon Beach. 74 Therein, the Supreme Court of Oregon declared that the general public had both a right of access to and a right to recreational use of privately owned dry sand beach under the ancient English doctrine of custom, which the court said was a background principle of Oregon property law. 75

Justice Scalia dissented from the Supreme Court of the United States' denial of the landowner's petition for a writ of certiorari. 76 After reviewing the Oregon court's vacillations on the application of the doctrine of custom, he had serious doubts as to whether asserted custom was just being used as an excuse to avoid the Takings Clause. 77 Lacking the facts to evaluate the landowner's takings claim, 78 Scalia argued instead for a due process review of whether the Supreme Court of Oregon had made a principled ruling based upon its established common law, or whether it was just invoking nonexistent rules of state law to justify a "land grab." 79 The majority of the Court refused to grant certiorari and to follow his lead. 80

73 See Stevens, 510 U.S. at 1211 (Scalia, J., dissenting).
74 Id. at 1207 (denying writ of certiorari).
75 Id. at 1211 (Scalia, J., dissenting).
76 Id. at 1207.
77 Id. at 1212.
78 Id. at 1213.
79 Stevens, 510 U.S. at 1212, 1214.
80 Id. at 1207 (denying writ of certiorari).
D. Tidewater Boundaries

The case of Stevens v. City of Cannon Beach focused upon the rights of owners holding "riparian" parcels of land abutting tidal waters.81 In most of America's coastal states, the high water line serves as the boundary between public property and private property.82 These states are presumed to own the land submerged under tidewaters up to the mean high water line (as measured by using tidal data over a nineteen-year period) on the "foreshore."83 Owners of private land abutting tidewaters are presumed to own the fast land above the mean high water line.84 Wet sand beaches (those between high tide and low tide) are in the public domain, while dry sand beaches (those only occasionally inundated by tidewaters) are in the private domain.85

By common law tradition, the owners of land abutting tidal waters also had certain ancillary riparian rights, including the right of access and the right to use the waters for fishing and navigation.86 Moreover, the riparian landowners have an additional entitlement to gradual sedimentary accretions that increased the territorial expanse of their fast land above the high water line.87


82 Such parcels include oceans, gulfs, bays, and estuarine rivers. See Black's Law Dictionary 1442 (9th ed. 2009); see also Sprankling, supra note 19.

83 See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597-98 (2010) (explaining that the foreshore, up to the mean high water line, is owned by the state for public use).

84 Id.


88 Id. at 26-28.
Conversely, riparian landowners lose their entitlement when the foreshore gradually erodes and what had once been their fast land falls below the high water line. The legal boundary between the public domain and the private domain is dynamic.

The common law applied different rules when a coastal storm or hurricane produced a large and convulsive change in shoreline. In such cases, the boundary between the public domain and the private domain remained the same; the riparian landowner retained entitlement to the "avulsion" and a right to reclaim the lost territory.

One way of reclaiming the shoreline was by "beach replenishment" projects that pumped large quantities of submerged sand back up onto the foreshore. Few, if any, individuals reclaimed their private beachfront after a major storm loss because of the engineering difficulties and high costs. Local governments, however, did undertake such projects on a larger scale in an effort to restore the recreational value of town beaches.

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89 Id. at 28-29.
90 See Henry Farnham, The Law of Waters and Water Rights 320-24 (1904) (explaining the different rules that apply to the wet sand area versus the dry sand area and the impact of reliction, avulsion, and accretion on those rules). In the event of reliction (gradual expansion of the foreshore resulting from lowering of the water level), riparian landowners might also expand their territory.
91 Id. The state would take title by adverse possession when the riparian landowner failed to reclaim a submerged avulsion within the time prescribed by the statute of limitations. Id. at 320-21.
E. Walton County v. Stop the Beach Renourishment, Inc. (Florida Supreme Court 2008)

A case testing the constitutionality of a law modifying riparian rights, called Walton County v. Stop the Beach Renourishment, Inc.,95 arose in Florida.96 In 2003, a tidewater county had undertaken to restore 6.9 miles of eroding beachfront.97 The plan called for "add[ing] about 75 feet of dry sand seaward of the mean high-water line."98 The procedures prescribed by the Florida Beach and Shore Preservation Act99 called for some modifications to the common law riparian rights of the abutting private landowners.100

The first step in a restoration project was establishment of "an erosion control line [to] be set by reference to the existing . . . high-water line."101 Sand was then dumped seaward of the erosion-control line on submerged land so as to raise it above the water level.102 Thereafter:

The fixed erosion-control line replaces the fluctuating mean high-water line as the boundary between privately owned [riparian] property and state property. Once the erosion-control line is recorded, the common law ceases to increase upland property by accretion (or decrease it by erosion). Thus, when accretion to the shore moves the mean high-water line seaward, the property of beachfront landowners is not extended to that line (as the prior law provided), but remains bounded by the permanent erosion-control line.103

95 Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).
96 Id. at 1105.
97 Stop the Beach, 130 S. Ct. at 2600.
98 Id.
100 See Stop the Beach, 130 S. Ct. at 2599-600.
101 Id. at 2599; § 161.161(3)-(5).
102 Stop the Beach, 130 S. Ct. at 2599.
103 Id. (citations omitted).
Under the Beach and Shore Preservation Act, landowners retained all of their common law riparian rights other than the right to accretions.\(^\text{104}\) The Act further stated that if the use of submerged land would "unreasonably infringe on riparian rights," then the project could not go forward.\(^\text{105}\)

A group of the beachfront property owners who owned parcels abutting the beachfront project on its landward side brought an action claiming that the Act was, on its face, an unconstitutional taking of their property.\(^\text{106}\)

On first impression, it would seem that the private owners of beachfront parcels had scant claim to compensation under the existing constitutional takings jurisprudence. Granted, the property rights associated with their parcels had been partially taken as a result of their loss of the right of accretion. But according to the landmark case of \textit{Penn Central Transportation Co. v. City of New York}, "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\(^\text{107}\) This "indivisibility principle" has been reiterated time and again in subsequent decisions of the Supreme Court of the United States.\(^\text{108}\)

\textit{Penn Central} then went on to specify the procedure for evaluating such partial takings of an entire individual parcel: "In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action

\(^{104}\) § 161.201.

\(^{105}\) \textit{FL. ADMIN. CODE ANN. r. 18-21.004(3)(b) (2009); see also Stop the Beach, 130 S. Ct. at 2599-600 (explaining the beach restoration project and the consequences of the agency not following certain instructions).}

\(^{106}\) Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106-07 (Fla. 2008), aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dept of Envtl. Prot., 130 S. Ct. 2592 (2010). The Pacific Legal Foundation, a conservative group dedicated to the protection of private property, filed a brief amici curiae. \textit{Id.} at 1105. It presumably sponsored the litigation. \textit{See id.}


and on the nature and extent of the interference with rights in the parcel as a whole...." 109

Applying that viewpoint to the case at hand, the beachfront owners had lost no territorial portion of their parcels. 110 Their investment-backed expectation in full access and enjoyment of the adjacent beach and ocean waters was assured. 111 Since parcels bordering an expansive beach are typically more valuable than parcels bordering an eroding beach, it is likely that the project will increase the value of the owners' beachfront property; it is unlikely that the owners' beachfront property has suffered any economic loss. 112 All that the owners have lost is the possibility of future accretions—such accretions that were unlikely to occur on a historically eroding beachfront. 113 The character of the government's action was designed to protect the shore from storm damage and to provide the benefits of a recreational beach for the property owner as well as the whole town. 114 On balance, the public benefits of beach preservation outweighed the insignificant private loss suffered by the beachfront owners. 115

Recognizing the difficulties of prevailing under a Penn Central theory, the beachfront property owners recast their claim as a Lucas challenge. 116 Instead of alleging that the Beach and Shore Preservation Act was a partial taking of their parcels, they alleged that the Act was a total taking of their "special right" to accretions, which were akin to easements under Florida property

109 Penn Central, 438 U.S. at 130.
110 See Stop the Beach, 130 S. Ct. at 2599.
111 See id.
112 Id. at 2612.
113 Id. at 2600. Per contra, the beachfront property owners could have argued a loss of their right to privacy. Before the project, strangers could only traverse the beach in front of their property on the wet sand when the tide was down; after the project, strangers could traverse along the beach in front of their property on the public dry sand at any time.
114 See Christie, supra note 87, at 37-38.
115 Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1120-21 (Fla. 2008) (illustrating that the inconvenience to property owners was so insignificant that their interest did not outweigh the public's interest in maintaining the beaches), aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dept of Envtl. Prot., 130 S. Ct. 2592 (2010).
116 Id. at 1105.
law.\textsuperscript{117} Since there had been a deprivation of all beneficial use of their right to accretions, the owners claimed to be entitled to compensation, regardless of the public interest advanced in support of the project.\textsuperscript{118}

The Supreme Court of Florida determined that the Beach and Shore Preservation Act did not unconstitutionally deprive beachfront property owners of their right to accretion, regardless of whether its impact was viewed as a partial taking or total taking.\textsuperscript{119}

As summarized by the Supreme Court of the United States, the Florida court concluded that compensation was due in neither case because the regulatory limitation "inhere[d] in the . . . background principles of the [state's] law of property . . . already place[d] upon land ownership."\textsuperscript{120}

Under the Supreme Court of Florida's view, the right to accretion was a contingent right.\textsuperscript{121} The Act, in keeping with the common law, struck "a reasonable balance of interests and rights to uniquely valuable and [fragile] property."\textsuperscript{122} Beach renourishment protected vital public economic and natural resources; it protected property owners from future storm damage and erosion; and it preserved the property owner's rights to access, use, and view the tidewaters.\textsuperscript{123} Based on this ad hoc, fact-specific balancing exercise, the Florida court concluded that no property had been taken and no compensation was due.\textsuperscript{124} This was exactly the type of judicial decision making that Scalia disavowed.\textsuperscript{125}

\textsuperscript{117} Id. at 1105, 1112, 1115.
\textsuperscript{118} Id. at 1105-07, 1111 (reexamining on appeal the owners' original claim that they were deprived of their right to accretion and therefore entitled to compensation, regardless of the public interest argument).
\textsuperscript{119} Id. at 1116.
\textsuperscript{120} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); see Walton County, 998 So. 2d at 1116-21.
\textsuperscript{121} Walton County, 998 So. 2d at 1112, 1118.
\textsuperscript{122} Id. at 1115.
\textsuperscript{123} Id. at 1120.
\textsuperscript{124} Id. at 1120-21.
\textsuperscript{125} Scalia, supra note 55, at 1177, 1187.
F. Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (U.S. Supreme Court 2010)

The beachfront property owners advanced a novel claim when they petitioned the Supreme Court of the United States for a writ of certiorari. In the Supreme Court of Florida, the owners had claimed that the Florida Legislature's Beach and Shore Preservation Act had unconstitutionally deprived them of their right to accretion in violation of the Takings Clause—and lost.126 Now, in the Supreme Court of the United States, they advanced the claim that it was the Supreme Court of Florida's decision in the Walton County case that had unconstitutionally deprived them of their rights in violation of the Takings Clause.127 The beachfront property owners claimed that there had been a "judicial taking."128

1. Writ of Certiorari

The Supreme Court of the United States granted a writ of certiorari, but after hearing the case, the Court unanimously129 held that the petitioners were not entitled to compensation.130 The unanimity of opinion seems somewhat surprising. Because granting of the writ requires the votes of four Justices at conference, this ordinarily means that at least four Justices have initially found the circumstances described in the petition as sufficient to warrant further scrutiny.131 But in this instance, none of the Justices found the petitioners' claim appealing. Why, then, did the Court grant certiorari in the first place? Perhaps the anomaly can be understood as the result of tactical

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126 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600 (2010); see supra text accompanying notes 99-124 (explaining the Supreme Court of Florida's analysis of its Beachfront Preservation Act).
127 Stop the Beach, 130 S. Ct. at 2597.
128 Id. at 2597, 2600-01.
129 Eight justices joined in this judgment: Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Sotomayor. See id. at 2597. Justice Stevens, as a Florida landowner, recused himself. Id. at 2613.
130 See id. at 2597, 2601, 2613.
"gamesmanship" by the four property rights advocates on the Roberts Court.132

After the death of William Rehnquist in 2005, John Roberts became Chief Justice.133 Antonin Scalia, as the Senior Justice on the Roberts Court, found his view that governments should be required to pay all of the private property costs associated with regulation now shared by the Chief Justice, long-time ally Clarence Thomas, and newcomer Samuel Alito.134

This Gang of Four had two reasons for wanting to hear the case in the Supreme Court. First, in the Florida court below, the beachfront landowners argued that the statute completely took their right of accretion (a right akin to an easement), which was categorically compensable without regard to the magnitude of the loss or the public interest at stake.135 But when making this argument, they ignored Penn Central's "parcel as a whole" rule136: "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."137 The case afforded an opportunity to definitively overrule this "nondivisibility"138 approach and to call for the separate evaluation of the right of accretion and all other "sticks in the bundle" of property rights, one at a time.139 Second, the case provided the chance to create a precedent for the novel proposition that federal courts had the power to collaterally attack and reverse state court decisions which evaded the requirements of the Takings Clause.

132 See, e.g., Stop the Beach, 130 S. Ct. at 2597 (illustrating these four Justices joining together on one side in a takings case).
134 See supra note 10 and accompanying text.
137 Id.
139 See Stop the Beach, 130 S. Ct. at 2601-02, 2605 (plurality opinion).
with pretextual background principles of the state's law of property.\(^{140}\)

If the four property rights advocates could attract one additional vote, they might reformulate takings jurisprudence to provide constitutional protection "to each part of an endowment of private property ... equal to the protection it affords the whole—no more and no less."\(^{141}\) Every taking would be a total taking.\(^{142}\) Moreover, the opinion could serve as a precedent holding that an unprincipled judicial action might result in an unconstitutional taking.

But after certiorari was granted and the case was heard, the fifth vote was not to be found.\(^{143}\) Having failed in their best efforts to convince the majority to award compensation, the Gang of Four found their tactical interests best-served by joining the majority opinion affirming the Supreme Court of Florida.\(^{144}\) By voting to affirm, Scalia made himself eligible to write the opinion of the Supreme Court.\(^{145}\) Therein, he could carefully craft his language in the opinion of the Court so as not to endorse the "parcel as a whole" rule.\(^{146}\) Moreover, he could include plurality opinions on behalf of himself and his three property rights associates that reaffirmed his concept of judicial takings and publicized his general principles of takings jurisprudence.\(^{147}\)

2. Opinion of the Court

Justice Scalia announced the unanimous judgment of the Supreme Court of the United States\(^ {148}\) that the Supreme Court of Florida had not contravened property rights of the petitioners in

\(^{140}\) See id. at 2608-10 (2010).

\(^{141}\) EPSTEIN, supra note 5.

\(^{142}\) Id.

\(^{143}\) See Stop the Beach, 130 S. Ct. at 2597 (showing that a fifth vote could not be obtained for Parts II and III of the opinion).

\(^{144}\) See id. at 2613.

\(^{145}\) See id. at 2597.

\(^{146}\) See id. at 2602-03, 2605 (plurality opinion).

\(^{147}\) See id. at 2601-10.

\(^{148}\) Id. at 2597 (majority opinion); see supra notes 129-30 and accompanying text.
violation of the Fifth and Fourteenth Amendments.\textsuperscript{149} And, on behalf of the Court, Justice Scalia explained why the total taking of the right to accretions was not compensable in the \textit{Stop the Beach} case.\textsuperscript{150}

He might have accepted the analysis of the Supreme Court of Florida. The Supreme Court of Florida had determined that under background principles of the state’s law of property, the right to accretion was contingent and subject to legislative modification or elimination because, on balance, the public interest in protecting the shoreline outweighed the private interest.\textsuperscript{151} But that approach involved exactly that sort of multifactor, fact-specific, discretionary judicial decision making that Scalia rejected as a rule of judges rather than a rule of law.\textsuperscript{152}

Instead, Scalia created a bright-line explanation of his own as to why ”the right [to accretion] was not implicated by the beach-restoration project.”\textsuperscript{153} He characterized the beach restoration project as an ”avulsion” on the state-owned submerged tidal land; as such, the State retained title when it artificially filled the land.\textsuperscript{154} Since the beachfront property owners no longer owned any land abutting the water, they no longer had any riparian rights.\textsuperscript{155} Florida’s background principles of property law—not any legislative or judicial action—had taken the right to accretions; thus, no compensation was due.\textsuperscript{156}

Justice Scalia characterized his conclusion as ”counter-intuitive” since it permitted state-created landfill projects to deprive riparian landowners of their waterfront expectations without compensation.\textsuperscript{157} But worse than that, it reflects a tortured misunderstanding (or manipulation) of the common law doctrine of

\begin{enumerate}
\item \textit{Stop the Beach}, 130 S. Ct. at 2597, 2613.
\item \textit{Stop the Beach}, 130 S. Ct. at 2610-2613.
\item Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1112, 1115, 1120-21 (Fla. 2008), aff’d sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592 (2010).
\item Scalia, \textit{supra} note 55, at 1177, 1187.
\item \textit{Stop the Beach}, 130 S. Ct. at 2612.
\item \textit{Id.} at 2611.
\item \textit{Id.}
\item \textit{Id.} at 2612.
\item \textit{Id.}
\end{enumerate}
avulsion. Ordinarily, water boundaries between parcels slowly change with the natural buildup or erosion of the banks of the watercourse. In the event, however, of a sudden change caused by events such as coastal storms, floods, or earthquakes (called avulsions), the boundaries do not change, and the landowners retain ownership of their original parcels. To classify state-created artificial landfill projects as avulsions is at odds with the ordinary meaning of the word and a mischaracterization of the customary common law. Scalia found no real support for this classification in Florida precedents. Moreover, under a federal system, it seems presumptuously inappropriate for the Supreme Court of the United States to be overruling the Supreme Court of Florida on the applicable Florida property law.

Justice Scalia's opinion for the Court had avoided ad hoc balancing and had instead conjured up a bright-line rule explaining why total deprivation of the beachfront landowners' loss of the right to accretion was not compensable—because of the state-created landfill, they no longer owned land abutting the waterway. In the creation of this rule, Scalia had misapplied the doctrine of avulsion and violated a basic precept of federalism. The other seven Justices, satisfied with the outcome, raised no objection to Scalia's mode of analysis.

3. Plurality Opinions

Justices Scalia, Roberts, Thomas, and Alito also had in mind several other reforms to the regulatory taking jurisprudence that

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158 Feig v. Graves, 100 So. 2d 192, 196 (Fla. 1958).
159 Stop the Beach, 130 S. Ct. at 2598-99.
160 SINGER, supra note 17, at 174 (explaining what an avulsion is and, in turn, illustrating how a state-created artificial landfill cannot be one).
161 See generally Stop the Beach, 130 S. Ct. at 2597-2613 (lacking any Florida cases to show support for the definition of avulsion as including artificial landfill projects).
162 Blue Cross & Blue Shield of Ala., Inc. v. Nielsen, 116 F.3d 1406, 1413 (11th Cir. 1997) (stating that state courts are the final arbiters of state law due to federalism, a doctrine which recognizes a court system for both the federal government and each state government).
163 Stop the Beach, 130 S. Ct. at 2599, 2611.
would provide greater protection for private property rights. But with respect to these, they lacked the fifth vote. Scalia appended these proposals to his opinion of the Court in *Stop the Beach* as plurality opinions of the Gang of Four.

### III. JUDICIAL TAKINGS

The writ of certiorari had been granted to consider the question of whether the Florida court of last resort had violated the Takings Clause of the Fifth and Fourteenth Amendments when it denied the beachfront property owners compensation for the taking of their property. This question had been rendered moot by the holding of the Court on the merits that there had been no constitutional taking. But as spokesman for the Gang of Four, Justice Scalia (without regard to the doctrine of judicial constitutional avoidance) seized the opportunity to reify the concept of judicial takings.

Scalia’s dicta began by pointing out that the Constitution included "no textual justification for saying . . . . that takings effected by the judicial branch are entitled to special treatment." He then went on to respond to conflicting views expressed in the separate opinions authored by Justices Breyer and Kennedy. The Justices quibbled back and forth on questions of ripeness, constitutional avoidance, jurisdiction, separation of powers, due process, sovereign immunity, and remedies. But all of the Justices seemed to agree that if and when a state court intentionally

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164 See id. at 2601-10 (plurality opinion).
165 See id.
166 Id. at 2597 (majority opinion).
167 See id. at 2613 (holding that the property rights and constitutional rights of the petitioners were not violated).
168 The doctrine of constitutional avoidance suggests that the Supreme Court of the United States should, as a matter of self-restraint, refuse to rule on constitutional issues when a case can be decided on nonconstitutional grounds. See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Homeland Sec., 527 F.2d 76, 98 (D.C. 2007).
170 *Stop the Beach*, 130 S. Ct. at 2601 (plurality opinion) (citation omitted).
171 See generally id. at 2603-05, 2608.
misrepresents the principles of its state property law so as to avoid the Takings Clause, it has violated the Constitution.\textsuperscript{172} And the real conundrum relates to the standard or test that should be used to determine when a state court has invoked nonexistent "background law."\textsuperscript{173}

The problem was complicated by the common law tradition that allows for judge-made incremental modifications to property law.\textsuperscript{174} Indeed, there may be a special need for flexibility with respect to common law rights to the shore and beaches. In the nineteenth century, the public policies behind riparian rights supported the filling of malarial marsh, industrial development, and disposal of wastes.\textsuperscript{175} In the twentieth century, public goals shifted towards wetland protection, pollution controls, and recreational waterfronts.\textsuperscript{176} As the public policy concerning waterfront development evolved from exploitation to conservation, some state courts felt a necessity to modify their law of riparian rights.\textsuperscript{177} There was no clear answer as to when and whether such changes went "too far" and became confiscatory.

As to what ought to be the standard for judicial takings, Justice Scalia was outspoken. He rejected all of the proposed tests ("sudden," "unpredictable," lacking of a "fair and substantial basis,"\textsuperscript{178} or involving an "abandonment of settled principles"	extsuperscript{179}) as proving too much and too little.\textsuperscript{180} Scalia's new bright-line rule would deem it a total taking whenever a state action results in the deprivation of any established property right.\textsuperscript{181} A corollary to that

\textsuperscript{172} Id. at 2602.
\textsuperscript{173} See id. at 2612-13 (majority opinion).
\textsuperscript{174} Id. at 2606 (plurality opinion).
\textsuperscript{177} See, e.g., Wiener, supra note 175, at 528-29.
\textsuperscript{178} \textit{Stop the Beach}, 130 S. Ct. at 2610 (plurality opinion).
\textsuperscript{179} See id. at 2615 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{180} See id. at 2610 (plurality opinion).
\textsuperscript{181} Id. at 2602, 2608.
rule made any state judicial attempt to disestablish that property right an unconstitutional judicial taking.\textsuperscript{182}

Under the present state of federal jurisdiction, a power in the federal courts to overturn judicial takings would have had little effect. The Civil Rights Act of 1871\textsuperscript{183} gives the federal courts jurisdiction to redress state actions violating the Fourteenth Amendment.\textsuperscript{184} Supreme Court precedents, however, provide an exhaustion principle requiring taking claimants to have a final state court judgment before seeking federal relief.\textsuperscript{185} Moreover, another Supreme Court precedent makes state court judges immune from federal civil rights suits.\textsuperscript{186} Hence, the victims of state judicial takings lack jurisdictional access to the lower federal courts. Their only opportunity for a federal court challenge to a state court’s judicial taking would be on writ of certiorari to the Supreme Court of the United States. Since the Court only hears seventy-five to eighty cases each term,\textsuperscript{187} it cannot begin to oversee the bona fides of the behavior of the high court in each of the fifty states.

But the Court might change its mind. Both of these limitations on federal jurisdiction—the exhaustion principle and the immunity of state judges—are the creation of Supreme Court precedents.\textsuperscript{188} Several Justices have already expressed the view that the requirement that ”the claimant . . . seek compensation in state court before bringing a federal takings claim in federal court” should be reconsidered.\textsuperscript{189} The judicial immunity doctrine has been the subject of scathing scholarly attack.\textsuperscript{190}

\begin{itemize}
  \item \textsuperscript{182} Id. at 2608.
  \item \textsuperscript{184} tit. 42, § 1983.
  \item \textsuperscript{186} Pierson v. Ray, 386 U.S. 547, 553 (1967).
  \item \textsuperscript{188} See Williamson Cnty., 473 U.S. at 195; Pierson, 386 U.S. at 553.
  \item \textsuperscript{189} San Remo Hotel v. City & County of San Francisco, California, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring).
  \item \textsuperscript{190} See generally Robert Craig Waters, Judicial Immunity vs. Due Process: When Should a Judge Be Subject to Suit?, 7 CATO J. 461 (1987) (referencing
\end{itemize}
Perhaps the Gang of Four property rights advocates on the Court will endeavor to overrule these precedents and to redirect regulatory taking cases back into federal district courts. The federal district courts would then, as a matter of course, certify questions of state law to the state supreme courts. The federal district courts would then be well-positioned to consider whether or not the state courts' written answers were setting forth nonexistent background principles of the state's law of property. The concept of judicial takings would permit the federal district courts to, in each and every case, scrutinize whether state court judges were evading the requirements of the Takings Clause with pretextual background principles of state law.

**General Principles of Takings Jurisprudence**

In another section of Justice Scalia's opinion (joined by Justices Roberts, Thomas, and Alito), he undertakes—with seeming diffidence—to "discuss some general principles of our takings jurisprudence."\(^{191}\) Although he mentions "the landmark case of Penn Central Trans[portation] Co. v. [City of] New York," he relegates it to footnote without further mention.\(^{192}\) Perhaps by ignoring Penn Central, he hopes to make it go away.

Scalia's dislike of the judicial method used in the Penn Central Court's opinion is on the record. He favors a mode of analysis in takings jurisprudence based upon clear, previously enunciated rules of law and not upon discretionary judge-made choices based upon the balancing of many factors.\(^{193}\) Moreover, he did not approve of the outcomes. Penn Central's central proposition was that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\(^{194}\) Because the

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\(^{191}\) Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot., 130 S. Ct. 2592, 2601 (2010) (plurality opinion).

\(^{192}\) Id. at 2603 n.6.

\(^{193}\) Scalia, supra note 55, at 1178.

\(^{194}\) Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978) (holding that air rights over Grand Central Station are not a separate property interest).
Grand Central Station parcel as a whole had residual value, this viewpoint was used to legitimize the City of New York's imposition of a loss of 40 million dollars' worth of air rights on Penn Central.195

Scalia instead wanted the Takings Clause to protect all of the rights inhering in ownership and to thereby discourage states from overusing their police power by forcing them to internalize all of the public and private costs associated with their regulations.196 But, unable to overrule Penn Central without the fifth vote, Scalia worked to undermine it. His discussion in Lucas v. South Carolina Coastal Council marginalized Penn Central by making no mention of the nondisvisibility principle.197

Scalia's Lucas opinion jumped to the conclusion that the right to accretion was the relevant "property interest' against which the [beachfront landowners'] loss of value [was] to be measured."198 By doing so, he aimed to characterize the abrogation of the right to accretion as a deprivation of all economically beneficial use that was "compensable without case-specific inquiry into the public interest advanced in support of the restraint."199 As such, the total taking was per se compensable under the Lucas test.

Scalia's only justification for this "conceptual severance"200 was a citation to the nineteenth-century case of Yates v. Milwaukee.201 But the Yates case was not on point; the Court had only held compensation to be due when a city navigation ordinance required the owner to remove a private wharf from a waterway.202 It was the private wharf that was the relevant property interest and

195 Id. at 137.
197 See generally id. at 1004 (making no mention of the nondisvisibility principle). But see Dolan v. City of Tigard, 512 U.S. 374, 401 (1994) (discussing the nondisvisibility principle).
198 Lucas, 505 U.S. at 1016 & n. 7.
199 Id. at 1015.
202 Yates, 77 U.S. at 507.
not the unexercised riparian right which only became constitutional property "when once vested." 203

In Stop the Beach, Scalia's discussion of the general principles of the taking jurisprudence used an off-point precedent from the nineteenth century to trump an on-point landmark decision from the twentieth century—and the decisions that followed it. He considered the wordplay of classifying some rights as compensable easements and other rights as noncompensable contingent future interests, but rejected it. Instead, he concluded that riparian rights and all other established rights were discrete segments of property, 204 the abrogation of which would be categorically compensable as a taking. Stop the Beach was only a plurality opinion, but the other Justices seemed not to have noticed. They made no criticism of Scalia's selection of precedents or language. Scalia's dicta had set the stage for the proposition that the beachfront landowners' right to receive future accretions (and other riparian rights) was separately and fully protected by the Takings Clause.

CONCLUSION

The opinion in Stop the Beach found four Justices intent on empowering federal courts to prevent state courts from invading the Takings Clause with pretextual background principles of the state's law of property. With a certain irony, their spokesman misstated the Florida property law principles with respect to avulsion. Justice Scalia was unable to muster a majority, but his arguments seem to have convinced the other Justices of the concept of judicial takings upon proof of a state court's intentional misrepresentation of its state property law.

Twenty-five years ago, law professor Richard A. Epstein, in his 1985 book Takings, 205 advanced a radical theory of absolute property rights: "All regulations . . . are takings of private property prima facie compensable by the [S]tate." 206 His central thesis was that "[t]he protection afforded by the [Takings C]lause to each part

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203 Id. at 504.
204 Stop the Beach, 130 S. Ct. at 2601-02, 2605 (plurality opinion).
205 EPSTEIN, supra note 5.
206 Id. at 95.
of an endowment of private property is equal to the protection it affords the whole—no more and no less."\textsuperscript{207} At the time, Epstein seemed out of touch with the holdings of the Supreme Court of the United States. In \textit{Pennsylvania Coal}, the Court had held that "property may be regulated to a certain extent," and only if it "goes too far [will it] be recognized as a taking."\textsuperscript{208} In \textit{Penn Central}, the Court had held "that government may execute laws . . . that adversely affect recognized economic values," so long as "the law does not interfere with . . . [the] primary expectation concerning the use of the parcel."\textsuperscript{209}

The opinion in \textit{Stop the Beach}, however, now finds four Justices intent on advancing Epstein's absolute theory of property rights. If the Gang of Four can get the fifth vote, they would dump the multifactor, ad hoc, fact-specific test set forth in \textit{Penn Central} into the trash bin of history. No longer would public benefit be balanced against private loss. Each and every "deprivation of an[y] established property right"\textsuperscript{210} will be a total taking.

Ronald Reagan observed that "government is not the solution to our problem; government is the problem."\textsuperscript{211} Oliver Wendell Holmes Jr. observed that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."\textsuperscript{212} If the Gang of Four can get the fifth vote that "breaks the bundle of property rights" so that "deprivation of any one of the sticks in the bundle" is a compensable taking, there will be much less government. Whether there will be fewer problems remains to be seen.

\textsuperscript{207} \textit{Id.} at 57.
\textsuperscript{210} \textit{Stop the Beach Renourishment, Inc.} v. \textit{Fla. Dep't of Envtl. Prot.}, 130 S. Ct. 2592, 2608 n.9 (2010) (plurality opinion).
\textsuperscript{211} See \textit{supra} note 50 and accompanying text.
\textsuperscript{212} \textit{Pa. Coal Co.}, 260 U.S. at 413.