

JUDICIAL TAKINGS OR DUE PROCESS?

Eduardo M. Peñalver[†] & *Lior Jacob Strahilevitz*^{††}

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, a plurality of the U.S. Supreme Court concluded that the Takings Clause of the U.S. Constitution prohibits the judiciary from declaring that “what was once an established right of private property no longer exists” unless the property owner in question receives just compensation. In this Article, we delineate the boundaries between a judicial taking and a violation of the Constitution’s due process protections. The result is a judicial takings doctrine that is narrower and more coherent than the one suggested by Stop the Beach.

Our argument proceeds in two parts. The first is a conceptual section that explains what factors are relevant to determining whether a judicial action diminishing a private property interest is a judicial taking or something else. In our view, where a judicial decision intentionally seizes private property to achieve a legitimate public end, the Takings Clause is an appropriate framework for evaluating the constitutionality of the State’s action. The Due Process Clause is the more appropriate doctrinal pathway where the judiciary does not intend to appropriate a private owner’s property rights on the State’s behalf, or where the diminution of private property rights results from a judicial action that serves no legitimate public purpose. By clarifying the boundaries of judicial takings, we also hope to shed light on the constitutional foundations for numerous state-court doctrines concerning the retroactivity of new property rules. The second section articulates a novel functional argument, which suggests that creating liability for judicial takings may cause litigants to underinvest in high-quality legal representation, which will in turn increase the likelihood of judicial mistakes and contribute to the destabilization of existing entitlements. This phenomenon prompts us to argue that cases in which the underinvestment incentives are most pronounced should be litigated under the Due Process Clause, but cases where repeat play or the government’s involvement as a litigant mitigates the underinvestment problem represent more appropriate vehicles for judicial takings treatment. What rides on the distinction between judicial takings and

[†] Professor of Law, Cornell University.

^{††} Deputy Dean and Sidley Austin Professor of Law, University of Chicago. We thank Jonathan Adler, Shyam Baganesh, Stephanos Bibas, Josh Chafetz, Adam Cox, Michael Dorf, Richard Epstein, Lee Fennell, Peter Gerhart, Michele Goodwin, Aziz Huq, Saul Levmore, Richard McAdams, Timothy Mulvaney, Ariel Porat, Andres Sawicki, Mike Schill, and Chris Yoo for helpful comments and conversations about this topic, along with faculty workshop participants at the University of Chicago, University of Pennsylvania, University of Minnesota, Case Western, and Loyola-Chicago, along with Smitha Nagaraja for research assistance, and the Morton C. Seeley Fund and Bernard G. Sang Faculty Fund for generous research support.

due process violations? Under our approach, judicial takings cases should be (a) easier to win than due process cases, (b) more likely to result in damages remedies than injunctive remedies, and (c) more amendable to attractive “comparative fault” inspired solutions.

INTRODUCTION	306
I. THE CONCEPT OF JUDICIAL TAKINGS.....	314
A. The Constitutional Text	316
B. Intent	319
C. Public Use and Intent	327
D. Intentionality and Coordination	328
E. Intentionality and Retroactivity	331
F. Regulatory Takings	333
II. THE UNDERINVESTMENT PROBLEM.....	335
III. HOW TO DIFFERENTIATE TAKINGS AND DUE PROCESS, AND WHY IT MATTERS.....	354
A. Likelihood of Success.....	357
B. Procedural Questions	361
C. Comparative Fault and Contributory Negligence	362
D. So What Is a Judicial Taking? A Few Examples.....	364
CONCLUSION	367

INTRODUCTION

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹ a plurality of the U.S. Supreme Court held that the Takings Clause of the U.S. Constitution prohibits the judiciary from declaring that “what was once an established right of private property no longer exists” unless the property owner in question receives just compensation.² In the process, *Stop the Beach* became the first Supreme Court decision to embrace the doctrine of “judicial takings.” In this Article, we ask readers to assume the correctness of the plurality’s conclusion that there is such a thing as a judicial taking.³ In light of that assumption, our goal is to delineate the boundaries between a judicial taking and a violation of the Constitution’s due process protections. Along the way, we will show how the doctrine of judicial takings might feasibly be constrained in a manner that does not prevent courts from making necessary clarifications about the scope of entitlements.

¹ 130 S. Ct. 2592 (2010).

² *Id.* at 2602.

³ We harbor some doubts as to the desirability of recognizing a judicial taking. Much of the analysis we provide in this Article, which suggests that the universe of judicial takings should not be large, can be used by those seeking to defend a more maximalist (or arguably minimalist) proposition, which is that there ought to be no such thing as a judicial taking.

This effort at boundary drawing is an academic exercise with real-world significance. *Stop the Beach* resulted in a heated split between the four Justices in the plurality, who wanted any judicial abrogation of existing property rights to be dealt with via the Takings Clause, and Justices Anthony Kennedy and Sonia Sotomayor, who agreed with the plurality that the Constitution constrained the judicial redefinition of property rights but thought that cases like *Stop the Beach* ought to be decided under due process analysis.⁴ This dispute between Justices Antonin Scalia, for the plurality, and Kennedy, in partial concurrence, over the appropriate doctrinal hook for dealing with judicial abrogation of existing entitlements extended into further disagreement over the appropriate remedies in those cases.⁵ Once a court finds a judicial redefinition of property unconstitutional, should owners receive damages or injunctive relief? We will begin by describing those two core disagreements, along with the relevant intricacies of Florida real property law, which were at issue in *Stop the Beach*.

The story of *Stop the Beach* actually begins in 1927. That was the year Babe Ruth and Lou Gehrig anchored Murderers' Row, the most feared lineup in baseball history. More obscurely, it was the year of *Martin v. Busch*, a Florida Supreme Court opinion holding that when the State creates new dry land out of what had previously been publicly owned submerged land, the new land belongs to the State, not to the private owner of the dry land that had previously abutted the water's edge.⁶ This was the result notwithstanding the common-law doctrine of accretion, which gives the private owner of adjacent dry land ownership over any submerged lands that become dry lands as a result of gradual recessions of the water's edge.⁷ The result in *Martin* mapped on to the way the common law had long treated avulsions, instances in which the water suddenly recedes to create new dry land.⁸ Such newly created dry land has for generations belonged to whoever owned the soil while it was still submerged, and *Martin* held that the State's causal role in the avulsion made no difference.⁹

The facts of *Stop the Beach* were very close to those of *Martin*. In *Stop the Beach*, the city of Destin, Florida sought to restore 6.9 miles of beach that had been eroded by multiple hurricanes.¹⁰ It proposed to do so by dredging submerged sand and dumping it onto the spot

⁴ *Stop the Beach*, 130 S. Ct. at 2597 (plurality opinion); *id.* at 2613 (Kennedy, J., concurring in part and concurring in the judgment).

⁵ *Id.* at 2607 (plurality opinion); *id.* at 2617 (Kennedy, J., concurring in part and concurring in the judgment).

⁶ 112 So. 274, 287 (Fla. 1927).

⁷ *Stop the Beach*, 130 S. Ct. at 2598.

⁸ *Id.*

⁹ *Martin*, 112 So. at 287.

¹⁰ *Stop the Beach*, 130 S. Ct. at 2600.

where the water met the sand.¹¹ In some places, this process would widen the beach by approximately seventy-five feet toward the water.¹² The State would own this newly recreated beachfront, and the private property owners whose land previously extended to the high-tide line would now have the publicly owned sand lying between their property and the water's edge at high tide.¹³ The private property owners argued that the widening of this beach deprived them of their right to access the water directly from their property and the right to expand the size of their beachfront property via accretions, asserting a violation of the Takings Clause.¹⁴ After the Florida courts ruled against the property owners, they sought certiorari in the U.S. Supreme Court, asserting that the Florida courts had engaged in a judicial taking by abrogating the property owners' rights to direct water access and accretion.¹⁵ Critically, none of the state judicial opinions cited *Martin v. Busch*.

Thanks in part to an amicus brief filed by the Solicitor General, which underscored the importance of *Martin*,¹⁶ the Supreme Court realized that the Florida courts had not changed the property owners' rights at all, since the *Stop the Beach* plaintiffs had never had any entitlement to prevent the State from widening the beach and claiming the widened portion as state property.¹⁷ With Justice John Paul Stevens recused, all eight remaining Justices agreed that in light of the answer to this property question, there was no judicial taking in *Stop the Beach*.¹⁸ For Justices Stephen Breyer and Ruth Bader Ginsburg, that was that, and the opinion need not have reached the constitutional question of whether there was any such thing as a judicial taking.¹⁹ It was enough to say that the facts before the Court presented no judicial taking.²⁰

Justice Scalia, writing for Chief Justice John Roberts, Justice Clarence Thomas, and Justice Samuel Alito, saw things differently. He wrote that the Constitution does protect property owners against tak-

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2600–01.

¹⁶ Brief for the United States as Amicus Curiae Supporting Respondents, *Stop the Beach*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3183079.

¹⁷ See *Stop the Beach*, 130 S. Ct. at 2611 (“[I]f an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner’s contact with the water.”).

¹⁸ *Id.* (“Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State’s right to fill.”).

¹⁹ *Id.* at 2619 (Breyer, J., concurring in part and concurring in the judgment).

²⁰ *Id.*

ings effectuated by the judiciary in the same way that it protects them against takings perpetrated by legislatures or executives.²¹ In the plurality's view, "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."²² Thus, the plurality concluded, "[i]f 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."²³

While the Breyer concurrence was short and minimalist, Justice Kennedy's concurrence (written on behalf of himself and Justice Sotomayor) was not. Elaborating on an approach that he had advocated in earlier Supreme Court concurrences,²⁴ Justice Kennedy argued that the most appropriate framework for deciding cases in which a judicial decision resulted in a litigant's loss of an existing entitlement would be through the Due Process Clause of the Constitution, not the Takings Clause.²⁵ But in *Stop the Beach* he did not want to decide the question of whether the Takings Clause might ever prohibit judicial conduct that the Due Process Clause permits.²⁶ The plurality fired back, accusing Justice Kennedy of advocating the improper importation of separation-of-powers considerations into due process jurisprudence, suggesting that Kennedy's approach is directly contrary to existing precedent, arguing that Kennedy's favored methodology would repeat the mistakes of the *Lochner* era by protecting economic liberties via substantive due process, and pointing out that a substantive-due-process approach would raise many of the practical objections that Justice Kennedy launched against the judicial takings approach.²⁷

The plurality and the Kennedy concurrence also differed sharply over the question of remedy, a second key point and one closely related to the question of whether the takings or due process approach is superior for the sort of injury in *Stop the Beach*. Prior to *Stop the Beach*, the law had for decades stated the remedy for a takings viola-

²¹ *Id.* at 2602 (plurality opinion).

²² *Id.* at 2601.

²³ *Id.* at 2602.

²⁴ *Id.* at 2614–15 (citing his previous opinions in *E. Enters. v. Apfel*, 524 U.S. 498 (1998) and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)).

²⁵ *Id.* at 2618 (Kennedy, J., concurring in part and concurring in the judgment).

²⁶ *Id.* Justice Kennedy also noted, "If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. In the meantime, it seems appropriate to recognize that the substantial power to decide whose property to take and when to take it should be conceived of as a power vested in the political branches and subject to political control." *Id.*

²⁷ *Id.* at 2605–06 (plurality opinion).

tion rather clearly: where the government violates the Takings Clause, the remedy is compensation for the period the violation is in place,²⁸ but when its action deprives an owner of property without due process, compensation is not sufficient and the government action must be invalidated. As the unanimous Court put it in *Lingle v. Chevron U.S.A., Inc.*:

The [Takings] Clause expressly requires compensation where government takes private property “for public use.” It does not bar government from interfering with property rights, but rather requires compensation “in the event of otherwise proper interference amounting to a taking.” Conversely, if a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.²⁹

The Supreme Court’s decision in *Stop the Beach* threw the remedial question into a state of uncertainty, at least where judicial takings are concerned. According to Justice Kennedy’s concurrence, a hypothetical jurisdiction whose new property rules were deemed a judicial taking would usually have to pay damages but could in limited circumstances face a choice between paying damages and reembracing the content of their earlier property precedents:

It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief It makes perfect sense that the remedy for a Takings Clause violation is only damages, as the Clause “does not proscribe the taking of property; it proscribes taking without just compensation.”

It is thus questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation. . . . If a single case were to properly address both a state court’s change in the law and whether the change was a taking, the Court might be able to give the state court a choice on how to proceed if there were a judicial taking. The Court might be able to remand and let the state court determine whether it wants to insist on changing its property law and

²⁸ See *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304 (1987).

²⁹ 544 U.S. at 543 (2005) (quoting *First English*, 483 U.S. at 315); see also Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 252 (2011) (noting that it “is sounder to analyze claims of improper judicial property declarations under a due process theory” because it would “provide some semblance of stability to property owners”); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 436 (discussing the “practical considerations” that support the remedy of invalidation, rather than compensation, under the Due Process Clause).

paying just compensation or to rescind its holding that changed the law.³⁰

Justice Scalia's plurality opinion brushed aside Justice Kennedy's conclusion that compensation would be the primary remedy for judicial takings. As the plurality saw it, a compensation "remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking."³¹ The plurality continued, noting that if the Court "were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question."³² If the plurality's approach to judicial takings is adopted by a majority in a subsequent case, then the usual remedy in a judicial takings suit would be the reversal of a lower court ruling that had tried to abrogate a preexisting entitlement.³³ Note in particular the deep tension between the *Stop the Beach* plurality and the *Lingle* Court's unanimous 2005 opinion.

If the remedies for both Takings Clause and Due Process Clause violations are identical—invalidation of the offending state action—then properly allocating claims between the two clauses arguably becomes a lower-stakes affair. Eliminating the traditional remedial consequences of the distinction would not, however, completely vitiate the significance of the choice of clauses. For starters, Justice Scalia did not take the position that damages would be unavailable for judicial takings violations. He only said that the usual remedy in the case of a judicial taking would be to invalidate the judicial decision giving rise to the violation. If a State created a mechanism to provide compensation for owners who suffer judicial takings, the Takings Clause would certainly *permit* the State to opt for the damages remedy.³⁴ On

³⁰ *Stop the Beach*, 130 S. Ct. at 2617 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)).

³¹ *Id.* at 2607 (plurality opinion).

³² *Id.*

³³ For an illuminating discussion of the remedial question and an argument for why the plurality gets the better of Justice Kennedy on the issue, see D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 944–48 (2011).

³⁴ Oregon's Measure 37 might constitute a useful data point concerning how local governments may respond when given a choice between compensating affected landowners and rescinding a regulation. That law required land-use regulators to either compensate owners when new land-use restrictions reduced the value of their land (to any extent) or to exempt the complaining landowner from the new rule. In the few years the law was in effect, governments invariably opted to exempt the landowner from the regulation. See JOHN D. ECHEVERRIA, GEORGETOWN ENVTL. LAW & POLICY INST., PROPERTY VALUES AND OREGON MEASURE: EXPOSING THE FALSE PREMISE OF REGULATION'S HARM TO PROPERTY OWNERS 37, at 5 (2007), available at <http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf> (citing *Measure 37 Database*, PORTLAND ST. U., <http://www.pdx.edu/ims/measure-37-database> (last updated Dec. 12, 2007)). Part of the problem, however, may have

the other hand, a state action that deprives an owner of property without due process *must* be invalidated and (if possible) the property restored to its owner, without regard to the payment of damages.³⁵

The core dispute between Justices Scalia and Kennedy is the central question we address in this Article: Assuming that there should be a remedy of some sort for instances in which courts abrogate preexisting private property rights, when does it make sense to proceed via a judicial takings remedy, and when does it make sense to resolve the dispute using a due process framework? In answering this question, we will begin to describe some of the decisive institutional considerations that should affect the analysis and flesh out how the law may develop in the coming years. The remedial question, which represented the second main bone of contention between the Scalia plurality and the Kennedy concurrence, will be a critical component of that analysis.

Our Article proceeds as follows. Part I identifies the salient textual, structural, and precedential arguments that might help us distinguish between those courts' interferences with property rights that implicate the Takings Clause and those that implicate the Due Process Clause. The key factor in our framework is intent to subject private property to public use. Where a judicial decision intentionally seizes private property to achieve a legitimate public end, the Takings Clause is the best framework for evaluating the constitutionality of the State's action. Due Process is the more appropriate doctrinal pathway where the judiciary does not intend to appropriate private owner's property, as well as when the diminution of private property rights results from a judicial action that serves no legitimate public purpose. Other relevant factors in our analysis include whether the private property in question is retained for a public purpose and whether the

been that the law required compensation to come from a fund specifically designated for the purposes of Measure 37 compensation. In William Fischel's account of *Lucas v. South Carolina Coastal Council*, he observed that, after the State of South Carolina was required to purchase David Lucas's waterfront property as a result of his successful inverse condemnation action, see 424 S.E.2d 484 (S.C. 1992), the State opted to sell the property for development rather than keep it in undeveloped—as it had forced Lucas to do. See William A. Fischel, *Takings and Public Choice: The Persuasion of Price*, in 2 THE ENCYCLOPEDIA OF PUBLIC CHOICE 549, 552 (Charles K. Rowley & Friedrich Schneider eds., 2004). Fischel views this as evidence of the cost-internalizing effects of compensation on government actors. See *id.* Vicki Been favors a more political interpretation of South Carolina's behavior, noting that, by the time it was forced to purchase the property from Lucas, the State had already significantly eased the regulatory regime that had motivated Lucas's original lawsuit in response to pressure from waterfront owners in the wake of the destructive Hurricane Hugo, a category 4 storm that severely damaged homes along the South Carolina coast in 1989. See Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES 299, 320–23 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

³⁵ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005).

judiciary and another branch of government have coordinated their actions in an effort to circumvent the Takings Clause's limitations on legislative and executive action. The main thrust of this Part is to lay the foundation for our discussion of judicial takings by spelling out in general terms the proper scope of the Takings Clause and in the process correct misimpressions that have developed in the takings literature and in some of the case law.

Part II then presents the core original thesis of the Article, providing a functional account that further helps reinforce the significance of the distinction between judicial takings and due process violations. On our account, there is a key distinction between judicial decisions that diminish the value of private property and executive or legislative decisions that do the same. Because of the adversarial nature of the judicial process, private property owners themselves shoulder more of the blame for a judicial decision that diminishes the value of their private property than would be the case if a legislature or agency diminished the value of their property. On this logic, the availability of judicial takings causes of action act as a form of mandatory insurance, one that may diminish the incentives of property owners to invest in high-quality legal representation at the early stages of judicial proceedings. Such underinvestment may create negative externalities in the form of destabilized property doctrines as cases work their way from trial to appellate courts. Because we argue that repeat play diminishes the underinvestment problem, we argue that cases involving repeat-player litigants are more appropriately treated as judicial takings cases, whereas those involving non-repeat-player litigants ordinarily would implicate the Due Process Clause. This functional analysis dovetails nicely with our discussion of the proper scope of the Takings Clause in Part I, because the biggest repeat player of them all in property litigation is the State. Thus, for both conceptual and functional reasons, property cases in which the State is a party should be understood to lie at the heart of the category of judicial takings, properly defined. (As we will argue in Part II, however, the category of judicial takings includes some cases in which the State is not a party.)

Part III identifies some of the implications of treating a subset of disputes as judicial takings and others as due process cases. In our view, judicial takings cases should (a) be easier to win than due process cases, (b) result in damages remedies rather than injunctive remedies, and (c) lend themselves to attractive "comparative fault" inspired solutions. By comparison, claimants litigating due process cases challenging judicial acts would face an uphill battle to prevail, with a series of remedies largely injunctive in nature and a landscape where doctrines like comparative fault would be unavailable to the courts. The universe of judicial takings claims will be confined, but it

will hardly represent a null set, as other commentators have advocated.³⁶ Although we draw on existing precedents to show why such different implications may flow from the divergent work that the Takings and Due Process Clauses are doing in the Fifth Amendment, our discussion in this Part is as much normative as positive. Having shown that there may be sensible ways to differentiate among different types of cases, we defend the view that those differences are justifiable and important.

I

THE CONCEPT OF JUDICIAL TAKINGS

Let us begin by considering two boundary dispute hypothetical scenarios. Assume that each of them involves a comparable economic loss.

*Private Boundary Dispute:*³⁷ A and B own neighboring residential properties. In the course of making several improvements to her property, B built a set of concrete steps and a concrete walkway that inadvertently encroached roughly two feet onto A's parcel. When A discovered the encroachment over twenty years later, he sued to have the steps and walkway removed. B claimed that she had acquired the land under encroachment by adverse possession. A 1921 decision by the New Jersey high court had held that, in order to adversely possess, a claimant must show that she knew she was occupying land that did not belong to her. The trial court followed that precedent and, because the evidence showed that B did not know she was encroaching, entered judgment for A. The New Jersey Supreme Court decides to repudiate its 1921 decision and follow the majority of American jurisdictions, which hold an adverse possessor's subjective state of mind to be irrelevant to her claim. As a consequence, B prevails.

*Public-Private Boundary Dispute:*³⁸ Hughes traces title to her ocean-front parcel in Washington State to an original purchaser from the federal government prior to Washington's statehood. In its 1889 Constitution, Washington State asserts ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."³⁹ The State has interpreted

³⁶ See, e.g., Walston, *supra* note 29, at 379, 435-36 (arguing that there should be no such thing as a judicial taking, and all cases involving judicially imposed diminutions in property rights should be considered under a due process framework).

³⁷ The facts of this hypothetical are based loosely on the New Jersey case of *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969).

³⁸ The facts of this hypothetical are based on *Hughes v. Washington*, 389 U.S. 290 (1967).

³⁹ *Id.* at 296 (quoting WASH. CONST. of 1889, art. XVII, § 1).

this language to confer on it ownership of accretions to waterfront parcels, in contradiction to the common law, which (at the time of the state constitution's adoption and in most jurisdictions since) grants ownership of accreted land to the upland owner. Hughes sues Washington State, claiming she owns the accretions adjacent to her waterfront parcel. The state trial court rules that federal law at the time of the original grant governs the question and rules for Hughes. On appeal, the state supreme court holds that Washington State law determines the scope of property rights within the state and adopts the state's interpretation of the 1889 constitutional provision to Hughes' land. Consequently, it rules that the State of Washington owns the accreted land.

In both hypotheticals, a landowner loses property, but in each case does it make sense to say that the State (acting through the courts) has taken property for public use without just compensation? Embedded within this question are two distinct, though related, issues. First, in what sense are courts properly understood as agents of the State such that judicial resolution of ostensibly private disputes constitutes an action on behalf of the State? Second, when is it appropriate to describe a court deciding a case in a way that impairs the property interests of one of the parties as taking property for public use so as to require just compensation by the State?

The first question raises tangled issues surrounding the doctrine of "state action." "Takings" are something that the *State* does to property owners. The *Stop the Beach* plurality is committed to the idea that a judicial decision constitutes state action to the same degree as an action by any other branch of government.⁴⁰ But, without substantial qualification, this simple equation leaves important questions unanswered. Does the plurality mean to suggest that any judicial application of state property law constitutes state action? If so, that would constitute a significant expansion of the state-action doctrine, in effect extending *Shelley v. Kraemer*⁴¹ to a very broad range of property cases. It would mean, for example, that any enforcement of a homeowners' association rule depriving an owner of preexisting rights—say, by banning smoking in common areas—might constitute state action and could give rise to a takings suit.⁴²

It seems unlikely that the plurality intended such a dramatic shift in the law of state action. A more likely possibility is that the *Stop the*

⁴⁰ See *supra* text accompanying notes 22–23.

⁴¹ See 334 U.S. 1, 14 (1948) (holding that state-court enforcement of racially restrictive covenants constituted state action for the purposes of the Equal Protection Clause of the Fourteenth Amendment).

⁴² Robert Ellickson advocated just such a "private" Takings Clause in a 1982 *University of Pennsylvania Law Review* symposium. See Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1533 (1982).

Beach plurality envisions a distinction between judicial lawmaking (i.e., law changing) and judicial law enforcement. The enforcement of an existing property law does not deprive someone of property he already had—even if it results in the owner losing a piece of property he previously possessed. This sort of judicial action merely activates existing limitations already embedded within their title.⁴³ But when courts *change* the law, they are acting as lawmakers. And it is only as a lawmaker altering existing property entitlements that the State can possibly take property from an owner for public use.⁴⁴

A. The Constitutional Text

Having narrowed the potential reach of the judicial takings analysis to situations in which judges change the law, the second question becomes the more challenging one. When does a judicial change in the law amount to a taking of property? Is it always the case that if someone loses property to which she was previously entitled because a court has changed a property rule, then the State (through the court) has taken her property for public use within the meaning of the Takings Clause? Recall that there is certainly language in the *Stop the Beach* plurality suggesting as much. “If a legislature *or a court* declares that what was once an established right of private property no longer exists,” the plurality says, “it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”⁴⁵ This simple equation of a loss due to a change in property rules with a “taking for public use” is only superficially appealing, a point driven home by the first hypothetical, the adverse possession case. When a state court loosens the rules governing adverse possession and applies the new rule to the parties before it, the consequence is that property that would not have changed hands under the old rule goes to the adverse claimant. The original owner has clearly lost property in the way apparently envisioned by the *Stop the Beach* plurality. The question is whether the mere fact that an owner suffers a loss at the hands of the State’s courts means the State has “taken” it “for public use” in a way that makes it analogous to the exercise of eminent domain and therefore triggers the compensation requirement of the Takings Clause.

⁴³ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (observing that a regulation that deprives an owner of all economically beneficial use would not constitute a taking if it “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership”).

⁴⁴ See Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 3 (2003) (“A viable regulatory takings claim assumes that the government has acted to prohibit some activity that once was allowed, or at least had not been explicitly prohibited.”).

⁴⁵ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

Answering this question requires a broader consideration of exactly how, and against what, the Constitution protects private property. There is a tendency among commentators—understandable as much for historical reasons as hermeneutic ones—to try to make the Takings Clause an ultimate and all-purpose constitutional guarantor of private property rights.⁴⁶ But the Constitution protects private ownership in a number of overlapping and complementary ways. Insofar as the Framers saw “faction” as a grave threat to property rights, we can understand many of the structural constraints on majoritarian politics built into the Constitution—the independent judiciary, the Senate, the Electoral College, the federal system, to name just a few—as property protections. As Alexander Hamilton put it in *Federalist No. 85*:

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States who may acquire credit and influence enough from leaders and favorites to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.⁴⁷

Even confining our focus to the textual provisions in the Constitution that explicitly protect property rights, we see a similar multiplicity of strategies. The Fifth Amendment itself has two property clauses, after all. The Takings Clause protects owners from having their property “taken for public use” without “just compensation.”⁴⁸ And the Due

⁴⁶ In the 1980s, a number of prominent conservative lawyers seized on the Takings Clause as the lynchpin for a concerted strategy of impact litigation to attack and rein in what they viewed an overreaching regulatory state. See, e.g., CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 183 (1991).

⁴⁷ THE FEDERALIST NO. 85, at 505–06 (Alexander Hamilton) (Am. Bar Ass’n. Classics 2009); see also THE FEDERALIST NO. 10, *supra*, at 47 (James Madison) (arguing that the regulation of competing property interests “forms the principal task of modern legislation”); Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2252–53 (2004) (“[T]he mechanisms for protecting property owners from abusive government regulation should not be primarily judicial, but rather structural and political.”).

⁴⁸ U.S. CONST. amend. V.

Process Clause protects them against being “deprived of . . . property, without due process of law.”⁴⁹ Perhaps the difference between taking property and depriving someone of property is akin to the distinction between picking someone’s pocket and, having found someone’s wallet, returning it to the wrong person. If the government imposes a loss without the intent to harness private property to accomplish a public purpose, it has not “taken” that property “for public use,”⁵⁰ though it might still have violated the owner’s constitutional rights. Although these two provisions have frequently been muddled together by courts and commentators alike,⁵¹ grammatically they operate independently of one another and the Supreme Court understands them to protect owners against different kinds of government harms.⁵²

To D. Benjamin Barros, the textual argument is a decisive reason for concluding that cases like our adverse possession example, where the courts hold that Blackacre really belongs to private actor *A*, despite earlier suggestions in the case law that it ought to belong to private actor *B*, cannot be judicial takings.⁵³ While we agree with Barros’s fundamental result in this particular hypothetical, we arrive there for somewhat different reasons. Assuming the textual approach is the right one to use to discern the meaning of the Takings Clause, it is worth underscoring that the Fifth Amendment is written in the passive voice, not the active one: “[N]or shall private property be taken for public use, without just compensation.”⁵⁴ The Constitution’s choice of passive voice obscures the identity of the taker, suggesting that the use need be public, but the taker need not. If the Constitu-

⁴⁹ *Id.*

⁵⁰ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005) (quotations omitted).

⁵¹ *See* Walston, *supra* note 29, at 379–80 (discussing the merger of substantive due process and regulatory takings).

⁵² *See Lingle*, 544 U.S. at 542–43 (distinguishing between the interests protected by the Takings and Due Process Clauses, with the former protecting owners against bearing a disproportionate burden of the costs of an otherwise valid regulation and the latter protecting owners against regulations that are invalid because they are irrational or arbitrary).

⁵³ *See* Barros, *supra* note 33, at 922 (“Focusing on both the front and back ends of the transfer provides a natural demarcation of which types of transfers are subject to the Just Compensation Clause and the Due Process Clause. Both private-public and private-private transfers imposed by a government actor ‘deprive’ owners of private property and are subject to the requirements of the Due Process Clause. Only private-public transfers, in contrast, ‘take’ property and are subject to the requirements of the Just Compensation Clause.”). *But see* Mulvaney, *supra* note 29, at 260–62 (concluding that private-to-private transfers of entitlements may be judicial takings under the *Stop the Beach* plurality approach). There are certainly cases in which courts have found takings liability when a local elected body transfers a common-law entitlement from one private party to another. *See, e.g., Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 322 (Iowa 1998) (holding that a county’s invocation of a state Right to Farm statute, which immunized a farmer against the possibility of a nuisance suit by neighbors, constituted a “flagrantly” unconstitutional taking).

⁵⁴ U.S. CONST. amend. V.

tion had been written to say, “nor shall the State take private property for public use” or “nor shall private property be taken *and retained* for public use,” then Barros’s argument would become decisive, at least in textual terms. In our view, the sort of but-the-language-could-have-been-clearer move that Barros makes, or that we just offered in response, is an unsatisfying way to interpret a constitutional text. Even beyond that, it seems counterintuitive to deem the text of the Takings Clause decisive when the case law interpreting it has deviated so sharply from both the Clause’s plain meaning and its original understanding.⁵⁵ The textual considerations strike us as, at most, suggestive.

B. Intent

Given the indeterminacy of the textual arguments, it is worth turning to a body of precedent that confronts a question very much like the takings/due process issue posed in *Stop the Beach*, but which benefits from having been open to consideration for a longer period of time and with less ideological valence. This body of case law, which discusses the connection between the regulatory takings inquiry and the purposive reading of the Takings Clause we are proposing, concerns the boundary between government takings, for which the constitution requires compensation, and government torts, for which it may not. In identifying State deprivations of property as “takings,” cases discussing this boundary principle consistently emphasize the importance of the government’s intent to appropriate the property in question for some public purpose or, alternatively, the fact that the government benefits from the property owner’s loss in a way that suggests the possible presence of such intent. Where the government deprives the owner of property through negligent acts not apparently calculated to derive some benefit from the owner’s loss, however, lower courts have often found the government’s conduct to fall beyond the reach of the Takings Clause.⁵⁶

In 2003, for example, the Federal Circuit considered a claim by a property owner who argued that the construction of a post office uphill from his property damaged his land by increasing the runoff from

⁵⁵ See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252–57 (1996); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1099–102 (2000); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791–92 (1995).

⁵⁶ See, e.g., *Green Int’l, Inc. v. State*, 877 S.W.2d 428, 434 (Tex. App. 1994) (“The rationale for [the] scienter requirement is the idea that negligence by government agents confers no benefit on the public.”). Some state constitutions expressly protect property owners from damage to their property by the State, as well as from takings. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 118–20 (1999).

the uphill parcel.⁵⁷ The court developed a test for marking the boundary between “takings for public use” and tortious deprivations of private property not compensable under the Takings Clause. The test focuses on the government’s intent to take property for its own purposes or, where evidence of specific intent is lacking but the property owner’s loss is the predictable consequence of the government’s conduct, on the government’s de facto appropriation, such that the government benefits at the private owner’s expense.⁵⁸ “[A] property loss compensable as a taking,” the court said, “only results when the government intends to invade a protected property interest or the asserted invasion is the ‘direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.’”⁵⁹

A similar issue arose in *Nicholson v. United States*, a case arising in the aftermath of Hurricane Katrina.⁶⁰ In that case, the Court of Claims was confronted with the argument that the United States had taken the plaintiffs’ property in violation of the Takings Clause when the levees built by the Army Corps of Engineers failed, causing widespread flooding in and around New Orleans.⁶¹ The court granted the government’s motion for summary judgment, noting that “[t]he key to distinguishing a taking from an incidental injury [not compensable under the Takings Clause] is the presence on the part of the Government of an intent to appropriate.”⁶²

As we will argue below, keeping the notion of due process and takings separate helps to clarify the proper reach of a doctrine of “judicial takings.”⁶³ Our position is not based on an overriding commitment to textualism or originalism as modes of constitutional interpretation. Instead, as we will argue, the use of multiple mechanisms for constitutionally protecting property not only maps well onto legal distinctions that have helped separate takings from torts, but also provides a normatively resonant alternative to trying to turn every unwise government act into a taking. Distinguishing between the Takings and Due Process Clauses is consistent with the text of the Constitution, but it also provides a richer conceptual vocabulary for evaluating constitutional property claims and helps courts tailor the

⁵⁷ *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1350–51 (Fed. Cir. 2003).

⁵⁸ *See id.* at 1355–56.

⁵⁹ *Id.* at 1355 (quoting *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955)).

⁶⁰ 77 Fed. Cl. 605 (2007).

⁶¹ *Id.* at 606–07.

⁶² *Id.* at 621 (internal quotation marks omitted) (quoting *Berenholz v. United States*, 1 Cl. Ct. 620, 627 (Cl. Ct. 1982)).

⁶³ *See* discussion *infra* Part III.

most protective remedies (injunctive relief) to the most serious violations of private property rights.

Much of the voluminous academic commentary on the Takings Clause has focused on the important questions of when property has been “taken.”⁶⁴ More recently, scholars have turned their attention towards the meaning of “public use.”⁶⁵ But, perhaps for understandable reasons, few have focused on the word linking these two important and contentious concepts. In defining the boundaries of the concept of judicial takings, however, the word “for,” with its implication of purposefulness, may help to shed some light on the Takings Clause’s meaning.

This is not to say that the question of intent has been wholly absent from the Takings Clause discussion. In an insightful article, Ronald J. Krotoszynski argued that intent to appropriate was a touchstone for distinguishing regulatory takings from due process violations.⁶⁶ And, in its 2005 decision in *Kelo v. City of New London*, the Supreme Court expressed a renewed interest in a condemning body’s intent.⁶⁷ Prior to *Kelo*, it had been common for courts and commentators to treat the “public use” language in the Takings Clause as a (concededly

⁶⁴ The academic commentary on the takings question is voluminous. Mercifully, its growth has slowed in recent years. The consensus among most scholars is that the Supreme Court’s takings jurisprudence is a “muddle.” See, e.g., Doremus, *supra* note 44, at 1–2 (calling regulatory takings law “famously incoherent”); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 279 (1992) (“[T]akings doctrine is a mess.”); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2169–70 (2002) (likening attempts to interpret the Takings Clause to the “physicist’s hunt” for the elusive quark (citation omitted)); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–62 (1984) (describing Takings Clause jurisprudence as “[b]y far the most intractable constitutional property issue”); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1077–97 & n.2 (1993) (reviewing the state of takings jurisprudence and collecting sources).

⁶⁵ See Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877; James W. Ely, Jr., *Thomas Cooley, “Public Use,” and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845; William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929; Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003); Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

⁶⁶ See Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 718 (2002) (arguing that intent to expropriate ought to be a requirement for establishing a regulatory taking). Our approach differs from Krotoszynski’s in that he defines the requisite intent far more narrowly than we do. For example, he distinguishes between an intent to appropriate and an intent to regulate. See *id.* at 719. On our approach, however, the intent to regulate is consistent with an intent to appropriate if the regulation deprives an owner of a property right that he previously possessed in order to accomplish some valid public end. In this sense, our approach is more consistent than Krotoszynski’s with the scope of existing regulatory takings doctrine.

⁶⁷ 545 U.S. 469 (2005).

weak) limitation on the government's power of eminent domain.⁶⁸ In *Kelo*, however, the Court seemed to go farther, emphasizing that for an explicit use of eminent domain power the condemnor's *actual intent* must be to foster a "public use" (which courts have long understood to broadly encompass any legitimate "public purpose") in order to constitute a valid exercise of that power.⁶⁹ Thus, as the Court said, a condemnor exceeds the limits of the Takings Clause when it takes property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."⁷⁰

Importantly, a use that is not public is invalid, even if accompanied by just compensation. One way of looking at this feature of "public use" inquiry is to treat it as a limitation on the ends that can be pursued through the use of eminent domain. Such a gloss makes sense where there is no dispute about whether a taking is occurring. But, in addition to a limit on ends, there is another way of looking at the relevance of intent in the "public use" inquiry, one that becomes more salient when there is a debate about whether a taking has occurred. This is to understand the requirement of intent not just as a restriction on ends but as also at least partially definitive of means. That is, property is "taken *for* public use" when there is intent not just with regard to the public ends being pursued but also with respect to the means being employed—the appropriation of property in the service of those ends.

This notion of the Takings Clause as only applying when certain intentions are present can help to make sense of the Fifth Amendment's textual distinction between two distinct categories of property losses. The first, broader category is "deprivations," which seems to encompass any loss of property imposed on owners by deliberate actions of the State, without any regard to purpose.⁷¹ This category is

⁶⁸ See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231–32 (1984); *Berman v. Parker*, 348 U.S. 26, 31 (1954); see also *Clayey*, *supra* note 65, at 878 (discussing the "strong impression" made by courts and commentators that the "public use" language of the Takings Clause had little influence on legislatures).

⁶⁹ See 545 U.S. at 477–78.

⁷⁰ *Id.* at 478.

⁷¹ See *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986). Justice Stevens would broaden the "deprivation" category even further and jettison the requirement that the State's action be deliberate:

"Deprivation," it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss. The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing—being "deprived" of—an aspect of liberty as the result, in part, of a form of state action.

See *id.* at 340–41 (1986) (Stevens, J., concurring in the judgment); see also AJ VAN DER WALT, *CONSTITUTIONAL PROPERTY LAW* 123–28 (2005) (discussing a similar—though not identi-

defined in part, though not exclusively, by the impact on the owner, not by the reason for the State's action. Some losses (deprivations) may be legitimate, whether or not owners are compensated, but some of them—those deprivations that occur without due process—are deemed illegitimate, perhaps even if compensation is provided. The second, narrower category, properly understood as a subset of the first, occurs when property is “taken for public use.” To fall within this subset, the State must purposefully employ a particular means—taking of property—in the service of public end. The presence of these intentions marks off the “takings” subset of the broader category of property losses due to intentional actions of the State (deprivations), a subset that the Fifth Amendment explicitly declares to be legitimate, provided that just compensation is paid.⁷²

The fact that the Constitution expressly permits intentional deprivations—so long as just compensation is paid—might at first seem odd. We are accustomed to the notion that intentionally imposing a loss is somehow more blameworthy than doing so accidentally. Why, then, does the Constitution permit the intentional harm of taking property upon the payment of compensation while at the same time categorically barring some potentially unintentional deprivations—those that occur without due process? The puzzle is deepened by the wide consensus, among courts and commentators, that “just compensation” systematically undercompensates most expropriated property owners.⁷³ In other words, the Constitution seems to empower the government to inflict significant harm on property owners but only if it does so with intent.

The puzzle is more apparent than real. The key is to take a closer look at the nature of the government intentions encompassed by the Takings Clause and, with that understanding in hand, revisit the notion of due process. The kind of government action that falls within the ambit of the Takings Clause is the intentional use of private property for the public's good, provided that just compensation is paid. Although what counts as a public use has historically been very broad, it excludes (as the Court made clear in *Kelo*) the taking of property

cal—distinction between “deprivation” and “expropriation” in the South African Constitution).

⁷² See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005).

⁷³ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183 (1985); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (6th ed. 2003); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 755 (1999); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962 (calling the notion that “just compensation” undercompensates a “truism”); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678–79 (2005). But see Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006) (questioning the conventional view that most owners are undercompensated when their property is taken by eminent domain).

with the animating purpose of benefitting some favored private party.⁷⁴

The Due Process Clause has a broader and more foundational focus. It protects property owners against lawless and arbitrary treatment at the hands of the State.⁷⁵ Historically, that protection has been understood to have both a substantive and a procedural dimension. In its procedural dimension, the Due Process Clause requires that the State deprive owners of property only through procedures that provide owners with notice and an opportunity to be heard.⁷⁶ How much notice and what kinds of opportunity to be heard depends very much on the circumstances of the loss being inflicted. As the Supreme Court put it in *Mathews v. Eldridge*, the process that is due is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens on the Government of requiring more process.⁷⁷ Where, as it is in the “judicial takings” context, the questions relate to whether it is permissible to change a legal rule and then apply it retroactively to existing entitlements, this procedural aspect of due process has obvious implications, both for the propriety of retroactive application of new rules and, as we will see, for the need to preserve a functional adjudicative process for judicially assessing disputed property entitlements.

In its substantive dimension, this category of arbitrary state conduct marks the outer boundaries of the State’s legitimate power to act at all. It has traditionally been analyzed in terms of the suitability of the government’s ends and the fit—as a matter of practical reasoning—between those ends and the means the government has chosen to pursue them.⁷⁸ The question of ends is nearly identical to the “public use” inquiry under the Takings Clause.⁷⁹

⁷⁴ See *Kelo*, 545 U.S. at 477–78.

⁷⁵ See *Lingle*, 544 U.S. at 542.

⁷⁶ See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

⁷⁷ See 424 U.S. 319, 335 (1976), *quoted in* *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

⁷⁸ See *Lingle*, 544 U.S. at 541–42.

⁷⁹ One possible difference is that, since *Kelo*, the “public use” question focuses on the government’s *actual* ends—that is, the goal it was actually trying to achieve by taking property. See *Kelo*, 545 U.S. at 478, 479–81 (“Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”); see also *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (“Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.”); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–41 (1984). Conversely, under due process (and equal protection) analysis of property regulation since the end of the *Lochner* era, the question has been whether there is some conceivable public purpose that would justify the regulation. See *Kelo*, 545 U.S. at 490–91 (Kennedy, J., concurring); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–314 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490–91 (1955). But, as Justice Kennedy observes in his concurring opinion

The restriction of state actors to public ends prohibits the State from abdicating its obligation to act in the public's interest by making itself the agent for a private actor's private good. This notion that valid lawmaking must be undertaken in pursuit of the public (and not some private actor's) good has deep roots in the Western legal tradition. As John Locke explained, "the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good."⁸⁰ Echoing earlier discussions by Aristotle and Aquinas,⁸¹ Locke took the position that the entire lawmaking and law-enforcing apparatus of the State must "be directed to no other end but the peace, safety, and public good of the people."⁸² This requirement that law be oriented towards the common or public good has been a fixed point within the American legal tradition. As Justice Samuel Chase famously explained in *Calder v. Bull*:

An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. . . . [A] law that makes a man a Judge in his own cause; or a law that takes property from A, and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.⁸³

in *Kelo*, the difference is more apparent than real. See *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring). The consideration of conceivable public purposes does not mean that the pursuit of private purposes is to be tolerated in the due process analysis. Instead, it reflects a strong presumption in favor of the public-spiritedness of public actors. Where the evidence shows that a regulation challenged under the Due Process or Equal Protection Clauses was in fact motivated by the narrow desire to confer a private benefit without at the same time achieving any public good, the regulation will run afoul of the Constitution. See *id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 447, 450 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533, 536 (1973)).

⁸⁰ JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 156 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

⁸¹ For Aristotle, for example, orientation towards the "common good" versus the private good of those with political power is what, at the most basic level, distinguishes legitimate political institutions from deviant ones. ARISTOTLE, THE POLITICS bk. III, ch. 6, § 9, at 97–99 (R.F. Stalley ed., Ernest Barker trans., Oxford Univ. Press 1995) (c. 350 B.C.E.); RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 385–86 (2002). Similarly, Aquinas considered orientation towards the common good a fundamental requirement for legality. See 2 THOMAS AQUINAS, SUMMA THEOLOGICA, Ia-IIae, q. 95, art. 4; q. 96, art. 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) (c. 1265–1274) ("[L]aw should be framed, not for any private benefit, but for the common good of all the citizens." (emphasis omitted)).

⁸² LOCKE, *supra* note 80, at 157.

⁸³ 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted).

A law that is enacted merely with the end of enriching *B* at the expense of *A*, with no apparent regard for the public's good, is not a legitimate legal act. Viewed from within this long tradition requiring that law be oriented towards the public good, the government's intention in the case of the taking for private use is far worse than its intention to take property in the public interest, and it makes sense to demand the more inflexible remedy (prohibition of the action rather than just compensation) for the former. Illegitimate state action does not come within the ambit of the Takings Clause. And excluding otherwise illegitimate acts from the logic of the Takings Clause makes normative sense since the remedy for violation of the clause is the payment of compensation. Government acts that are not oriented towards the public good, however, fail the most basic test of legality and are not licensed even upon the payment of compensation.

The notion that a taking (and, therefore, a judicial taking) is an intentional deprivation aimed at putting a piece of private property to public use requires some additional clarification about what constitutes an intentional taking. In this regard, it is important to distinguish between two categories of judicial action: on the one hand, intentionally submitting property to public use; and on the other, incidentally imposing property losses on particular owners as a result of changes in property law (albeit changes intentionally undertaken, as all public actions must be, for public reasons). Both sorts of losses result from judicial actions that are motivated by a desire to achieve a public purpose. But are they the same? In the former case, the private property lost by the owner is intentionally harnessed towards a public end. In the latter case, the property loss is simply an unintended consequence of a change in the law where it is the change in the law itself that fosters the public end. We can isolate the first category by asking whether a particular property owner's loss is itself a means of achieving the relevant public end. When this is the case, the legal change is properly evaluated under a judicial takings analysis.

The second category is different. If the owner's loss is, from the narrow point of view of achieving the public end, a matter of indifference, then the judge has not appropriated the owner's property for a public use, and the loss falls beyond the reach of the judicial takings analysis. The conclusion that the property was not appropriated for public use, however, does not mean that the owner is without constitutional recourse. It simply means that, to make a claim, the owner must show that the property loss was not consistent with due process. This means that the owner must show that there is no reasonable explanation for why this change in the law must be implemented in a way that imposes a loss on this owner. The most obvious justification for the State to offer will be the costs of administering the new rule in

a way that avoids the loss. That answer, however, will not always be credible, for reasons we will discuss. Moreover, if the owner can prevail, the law will forcefully protect the owner's entitlement by mandating an injunctive remedy—the restoration of the property—rather than permitting the State to proceed with the deprivation upon the payment of just compensation.

C. Public Use and Intent

Courts and commentators alike have often said that a taking for a private purpose is ruled out by the public use language of the Takings Clause itself.⁸⁴ This narrow identification of the “public use” restriction with the Takings Clause appears to rest on a conceptual error. As the public use language makes clear, and as Justice Oliver Wendell Holmes observed in *Pennsylvania Coal v. Mahon*, the Takings Clause *assumes* that any action covered by its compensation obligation is, in the first instance, a legitimately public act.⁸⁵ A better way to describe the situation of takings for private use is that they do not fall within the scope of the State's power to act at all and, for the same reason, violate due process. Taking A's property in order to enrich a well-connected private party is simply not a legitimate public act, irrespective of the payment to A of just compensation.

But this sort of misuse of the public power for private ends does not exhaust the due process analysis. Even the pursuit of a valid government end can be arbitrary—and therefore violate due process—if it imposes a loss on a property owner where it is easy to avoid the loss and where failing to avoid it in no conceivable way assists the State in pursuing its legitimate public ends. While the “ends” part of the due process analysis rules out certain intentions (such as the bald pursuit of private gain) as inconsistent with the exercise of lawmaking power, the “means” part of the analysis requires from the State a minimal degree of competence and care in the pursuit of its ends. The requirements of competence and care do not prohibit the government

⁸⁴ See, e.g., *Midkiff*, 467 U.S. at 241 (discussing the requirements imposed by the “Public Use Clause”); Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 331 (2010) (“The Fifth Amendment to the United States Constitution provides that private property may not be taken by the government except for a ‘public use’ and upon ‘just compensation.’”). But see Rubinfeld, *supra* note 64, at 1079–80 (criticizing the traditional interpretation of the “public use” language as a limitation on the takings power rather than descriptive of the sorts of government actions that require compensation to property owners).

⁸⁵ See 260 U.S. 393, 415 (1922) (“The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.”); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (“[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”).

from imposing losses on owners. Instead, they simply demand that the government avoid—where feasible—needless losses and demand that the State be able to give some account of how its failure to avoid a particular owner's loss relates to the government's ability to pursue its valid ends. If the State cannot give such an account, then the way in which it is pursuing a concededly public end imposes an arbitrary loss on the property owner, and the remedy is to require the State to pursue the end in a way that does not impose the needless deprivation.

The distinction between a taking for public use and a deprivation without due process does not mean that a property owner must challenge a government action as either one or the other. It does mean, though, that a deprivation without due process cannot simultaneously be a violation of the Takings Clause.⁸⁶ Moreover, since the takings inquiry operates on the assumption that due process requirements have been satisfied, the due process inquiry is, in a sense, logically prior to the Takings Clause analysis.⁸⁷ This in turn suggests that, when confronted with a claim that a state action is either a violation of due process or of the Takings Clause, a court should consider the due process challenge first; only if that challenge fails (i.e., if the court thinks the government's action is consistent with due process) should the court move on to consider the takings challenge.

D. Intentionality and Coordination

To summarize the discussion so far, the Takings Clause addresses situations in which the government intentionally diminishes a private owner's property rights to achieve a legitimate public end, permitting the government to exercise this power but potentially requiring the payment of just compensation. The Due Process Clause covers a broader range of state conduct insofar as it addresses itself to all other losses imposed by state action on private owners. The State violates the Due Process Clause when it inflicts those losses without adequate procedural safeguards, or for nonpublic ends, or when the State pursues public ends but could just as easily and effectively do so in a way that would not impose a loss on the complaining property owner.

In the first law review article to analyze systematically the possibility that judicial actions might engender governmental liability under the Takings Clause, Barton Thompson posited that if the judiciary was acting in a coordinated fashion with the legislature or the executive

⁸⁶ It makes sense to speak of a law that—if it were valid under the Due Process Clause—would nonetheless constitute a taking.

⁸⁷ See *Lingle*, 544 U.S. at 543 (calling the due process inquiry “logically prior to and distinct from the question whether a regulation effects a taking”); Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 387–406 (2006).

branch to wipe out a private property owner's rights, it made little sense to let the government skirt its obligation to compensate the private property owner.⁸⁸ In his words, "By exempting courts from the takings protections, we create an imbalance that invites the state to attempt to accomplish through the judiciary what it cannot accomplish through the other branches of government—thereby unnecessarily skewing the appropriate division of responsibility between the branches."⁸⁹ This objection has some force, and its sentiment was echoed by the *Stop the Beach* plurality,⁹⁰ but it is a further factor buttressing the importance of intentionality in determining what might constitute a judicial taking. In this instance, coordination acts as a proxy for intent. Coordinated action by two branches of government requires that both branches know what they are doing and intend to act jointly.⁹¹ Thus, all things being equal, in cases in which there is no evidence of coordination, the risk that the judiciary is intentionally taking private property for a public use is reduced.

What about coordination that occurs, not between two branches of government, but between the judiciary and a powerful nongovernmental actor? Under our approach, cases involving a corrupt judge who imposes a loss on a property owner to benefit a private party would not be judicial takings. Such cases would instead violate the Due Process Clause. Corruption of this sort can arise when the government officials are themselves the direct beneficiaries. It can also manifest itself when government officials are indirect beneficiaries, having used the eminent-domain power to enrich their allies, perhaps with the hope that their allies (or others) will return the favor in the future. Extreme acts of self-dealing could subject government officials to *ex post* criminal prosecution, regardless of whether the actors are members of the judiciary, a legislature, or the executive branch.⁹² Similarly, judges and executives can be impeached for self-dealing that rises to the level of criminality, and legislators can be censured or conceivably expelled.⁹³ But while these remedies may deter wrongdo-

⁸⁸ See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

⁸⁹ *Id.* at 1544.

⁹⁰ See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion).

⁹¹ To be sure, coordination sometimes occurs despite an absence of joint intention. This is how focal points can be created, seemingly by accident. But Thompson's concern about coordination in the judicial takings context seems to stem from a fear of conspiratorial coordination designed to circumvent a constitutional protection. See Thompson, *supra* note 88, at 1507–09, 1544. In such cases, it is plain that some level of intent on the part of both branches of government will be necessary.

⁹² For an analysis of the Constitution's provisions designed to restrain corruption, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

⁹³ Recent cases include the impeachment of Federal District Judge G. Thomas Porteous and the censure of Representative Charles Rangel. Both were accused of leveraging the powers of their offices to enrich themselves by accepting benefits to which they

ing, they provide little comfort to the landowner who has suffered an unjust loss. That is the gap the Due Process Clause is designed to fill.

To be sure, there are divergences between the law's treatment of self-dealing by judges and other sorts of governmental officials whose conduct has long been thought to implicate the Takings Clause. Constraints on self-dealing by the judiciary arise via a number of doctrinal avenues including the Due Process Clause and doctrines governing judicial recusal. In some respects the constraints on judges are more substantial than those placed on other government actors. For example, while legislatures have self-imposed indirect limits on their freedom to engage in self-dealing through single-subject voting rules, antilogrolling rules, disclosure obligations, gift limitations, and the like,⁹⁴ there is no legislative doctrine that flatly prohibits legislators from voting on legislation being promoted by their campaign contributors. By contrast, judges deciding cases in which the role of their campaign contributors loom large may be substantially constrained by due process considerations. In *Caperton v. A.T. Massey Coal Co.*, the U.S. Supreme Court held that an objective standard determines whether a judge's failure to recuse himself violates the Due Process Clause.⁹⁵ Courts are to take into account a "realistic appraisal of psychological tendencies and human weakness" in assessing the risk that a judge is actually biased or has prejudged the case.⁹⁶ Applying that standard to the facts of *Caperton*, the Court held that the enormous size of a single campaign contributor's spending, its temporal proximity to the West Virginia Supreme Court's consideration of the case implicating that contributor's economic interests, and the contributor's very large stake in the outcome of that pending case warranted recusal as a matter of law.⁹⁷ In other respects though, constraints on judges may be weaker than those imposed on other state actors.⁹⁸ For example, judges may have broader immunity against suit for misconduct than their counterparts in the executive branch and perhaps even the legislature.⁹⁹

When compared with legislators, judges have relatively little incentive to deprive a private property owner of property because it is

were not entitled. See Michael A. Memoli, *Senate Convicts Federal Judge*, L.A. TIMES, Dec. 9, 2010, at A12; Richard Simon, *Rangel Draws Ethics Censure*, L.A. TIMES, Dec. 3, 2010, at AA.

⁹⁴ For a detailed discussion of these limitations, see Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 635–64 (1994).

⁹⁵ 129 S. Ct. 2252, 2254 (2009).

⁹⁶ *Id.* at 2263 (citation omitted).

⁹⁷ *Id.* at 2263–65.

⁹⁸ Teachout notes that the Constitution contains more provisions designed to constrain the corruption of the executive and legislative branches than the judiciary. Teachout, *supra* note 92, at 368.

⁹⁹ See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1031–35 (2009).

more difficult for those judges to capture the benefits associated with the deprivations. This is particularly true for judges with life tenure or those who face little electoral pressure. Again, to the extent that a judge does benefit financially from a ruling, particularly a ruling that deprives a property owner of land or chattels, serious questions will arise as to why the judge did not recuse at the outset of the litigation. If it is indeed the case that judges are less likely to engage in self-dealing, then there is less work for the Takings Clause to do. This analysis suggests that self-dealing cases generally present poor candidates for takings claims and particularly poor judicial takings claims.

In the absence of a Due Process Clause, we might wish the Takings Clause to incorporate an electoral test into the Constitution. Because the risk of self-dealing is greater in the case of elected judges than in the case of appointed judges, the existence of an elected judiciary in a particular jurisdiction ought to make us more inclined to recognize the existence of a judicial taking there. But precisely because the Constitution has a Due Process Clause, and because that clause polices the conduct of elected judges,¹⁰⁰ incorporating the means of judicial selection into the takings calculus is unnecessary. By the same token, the elected status of some judges might justify more exacting scrutiny of due process claims against elected judges charged with self-dealing.

E. Intentionality and Retroactivity

When judges (or legislatures or executives) change a rule of property law, they have the option to apply the new rule retroactively—that is, to property interests formed prior to the rule’s change—or prospectively only. The foregoing analysis suggests that it is the Due Process Clause that is usually the proper vehicle for evaluating pure questions of retroactivity in judicial changes to property law. For example, if a state court changes the law of easements, say, to permit the reservation of an easement in a third party in order to eliminate what it sees as a senseless formalism that interferes with parties’ expectations and reduces the efficiency of property law,¹⁰¹ the court is almost certainly indifferent to the fact that one owner loses the right to exclude and another gains the right to use a right of way. Though the retroactive application of the rule may in some way enhance its effectiveness, the State is indifferent as to who wins or who loses under the new rule. In these situations, the unfortunate owner’s lost property is not itself a means to achieving any public end. The

¹⁰⁰ See *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance’” (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972))).

¹⁰¹ See, e.g., *Willard v. First Church of Christ, Scientist*, 498 P.2d 987 (Cal. 1972).

sole question is the propriety of the retroactive application on the owner in a way that imposes a loss. Due process is the better rubric to apply when application of such a rule retroactively leads an owner to lose property that she otherwise would have retained but where the owner's loss—apart from that retroactivity—does not contribute to the public good being pursued by the new rule. Where the retroactive application of the rule to owners with existing property rights will in no way assist in achieving the goals motivating the change in the rule, applying the rule retroactively is likely to be arbitrary. This suggests a due process inflected presumption against retroactivity when property rules are changed. And this is, in fact, the prevailing norm in many areas of property law.¹⁰² Courts have often been unclear, however, about whether the antiretroactivity principle arises under a takings or due process analysis.¹⁰³ It is important to recognize that, when all signs indicate that the State is indifferent as to the identity of winners and losers under the new rule, it cannot be said to have “taken” the loser's private property “for public use” when it applies a new norm retroactively, and a due process analysis of the propriety of the retroactivity decision is the correct one.

In some cases, however, the retroactive application of the rule in a way that imposes a loss on a specific property owner will be an essential component of the judge's plan for achieving the purposes animating the rule's change. For example, when the New Jersey Supreme Court extended the reach of the public trust doctrine in *Matthews v. Bay Head Improvement Ass'n*,¹⁰⁴ its goal was to expand public recreational access to beaches in New Jersey where municipal access was not available. The effective provision of public access means that the court had to weaken certain waterfront owners' rights to exclude. Opening up those particular owners' parcels was the strategy the court used to achieve the goal of adequate public beach access. Its action

¹⁰² See, e.g., James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095, 1106–09 (2000). None of this suggests that courts do not apply new property rules retroactively. But when they do so act retroactively, they usually feel the need to explain why retroactive application is appropriate.

¹⁰³ See *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 260–62 (N.Y. 1977) (calling the retroactive application of a new rule that deprives an owner of the value of his investment a violation of due process norms); *Franza v. Olin*, 897 N.Y.S.2d 804, 807–08 (App. Div. 2010) (holding that the application of an amended adverse possession law to a fully vested claim would constitute a taking of property without just compensation); *Barra v. Norfolk S. Ry. Co.*, 907 N.Y.S.2d 70, 73–74 (App. Div. 2010) (holding the same without specifying the legal foundation for the nonretroactivity rule); see also *Schrader v. Schrader*, 101 S.W.3d 873, 877 (Ark. Ct. App. 2003) (same); *Gorte v. Dep't of Transp.*, 507 N.W.2d 797, 800–01 (Mich. Ct. App. 1993) (same) (citing *In re Certified Questions* from the U.S. Court of Appeals for the Sixth Circuit (*Karl v. Bryant Air Conditioning Co.*), 331 N.W.2d 456, 464 (Mich. 1982) (analyzing the impact of retroactivity on vested rights using a due process rubric)).

¹⁰⁴ 471 A.2d 355 (N.J. 1984).

was analogous to a city creating new zoning law that prohibits an existing use that is not itself a nuisance. The effectiveness of the zoning regime depends on the eventual application of the new regulatory scheme to land occupied by the prior nonconforming use. Importantly, in both of these circumstances, the losses these owners suffer is not a matter of indifference but is intentionally instrumental to accomplishing the public purpose served by the new rules. In these circumstances, then, a takings analysis is the appropriate one, whether the new rule is created by a zoning board, a legislature, or a court. As we will discuss, this is not the same as saying that all new rules that operate in this way are in fact takings that require just compensation. It only means that, where a court makes a new rule and applies it to a property owner because imposing a loss on *that particular owner (or that owner's parcel)* will foster the rule's public purposes, it is appropriate to apply a judicial takings framework in analyzing the owners' claim that their rights have been violated.

Existing state land-use doctrines concerning "vested rights" and "prior nonconforming uses" have long protected existing land uses from retroactive application of regulatory changes of this sort.¹⁰⁵ At a minimum, courts have held, existing uses are entitled to a "reasonable" transition, or "amortization," period following the introduction of a new rule. This transition period ostensibly allows owners to recoup a reasonable return on their investment before the new regulation is applied to their nonconforming property.¹⁰⁶ State courts frequently justify these doctrines in constitutional terms, though often, as Christopher Serkin notes, courts often employ them without specifying any particular constitutional provision.¹⁰⁷ Our analysis makes clear that a takings analysis is usually the proper rubric for understanding the legal and normative underpinnings of these doctrines.

F. Regulatory Takings

The conception of the scope of the Takings Clause we advocate here is fully consistent with the existence of a regulatory takings doc-

¹⁰⁵ See, e.g., *Quality Refrigerated Servs., Inc. v. Spencer*, 586 N.W.2d 202, 206 (Iowa 1998) (holding that, when a property owner makes substantial expenditures toward completion of a project, the owner acquires "the right to complete the development of his property in accordance with his plans as of the effective date of the new ordinance"); *Town of Hillsborough v. Smith*, 170 S.E.2d 904, 909 (N.C. 1969) (same); *City of Dublin v. Finkes*, 615 N.E.2d 690, 692 (Ohio Ct. App. 1992) (stating that federal and state constitutions both "recognize a right to continue a given use of real property if such use is already in existence at the time of the enactment of a land use regulation forbidding or restricting the land use in question").

¹⁰⁶ See, e.g., *Modjeska Sign Studios*, 373 N.E.2d at 260–62 (assessing the reasonableness of an amortization provision prohibiting billboards on private land within a state park).

¹⁰⁷ See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1223–32 (2009).

trine. But the requirement of an intent to appropriate does help limit the reach of that doctrine by restricting it to regulatory actions that match certain characteristics of an actual exercise of eminent domain in certain crucial respects.¹⁰⁸ As the Court emphasized in *Lingle*, the touchstone of the regulatory takings inquiry is an effort “to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹⁰⁹ It goes without saying that such regulatory appropriations must also be undertaken with the intent to achieve a “public use” because, as with an exercise of eminent domain, regulatory takings analysis “presupposes that the government has acted in pursuit of a valid public purpose.”¹¹⁰ The presence of such a public purpose is virtually never at issue in a litigated regulatory takings case—though it is easy enough to imagine cases where the issue might be contested. Less obvious, though equally necessary if regulatory takings are to constitute the “functional equivalent” of an explicit exercise of eminent domain, is the requirement that the regulatory body act with the purpose of employing the owner’s private property as the means of accomplishing that public purpose.

On the narrower, purposive reading of the Takings Clause, in cases where a private owner’s loss is merely incidental to a rule change, as in the easement law hypothetical described above,¹¹¹ a judicial (regulatory) takings analysis is not appropriate because, although the owner has been deprived of property, her property has not been taken by the State for public use. Her loss is more akin to the loss suffered by a property owner when the State commits a tort. Again, it is important to emphasize that this conclusion does not mean that the retroactive application of a change in a property rule under these circumstances is permitted by the Constitution. It simply means that, if it does, the violation is of some other norm, most likely the Due Process Clause’s protection against arbitrary or irrational treatment by state actors.

In contrast, in the context of disputes over ownership between private parties and the State (the second hypothetical we discussed at the beginning of this Part), the notion that a change in the rules purposefully takes property for public (i.e., State) use seems easy to see. In these cases, it is almost a matter of indifference whether the “taker” is understood to be the court or the state-actor litigant. What the judicial takings doctrine would add to these cases is a tool to prevent state

¹⁰⁸ See Krotoszynski, *supra* note 66, at 719.

¹⁰⁹ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

¹¹⁰ *Id.* at 543.

¹¹¹ See *supra* text accompanying note 101.

courts from sidestepping the protections of the Takings Clause by spuriously recharacterizing its prior property doctrine.

In short, we believe that there are good textual, precedential, and conceptual reasons why the State's intentions are a critical factor in determining whether a government action that diminishes an individual's private property rights are better dealt with under the Takings Clause or the Due Process Clause. So far, our analysis has steered clear of functional arguments. In the next Part, we develop the functional argument in much more detail, showing that when the State is financially responsible for judicial decisions that diminish the value of private property, the likely consequence is an incentive for one of the litigants to underinvest in legal representation. A desire to avoid the problems associated with this form of underinvestment may provide us with additional tools to identify those cases in which treating a court's decision as a potential judicial taking, rather than a due process violation, makes sense.

II

THE UNDERINVESTMENT PROBLEM

What good would be accomplished by requiring that property owners whose rights are diminished or destroyed by a judicial decision be compensated? Barton Thompson's classic article answered that question in the following way:

In many situations, judicial changes in property law raise the same concerns as legislative and executive takings. . . . By applying the takings protections to the judiciary, we encourage courts to be more sensitive to the impact that their decisions have on property holders and thereby protect the values embedded in the takings protections.¹¹²

Problematically, Thompson assumes that compensation would make judges more sensitive to the impact that their rulings have on property owners, but he does not explain the mechanism by which this would occur.¹¹³ It may be that courts would regard a determination that a judicial taking had occurred as an ordinary reversal. There may be some reputational costs associated with such a reversal, and it is even conceivable that finding a judicial taking would impose a greater stigma on a court than an ordinary reversal would. But if Thompson intended to suggest that, by imposing liability on the government, judges would be less likely to rearrange entitlements, then that is a harder story to defend.

¹¹² Thompson, *supra* note 88, at 1544.

¹¹³ *See id.*

Judicial takings liability would be paid for out of general governmental revenues, not out of the court's budget or judicial salaries. As Daryl Levinson has shown, the Takings Clause may do a poor job of forcing government officials generally to internalize externalities,¹¹⁴ and that argument carries even more force as far as the judiciary is concerned. Perhaps, then, judicial takings liability will not accomplish as much as its advocates hope. But another question remains unanswered: Why should the judiciary be able to do something that the other branches cannot do? From the landowner's perspective, what matters is the loss, not the mechanism by which the loss occurs. This critique plainly resonated with the plurality in *Stop the Beach*, who wrote:

[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant.¹¹⁵

In our view, the identity of the state actor is relevant. In fact, there is a good answer to the question of why we ought to treat judges differently from legislators and regulators.¹¹⁶

¹¹⁴ Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 415–17 (2000).

¹¹⁵ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

¹¹⁶ John Echeverria has provided a mix of five formalist and federalist reasons why it may make sense to differentiate between judicial takings and takings by other branches of the government. None of Echeverria's reasons go far afield from the briefs, opinions, and oral argument in *Stop the Beach*. See John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 485–93 (2010). More provocatively, Richard Epstein offered a very different sort of answer to the question of compensating parties for a judicial error in a footnote contained in his influential 1985 book on takings:

Initially, it seems clear that the [T]akings [C]lause applies to judicial orders. When the state resolves a dispute between A and B, it wrongfully takes property if it makes the incorrect judgment. Forcing A to pay B \$100 for a debt not owed takes \$100 from A. Not making A pay the \$100 when it is owed takes it from B. The demand for unbiased judges therefore translates into a demand that the probability of error be symmetrically distributed, so that each side receives, in the form of erroneous judgments in its favor, ex ante compensation for those erroneous judgments entered against it. So understood, absolute judicial immunity for erroneous judgments still satisfies both the just compensation and the public use requirements, because the legal rule divides the anticipated surplus from collective action.

EPSTEIN, *supra* note 73, at 196 n.2. Our focus on the underinvestment problem and our divergent view of takings cases more generally causes our analysis to differ from Epstein's. We also deviate from Epstein in viewing considerations of judicial bias as relevant to the due process inquiry, and in rejecting Epstein's supposition that the probabilities of error will be distributed symmetrically. See *infra* text accompanying notes 124–36.

The existence of a judicial takings cause of action creates two sets of potentially perverse incentives. First, the availability of a judicial takings cause of action may induce entitlement holders to invest too little in protecting their entitlement in earlier stages of legal proceedings. This underinvestment problem may in turn introduce unnecessary instability into property doctrine. Second, judicial takings may prompt collusive deals in which what would ordinarily be disputes between two private parties become opportunities for those private parties to divvy up a surplus provided by the taxpayers. By fully compensating landowners who are deprived of their property as a result of the legislative, executive, or judicial change, we create, in effect, a free insurance policy for private property owners. As various commentators have observed in the context of regulatory takings, such an insurance policy necessarily diminishes the incentives for landowners to resist that change in the first instance and may generate a kind of moral hazard.¹¹⁷

Let us contemplate the first perverse incentive at the outset. Recall the hypothetical that we introduced in Part I. Suppose you are a landowner involved in a dispute with a longtime trespasser. The trespasser has been occupying your land in good faith for a period slightly longer than the statute of limitations on trespass actions. The trespasser thought that the land was his, not yours, on the date his trespass began. Because your jurisdiction has long adhered to a rule that prohibits good faith trespassers from acquiring title via adverse possession, you had little to fear in the litigation if you knew the trespasser's state of mind. If the courts continue to follow existing precedents, you will retain your land.

Now suppose that the courts deviate from existing precedents, for example, by following the majority of jurisdictions in holding that a trespasser's state of mind is irrelevant for the purposes of adverse possession law. As a result, you will lose your land, but under the plurality approach in *Stop the Beach* you may have a judicial takings cause of action against the State for changing its property rules in a way that deprived you of what previously was yours. Let us assume, as Justice Kennedy argued in *Stop the Beach* and as the Court's unanimous opinion in *Lingle* implied,¹¹⁸ that the remedy for a judicial taking in this sort of case will be the payment of just compensation. That is, if the courts determine that a judicial taking has occurred, then the prop-

¹¹⁷ See, e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 592–99 (1984); Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451, 525–27 (2003); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 527–32, 551–52, 602–06 (1986); Levinson, *supra* note 114, at 392.

¹¹⁸ See *supra* text accompanying note 29.

erty doctrine embraced by the lower court will not revert back but will remain in place, followed by a constitutionally compelled payment by the State to the party that lost its property.¹¹⁹

Judicial takings liability will raise underinvestment concerns similar to those associated with compulsory insurance.¹²⁰ Where the prevailing party does not itself have to bear the costs of compensating the loser for losses he suffers as a result of the rule change, the introduction of judicial takings liability may create asymmetric incentives for the parties involved in litigation. Even with a doctrine like judicial takings, the trespasser still has an incentive to litigate aggressively to convince the courts to change property law in a way that will transfer title over your land to him, as long as he will not be liable to compensate the loser. You, by contrast, have a diminished incentive to resist a change in the law in the presence of a compensation requirement, at least at the first stage of the litigation. Only if the courts rule in favor of the trespasser will you have a strong incentive to lawyer up. At that point, even if the well-represented trespasser has won in the initial proceedings, your judicial takings claim has a very high likelihood of succeeding. In short, liability introduces an asymmetry into litigation strategy that permits only the party advocating for a change in property doctrine to realize the benefits of early investments in high-quality counsel. The law might try to mitigate the underinvestment concern by requiring that judicial takings suits be highly deferential to lower-court determinations of property rights, but even this would attack the problem only indirectly. In any event, and for whatever reason, the plurality in *Stop the Beach* was skeptical of such a tack, stating that the Court would “make our own determination, without defer-

¹¹⁹ It might be a fair criticism of our approach to say that in this Part we are critiquing a position that none of the Justices actually embraced in *Stop the Beach*. *Stop the Beach* left open the question of whether the appropriate remedy in a judicial takings suit is the payment of just compensation alongside the maintenance of the new property rule or an invalidation of the new property rule on the grounds that stripping an owner of an entitlement without paying compensation is unconstitutional. Compare *Stop the Beach*, 130 S. Ct. at 2607 (plurality opinion) (stating that compensation is not the only remedy, as the court could simply invalidate the property rule), with *id.* at 2617 (Kennedy, J., concurring in part and concurring in the judgment) (arguing that an injured party is entitled to just compensation but not equitable relief). The plurality might have intentionally wanted to couple its aggressive view about the scope of the Takings Clause with its less aggressive view about how often damages would be the appropriate remedy. For reasons we will explain later, we believe that the plurality’s view as to damages is in tension with Supreme Court precedents on remedial questions, especially the Court’s unanimous 2005 opinion in *Lingle*. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). The *Stop the Beach* plurality cited *Lingle* only with approval. 130 S. Ct. at 2614–15 (plurality opinion). Therefore, absent some rationale for discarding *Lingle*’s approach, we assume the correctness of an answer to the remedial question that has garnered nine votes in the past, rather than one that garnered four votes more recently.

¹²⁰ See *supra* note 117 and accompanying text.

ence to state judges, whether the challenged decision deprives the claimant of an established property right.”¹²¹

The foregoing analysis provides a plausible reason why Justice Scalia’s plurality opinion in *Stop the Beach* was right to reject the idea that the surprising nature of a judicial decision makes that decision more likely to constitute a judicial taking.¹²² Apart from the difficulty of operationalizing a foreseeability test and the problems associated with hindsight bias (which might make it difficult for courts to discern after the fact which decisions depriving an owner of property rights were surprising),¹²³ putting the thumb on the judicial takings scale where decisions are surprising would only exacerbate the underinvestment problem. If a surprising decision is more likely to constitute a judicial taking, then the property owner’s lessened incentive to hire a good trial lawyer because of her chance to take a second bite at the apple in a subsequent judicial takings suit is compounded by the diminished incentive to obtain high-quality representation at trial based on the low *ex ante* probability of losing. Both incentives push against retaining high-quality counsel.¹²⁴ Underinvestment problems such as these will be most worrisome where (1) the costs of litigating an appeal are low in comparison to the costs of litigating to summary judgment or a trial; (2) the cost differential between a high-quality lawyer and a low-quality lawyer is significant; (3) lawyer quality is relatively outcome determinative; (4) the difference between prevailing at trial and prevailing on appeal, legal costs aside, is marginal; and (5) low levels of deference to trial-court determinations make reversals on appeal relatively likely. Judicial takings suits typically would satisfy conditions 1, 4, and 5. The impact of factors 2 and 3 on the typical judicial takings suit is less clear.

This brings us to the second set of perverse incentives. Under a judicial takings approach, it is not fanciful to believe that the asymmetric litigation incentives between those seeking to change an existing entitlement and those seeking to preserve the status quo would reward collusive behavior. Suppose that the trespasser approaches you with the following offer:

¹²¹ *Stop the Beach*, 130 S. Ct. at 2608 n.9 (plurality opinion).

¹²² *Id.* at 2610.

¹²³ On hindsight bias, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571–76 (1998).

¹²⁴ There might be circumstances in which the fact that a decision was unsurprising should make us inclined to think that a judicial taking occurred. If “surprising” decisions are particularly likely to result from a process in which bad lawyering contributed to the result, then a doctrine equating surprises with judicial takings would discourage clients from seeking out good lawyers, with the result being more surprises. On this analysis, it is possible that Justice Stewart had it backwards when he argued that surprising judicial decisions are good candidates for judicial takings treatment. See *Hughes v. Washington*, 389 U.S. 290, 296–98 (1967) (Stewart, J., concurring).

I will pay you \$50,000 if you minimally defend yourself in a quiet title action brought by me, the trespasser. Your land is worth \$100,000. If I prevail in my quiet title action, and the State changes its adverse possession law to become more favorable to bad faith adverse possessors, then you will sue the State for a judicial taking. You will win your lawsuit and recover \$100,000. I am \$50,000 richer because I own a \$100,000 parcel of property and paid you \$50,000. You are \$50,000 richer because you have my \$50,000, and the State compensated you fully for your lost land. The State is \$100,000 poorer, but that's not your problem or mine.

Assuming away litigation expenses or a subjective attachment to the property, would you take this deal? Wouldn't lots of people take this deal? Deals of this sort are not obviously illegal under current law if structured as part of a civil settlement,¹²⁵ and it is not clear how the State would effectively identify this sort of collusion as it was happening and intervene so as to protect its fiscal interests. At least in those instances where the just compensation required by the Constitution is close to the landowner's subjective value, we might expect to see collusive deals of precisely this sort.¹²⁶ Collusion of this sort is also easier to

¹²⁵ If the collusive settlement was discovered, then the State might try to avoid paying just compensation by virtue of the landowner having received compensation from the trespasser. This argument might prevail, but it will be difficult for states to detect settlements of this sort, particularly if arranged by unscrupulous counsel who have structured a settlement so as to avoid detection. For example, there may be multiple claims at issue in the suit, and any money that changes hands pursuant to a settlement may be characterized as a payment for harm stemming from the other claims.

¹²⁶ One factor to consider in going forward is the extent to which imposing liability for judicial takings identifies the most appropriate defendant. In a case where an administrative agency or an executive causes a regulatory taking, it may make some sense to have the beneficiary of the regulation compensate the party burdened by the regulation. This dynamic sets up a "givings" problem of the sort discussed in Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549–57 (2001). In the absence of a givings clause in the Constitution, taxing the benefited party may be impracticable. Indeed, a regulatory taking is supposed to be an instance of the State regulating in a manner so as to confer benefits on the public more broadly. A regulatory taking is not supposed to rob Peter to pay Paul, so making Paul pay Peter off is a problematic remedy. But what about judicial takings of the sort represented by our adverse possession hypothetical? The case caption in such controversies is Peter versus Paul. A lower court ruling in which Peter's preexisting property rights were abrogated and in which Paul's property rights were augmented does seem to present a straightforward remedial opportunity: make Paul pay Peter the value of the property rights that Peter lost. This raises the question of whether the courts or a private party is the appropriate defendant in a takings suit more generally. In our view, unless redistribution as between Peter and Paul is the goal of the new rule, imposing liability on the State in cases involving a redistribution of property rights from Peter to Paul makes less sense than drawing on Paul's resources to make Peter whole. The comparison to good-faith improver statutes in California, New Jersey, and other jurisdictions, which transfer title to a good-faith improver from a prior owner, upon the payment of just compensation by the former to the latter, is instructive. See, e.g., CAL. CIV. PROC. CODE § 871.5 (West 2010) (giving the court broad discretion to select appropriate equitable or legal relief). Similarly instructive was the mechanism that Hawaii adopted in the land-reform statute at issue in *Midkiff*. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233–34 (1983).

arrange in the courts than in the legislature, because there are only two parties who need to coordinate and keep a secret, not dozens or hundreds.

Although most eminent domain awards of just compensation are undercompensatory, it would be relatively easy for parties seeking a collusive settlement to identify a subset of properties in which subjective value to the owner and fair market value are closely matched, and to approach only those owners.¹²⁷ More generally, this analysis helps us realize that it is the undercompensatory nature of many just compensation awards that helps keep the underinvestment problem in check. Some property scholarship has suggested compensating owners above fair market value for takings,¹²⁸ and our analysis shows a concern raised by such an approach.¹²⁹

The idea that takings liability represents a form of compulsory insurance is a point that has been made elsewhere in the regulatory takings literature. But the issue has not been incorporated into discussions of judicial takings, where it has the most force due to the distinctive nature of judicial decision making. Particularly in those instances in which the judicial takings claimant was the party who litigated and lost below, the availability of a judicial takings remedy limits the resources that a rational litigant will devote to the first stage of the legal proceedings. This idea is merely the analog to a more familiar argument that in the presence of a Takings Clause claim, affected parties might devote fewer resources to lobbying against a policy change that will adversely affect their property interests.¹³⁰ In this case, because of the asymmetric incentives created by judicial takings doctrine, lower-priced, lower-quality law firms will be able to outcompete

That law empowered the State to condemn privately owned land and convey that land to the owners of homes built on the land in order to address the extreme concentration of land ownership that prevailed in the state. But it required homeowners to reimburse the State for the value of the land they were to receive under the scheme. *See id.* at 234.

¹²⁷ Cf. Garnett, *supra* note 73, at 142–43 (noting that property owners are sometimes very happy to sell property to the government quickly, particularly when there is a good prospect for receiving compensation above fair market value).

¹²⁸ See, e.g., EPSTEIN, *supra* note 73, at 184; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736–37 (1973); Fennell, *supra* note 73, at 993–95.

¹²⁹ See also Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1676, 1706–09 (2010) (arguing that compensating owners at greater than fair market value would encourage corruption in the takings process).

¹³⁰ See, e.g., Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–21 (1990) [hereinafter Levmore, *Just Compensation*]; Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–48 (1991); see also Been, *supra* note 34, at 306 (noting that although David Lucas knew that the South Carolina legislature would grandfather in beachfront development projects that had begun prior to the initiation of a development ban, he “made no effort to obtain a building permit,” even as he followed the legislation’s advance toward becoming law).

higher-priced, higher-quality law firms in the battle for early-stage legal work.

There is a salient difference between the judicial takings context and the general regulatory taking context from the perspective of the underinvestment problem. The legislature and agency, after all, have considerable resources at their disposal to conduct their own fact finding and analysis. The Office of Management and Budget, the General Accounting Office, the Congressional Research Service, the Congressional Budget Office, and their state equivalents provide executives and legislators with a great deal of pertinent information relevant to the task of lawmaking. Then there is the role of lobbyists, for better or worse. We typically conceptualize expenditures on lobbying legislators or administrative agencies engaged in rulemaking as something akin to a deadweight loss. While lobbyists might expose majoritarian bodies to information and ideas possessed by discrete minorities with a lot at stake in the legislative outcome, a well-functioning two-party or multiparty democracy will provide many mechanisms by which this information will come to light, even if the minorities at issue do not employ lobbyists. If any individual interested party remains silent in the lobbying process, that silence is unlikely to significantly undermine the quality of the legislative or administrative decision. After all, lobbying is typically multilateral. On any issue there may be a score of affected firms and individuals lobbyists at the table. Little ordinarily rides on the absence of any single lobbyist from a smoke-filled room.¹³¹

Judicial decision making is structured differently. It is built on an adversarial process in which the courts necessarily delegate a great deal of the legal research to the litigants themselves. Moreover, the litigants have the exclusive responsibility to generate the facts that will be relevant in the proceedings. Through doctrines like waiver, common-law courts may even prevent themselves from considering facts known to be true but that were nevertheless not brought forward because of errors made or calculated risks taken by the parties' counsel. With only two parties to make arguments in a typical case, the failures of a single litigant to make the most effective arguments possible may well compromise the soundness of a court's final decision.¹³² A judge may have a few law clerks to assist in supplementing the research pro-

¹³¹ Administrative adjudication resembles litigation much more closely than it resembles administrative rulemaking, so there are good arguments for uniform treatment of "adjudicative takings" regardless of whether an agency or a court is the entity that deprives an owner of her entitlement.

¹³² In nonadversarial civil law systems, by contrast, the arguments for expansive judicial takings protections are much stronger because the courts do not externalize as many legal research and fact-finding costs to the parties' counsel. See Gregory F. Hauser, *Representing Clients from Civil Law Legal Systems in U.S. Litigation: Understanding How Clients from Civil Law*

vided by the parties, but even the best clerks will lack the experience and expertise to notice all of private counsel's mistakes and omissions. In a world where each judge had twenty seasoned and well-paid clerks, we would not need to worry so much about using doctrine to incentivize private counsel to develop their best arguments. Alas, neither of us expects American judges to wake up in that world any time soon.

There are instances elsewhere in law where similar sorts of underinvestment might exist. For example, in the criminal context, a defendant can retain private counsel of low quality and subsequently challenge a resulting conviction on the basis of an ineffective assistance of counsel argument. Courts apply the same standard for ineffective assistance of counsel regardless of whether the defendant's lawyer was privately obtained or court appointed.¹³³ In theory, the availability of an ineffective assistance claim could prompt defendants to underinvest in quality representation at trial. That said, the very difficult legal standard for prevailing on such a claim¹³⁴ combined with the fact that the defendant convicted at trial will often be incarcerated during the appellate process substantially alleviates these concerns.¹³⁵ A judicial takings claimant typically has relatively little skin in the game as the case proceeds beyond a final judgment at trial, and the plurality in *Stop the Beach* rejected the suggestion that a deferential standard of review would apply.¹³⁶

In short, legislative and administrative rulemaking processes are thought not to suffer unduly when affected parties lack strong incentives to bring the relevant precedents and facts to the attention of the decision maker. The judicial process, by contrast, can break down

Nations View Civil Litigation and Helping Them Understand U.S. Lawsuits, 17 INT'L L. PRACTICUM 129, 131 (2004).

¹³³ See generally *United States v. Williams*, 562 F.3d 938, 940–41 (8th Cir. 2009) (applying an “objective standard of reasonable competence” for a claim for ineffective assistance).

¹³⁴ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“Judicial scrutiny of counsel’s performance must be highly deferential.”); *Allen v. Secretary*, 611 F.3d 740, 751 (11th Cir. 2010) (noting that to prevail in federal court habeas proceedings, a challenge to a State’s finding that counsel was not ineffective, a petitioner must show that the state court’s conclusion was objectively unreasonable as a matter of law).

¹³⁵ Doug Keller, *Resolving a “Substantial Question”: Just Who Is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?*, 60 FLA. L. REV. 825, 826 (2008).

¹³⁶ See *supra* text accompanying note 121. To be sure, other doctrines may create underinvestment problems that the law tolerates. For example, the American rule, which typically requires the prevailing party to pay his own legal fees, may well encourage parties to underinvest in high-quality legal representation. The British rule of loser pays, by contrast, does not dampen incentives to invest in high-quality legal representation, though it may have other effects, such as promoting settlement. For an assessment and review of the literature, see John J. Donohue III, *Opting for the British Rule, or If Posner and Shavell Can’t Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093 (1991).

under such circumstances, at least in common-law systems.¹³⁷ Courts therefore have developed rules and norms that penalize lawyers for failing to bring controlling precedents to the attention of the judges. But in a judicial takings suit, the omissions of a lawyer for the plaintiff or nongovernmental defendant are not obviously relevant to the inquiry, since it is the State's conduct that is being challenged. Indeed, in *Stop the Beach* itself, it was revealing that the Florida Supreme Court had failed to cite *Martin v. Busch*,¹³⁸ its own 1927 precedent that squarely addressed the situation before the Florida courts in *Stop the Beach*.¹³⁹ The lower courts omitted any discussion of *Martin* as well.¹⁴⁰

The U.S. Supreme Court plurality did note that the Florida Supreme Court had failed to cite *Martin*.¹⁴¹ The Florida court's omission was hardly the fault of Florida's lawyers, who argued in the Florida Supreme Court that *Martin* resolved many of the issues then before the court.¹⁴² Petitioners' lawyers, by contrast, basically ignored *Martin*, even though Florida insisted that it was relevant.¹⁴³ After the Florida Supreme Court similarly ignored *Martin* altogether, Florida's lawyers may have felt chastened. They too ignored *Martin* in their U.S. Supreme Court opposition to certiorari,¹⁴⁴ an omission that in hindsight likely contributed to the Court's decision to grant certiorari.¹⁴⁵ After the Supreme Court granted certiorari, Florida brought *Martin* to the Justices' attention in its merits briefing, though the State softened its claim as to *Martin*'s relevance, describing it as "somewhat

¹³⁷ Cf. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449–54 (2009) (discussing the costs associated with pro se litigation in the United States); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1547–49 (2005) (discussing the administrative burdens resulting from pro se litigation).

¹³⁸ 112 So. 274 (Fla. 1927).

¹³⁹ See *supra* text accompanying notes 6–18.

¹⁴⁰ See, e.g., *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008); *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So.3d 48 (Fla. Dist. Ct. App. 2006).

¹⁴¹ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2612 (2010) (plurality opinion).

¹⁴² See Initial Brief of the Department of Environmental Protection & Board of Trustees of the Internal Improvement Fund at 25–29, *Walton Cnty.*, 998 So. 2d 1102 (No. SC06-1449), 2006 WL 3074094.

¹⁴³ See Petitioners/Appellants' Initial Brief on the Merits, *Walton Cnty.*, 998 So.2d 1102 (No. SC06-1447), 2006 WL 3074093; Petitioners/Appellants' Reply Brief on the Merits, *Walton Cnty.*, 998 So. 2d 1102 (No. SC06-1447), 2006 WL 3932222.

¹⁴⁴ See Respondent Florida Department of Environmental Protection's Brief in Opposition, *Stop the Beach*, 130 S. Ct. 2592 (2009) (No. 08-1151), 2009 WL 1206633.

¹⁴⁵ Giving the keynote address at a Chicago-Kent College of Law conference, "Judicial Takings: Property Rights and the Rule of Law" on October 18, 2011, Justice Scalia said of *Stop the Beach*, "We didn't take the case to decide Florida law, for Pete's sake." See *Scalia Criticizes Kelo Ruling on Private Property*, CHI. DAILY L. BULL. (Oct. 19, 2011), <http://www.chicagolawbulletin.com/Elements/pages/print.aspx?printpath=/Articles/2011/10/19/17494&classname=tera.GN3Article>.

similar to the instant case.”¹⁴⁶ The brief filed by Solicitor General Kagan on behalf of the federal government discussed *Martin* as well, using slightly stronger language.¹⁴⁷ But well-represented parties were not uniform in grasping the significance of the prior precedents. Even the brief for sophisticated amici like the Pacific Legal Foundation and Cato Institute ignored *Martin*.¹⁴⁸ Had they understood the case correctly, these capable amici probably would have sought out a better vehicle for the Supreme Court’s initial foray into judicial takings doctrine.

It is easy to ask “What if?” and imagine a scenario in which Florida’s lawyers, like the lawyers for the plaintiffs, amici, and the judges on the Florida Supreme Court, failed to grasp the significance of *Martin v. Busch*. Like many property precedents from the 1920s, *Martin* is not written in a straightforward way. While we believe the Supreme Court Justices correctly concluded that *Martin* seems to have settled the issue being litigated in *Stop the Beach*, we can see how even diligent counsel might have failed to understand the relationship between the two cases. Indeed, recent events in the Supreme Court have shown that even the U.S. Solicitor General’s Office can overlook critical authority on occasion, failing to bring it to the Court’s attention.¹⁴⁹ Even the most capable, best-incentivized lawyers are imperfect legal researchers. Mistakes will be relatively common for less capable, poorly motivated counsel.

The failure of the lower courts and some counsel to recognize the importance of *Martin* illustrates the potential costs of failing to ground a judicial takings doctrine, resulting in an unrealistic model of property law and the litigation process. The *Stop the Beach* plurality envisions a world in which property rights are straightforward and readily discerned by courts and litigants alike.¹⁵⁰ Recall the plurality’s

¹⁴⁶ See Brief of Respondents, Florida Department of Environmental Protection & Board of Trustees of the Internal Improvement Trust Fund at 18, *Stop the Beach*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3143707.

¹⁴⁷ See Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 16, at 26.

¹⁴⁸ See Brief Amicus Curiae of Cato Institute, NFIB Legal Center, & Pacific Legal Foundation in Support of Petitioner, *Stop the Beach*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 2588282.

¹⁴⁹ See, e.g., *Kennedy v. Louisiana*, 129 S. Ct. 1, 1 (2008) (explaining the Court’s denial of a rehearing despite the Justices having ruled in an Eighth Amendment case in a manner suggesting their embarrassing ignorance of 10 U.S.C. § 856 (2006), a federal child-rape statute that was not mentioned in any of the briefs to the Court); Terry Eastland, *Supremely Screwed Up: A Do-Over for the High Court?*, WKLY. STANDARD, Aug. 4, 2008, <http://www.weeklystandard.com/Content/Public/Articles/000/000/015/365drohy.asp> (discussing the *Kennedy v. Louisiana* mistake made by the Solicitor General’s Office, which admitted its error in failing to file a brief when the Court considered that case).

¹⁵⁰ Justice Scalia has long held this view of property law as a readily discerned set of rules. See his opinion for the majority in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992).

central formulation of its test for judicial takings—it is a dead giveaway as to the formalism inherent in its approach: “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.”¹⁵¹ To the plurality, the universe of property claims is binary: some are “established,” in which case a deprivation of them is a judicial taking. Other property rights are doubtful, in which case there can be no judicial taking.¹⁵² To property scholars, however, such a dichotomy seems inapt. Property rights are sometimes quite clear, but in *Stop the Beach* and other sorts of cases likely to be litigated in appellate courts, the precise boundaries of even “established” entitlements may be murky and contested.¹⁵³ Parties can invest in discovering the scope of their entitlements to particular resources, and the more they invest in such discovery, the more clarity they will achieve with respect to the rights and obligations attendant to their property. Just as privately retained counsel are more likely to reach erroneous assessments of property entitlements if they do not invest sufficient resources in researching their scope, courts may err as well. Indeed, inadequate research expenditures by opposing counsel make erroneous determinations by the courts more likely. With each step up the appellate ladder, erroneous assessments of the scope of “established” property rights become less likely. But at no point are they reduced to zero. These three inevitabilities—the uncertain nature of the property rights likely to be contested in the courts of appeals; the resource, research, and analytical constraints faced by counsel; and the fallibility of all courts—provide another way to think about judicial takings and the circumstances under which a party ought to be compensated.

In a judicial takings suit, what should follow from these sorts of omissions and who should be financially responsible for such blunders? One can imagine courts developing ad hoc waiver or preclusion doctrines within judicial takings jurisprudence to deal with the problem of mounting government liability resulting from poor lawyering by plaintiffs. The courts could hold that a party alleging that the courts worked a judicial taking would be collaterally estopped from raising arguments in the judicial taking suit that had not been raised below. Some language in the *Stop the Beach* plurality opinion suggests receptiveness to the development of these sorts of procedural rules.¹⁵⁴ On the other hand, both the way the plurality structured the test for

¹⁵¹ *Stop the Beach*, 130 S. Ct. at 2602 (plurality opinion).

¹⁵² *See id.* at 2608 n.9.

¹⁵³ *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 580–90 (1988).

¹⁵⁴ The plurality in *Stop the Beach* suggested that waiver would apply to issues not raised in the petition for certiorari. 130 S. Ct. at 2610 & n.11 (plurality opinion).

judicial takings and the practice rules dictating that lawyers for *both* sides in a case are obliged to bring controlling authority to the attention of the court suggest that—depending on the breadth of the judicial takings doctrine—the government might have to pay for the mistakes of a lawyer representing a private property owner.¹⁵⁵

Advocates of judicial takings liability have argued that the requirement of compensation will promote stability in property law.¹⁵⁶ But we can now see how the underinvestment problem associated with judicial takings liability in disputes between private landowners might push the other way. The stability of property law is promoted by courts that have a full understanding of what the law presently is and what the costs of changing it would be.¹⁵⁷ When parties lack the proper incentives to educate the courts there is a substantial risk that judges will create the worst sort of instability—the kind created out of ignorance. If state litigation must reach a final judgment on the merits before a federal judicial takings suit can be brought to correct the state court's error, then it may take a decade before an error is definitively corrected. In the interim, erroneous precedent will stand, confusing other courts and the many parties that will negotiate deals or make investments in the shadow of the law. The underinvestment associated with judicial takings liability will reduce the quality of judicial decision making and the coherence of property law. The direction of the effect seems clear, though its magnitude is very difficult to estimate. In a world with no judicial takings liability, by contrast, both the private property owner and the adverse litigant have incentives to hire the best lawyers to advance the best arguments, constrained of course by the stakes at issue in the litigation. The likelihood that the court will erroneously or unthinkingly abrogate existing property rights is diminished.

In light of this dynamic, there is a strong connection between the intentionality test we offered in Part I and the underinvestment test we develop in this Part. Where parties that hold existing entitlements have strong incentives to invest in high-quality legal representation at the earlier stages in the proceedings, there is a lower probability that the courts will unwittingly deprive the entitlement holder of her prop-

¹⁵⁵ See *id.* at 2602 (holding that “[i]f a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property,” regardless of the competence of either plaintiff's or defendant's counsel).

¹⁵⁶ See, e.g., Thompson, *supra* note 88, at 1544. But see *Stop the Beach*, 130 S. Ct. at 2615–16 (Kennedy, J., concurring in part and concurring in the judgment) (noting that state-court judges may be more likely to change property rules abruptly if they know that the parties that lose as a result of these changes will receive just compensation).

¹⁵⁷ See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652–53 (1999) (discussing the importance of stable judicial doctrine to robust property rights).

erty rights.¹⁵⁸ And, in the absence of judicial mistakes, the deprivations that remain may end up being easier to evaluate for takings or due process violations. In other words, by creating incentives for investment in litigation resources, a narrower judicial takings doctrine may do a better job of protecting property entitlements over the long run than an expansive compensation requirement such as the one that the *Stop the Beach* plurality envisioned.

In cases involving private parties litigating over whether property doctrines should change, the due process doctrine can address the problems associated with underinvestment in high-quality legal representation relatively easily. The extent to which a property owner has made rational investments in high-quality legal representation or assisted them fully in their development of arguments seems like a natural consideration in procedural-due-process analysis.¹⁵⁹ Incorporating such a concern into a doctrine of judicial takings, however, presents more of a challenge. Property law is designed to create stable entitlements that promote investments in improvements, and the law favors property protection when it does not force an owner to negotiate or go to court to get third parties to respect his rights.¹⁶⁰ It would be strange, therefore, to hold that a party that had failed to hire an effective lawyer in the initial legal proceedings would have a weakened takings claim as a result. After all, in other takings contexts, the fact of a mistake by the State as to ownership of property would not bar a claim for compensation under the Takings Clause, even if the property owner could have alerted the State to its mistake in a timelier manner.¹⁶¹ We propose a solution to this problem below, by arguing that comparative fault principles might be used to reduce just-compensation awards when a litigant's insufficient investment in high-quality lawyering contributed to that litigant's loss of an entitlement.¹⁶² But

¹⁵⁸ Cf. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4423 (2d ed. 2002) (discussing the rationale behind requiring an incentive to litigate for issue preclusion purposes).

¹⁵⁹ Cf. *Matheney v. State*, 688 N.E.2d 883, 891–93 (Ind. 1997) (holding that a client's decisions to not cooperate fully with his lawyer's preferred legal strategies inform the determination as to whether a postconviction hearing complied with the requirements of the Due Process Clause). See generally *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319–34 (1985) (discussing the circumstances under which the Due Process Clause requires that claimants have meaningful access to high-quality legal representation).

¹⁶⁰ See John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 466 (2007) ("American courts have also routinely subscribed to the view that property law's fundamental goal is to provide stability and security in ownership and title.").

¹⁶¹ In *Stop the Beach* itself, there was a six-year lag between the land-use decision the petitioners challenged (July 2004) and the Supreme Court's final resolution of the property law issues (July 2010). Of course, in *Stop the Beach*, the litigation never reached the federal district court stage, nor the federal court of appeals stage, which could have slowed down matters considerably.

¹⁶² See *infra* text accompanying notes 199–203.

we recognize that making such factors relevant would represent a significant departure from existing just-compensation law. Thus, if due process becomes the primary avenue by which claims regarding judicially abrogated entitlements are litigated, the law could—without too much trouble—differentiate between parties that diligently bring the relevant legal rules to lower courts' attention and parties that had waited until after a lower-court defeat to act assertively.

Even if the courts were to embrace a robust waiver doctrine, however, it would not solve the underinvestment problem. There is a difference between raising an argument in the lower courts with sufficient specificity as to avoid waiver and advocating an argument in the most forceful and persuasive way. Absent very strong deference to lower courts on questions of law, it is essentially impossible to construct a legal doctrine that both makes available a judicial takings claim for parties that lose their property rights in the first round of litigation and avoids dampening the incentive of those parties to invest in vindicating their rights in that round of litigation. Something like a comparative-fault doctrine could mitigate the underinvestment problem, but unless judges have perfect information about unobservable facts, even that innovation would not incentivize socially optimal behavior by litigants. This is why it is important to correctly define the scope of the judicial takings doctrine at the outset.

Suppose we were to replay history, and this time Florida's lawyers and the Solicitor General's office had failed to grasp *Martin v. Busch's* significance. Suppose further that the Justices and their law clerks had similarly missed the case. Under these circumstances, it is conceivable that the Supreme Court would have held that the actions of the Florida courts deprived the plaintiffs of their ownership rights to accretions and their rights to have their littoral property come into contact with the water, constituting a judicial taking. There were certainly Florida precedents lending some support to such an argument.¹⁶³ If the Supreme Court's conclusions about the substance of Florida property law were treated as authoritative by state and federal courts in Florida, the Court would have, in effect, unwittingly abrogated a property right that had belonged to the state government, which should have owned the land by virtue of *Martin*. But wouldn't it necessarily follow (under the broadest interpretations of judicial takings) that the Supreme Court itself had, in (incorrectly) adjudicating one party's claim for a judicial taking, committed a judicial taking of its own? Who is to police judicial takings by the highest judicial body?

Imagine that, after the mandate issues in *Stop the Beach*, the State's lawyers turn up *Martin v. Busch* and understand its implications. Since

¹⁶³ See, e.g., *Bd. of Trs. v. Sand Key Assocs.*, 512 So. 2d 934 (Fla. 1987).

the federal government must compensate state governments when it takes their property under the Takings Clause,¹⁶⁴ the State of Florida might then be able to file a suit in federal court, alleging that the U.S. Supreme Court had taken its property when it misadjudicated the judicial takings claim. Accretions that should have belonged to the State had been transferred to private property owners as a result of *Stop the Beach*. It seems the State in this follow-on case should win. Although we have framed it as a hypothetical, the possibility of judicial takings by the Supreme Court is real. Arguably, under *Stop the Beach*, the U.S. Supreme Court's opinion in *Keystone Bituminous Ass'n v. DeBenedictis* was a judicial taking, insofar as it abrogated the right of a property owner to recover for a claim that had been clearly recognized by Supreme Court jurisprudence for more than a generation.¹⁶⁵ After all, as five Justices noted a few years after *Keystone Bituminous* was handed down, the law at issue in *Keystone Bituminous* was "nearly identical" to the statute at issue in *Mahon*.¹⁶⁶

Is there an alternative to this possibility of a merry-go-round of litigation of the same entitlements, particularly in the case of similarly situated landowners who were not involved in the original litigation? Due process provides a sensible framework for considering these issues. The Takings Clause inquiry focuses on the magnitude of a private loss and the social justifications for imposing that loss on a particular owner, leaving little room for questions like whether a litigant was involved in earlier litigation.¹⁶⁷ The Due Process framework provides a more attractive way to analyze these sorts of issues.

A *Mathews v. Eldridge* procedural-due-process approach, with its focus on providing owners with a reasonable opportunity to be heard, would balance the property owner's investments in representation against the value of the interests at stake.¹⁶⁸ Where little is at stake,

¹⁶⁴ See Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 830–32 (1989).

¹⁶⁵ See 480 U.S. 470 (1987) (rejecting on virtually identical facts the central holding in the landmark regulatory takings case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which had held that Pennsylvania legislation designed to prevent subsidence of surface land over coal deposits amounted to a regulatory taking by depriving the coal company of a support estate that it had purchased from the surface owners); Mulvaney, *supra* note 29, at 259.

¹⁶⁶ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

¹⁶⁷ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (describing the regulatory takings inquiry as focusing "upon the severity of the burden that government imposes upon private property rights" in contrast to a due process inquiry focused on the rationality of the government's policy decision). The Court's discussion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001), of the timing of an owner's acquisition of property relative to the imposition of a regulatory burden does not reflect an effort to inquire into the owner's opportunity to influence the rulemaking process. Rather, that case concerned the threshold question of whether an owner ever actually owned the interest he accused the government of taking from him.

¹⁶⁸ See *supra* notes 75–77 and accompanying text.

the owner could get away with lesser investments in legal representation. Where the stakes are high and the risk of loss significant, a due process framework would penalize the property owner who failed to take reasonable steps to obtain highly qualified legal representation in a case affecting her property rights.¹⁶⁹ Under such a procedural-due-process approach, cases in which a party that had been involved in round one of the litigation sues in round two may be treated differently than cases in which the party alleging the deprivation of a property right was not a litigant in the proceedings below.¹⁷⁰

Now the property owner challenging the court's action had limited opportunities to prevent the abrogation of his property rights in the first instance. That is not to say that the challenger had no capacity to affect the results in the proceedings below. After all, the property owner could have filed an amicus brief or perhaps even moved to intervene. But the question arises as to whether that is a reasonable burden to place on property owners. Property law often embraces the

¹⁶⁹ To be sure, judicial takings liability creates incentives that might cut the other way. For example, unclear statutory regimes may lend themselves to greater fluctuations in the content of private property rights. The less clear a statutory regime, the more judges will struggle with identifying the holders of property rights and the scope of those rights. Judicial takings liability therefore could function as a disciplining mechanism. Legislatures will have incentives to create clear entitlements at the outset so as to minimize the risk of judicial error and attendant judicial takings liability. See generally Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 564–65 (2005) (discussing the possibility that judicially enforced clear statement rules might prompt more careful legislative deliberation). Assuming that we would like to see legislatures, as opposed to courts, dictating the substance of property rights, it would be beneficial to incentivize the creation of clearer legislative rules. Courts in landmark cases like *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990), and *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), have articulated the idea that legislatures ought to be the legal institution of choice when it comes to recognizing new private property rights. See *Moore*, 793 P.2d at 496 (“If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision.”); see also *Chakrabarty*, 447 U.S. at 317 (“The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government”); *id.* at 308 (“We have also cautioned that courts should not read into the patent laws limitations and conditions which the legislature has not expressed.” (internal quotation marks and citations omitted)). Even taking this preference for legislative action as a given, it is conceivable that legislatures could respond to the prospect of judicial takings liability in a different way. That is, they might simply become much more reluctant to create new entitlements in the first place. If they create no entitlements, they can incur no takings liability. This concern might warrant skepticism about imposing liability for any sort of regulatory taking, but it is most salient in those domains where an institution other than the legislature will be responsible for avoiding liability. Seen in this light, the legislature's inability to prevent judicial takings coupled with its liability for those takings heightens the danger that legislatures will enact prophylactically unduly cautious policies.

¹⁷⁰ See Barros, *supra* note 33, at 951.

idea that owners do not usually have to explain themselves.¹⁷¹ Because property law is designed to promote secure investments, the law hesitates to impose on owners an affirmative burden to remain constantly vigilant about shifting legal doctrines that may affect their rights. The almost-universal practice in property law (particularly in the land-use context) is to exempt existing property entitlements from new rules, grandfathering them in, either for some extended period of time, until the property changes hands, or the property owner ceases to avail herself of the old rule.¹⁷² The question of how much of a burden to place on owners to keep abreast of litigation activity that might affect their rights is one of trade-offs. On the one hand, incentivizing similarly situated parties to participate in litigation reduces the risk of judicial error. On the other hand, we recognize that forcing the similarly situated parties to monitor litigation that might conceivably affect their rights substantially burdens large numbers of owners.

The preceding discussion assumes that a party that has lost the entitlement as a result of a court's reversal of a longstanding property doctrine is entitled to damages. As we discussed above, however, this remedial question was the subject of an extensive back and forth between the *Stop the Beach* plurality, which thought invalidation of the judicial decision giving rise to the taking would be the normal remedy, and Justice Kennedy, who assumed that damages was the proper remedy for a violation of the Takings Clause.¹⁷³ If we assumed that the plurality's approach to remedies was the correct one, and that landowners would be entitled to have regulations that constitute judicial takings invalidated (with the payment of damages only for the time during which the regulation was in effect), how would that change the analysis of asymmetric litigation incentives offered above? It is tempting to think that the availability of a judicial takings challenge in the federal courts would simply resemble an additional layer of appellate review, with a (small) possibility that the federal courts might effectively reverse a state court's interpretation of its own property rules.¹⁷⁴ If that were the case then the availability of a judicial takings remedy would not result in any asymmetry between the party seeking to change the existing arrangement of entitlements and the

¹⁷¹ See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1847 n. 47 (2006).

¹⁷² See Serkin, *supra* note 107, at 1223 n.1, 1224–32 & n.4; see also *supra* notes 105–07 and accompanying text (discussing ways in which state land-use doctrines protect entitlements).

¹⁷³ See *supra* text accompanying note 30.

¹⁷⁴ In that case, the process would resemble an approach recently advocated by Jonathan Mitchell, who argues that federal courts should take a more active role in interpreting state law so as to minimize the need to reach a federal constitutional question unnecessarily. Jonathan F. Mitchell, *Reconsidering Murdock: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1336–39 (2010).

party advocating a continuation of existing rules. But upon closer reflection, a judicial takings inquiry differs from an additional layer of appellate review in one important respect: it is an additional layer that is available only to a party that has lost its preexisting entitlement. As a conceptual matter, this asymmetry should have two countervailing effects: it will incentivize parties seeking to preserve the status quo to invest fewer resources in defending their rights at each stage of the legal proceedings, and it could make parties that would like to change existing entitlements less likely to attempt to do so via the courts. The former effect promotes instability in property doctrine, while the latter effect may cut the other way under certain assumptions about the propensities of courts and legislatures. It is not clear which effect would dominate, though it seems at least plausible that the net result of judicial takings liability would be increased instability in entitlements, even if injunctive relief becomes the default remedy.

In his recent *Yale Law Journal* article, Jonathan Masur argues that the unidirectional availability of appellate review can skew substantive litigation outcomes systematically.¹⁷⁵ The judicial takings example shows that the unidirectional availability of appellate review could diminish the incentives of the parties to make their strongest legal arguments, resulting in legal rules that are more likely to vacillate during the pendency of a case. If all appellate cases result from appeals by parties alleging that the lower courts have abrogated their existing entitlements—not from an equal mix of parties challenging the lower courts' abrogations and refusals to abrogate entitlements—then erroneous determinations by reviewing courts that lower courts abrogated existing rights are inevitable. The absence of deference to state courts or of vigorous waiver doctrines would result in further skew. This effect may be significant for owners that are situated similarly to the party that is seeking to preserve its entitlement. In a world where judicial takings remedies provide these parties with a second bite at the apple, they have diminished incentives to file amicus briefs or intervene in early stages of a proceeding. The strategy of waiting until the state court appeals are fully resolved, and then raising judicial takings arguments that were not considered by the courts below, could often constitute the optimal litigation strategy for a similarly situated owner, albeit a strategy that imposes negative externalities on the courts and those similarly situated. The second-order effect of asymmetric appellate review would be decreased expenditures on legal representation at the early stages of a case.

We can now bring the discussion full circle. Recall that in Part I we suggested that it is appropriate to use the judicial takings frame-

¹⁷⁵ See Jonathan Masur, *Patent Inflation*, 121 *YALE L.J.* (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623929.

work to analyze cases in which the court intentionally changes a property rule to appropriate private property to achieve some public goal. This is significantly more likely to occur where the State is actually a party to the action than when the case is simply a dispute between private parties, though we concede that—as with the New Jersey beach cases¹⁷⁶—some private disputes may present opportunities for intentional appropriations. But, importantly, our criticisms in this Part of the asymmetric incentives created by judicial takings have been limited to those instances in which both parties to a dispute are nongovernmental actors. The incentive to underinvest is substantially diminished in cases involving governmental defendants for two reasons. First, the government will be on the hook for any damages that are ultimately awarded to property owners. Second, and perhaps less obviously, state actors are likely to be repeat players in property litigation. Res judicata and stare decisis mean that a defendant who expects to have to confront many similarly situated landowners is likely to invest appropriately in retaining high-quality legal counsel at every stage in the legal proceedings, regardless of whether the possibility for bringing a judicial takings suit exists. Governments have enough at stake to warrant the expenditures. To be sure, their lawyers may still make costly mistakes—as Florida’s lawyers did in their brief opposing certiorari in *Stop the Beach*—but the clients will have the right sorts of incentives to minimize these mistakes over the long run.¹⁷⁷ Because nearly all governments will be repeat players in property litigation, and only a few private actors will be, using divergent doctrines to deal with the challenges of private-versus-public and private-versus-private litigation provides a sound enough heuristic.

III

HOW TO DIFFERENTIATE TAKINGS AND DUE PROCESS, AND WHY IT MATTERS

On the basis of our analysis in Parts I and II, we can now identify several connected factors that can help courts decide when a claim that the judiciary has curtailed an owner’s private property rights should be litigated under the Takings Clause and when it should be litigated under the Due Process Clause. The following table summarizes our argument:

¹⁷⁶ See *infra* notes 215–18 and accompanying text.

¹⁷⁷ At the risk of stating the obvious, we do not attribute any mistakes made by lawyers in *Stop the Beach* to the existence of a judicial takings doctrine because the federal courts had not recognized a judicial takings cause of action at the onset of litigation in that case. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2601–02 (2010) (plurality opinion) (equating legislative and judicial takings to state takings through regulations).

TABLE 1: DECIDING BETWEEN DUE PROCESS AND JUDICIAL TAKINGS APPROACHES

Factors Warranting Judicial Takings Treatment	Factors Warranting Due Process Treatment
<ul style="list-style-type: none"> • Intent to appropriate property for public use • Presence of repeat-player, governmental litigants mitigating underinvestment problem • Government retains the property for a public use • Coordinated effort between judiciary and another branch 	<ul style="list-style-type: none"> • Absence of intent to appropriate by the judiciary • Absence of repeat-player litigants, creating underinvestment incentives • Government does not retain the property, but court merely causes a private owner to lose it • Self-dealing by the judiciary, with judges as the direct or indirect beneficiaries

These four basic factors—(1) intent to appropriate private property for public use, (2) repeat play, (3) State retention of the property, and (4) coordination—are the central questions that courts should confront in deciding whether it is appropriate to treat government conduct as a potential judicial taking. The factors stem from conceptual, textual, structural, and pragmatic readings of the constitutional text, and are largely congenial to existing precedents. Although there will be (hard) cases in which the factors will point in different directions, in the majority of cases we expect the factors to correlate strongly, with the intent and benefit elements providing much of the connective tissue. Axiomatically, different government entities cannot coordinate their actions unless they know what they are doing and intend to act in concert. Where the government winds up with control over an entitlement it previously lacked, it is likely to recognize the alteration of the status quo. Inadequate legal research and poor framing of the arguments by non-repeat-player litigants will make it more likely that the judiciary unintentionally strips an owner of an existing entitlement. We believe that these four factors present a workable standard that can be used to guide courts in judicial takings and due process cases going forward.

What are the implications of a claim being placed in the takings box, as opposed to the due process box? Now we will work with a contrasting list of threes, and we again can encapsulate the key distinctions in a simple table. The first is that judicial takings claims will be easier to win than due process claims. A judicial takings claimant need only show that the government's act violates one of the existing tests for determining whether a taking has occurred. A due process claimant will, in most cases, have to show that the government's conduct does not withstand rational basis review or a similarly demanding standard. This will be a tall order, though it can certainly be accom-

plished in cases involving judicial self-dealing, needless losses imposed on owners, or other forms of arbitrary action. Indeed, despite the low reputation for success of due process claims against economic regulation in federal court, state courts have shown a greater willingness to strike down land-use regulations on due process grounds.¹⁷⁸ In other words, relegating a category of claims to a due process analysis is by no means a death sentence for property owner's chances of success, especially in state court.

The second implication is that the remedy for judicial takings will ordinarily be damages, and the remedy for a due process violation will be injunctive relief. The third implication flows from the second. In judicial takings cases, a remedy adjustment along the lines of comparative fault will be available to deal with lingering underinvestment incentives. In due process cases, the nature of the injunctive remedy will preclude a comparative fault approach, though a less precise defense analogous to contributory negligence may be available.¹⁷⁹

TABLE 2: IMPLICATIONS OF THE JUDICIAL TAKINGS AND DUE PROCESS APPROACHES

Implications of Judicial Takings Treatment	Implications of Due Process Treatment
<ul style="list-style-type: none"> • Relatively easy for the entitlement holder to prevail 	<ul style="list-style-type: none"> • Relatively difficult for the entitlement holder to prevail
<ul style="list-style-type: none"> • Damages remedy 	<ul style="list-style-type: none"> • Injunctive remedy
<ul style="list-style-type: none"> • Comparative fault available to address the (small) underinvestment problem 	<ul style="list-style-type: none"> • Contributory negligence potentially available to address the (large) underinvestment problem

¹⁷⁸ See, e.g., *Twigg v. Cnty. of Will*, 627 N.E.2d 742, 746 (Ill. App. Ct. 1994); *Anderson v. City of Issaquah*, 851 P.2d 744, 751-55 (Wash. Ct. App. 1993).

¹⁷⁹ Other pertinent distinctions do arise, though they do not map onto the judicial-takings-versus-due-process dichotomy. For example, the opportunities for legislative reversal will differ between judicial takings cases and the two kinds of due process cases. More precisely, both judicial takings cases and procedural-due-process cases will provide the relevant legislature with an opportunity to accomplish the objective that the judiciary sought to achieve, assuming the legislature shares the judiciary's goals. In other words, if the legislature feels that the judiciary appropriately abrogated existing property rights (say, in order to maximize the community's welfare) it can pay the affected private property owners and continue to enjoy the benefit of the new judicial rule. If, by contrast, it feels that the judiciary was grabbing entitlements that ought to remain in private hands, then it can restore the prelitigation status quo ante. This will limit the legislature's financial liability to temporary damages that accrued between the time of the judicial decision that amounted to a taking and the date on which the legislature restored the claimant's private property rights. Similarly, in the procedural-due-process context, the legislature can always direct the judiciary to enhance procedural protections for entitlement holders in a way that will avoid running afoul of constitutional guarantees. In the substantive-due-process case, by contrast, a constitutional violation will ordinarily preclude subsequent legislative efforts to restore what the judiciary was trying to accomplish.

A. Likelihood of Success

Having articulated those implications of treating the case one way or another, let us now explore the intricacies of those implications in more detail. We begin with the question of how likely a property holder challenging a judicial decision is to prevail. Where an alleged judicial taking does not transfer fee simple ownership from one owner to another, evaluating the merits of the takings claim should proceed under existing Supreme Court regulatory takings precedent. The *Stop the Beach* plurality formulated its test for judicial takings as requiring, as an initial matter, a change in state property law.¹⁸⁰ This requirement makes sense as a threshold requirement not just for judicial takings, but for regulatory takings in general.¹⁸¹

Where the activity regulated by the new rule is not a nuisance,¹⁸² the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York* supplies the default test for resolving claims that the new regulation amounts to a taking of private property.¹⁸³ Indeed, in earlier cases like *PruneYard*, the Supreme Court has applied the *Penn Central* test to what were essentially judicial takings claims.¹⁸⁴ Although it has been extensively criticized in the academic commentary for its indeterminacy, the *Penn Central* test has functioned in this role for over three decades.¹⁸⁵ Under the *Penn Central* approach, the mere fact that a judicial decision changes the law in a way that burdens some part of an owners' bundle of rights to accomplish a public use will not invariably support the conclusion that the court has "taken" the owner's property without just compensation in violation of the Constitution.¹⁸⁶ Instead, *Penn Central* instructs courts considering the impact of the regulation on the parcel as a whole to weigh (1) the economic impact of the regulation, which courts have often taken to mean the impact of the regulation on the market value of the parcel; (2) the degree to which the regulation interferes with owners' "investment-backed expectations" for it, and (3) the character of the government

¹⁸⁰ See *Stop the Beach*, 130 S. Ct. at 2601–02 (plurality opinion).

¹⁸¹ See Doremus, *supra* note 44, at 3.

¹⁸² The *Hadacheck* per se rule tells us that where a court is acting to abate a nuisance, the attendant restrictions on the property rights of the party that created the nuisance should never amount to takings. See *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

¹⁸³ 438 U.S. 104 (1978).

¹⁸⁴ Walston, *supra* note 29, at 427–28 (discussing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

¹⁸⁵ See, e.g., Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1701–02, 1711 (1988) (discussing the potential harm that an unpredictable takings law standard could cause to investors and government officials).

¹⁸⁶ See *Penn Cent.*, 438 U.S. at 124 ("Government 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." (internal quotation marks omitted) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922))).

action, such as the degree to which it singles out particular owners for uniquely burdensome consequences.¹⁸⁷

One aspect of the character of the government action that both courts and commentators have found to be particularly salient is the degree to which it singles out owners for uniquely burdensome consequences.¹⁸⁸ As Saul Levmore has observed, “A central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities.”¹⁸⁹ Government action that concentrates its costs on a small number of individual property owners leaves those owners uniquely vulnerable to majoritarian abuse.¹⁹⁰ The concept of the judicial taking interacts in potentially complicated ways with this emphasis on “singling out.” Because of the case-by-case nature of judicial decision making, the argument might be made that every judicial decision imposing a loss on an owner in some sense singles that owner out for adverse treatment. This would suggest that judicial action might be especially likely to lead to successful *Penn Central* regulatory takings claims or, perhaps, that judicial takings claims should be treated in a categorically different way within a regulatory takings analysis. If, as we argued above,¹⁹¹ however, a judicial takings claim only arises when courts change the law (as opposed to when they merely apply existing law to the litigants before them), then judicial takings do not appear to be different in kind from takings worked by other branches of government from the standpoint of their likelihood to single out. In assessing the degree to which a judicial rule change singles out property owners for the purposes of applying the third *Penn Central* factor, the nature and reach of the new rule of decision is the appropriate object of the “singling out” inquiry, as it would be for any other state actor. That new rule can be very broad, or it can be exceedingly narrow. The mere fact that it is a court that is making the new rule should not itself be the decisive consideration.

In addition to the three-factor analysis laid out in *Penn Central*, the Court has supplied a number of “per se” regulatory takings tests that apply to narrow contexts. Where, for example, a State authorizes

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 133; *see also* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1039 (2003) (“The problem of eminent domain is essentially one of discriminatory taxation, which the government corrects through the provision of just compensation.”); Levmore, *Just Compensation*, *supra* note 130, at 306–07 (claiming that the “occasional individual[]” or group rather than the traditional minority group is protected by the Takings Clause because there would be no other political redress for that individual); Peñalver, *supra* note 47, at 2223–28 (analyzing the differences between intentional and accidental “singling out”); Treanor, *supra* note 55, at 866–80 (discussing process failure and the Takings Clause).

¹⁸⁹ Levmore, *Just Compensation*, *supra* note 130, at 309.

¹⁹⁰ *See id.*

¹⁹¹ *See supra* notes 40–44 and accompanying text.

the permanent physical occupation of land—either by the government or by a third party—for a public purpose, the Court’s decision in *Loretto v. Teleprompter Manhattan CATV Corp.* holds that per se a taking has occurred.¹⁹² In the judicial takings context, this would mean that the payment of just compensation is required where a judicial decision that is appropriately characterized as a possible taking changes the existing law of property to require an owner to endure the permanent physical occupation of her land. In the past, the Court has assumed that easement-like public access rights are equivalent to a permanent physical occupation.¹⁹³ This suggests that, for example, a judicial decision mandating public access to private property in order to accomplish a public end, such as the New Jersey Supreme Court’s line of beach-access decisions, would constitute a per se judicial taking unless the decision were consistent with existing state-law property principles (as the New Jersey beach-access decisions may have been).

Another important “per se” rule the Court has adopted in the regulatory takings context holds that, where a State permanently and completely deprives an owner of the economically beneficial use of his land, a taking has occurred.¹⁹⁴ The exception, the Court said in *Lucas*, is where the restriction on the owner’s use of her property is consistent with “background principles of the State’s law,” for example by prohibiting the owner from creating a nuisance.¹⁹⁵ As with the other regulatory takings doctrines, the *Lucas* test translates relatively easily into the judicial takings context. The question simply becomes whether a state-court decision deviates from background principles of property law (such as the existing law of nuisance or zoning) and, if so, whether it has the effect of permanently depriving an owner of all economically beneficial use of his land. Where the answer to both of these questions is yes, a judicial taking has occurred.¹⁹⁶

Where judicial takings analysis is inappropriate (e.g., because of the absence of the requisite intent to appropriate), claims by owners

¹⁹² 458 U.S. 419, 426 (1982).

¹⁹³ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831–32 (1987).

¹⁹⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 303 (2002) (“[A] permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.”).

¹⁹⁵ *Lucas*, 505 U.S. at 1029.

¹⁹⁶ An interesting question in this context is whether the retroactive imposition of monetary liability constitutes a taking of property, as a plurality of the Supreme Court suggested in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532–37 (1998) (plurality opinion). If that were the case, the judicial takings version of the *Lucas* rule might become extremely broad, at least unless the judicial takings doctrine is properly cabined by correctly identifying the boundaries of the takings–due process divide.

complaining that a judicial decision has deprived them of property should be evaluated using a due process analysis. As we discussed above, the due process analysis includes both a procedural and a substantive component.¹⁹⁷ Procedurally, a property owner is entitled to notice and an opportunity to be heard before losing her property. The retroactive application of a rule to a party with a fully vested property right implicates the notice element of procedural due process. Although the owner does have an opportunity to be heard—in the sense that someone has to initiate a judicial process to effectuate the new rule—the inability of the owner to do anything to avoid her loss constitutes a failure of notice in a way that implicates fundamental conceptions of fairness. But this does not translate into a bright-line rule that retroactivity in property law violates principles of procedural due process.

In addition to its procedural protections favoring notice and an opportunity to be heard, due process in its substantive dimension protects owners against arbitrary treatment at the hands of state actors. Although they have not always kept regulatory takings and substantive due process distinct, courts have normally understood the substantive-due-process inquiry to involve an evaluation of the fit between the means and ends.¹⁹⁸ In contrast, the takings inquiry is usually understood to focus on the fairness of the burden a law imposes on a particular owner.¹⁹⁹ Where a court inadvertently imposes a loss on a property owner by retroactively applying a new property rule, a substantive-due-process claim would argue that the decision of the court not to apply the rule prospectively only is itself arbitrary. Although the argument that a state action is arbitrary under the rational basis test is usually thought to be virtually impossible for a claimant to win,²⁰⁰ there are a number of reasons to think that it would not be a futile argument to make when a property rule is applied retroactively. For starters, these claims would all arise in situations in which the owner's loss does not itself foster the State purpose animating the rule change, otherwise the claim would be analyzed under the rubric of judicial takings. And while there might be reasons a court would argue that it was rational nonetheless to apply a new rule retroactively—largely due to questions of administrative convenience—those arguments would carry less weight in the context of judicial takings, where the fact of case-by-case adjudication substantially weakens the benefits of retroactive rule application.

¹⁹⁷ See *supra* notes 76–79 and accompanying text.

¹⁹⁸ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005).

¹⁹⁹ See *id.* at 540–42.

²⁰⁰ David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings*, 74 NOTRE DAME L. REV. 717, 750 (1999).

Indeed, except where it would be difficult to determine when a property interest was created, the case for the irrationality of retroactivity seems very strong in property cases where the loss suffered by the owner does not itself advance the policy behind the new rule. Because most interests in land are created through written, publicly recorded documents, proving when they are created is usually a relatively straightforward task. But where it is hard to determine when a property interest was formed, that difficulty can itself constitute a reasonable basis for deciding to apply the rule retroactively (or, more accurately, in all cases decided thereafter). Compared to real property, interests in personal property are more likely to be created without such contemporaneously recorded documentation. So, due process should perhaps be more tolerant of retroactivity with respect to personal property and less so where interests in real property are at stake, where arguments against limiting a rule to prospective application would be harder to justify. Even where it would be relatively easy to determine when an item of personal property was acquired, prospective application of a new rule may be more time consuming and costly than universal application of the new rule. This might happen, for example, where application of the new rule normally occurs outside of an adjudicative process, such as with rules concerning income taxation. As a result, we should not be surprised to see greater tolerance of retroactivity in that context.²⁰¹ Another situation in which the presumption against retroactivity would not carry as much weight is where it is clear that the parties to a particular transaction did not alter their position in reliance on the old rule. In those situations, retroactive application of the rule does not do much to frustrate the parties' expectations and courts seem more willing to apply the new rule retroactively.²⁰²

B. Procedural Questions

How would a property owner raise a judicial takings claim? For the owner involved in the state-court litigation that arguably gives rise to the judicial takings cause of action, one obvious course is to raise the claim in the state-court proceeding itself. If the State were not already a party to the action (a possibility, depending on the test be-

²⁰¹ See, e.g., Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 49 (1977); Saul Levmore, *The Case for Retroactive Taxation*, 22 J. LEGAL STUD. 265, 266 (1993); Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity*, 84 HARV. L. REV. 436, 436-37 (1970).

²⁰² See, e.g., *Mannillo v. Gorski*, 255 A.2d 258, 262 (N.J. 1969) (applying a new adverse possession "state of mind" requirement to the case before it because the parties were unlikely to have relied on the old rule); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 162 (Wis. 1997) (applying a new rule permitting punitive damages without actual damages in part because of lack of defendant's reliance on the old rule).

ing used to determine the proper boundaries of the judicial takings doctrine), there would need to be some mechanism for providing notice to the State's attorneys. Raising the judicial takings claim might be procedurally awkward in the earlier stages of litigation, particularly where the judicial decision giving rise to the taking strikes like a bolt from the blue. But motions for rehearing and, more obviously, the appellate process provide procedural means for raising the judicial takings argument.

A slightly trickier question arises for nonparty owners whose interests are affected by judicial decisions. If a state court, for example, has ruled that all beachfront property must be made open to the public, this might work a judicial taking of the property of owners not participating in the litigation in which the court announces the new rule. The Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* requires takings claimants to seek compensation through State-created procedural mechanisms—including a state-court action for inverse condemnation—before proceeding to federal court with an assertion that the State has violated the Takings Clause.²⁰³ Applying *Williamson County* in the context of a judicial taking suggests that a nonparty owner who believes she has been deprived of property by a state-court decision must first seek compensation by filing an inverse condemnation action in the state court. But where the compensation issue has already been litigated in the state courts, such an inverse condemnation action may well seem futile. Nevertheless, this futility in the judicial takings context does not seem to be different in kind from that faced by, say, a property owner raising a nonjudicial regulatory takings claim that is substantially similar to one that has already been litigated unsuccessfully by another property owner. Consequently, the argument for departing from existing procedural requirements for raising regulatory takings claims seems weak.

C. Comparative Fault and Contributory Negligence

Having already discussed the remedial implications of a determination that state action implicates the Takings Clause or Due Process Clause, we can now say more about remedies. We have suggested that the judicial takings framework is inappropriate in cases where the underinvestment problem is significant. That said, because underinvestment is one of four factors relevant to the judicial takings versus due process inquiry, there may be disputes that present a real underinvestment problem but nevertheless ought to be characterized as judicial takings cases. Moreover, while the presence of a repeat player miti-

²⁰³ 473 U.S. 172, 194–95 (1985).

gates the negative externalities associated with underinvestment in high-quality legal representation, it does not eliminate it altogether. To the extent that a free-rider problem persists, a comparative-fault approach might make some sense in the judicial takings context. For example, instead of losing a claim outright, an owner who has her property taken for public use (in part) because of her own failure to bring favorable relevant precedent to the court's attention might suffer some percentage reduction in the just compensation ordered for a successful judicial takings claim. Such a mechanism would operate like a waiver doctrine, requiring owners to bring their judicial takings claim to the courts' attention at the earliest point when courts are best able to deal with the substantive legal and retroactivity questions. At present, comparative fault is a concept quite foreign to takings jurisprudence. But, until recently, the idea that a court could commit an unconstitutional taking was largely foreign as well. The creation of judicial takings liability presents several new legal challenges, and importing comparative fault from tort law is a sensible approach to addressing a problem that does not really arise in traditional takings cases, which do not depend on the property owner's own involvement in the adversarial litigation process.²⁰⁴ To be sure, there may be some concern that, if comparative fault were to find a foothold in judicial takings law, it might be expanded to cover ordinary takings cases where a well-connected constituent had failed to mount any political resistance against a regulation that would wipe out the value of his property, and this in turn could have pernicious consequences by encouraging landowners to take a scorched-earth approach to resisting regulatory change. But the distinctive nature of judicial decision making, with its reliance on litigants to educate the court about the legal landscape, means that waiver-like doctrines such as the comparative-fault scheme we are describing could appropriately be restricted to the discrete domain of judicial takings.²⁰⁵

There is precedent both for approaching takings and due process cases with an eye toward splitting the burdens of the regulation between the regulating entity and the regulated entity and for penalizing owners who negligently bring regulatory hardship upon themselves. For example, most state courts hold that new land-use

²⁰⁴ A law review comment recently proposed a similar move in the context of compensation for wrongful convictions, noting that several common-law countries had imported comparative fault principles into their analysis of appropriate damages. See Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 264–69 (2008).

²⁰⁵ We think the argument that comparative-fault principles should loom larger in takings cases more generally is worthy of further consideration, though we are not prepared to take a position on that question here. For an article that develops this sort of approach to regulatory takings, see Fee, *supra* note 188.

regulations cannot be applied to existing uses without, at a minimum, a “reasonable” amortization period that equitably balances the public good generated by the regulation against the private burden imposed on the regulated landowner.²⁰⁶ As with the due process cases more generally, the courts in amortization cases seem to be aiming to achieve a fit between the means and ends sought by the policy and the private property owner’s economic interests.²⁰⁷ And, in land-use cases, courts routinely treat self-created hardship by property owners as a reason to allow regulators to impose heavier burdens on the landowner.²⁰⁸

In the due process context, where affected property owners have had an opportunity to be heard, but share some blame for the application of the new rule to their claim, the appropriate legal rule might spread the costs between the government and owners whose own actions had contributed to the judicially imposed loss. One could imagine a regime much like contributory negligence, operating at the stage of determining whether there has been a violation of the Constitution, not at the stage of what the damages should be for such a violation. If a property owner had been involved in the proceedings below, but failed to cite relevant precedents that made it clear to the court that a decision adverse to them would abrogate an existing property right, then her claim that the decision retroactively changing the rule of property violated due process would fail. If, however, a property owner with notice of a pending case had failed to intervene while a court ruled against a similarly situated landowner, the argument that the owner is somehow at fault for the loss she has suffered would be much weaker. Of course, contributory negligence’s all-or-nothing character is troubling. Takings cases, which necessarily involve monetary damages and therefore lend themselves to fine-grained approaches like comparative fault, provides judges with a more comfortable margin for error.

D. So What Is a Judicial Taking? A Few Examples

Assuming that compensating parties for property losses imposed by the judiciary is appropriate, we conclude that there is a category of cases that should be treated as judicial takings. These cases involve a judicial decision holding that a property right previously possessed by

²⁰⁶ See, e.g., *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 260–62 (N.Y. 1977).

²⁰⁷ See *id.*

²⁰⁸ The most common context in which this consideration arises is when homeowners are seeking a variance from a zoning law that imposes a significant hardship on one of their parcels. See, e.g., *Bloom v. Zoning Bd. of Appeals*, 658 A.2d 559 (Conn. 1995); *Eastroads, L.L.C. v. Omaha Zoning Bd. of Appeals*, 628 N.W.2d 677 (Neb. 2001); *Shemo v. Mayfield Heights*, 722 N.E.2d 1018 (Ohio 2000); *Sciacca v. Caruso*, 769 A.2d 578 (R.I. 2001).

a private property owner is now to be taken from the owner to serve some public end. While we believe that the universe of judicial takings claims should be constrained, there are plenty of disputes that fit the bill. *Stop the Beach* itself would have presented one such case.²⁰⁹ Recall that the U.S. Supreme Court in *Stop the Beach* held that the State, not the private property owners, possessed the right to the newly filled beach under existing Florida law.²¹⁰ Had prior Florida law pointed in the other direction, then the Takings Clause would have been the appropriate tool for considering the constitutionality of the state courts' conduct. As we have argued, applying the Takings Clause to cases in which judicial action redefines property rights to put what were previously private property rights to public use makes good sense for a number of different reasons. If the Florida Supreme Court had in fact changed its law of avulsion, *Stop the Beach* would have had the profile of a classic takings case. In a hypothetical world where the property owner had a clear entitlement, but the State proceeded with the beach-filling project, the intentionality element would have been satisfied: the judiciary would have been knowingly abrogating a private property interest to serve the public interest. The courts would have been the instrumentality by which the government defendants in *Stop the Beach* took private property for public use, literally redefining private property as state property. The case involved a state-government repeat player as one of the litigants. That repeat player had appropriate incentives to bring the pertinent precedents to the court's attention, given the stakes in other land disputes in which they may have been implicated. And, of course, the government defendants in *Stop the Beach* became the owners of the land in question.

On the reading of the Fifth Amendment we proposed in Part I, the State's action in this hypothetical situation looks more like a taking than a (due process) deprivation of property. The only missing factor separating our modified *Stop the Beach* scenario from a paradigmatic judicial taking would be the absence of obvious coordination between the judiciary and another branch. But while the presence of coordination strongly suggests that treating a state action as a potential judicial taking is appropriate, the opposite does not follow from the absence of affirmative evidence of coordination. Counterfactually, had prior Florida law treated avulsions the same way it treated accretions, the State's actions might well have amounted to a per se judicial taking under *Loretto*.²¹¹ Having said that, it is plausible that the State's action would have amounted to a taking that did not war-

²⁰⁹ See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2611 (2010) (plurality opinion).

²¹⁰ *Id.*

²¹¹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–38 (1982).

rant the payment of compensation, just as Jean Loretto herself evidently received only one dollar in compensation on remand from the Supreme Court.²¹² The best defense of Florida's beach renourishment is that it was necessary to prevent the beachfront owners' houses from eventually washing into the sea as a result of beach erosion. Under such circumstances, the State's condemnation of the land for the purposes of widening the beach may have left the property owners better off than the alternative of state inaction.²¹³

The public-private boundary dispute we discussed at the beginning of Part I is analytically similar to the issue in *Stop the Beach*. Part I's not-so-hypothetical dispute between private parties over adverse possession rules, by contrast, will most often implicate the Due Process Clause. Even though the hypothetical arises in a situation where the courts recognize that they are deviating from a previously controlling precedent, the question of precisely which property owner prevails (and which loses) under the new rule is almost certainly a matter of indifference to the court. And so the intent to appropriate the property for public use is lacking. The analysis would be different if the new rule were enacted—and applied retroactively to vested claims—precisely to reallocate property from one group (e.g., squatters) of claimants to another (e.g., absentee owners). Moreover, the other components of a paradigmatic judicial taking as we have described them are missing. The litigants were not repeat players, which make us worry about underinvestment and should diminish our confidence in the extent to which the court made fully informed decisions about the prevailing framework and the costs associated with departing from the existing rule. The government never took control over the disputed parcel of land, nor put it to a use appropriately characterized as a public one at the conclusion of the litigation. The fact that the State probably had some efficiency- or fairness-oriented purpose in changing its property doctrine tells us nothing about the ultimate use of the land. And even if we were to assume that the change in the doctrine will likely have the effect of transferring land from lower-value to higher-value users across the large universe of cases, there would be no grounds for reaching a particularized finding with respect to the highest value use of the parcel at issue on the facts before the court.²¹⁴

²¹² Loretto v. Group W. Cable, 522 N.Y.S.2d 543, 546 (App. Div. 1987).

²¹³ See EPSTEIN, *supra* note 73, at 195–99 (discussing implicit in-kind compensation); 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8A.04[2] (3d ed. 1999) (discussing the case law regarding severance damages, which incorporates principles of in-kind compensation for special benefits to landowners); Lior J. Strahilevitz, Case Note, *When the Taking Itself Is Just Compensation*, 107 YALE L.J. 1975, 1977–80 (1998) (discussing Sullivant v. City of Oklahoma City, 940 P.2d 200 (Okla. 1997) and advocating a rule whereby actual private benefits from a taking offset any just compensation that otherwise would be owed).

²¹⁴ See Nicole Stelle Garnett, *Planning as Public Use*, 34 ECOLOGY L.Q. 443, 448–54 (2007) (identifying legislative planning as a reason for judicial deference in takings cases);

Finally, there was nothing to suggest a coordinated effort between the judiciary and another branch. If the court were to apply the rule retroactively to adverse possession claims that had already vested before the new rule was announced, due process would be the better framework for evaluating the constitutionality of the state court's action.

Other cases, even those not involving permanent physical occupations of private land by the State, provide further examples of disputes that would be good candidates for analysis as judicial takings. Consider, for example, the New Jersey Supreme Court's decisions in *Matthews v. Bay Head Improvement Ass'n*,²¹⁵ which we discussed above, and *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*²¹⁶ In *Matthews*, the New Jersey high court expanded the reach of the public trust doctrine to require recreational public access to the dry sand areas of certain privately owned beaches.²¹⁷ In *Atlantis Beach Club*, it applied its holding in *Matthews* to require the private beach club to allow members of the public to make use of recreational use of its dry sand beach without payment of the usual membership fee (though the court did allow the club to charge members of the public a reasonable fee to cover the cost of club services they enjoyed while using the beach).²¹⁸ Applying our theory of takings as purposeful appropriation of private property for public use, cases like *Matthews* and *Atlantis Beach Club* would seem to fall within the ambit of a judicial takings analysis (though, again, that is not the same as saying that, given New Jersey's background property law and the other considerations necessary to find a Takings Clause violation, they would actually constitute judicial takings).

CONCLUSION

This Article confronts the most serious and significant disputes that arose in *Stop the Beach*, the Supreme Court's landmark judicial takings case: the questions of when it makes sense to characterize a judicial action as implicating the Takings Clause and what the appropriate remedies for such a taking might be. We find the approach of neither Justice Scalia nor Justice Kennedy in *Stop the Beach* fully satisfying, and offer what we hope will be a better alternative. In our view, the distinction between a violation of the Takings Clause and the Due Process Clause depends on four interrelated factors: (1) the government's intention to appropriate the property for a public purpose,

cf. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (finding that very extensive legislative findings and planning were necessary to justify the use of the eminent domain power for economic development purposes).

²¹⁵ See 471 A.2d 355 (N.J. 1984).

²¹⁶ 879 A.2d 112 (N.J. 2005).

²¹⁷ See *Matthews*, 471 A.2d at 365.

²¹⁸ See *Atlantis Beach Club*, 879 A.2d at 113.

(2) the involvement of repeat players in the state-court proceedings giving rise to the complaint about judicial appropriation, (3) whether the government retains the property in question for a public use, and (4) the existence of any coordination between the judiciary and another branch. These factors stem from the convergence of textual, conceptual, and consequentialist arguments about the nature of the judicial power to adjust entitlements. Along the way, we develop a functionalist answer to a question that has been lingering ominously in the judicial takings debate since 1990—why should it matter which branch of government reduces the value of private property? We suggest that the nature of the adversarial process, and the pronounced underinvestment problem that can result from compulsory judicial takings insurance warrant significant restraint in identifying the proper scope of a judicial takings doctrine.

The exercise of compensating property owners for judicial changes in property doctrine remains controversial. Readers who are hostile to the idea that the Constitution constrains this sort of judicial conduct can understand our Article to be a theoretically ambitious “second-best” effort to steer the case law in a more favorable direction. When a car is careening off the road, it is better to have it crash into the bushes than into a crowded café. Audiences more sympathetic to the views of the six Justices in *Stop the Beach* who embraced the idea of constitutionally limiting judges’ ability to modify existing entitlements should view our framework as a way forward, both for the courts that will shape legal doctrine and for the scholars tasked with creating a coherent fit between judicial takings and the rest of property theory.