

**THE USE OF THEORY MAKING AND DOCTRINE MAKING  
OF REGULATORY TAKINGS THEORY TO EXAMINE  
THE NEEDS, REASONS, AND ARGUMENTS TO  
ESTABLISH JUDICIAL TAKINGS THEORY**

*James E. Holloway\**

*Donald C. Guy\*\**

**ABSTRACT**

The Roberts Court attempts to establish takings theory in light of Justice Holmes' theory-making methodology, which created regulatory takings theory, and the Rehnquist Court's doctrine-making approach, which created a regulatory takings doctrine guaranteeing the right to receive just compensation.<sup>1</sup> In establishing this regulatory takings doctrine, the Rehnquist Court's most seminal decisions were *Lucas v. South Carolina Coastal Council* and *Dolan v. City of Tigard*.<sup>2</sup> *Lucas* and

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\* Professor, Business Law, Department of Finance, College of Business, East Carolina University, Greenville, North Carolina. B.S., North Carolina Agricultural & Technical State University, 1972; M.B.A., East Carolina University, 1984; J.D., University of North Carolina at Chapel Hill, 1983.

\*\* Professor Emeritus, Real Estate and Finance, Department of Finance, College of Business, East Carolina University, Greenville, North Carolina. B.S., University of Illinois at Urbana-Campaign, 1962; M.S., University of Illinois, 1969; Ph.D., University of Illinois at Urbana Campaign, 1970. A version of this Article was presented at the National Meeting of the Academy of Legal Studies in Business on August 5-9, 2010, in Richmond, Virginia. We thank our colleagues at this meeting for their suggestions and comments.

<sup>1</sup> See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (ruling made by Justice Scalia finding no unconstitutional taking of property owners' rights without sufficient reference to the foundations of takings law laid out by prior decisions); *infra* notes 2-8.

<sup>2</sup> See generally *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (finding a regulatory taking when the city conditioned approval of Dolan's application for expansion of her store and parking lot on dedication of land for a flood plain and a bicycle pathway, without the "rough proportionality" or reasonable relationship between the permit conditions and a legitimate state interest); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-20 (1992) (holding that regulations causing a property owner to suffer a physical "invasion" of his property, or eliminating "all economically [viable] use of

*Dolan* set forth takings doctrines that examined the nature of the government action in *Penn Central Transportation Co. v. City of New York*<sup>3</sup> and gave a higher standing to the right to receive just compensation, compared to fundamental rights, by establishing higher standards of review to protect private property rights.<sup>4</sup> Several decades earlier, the Taft Court, with Justice Holmes writing for the majority, had established regulatory takings theory in *Pennsylvania Coal Co. v. Mahon* to guarantee the right of a private landowner to receive just compensation.<sup>5</sup> The Taft Court created theory-making methodology to prevent the government from taking private property for public use without paying just compensation, though the regulation in *Pennsylvania Coal Co.* appeared reasonable under the Due Process Clause.<sup>6</sup> The Roberts Court's attempt to establish a takings theory pays too little attention to the doctrine-making approach and theory-making methodology to justify a judicial takings theory and establish an appropriate takings inquiry

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land," constitute a taking that requires just compensation). *See infra* notes 22-23 and accompanying text. The Court in both *Lucas* and *Dolan* concentrated its Takings Clause analysis on the private property owner's right to receive compensation. *See generally Dolan*, 512 U.S. 374; *Lucas*, 505 U.S. 1003.

<sup>3</sup> *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978); *see Dolan*, 512 U.S. at 400-01; *Lucas*, 505 U.S. at 1023. In *Penn Central Transportation Co. v. City of New York*, Justice Brennan held that the application of New York City's historical preservation ordinance to the air space above Grand Central Station was not a regulatory taking, although it prohibited Penn Central Transportation Company from selling the space to a developer because the ordinance was "substantially related to the promotion of the general welfare" and allowed appellants other beneficial use of the property. *Penn Cent.*, 438 U.S. 104, 138. The *Penn Central* Court established a three-pronged test to determine when a regulatory taking has occurred. *See infra* note 44.

<sup>4</sup> *See Dolan*, 512 U.S. at 391; *Lucas*, 505 U.S. at 1030.

<sup>5</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes, writing for the majority, found a taking when a Pennsylvania statute prohibiting subsurface mining was invoked to stop the Pennsylvania Coal Company from exercising its rights to mine coal on a parcel of land. *Id.* Justice Holmes also noted that "some values are enjoyed under an implied limitation and must yield to the police power," but that "[w]hen it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413. Therefore, Justice Holmes's regulatory takings theory was to be applied on a case-by-case basis. *Id.*; *see infra* notes 66-73 and accompanying text.

<sup>6</sup> *Pa. Coal Co.*, 260 U.S. at 415 ("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.").

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and standard of review.<sup>7</sup> The Roberts Court's takings theory must guarantee the right to receive just compensation so as not to permit state courts to shift a public burden to a private landowner.<sup>8</sup>

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<sup>7</sup> See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2611 (2010) (finding that a private landowner must prove a property right superior to those of the state).

<sup>8</sup> See *Lucas*, 505 U.S. at 1016 n.6 (stating the private landowner need only demonstrate an interference with economic beneficial use of the land); *infra* Part I.

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## I. INTRODUCTION

The United States Supreme Court should establish takings theory by developing theory-making methodology that bears some semblance to the theory making and doctrine making of seminal Court precedents.<sup>9</sup> If the present Court exceeds the logic and analytics of past Courts by creating a new takings theory, the present Court should, at least, develop a theory-making methodology and lay the groundwork for a doctrine-making approach that would add more predictability, continuity, and stability to takings jurisprudence.<sup>10</sup> The Rehnquist Court's doctrine-making approach and the Taft Court's (Justice Holmes's writing) theory-making methodology prohibit the exercise of government power and protect private property rights by guaranteeing the right to receive just compensation.<sup>11</sup> The Takings Clause guarantees the right to receive just compensation when the government takes private property for public use.<sup>12</sup> The Rehnquist and Taft Courts made takings theory and doctrine that increase both the standing of the right to just compensation and the guarantee to that right.<sup>13</sup> The Roberts Court elevates, perhaps, the level of discourse on constitutional logic but adds no theory that proffers the aforementioned goals of takings jurisprudence.<sup>14</sup> This Article offers a new starting point, exclusively within the Takings Clause, for the Roberts Court and lower courts to consider when they ponder the need to expand and establish takings theory and doctrine.<sup>15</sup>

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<sup>9</sup> See, e.g., *Dolan*, 512 U.S. 374 (discussing doctrine making); *Lucas*, 505 U.S. 1003 (discussing doctrine making); *Pa. Coal Co.*, 260 U.S. 393 (discussing theory making).

<sup>10</sup> But see, e.g., *Stop the Beach Renourishment*, 130 S. Ct. at 2611 (shifting the burden of proof to the private landowner without sufficient justification or explanation).

<sup>11</sup> Both Rehnquist and Taft Courts required compensation when denying a landowner beneficial use of land. See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1018; *Pa. Coal Co.*, 260 U.S. at 415.

<sup>12</sup> See U.S. CONST. amend. V.

<sup>13</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1018; *Pa. Coal Co.*, 260 U.S. at 415.

<sup>14</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2611 (placing the burden on the private landowner without addressing the need to grant just compensation).

<sup>15</sup> See James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 315, 373-75 (2010) (arguing that the United States Supreme Court should use *Armstrong v. United States*, 364 U.S. 40 (1960), as a source of takings doctrine to establish principles and standards of review under the Takings Clause); see also U.S. CONST. amend. V ("nor shall private

The Court must neither overlook the doctrine-making approach of the Rehnquist Court's doctrines nor ignore the theory-making methodology of the Taft Court's regulatory takings theory.<sup>16</sup>

This Article explains why the Court should consider a doctrine-making approach and theory-making methodology to begin and ground its need to establish a judicial takings theory.<sup>17</sup> Specifically, the Rehnquist Court's doctrine-making approach (or rights-centered approach) and Justice Holmes's theory-making methodology (regulatory taking) will be used in this Article to examine the Roberts Court's need to establish a judicial takings theory, fashion a standard of review, and address the impact of new takings theory on state courts.<sup>18</sup> This Article argues that the Roberts Court's approach and methodology must establish takings theory that increases the standing of and guarantees the right to receive just compensation so that private property rights are protected.<sup>19</sup>

This Article consists of six parts, including the Introduction. Part II examines the Rehnquist Court's seminal doctrine-making precedents and Justice Holmes's theory-making methodology to advance and establish regulatory takings theory. Part III explains the use of takings doctrine to expand the regulatory takings theory, examines the nature of property rights of a takings claim, and analyzes the Court's reluctance to move beyond regulatory takings theory. Part IV examines the need, and opposing arguments against the need, to consider and establish a judicial takings theory. Part V analyzes the takings inquiry, the standard of review of judicial taking, and the judicial impact of judicial taking on the flexibility of state courts. Part VI concludes that the Roberts Court attempts to establish judicial takings theory but does not give

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property be taken for public use, without just compensation"); *Armstrong*, 364 U.S. at 49 (stating the purpose of the Takings Clause is to "bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (finding the Takings Clause applies to states through the Fourteenth Amendment).

<sup>16</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1018-19; *Pa. Coal Co.*, 260 U.S. at 415-16.

<sup>17</sup> *Infra* Part VI.

<sup>18</sup> *Infra* Part VI.

<sup>19</sup> *Infra* Part VI.

leverage to the doctrine making and theory making of seminal takings precedent that guaranteed the right to receive just compensation.

## II. ESTABLISHING TAKINGS THEORY IN LIGHT OF EXISTING THEORY AND DOCTRINES

Deciding whether state supreme courts' clarification or interpretation of property rights justifies the need to establish a judicial takings theory includes more than the protection of property rights.<sup>20</sup> The need to establish a judicial takings theory seems no less formidable than deciding whether the taking of private property by regulation goes too far and whether the takings inquiry or application of a regulatory takings theory in some circumstances requires a takings doctrine to justify heightened scrutiny of government regulation under the Takings Clause.<sup>21</sup> In *Lucas*, the Court applied the background principles of common law doctrine to justify a per se test to examine the nature of

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<sup>20</sup> See generally *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010) (analyzing various factors to determine if a judicial taking occurred).

<sup>21</sup> See, e.g., Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 713, 717 (2011) (concluding that a judicial taking would impose a restraint on state court's ability to adapt common law); Nestor M. Davidson, *Judicial Takings and State Action: Rereading Shelley After Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL'Y 75, 81 (2011) (explaining the need for some to read *Stop the Beach Renourishment* in light of *Shelley v. Kramer*, 334 U.S. 1 (1948), and its impact on private property rights); Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the IUS Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL'Y 37, 70 (2011) (finding that a place may exist in our federalism for a judicial takings theory); Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91, 96 (2011) (finding that a judicial taking does exist under the Federal Takings Clause); Robert H. Thomas et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 VT. L. REV. 437, 440 (2010) (concluding that a state judicial taking could undermine a federal judicial taking if a state court could declare private property to be public property); J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747, 1748 (2005) (exploring whether a change in patent law could amount to regulatory takings); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE, Feb. 18, 2011, at 247-48, <http://yalelawjournal.org/images/pdfs/946.pdf> (finding that the plurality opinion in *Stop the Beach Renourishment* shows distrust for judgments of state courts making decisions on questions of property rights).

government regulation and to determine if the landowner was entitled to a guaranteed right to receive just compensation.<sup>22</sup> Two years later, in 1994, the Court applied the unconstitutional conditions doctrine in justifying a higher standard of review when determining whether to guarantee the right to receive just compensation in *Dolan*.<sup>23</sup> *Dolan* and *Lucas* include the doctrine-making approach, and in *Pennsylvania Coal Co.*,<sup>24</sup> the Court applied theory-making methodology that established regulatory takings theory during the *Lochner* era<sup>25</sup> and rejected the idea that substantive due process prohibited a taking by regulation.<sup>26</sup> *Lucas* and *Dolan*'s doctrine-making approach and *Pennsylvania Coal Co.*'s theory-making methodology guarantee the right to receive just compensation, thus giving greater protection to private property rights.<sup>27</sup> The Roberts Court needs to integrate this approach and methodology into its

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<sup>22</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

<sup>23</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

<sup>24</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922). In *Lucas*, the Court stated that "Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 505 U.S. at 1014 (citing *Pa. Coal Co.*, 260 U.S. at 414-15). In addition, the *Lucas* Court stated that "[i]f, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Id.* (quoting *Pa. Coal Co.*, 260 U.S. at 415) (alteration in original). Finally, the *Lucas* Court concluded that "[t]hese considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Id.*

<sup>25</sup> *Lucas*, 505 U.S. at 1069; *Pa. Coal Co.*, 260 U.S. at 414-15. See generally *Lochner v. New York*, 198 U.S. 45 (1905) (refusing to sustain a state statute establishing a limit on the number of hours of work). Approximately three decades later, the United States Supreme Court permitted state and federal governments to regulate economic relationships of private property and eventually ended the *Lochner* era. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (involving a federal statute excluding filled milk from interstate commerce); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (involving a state statute establishing a minimum wage for women); *Nebbia v. New York*, 291 U.S. 502 (1934) (involving a state statute fixing the price of milk).

<sup>26</sup> *Pa. Coal Co.*, 260 U.S. at 414-15.

<sup>27</sup> See *Dolan*, 512 U.S. at 384-85; *Lucas*, 505 U.S. at 1014; *Pa. Coal Co.*, 260 U.S. at 414-15; see also *infra* Part II.B.

logic and analytics in order to establish harmonious takings jurisprudence.<sup>28</sup>

**A. *Nature of Theory Making in Light of Past Doctrine and Theory***

The Roberts Court appears ready to move beyond the Rehnquist Court by creating constitutional theory under the Takings Clause.<sup>29</sup> When the Roberts Court moves beyond present takings doctrines in order to protect common law property rights, one can only think that the starting point would be the Rehnquist Court's doctrine-making approach.<sup>30</sup> The Rehnquist Court established the common law background doctrine in *Lucas*, which protects the common law,<sup>31</sup> and implanted the unconstitutional conditions doctrine in *Dolan*, which prevents the involuntary transfer of private property rights<sup>32</sup> under the common law. Both *Lucas* and *Dolan* guarantee the right to receive just compensation by providing heightened scrutiny to new circumstances that demand closer scrutiny of the nature of government regulation.<sup>33</sup> In *Lucas* and *Dolan*, the Rehnquist Court's efforts to elevate and guarantee the right to receive just compensation are obvious, but the Roberts Court's efforts to follow the Rehnquist Court's doctrine-making approach are not.<sup>34</sup>

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<sup>28</sup> See *infra* Part V.

<sup>29</sup> See Mulvaney, *supra* note 21, at 247.

<sup>30</sup> See Holloway & Guy, *supra* note 15, at 373-74; *supra* note 15 and accompanying text.

<sup>31</sup> See *Lucas*, 505 U.S. at 1029 (“We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”).

<sup>32</sup> *Dolan*, 512 U.S. at 385 (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”).

<sup>33</sup> *Id.*; *Lucas*, 505 U.S. at 1029.

<sup>34</sup> See *infra* Part III.C.

State courts can use adjudication to make decisions, and state and local legislative bodies can use adjudication as a decision-making process to restrict property rights.<sup>35</sup> However, *Dolan* explicitly limits adjudication by elevating the right to receive just compensation, placing a restraint on legislative bodies using conditional demands to force a transfer of property rights.<sup>36</sup> *Dolan* shows that the Rehnquist Court did not intend to exempt legislative adjudication from closer constitutional scrutiny.<sup>37</sup> One must now ask whether state courts' adjudicatory decisions are exempt when they cause the same constitutional injuries as legislative bodies using adjudication to transfer property rights.<sup>38</sup> The Roberts Court did not need to make a big leap of logic to conclude that state courts are not exempted under the Takings Clause, though these state courts are only clarifying or interpreting property law.<sup>39</sup> Moreover, the Due Process Clause was not established to provide a remedy for property rights taken for public use when the Takings Clause exists.<sup>40</sup> Although *Dolan* limits legislative bodies' use of adjudication, *Dolan*'s doctrine-making approach (or rights-centered approach), which forms the basis of takings doctrine and includes higher preference for the right to receive just compensation, may show the difficulty of moving takings jurisprudence toward a new theoretical approach, namely takings theory.<sup>41</sup>

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<sup>35</sup> See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2613 (2010) (showing support for the judicial decision-making process where "the Florida Supreme Court's decision did not contravene the established property rights of petitioner's Members").

<sup>36</sup> See *Dolan*, 512 U.S. at 385 (using the unconstitutional conditions doctrine, an older doctrine, to guarantee the right to receive just compensation). This leads one to believe that the unconstitutional conditions doctrine's importance is not minor when compared to other fundamental rights that the doctrine protects. See *id.* (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968)).

<sup>37</sup> See *id.*

<sup>38</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2597.

<sup>39</sup> See *id.* at 2602 ("In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.").

<sup>40</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (recognizing that we cannot undermine or diminish the Due Process Clause and Contract Clause but implicitly recognizing that these clauses cannot protect the right to receive just compensation when government power in the form of regulation takes property for public use).

<sup>41</sup> See *infra* Part II.B.

***B. Lucas and Dolan as Unique Efforts to Expand the Takings Theory***

Judicial takings theory comes as no surprise in light of *Lucas* and *Dolan*, which added doctrines to expand regulatory takings theory by limiting exercises of government power under new circumstances.<sup>42</sup> When a branch of the government seeks to eliminate private property rights by redefining property law, courts should not insulate that branch of government or its decision-making process from the guarantee of the right to receive just compensation.<sup>43</sup> The need to expand or establish takings theory points to the rights-centered approach of *Lucas* and *Dolan* where the Rehnquist Court applied the nature of the government action factor of the *Penn Central* inquiry.<sup>44</sup> Straightforwardly, this specific need implicates the guarantee of the right to receive just compensation, which, in turn, protects private property by not permitting the government to make regulations and other decisions that redefine property rights at common law.<sup>45</sup>

The rights-centered approach of *Lucas* and *Dolan* created regulatory takings doctrines that expanded the limitations of regulatory takings theory.<sup>46</sup> Logically, this expansion is a necessary stage in showing that there are circumstances involving a loss of property rights beyond regulatory takings theory and the limits of the Due Process Clause.<sup>47</sup> These circumstances cause the need for another takings theory to address constitutional harm.<sup>48</sup> We conclude that the Roberts Court chose interpretive theory to start its analysis and then moved beyond regulatory takings theory to establish judicial takings theory, rather than start-

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<sup>42</sup> See *Dolan*, 512 U.S. at 385 (city development of commercial property); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (beach property issues).

<sup>43</sup> See, e.g., *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

<sup>44</sup> *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). The *Penn Central* inquiry includes the nature of the government action factor that examines land use, environmental, and other regulations to determine whether this regulation “substantially advance[s] a legitimate state interest” and denies all economically viable use to justify a need for and use of this regulation. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>45</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>46</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>47</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>48</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2599-600.

ing its analysis by relying on substantive theory and completing its analysis at the end of regulatory takings theory.<sup>49</sup>

When regulatory takings theory fails to protect the right to receive just compensation or another constitutional theory fails to alleviate the harm, the Court should establish a new takings theory.<sup>50</sup> Although regulatory and other taking theories failed to protect property rights, the Court must still decide whether the government decision that allegedly eliminated common law property rights amounts to a taking of private property.<sup>51</sup> The Roberts Court would be asked to establish takings theory that goes far beyond the regulatory takings theory established when substantive due process of the *Lochner* era<sup>52</sup> gave much protection to property rights.<sup>53</sup> Regulatory takings theory limits the exercise of government powers that are not within due process and other limitations.<sup>54</sup> Specifically, the common law background principles and unconstitutional conditions doctrine of *Lucas* and *Dolan*, respectively, expand regulatory takings theory by creating a guarantee of the right to receive just compensation.<sup>55</sup> Any new takings theory that moves beyond these doctrines also must expand this guarantee.<sup>56</sup>

### C. *Doctrine Making and Theory Making Under the Takings Clause*

*Lucas* and *Dolan* offer insight into the Court's logic and analytics in furthering regulatory takings theory as a means of limiting police power.<sup>57</sup> When takings doctrines and other principles can no longer

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<sup>49</sup> *See id.*

<sup>50</sup> *See Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>51</sup> *See Stop the Beach Renourishment*, 130 S. Ct. at 2600-01.

<sup>52</sup> *See supra* notes 25-27 and accompanying text.

<sup>53</sup> *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). In *Pennsylvania Coal Co.*, Justice Holmes, writing for the majority, stated that “[o]ne fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.” *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>56</sup> *See Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>57</sup> *See Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1027.

expand the boundaries (cover the circumstances and facts) of the regulatory takings theory, then another takings theory is needed to limit government power and guarantee the right to receive just compensation in order to protect property rights.<sup>58</sup> *Lucas* and *Dolan* expand or further regulatory takings theory,<sup>59</sup> even though the Court in *Pennsylvania Coal Co.* decided that the Takings Clause was a limitation on the exercise of state legislatures' police power.<sup>60</sup> Thus, the boundaries of regulatory takings theory are finite, especially where the states' legislative power is not the sole source of government power to transfer, limit, or restrain the rights of private property owners.<sup>61</sup>

The Rehnquist Court used a doctrine-making approach to expand regulatory takings theory, and the Roberts Court needs a doctrine-making approach and theory-making methodology that establish a takings theory when the Court attempts to make a theory and develop its takings inquiry and standard of review.<sup>62</sup> Justice Kennedy recognized *Pennsylvania Coal Co.* in the Roberts Court's attempt to establish judicial takings theory in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>63</sup> but the Roberts Court chose not to follow *Pennsylvania Coal Co.*'s theory-making methodology.<sup>64</sup>

The Taft Court established regulatory takings theory during the *Lochner* era when it applied substantive due process to protect economic and property rights.<sup>65</sup> Justice Holmes, writing for the majority in *Pennsylvania Coal Co.*, considered but rejected due process as a constitutional limitation to prohibit the taking of private property by regula-

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<sup>58</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>59</sup> See *Dolan*, 512 U.S. at 385; *Lucas*, 505 U.S. at 1029.

<sup>60</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922).

<sup>61</sup> See *id.* at 413.

<sup>62</sup> See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601-02 (2010); *Pa. Coal Co.*, 260 U.S. at 413.

<sup>63</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring in part).

<sup>64</sup> See *id.* at 1029 (majority opinion); *Pa. Coal Co.*, 260 U.S. at 414-15; *supra* note 26.

<sup>65</sup> See *Pa. Coal Co.*, 260 U.S. at 415.

tion.<sup>66</sup> Instead, Justice Holmes concluded that the issue in *Pennsylvania Coal Co.* was not a due process issue regarding damages for a government action taking private property for public use<sup>67</sup> but that due process had a boundary that the use of government power could exceed without impunity.<sup>68</sup> Justice Holmes found that both the Takings and Due Process Clauses require compensation for a taking, but “[w]hen this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.”<sup>69</sup> Justice Holmes concluded that the exercise of police power could eventually destroy property rights and must be subject to or arise under the Takings Clause.<sup>70</sup> Thus regulatory takings theory was more appropriate because this issue was unique and did not fit substantive due process or prior physical per se takings cases.<sup>71</sup> Justice Holmes stated that “this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.”<sup>72</sup> Justice Holmes concluded that the takings issue in *Pennsylvania Coal Co.* was unique and justified new takings theory.<sup>73</sup> The Roberts Court should not ignore the regulatory takings methodology of *Pennsylvania Coal Co.* when establishing a new takings theory.<sup>74</sup>

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<sup>66</sup> *Id.* The Court has found a physical taking when government regulation permits another person or government agency to permanently occupy private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

<sup>67</sup> *Pa. Coal Co.*, 260 U.S. at 415-16.

<sup>68</sup> *Id.* at 413.

<sup>69</sup> *Id.* at 415.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 416.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 415-16.

<sup>74</sup> See generally Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL’Y 1 (2010) (indicating that all of the seminal takings cases decided since *Pennsylvania Coal Co.* have built upon and developed the regulatory takings analysis that Justice Holmes originally provided).

### III. BEYOND THE BOUNDARIES OF REGULATORY TAKINGS THEORY AND FINDING NOTHING

One must not forget that if the government could totally circumvent the right to receive just compensation, the government would have no need to consider regulations and judicial decisions eliminating and redefining property rights.<sup>75</sup> *Lucas* and *Dolan* created a rights-centered, doctrine-making approach by guaranteeing the right to receive just compensation, which advanced regulatory takings theory.<sup>76</sup> New regulatory takings doctrine permits courts to determine whether new government regulation that was once applied to past circumstances and regulation now amounts to a taking of private property for public use.<sup>77</sup> The Court must be able to expand the boundaries of regulatory takings theory by creating doctrine, and when the current takings doctrines and principles do not guarantee the right to receive just compensation under government actions, the Court must consider creating a new takings theory.<sup>78</sup>

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<sup>75</sup> See Kimberly A. Selemba, Comment, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)constitutionally "Takes" Land Dirt Cheap*, 108 PENN. ST. L. REV. 657, 662-63 (2003) (explaining that physical takings require compensation because they are a physical invasion of one's property, while regulatory takings require compensation when they deprive the property owner of all economically beneficial use; both types of takings require compensation because of the effects on the property owner's rights).

<sup>76</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994) (setting forth a rough proportionality test to ensure that a higher standard protects property owners' right to compensation); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1026 (1992) (holding that a regulatory taking occurs when the regulation deprives the property owner of all economically viable use of his property, regardless of whether the government justifies the regulation as being a noxious use).

<sup>77</sup> See Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 DICK. L. REV. 327, 329-31 (1998) ("This article identifies and examines the development of regulatory takings analysis by the Supreme Court during the Twentieth Century. . . . *Dolan* establishes a higher scrutiny for some land use regulations, initiates a type of means-ends analysis for other regulations, and generally provides for greater protection of property rights under the Takings Clause.").

<sup>78</sup> See, e.g., *Dolan*, 512 U.S. at 391 (rejecting the "reasonable relationship test" employed by most jurisdictions in determining whether there was a regulatory taking and adopting the "rough proportionality" test as the correct standard, under which the government has the burden of making an individualized determination that the dedication which it wants the property owner to comply with is "related both in nature and extent to the impact of the proposed development" of the dedication).

However, a takings theory may not apply to these circumstances and actions when a state government does not protect or recognize a landowner's interests and rights of private property.<sup>79</sup>

**A. *Takings Doctrines as a Means to Expand Regulatory Takings Theory***

*Lucas* and *Dolan* are only two precedents, but they are the high point of takings jurisprudence in the Rehnquist Court and the next logical step in moving the Rehnquist Court beyond the *Penn Central* inquiry (or the takings-analytical framework) of the Burger Court.<sup>80</sup> *Lucas* and *Dolan* advanced regulatory takings theory by creating takings doctrine that is just a step below takings theory to examine the nature or character of government regulation.<sup>81</sup> Specifically, *Lucas* established heightened scrutiny of government regulations that “denie[d] an owner economically viable use”<sup>82</sup> of private property rights protected under the land title at common law.<sup>83</sup> *Lucas* gives more protection to common law uses by not permitting the state legislature to deny land development (or use) that common law permitted.<sup>84</sup> *Lucas* also recognizes limits on the government's power to redefine property rights.<sup>85</sup>

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<sup>79</sup> The Fifth Amendment to the United States Constitution states, “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. If the government does not recognize an individual's right of private property, a taking necessarily cannot occur given the plain text of the Constitution. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2613 (2010).

<sup>80</sup> *Lucas* was the first time in which the Court applied the “deny all economically viable use” language in determining the existence of a regulatory taking, and *Dolan* was the first time the Court announced the rough proportionality approach, both of which came from the standard set forth in *Penn Central*. *Guy & Holloway*, *supra* note 77, at 338 n.65, 344-45.

<sup>81</sup> *Id.* at 337-38 (indicating that a determination of whether the regulatory taking requires compensation starts with the *Penn Central* inquiry, under which the Supreme Court is most concerned with the nature of the government action).

<sup>82</sup> *Penn Central Transp. Co.*, 478 U.S. at 138 n.36; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>83</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1001, 1029-31 (1992).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1014.

*Dolan* established a higher standard of review examining the relationship between the means and the ends of the regulation<sup>86</sup> where the means (land dedication conditions) were established by an adjudicatory process requiring a landowner to surrender the right to receive just compensation by transferring land to a municipal government to receive a public benefit.<sup>87</sup> *Dolan* gave more protection to landowners by not allowing legislative bodies the use of adjudicatory decision making to impose a conditional demand causing the transfer of land to a municipal government.<sup>88</sup> Both *Lucas* and *Dolan* give more protection to property rights but are narrow precedents protecting common law principles and limiting the use of the adjudicatory process to compel a transfer of land.<sup>89</sup>

The Court in *Lucas* and *Dolan* used higher standards of review to judge the exercise of government power (nature of the government action), and they advanced regulatory takings theory by finding a constitutional need (actually expanding the boundaries of this theory) to guarantee the right to receive just compensation.<sup>90</sup> *Lucas* and *Dolan* show the judicial logic needed to advance regulatory takings theory and to prevent the erosion of property rights by means other than legislative and executive powers.<sup>91</sup> In *Lucas*, the Court believed that state environmental legislation amounted to a regulatory taking “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . . .”<sup>92</sup> Moreover, the Court stated that “[a]ny limita-

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<sup>86</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385-86 (1994); *see also Agins*, 447 U.S. at 260 (stating that government regulation must substantially advance a legitimate state interest, or the court will deem it a taking).

<sup>87</sup> *Dolan*, 512 U.S. at 385.

<sup>88</sup> *Id.*

<sup>89</sup> *Guy & Holloway*, *supra* note 77, at 346 (“In *Dolan*, the Court explicitly noted that the City of Tigard used an adjudicative decision, and not a legislative determination, to impose its land dedication condition. Consequently, the nature of the government decision-making process could limit the application of the rough proportionality standard in future cases.”). In *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), the Supreme Court refused to apply *Dolan*’s rough proportionality test because it involved a legislative and not an adjudicatory decision. *See id.* at 346 n.139.

<sup>90</sup> *See supra* notes 78-86 and accompanying text.

<sup>91</sup> *See supra* note 89.

<sup>92</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

tion so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>93</sup> *Lucas* shows how the Court created takings doctrine to justify and underpin the highest standard of review that protects the right to develop land guaranteed in title of land at common law.<sup>94</sup>

Likewise, in *Dolan*, the Court created takings doctrine that justifies a higher standard of review.<sup>95</sup> The land dedication "conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."<sup>96</sup> The land dedication conditions were so burdensome that the Court invoked the unconstitutional conditions doctrine in order to limit the denial of the right to receive just compensation, thus limiting a burdensome interference with the exercise of property rights.<sup>97</sup> *Dolan* represents the willingness of the Court to use old constitutional doctrine to underpin heightened scrutiny and to give greater standing to the right to receive just compensation in order to prevent an involuntary transfer of land to the government.<sup>98</sup> Both *Dolan* and *Lucas* demonstrate the importance of creating and importing, respectively, doctrines that advance takings theory to prevent government from changing the nature of property rights.<sup>99</sup>

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<sup>93</sup> *Id.* at 1029.

<sup>94</sup> *Id.* at 1031.

<sup>95</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. . . . [T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

<sup>96</sup> *Id.* at 385.

<sup>97</sup> *Id.* ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968))); see *supra* note 38 and accompanying text.

<sup>98</sup> See *Dolan*, 512 U.S. at 385.

<sup>99</sup> See generally Recent Case, *California Court of Appeal Finds Nollan's and Dolan's Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance*—Home Builders

### ***B. Property Rights as the Essential Element of a Takings Claim***

If state courts are interpreting common law property principles that allow the states to acquire ownership of private property, the question is whether the right to receive just compensation imposes a restraint on this exercise of judicial power.<sup>100</sup> This issue is no longer a hypothetical and creates the need for the Court to consider state courts' judicial takings.<sup>101</sup> Specifically, in *Stop the Beach Renourishment*, the Florida Supreme Court concluded that the doctrine of avulsion "permitted the State to reclaim the restored beach on behalf of the public" and "described the right to accretions as a future contingent interest, not a vested property right."<sup>102</sup> The petitioner requested a rehearing before the Florida Supreme Court "on the ground that the Florida Supreme Court's decision amounted to a taking of the Members' littoral rights contrary to the Fifth and Fourteenth Amendments to the Federal Constitution."<sup>103</sup> The Florida Supreme Court denied the request for rehearing.<sup>104</sup> The petitioner requested the United States Supreme Court to grant a writ of certiorari to the Florida Supreme Court,<sup>105</sup> and the Court agreed to decide whether "the decision of a State's court of last resort

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Ass'n of Northern California v. City of Napa, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001), 115 HARV. L. REV. 2058, 2060, 2063 & n.51 (2002) (discussing the heightened scrutiny tests of both *Dolan*, "which requires 'rough proportionality' between that condition and the impact of the proposed development," and *Lucas*, which finds "a nonphysical per se taking only when regulation declares off-limits all economically productive or beneficial uses of land" (internal quotation marks omitted)).

<sup>100</sup> See generally Cody Snyder, *Unnecessary Expansion of the Takings Clause to the Judiciary: Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010), 30 TEMP. J. SCI. TECH. & ENVTL. L. 347, 347-48 (2011) ("[Although] regulatory takings have [traditionally] applied strictly to legislative acts, . . . Supreme Court cases have insinuated that judicial actions can have the same effect as a regulatory taking. . . . [For example], a judicial taking issue [is theoretically] raised when a state court changes the definition of property by determining that private property rights once recognized under state law, no longer exist." (footnote omitted)).

<sup>101</sup> See *id.* at 348 (noting that until the United States Supreme Court's decision in *Stop the Beach Renourishment*, "the question of whether a judicial decision could even effect a taking of private property at all was not clear").

<sup>102</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2600 (2010).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2600-01.

<sup>105</sup> *Id.* at 2601 (granting certiorari, 129 S. Ct. 2792 (2009)).

took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth [Amendment].”<sup>106</sup>

In order to make the decision whether there is a takings dispute under the Takings Clause, the Court must determine the existence of property rights.<sup>107</sup> An essential element of a takings claim is the possession of private property rights that exist under state common law.<sup>108</sup> Landowners and beachfront owners can claim property rights, but state property law must recognize these rights.<sup>109</sup> States establish and define property rights,<sup>110</sup> including the “property rights in navigable waters and the lands underneath them.”<sup>111</sup> The states hold in trust for public use “land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line [(MHWL)]).”<sup>112</sup> Further, “[t]he mean high-water line . . . is the ordinary boundary between private beachfront, or littoral property, and state-owned land.”<sup>113</sup> Moreover, riparian or littoral owners possess property rights that are similar to easements on water and the landward side of the MHWL.<sup>114</sup> These property rights “include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property.”<sup>115</sup> Florida and other coastal states grant littoral rights that are consistent with the common

<sup>106</sup> *Id.* at 2597 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994)).

<sup>107</sup> *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (stating that “[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law’” (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))).

<sup>108</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2601.

<sup>109</sup> *Id.* at 2597.

<sup>110</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2597 (citing *Phillips*, 524 U.S. at 164).

<sup>111</sup> *Id.* (citing *United States v. Cress*, 243 U.S. 316, 319-20 (1917); *St. Anthony Falls Water Power Co. v. St. Paul Water Comm’rs*, 168 U.S. 349, 358-59 (1897)).

<sup>112</sup> *Id.* at 2598 (citing FLA. CONST. art. X, § 11; *Broward v. Mabry*, 50 So. 826, 829-30 (Fla. 1909)).

<sup>113</sup> *Id.* (citing FLA. STAT. §§ 177.27(14)-(15), 177.28(1) (2007); *Miller v. Bay-To-Gulf, Inc.*, 193 So. 425, 427-28 (1940) (per curiam)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

law but vary among the states.<sup>116</sup> Beachfront owners and other landowners must possess private property rights before a state or federal court can review a takings dispute.<sup>117</sup>

The landowners and beachfront owners who brought the takings claims must establish that private property rights allegedly taken by the government were recognized by state property law.<sup>118</sup> In *Stop the Beach Renourishment*, the petitioner argued that the Florida Supreme Court's decision effected a taking of the littoral rights to accretion and the right to touch or contact water under Florida common law.<sup>119</sup> The petitioner's argument means that "the State's filling of submerged tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions."<sup>120</sup> This argument also states that "the Florida Supreme Court's judgment in the present case abolished those two easements to which littoral property owners had been entitled."<sup>121</sup>

The Court stated that petitioner's argument places the burden of proof on the state of Florida, which is not appropriate under the Takings Clause.<sup>122</sup> The existence of an essential element in takings law is that "[t]here is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land."<sup>123</sup> The Court did not see how the petitioner could establish the existence of rights to future accretions and contact property rights that would permit it to bring a judicial takings claim if these rights never existed at Florida common law.<sup>124</sup> The burden of

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<sup>116</sup> *Id.*

<sup>117</sup> *See supra* note 107 and accompanying text.

<sup>118</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2601.

<sup>119</sup> *Id.* at 2600-01. The Court notes that the parties raised other issues in their joint brief and independently, but these issues would not be addressed before the Court. *Id.* at 2610. The Court chose not to decide a regulatory takings issue that was already before the Court in another argument and a due process issue that was not fully presented before the Court. *Id.* at 2610 n.11.

<sup>120</sup> *Id.* at 2611.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

proof rests with the petitioner to prove the existence of a littoral or property right at common law before the takings dispute arose.<sup>125</sup> If there are no property rights at common law, the Court has no need to protect the right to receive just compensation since this right cannot protect private property that did not exist.<sup>126</sup>

### C. *Not a Taking and Not Based on Any Takings Theory*

The Court must decide whether there needs to be a judicial takings theory that guarantees the right to receive just compensation as a means to protect private property from an exercise of state judicial power.<sup>127</sup> The doctrines of *Lucas* and *Dolan* give greater protection to the guarantee of the right to receive just compensation, which, in turn, gives greater protection to property rights.<sup>128</sup> Justice Kennedy's concurrence in *Stop the Beach Renourishment* attempted to establish a judicial takings theory,<sup>129</sup> but the majority did not go as far as the Rehnquist Court that created takings doctrines.<sup>130</sup> On the takings question, the Roberts Court concludes that the Florida Supreme Court did not take private property rights (namely the right to accretion and the right to contact the water) for public use in violation of the Takings Clause.<sup>131</sup> The Court's decision is an uncategorized taking, but definitely not a judicial or regulatory taking.<sup>132</sup> The Roberts Court fails to measure up to the Rehnquist Court that had fashioned takings doctrines advancing regulatory takings theory.<sup>133</sup> *Stop the Beach Renourishment* fails to es-

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<sup>125</sup> *Id.* at 2606, 2608, 2611; *see also* *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1107-09 (Fla. 2008).

<sup>126</sup> *See, e.g., Stop the Beach Renourishment*, 130 S. Ct. at 2601-02, 2606, 2608; *Stop the Beach Renourishment*, 998 So. 2d at 1111.

<sup>127</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2607.

<sup>128</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992).

<sup>129</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2608-10; *see id.* at 2613 (Kennedy, J., concurring in part).

<sup>130</sup> *See id.* at 2608 (majority opinion); *Lucas*, 505 U.S. at 1015; *Holloway & Guy*, *supra* note 15, at 323-28 (discussing the Rehnquist Court takings doctrines).

<sup>131</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2613.

<sup>132</sup> *Id.* at 2597. A majority of the Court failed to establish and apply a judicial takings theory but concluded that Florida's actions did not amount to an uncompensated taking of private property rights. *Id.* at 2606-07.

<sup>133</sup> *Id.* at 2607.

establish takings theory, advance regulatory takings theory, or identify a category of taking.<sup>134</sup>

Although the Court concluded that Florida did not effect a taking of private property because it had not eliminated property rights of background common law principles, the Court did not identify the category of the taking (either physical or regulatory) at issue in the case.<sup>135</sup> The Court concluded that the Florida Supreme Court had not contravened established state property law and rejected the petitioner's arguments that the Florida Supreme Court eliminated property rights of background common law principles.<sup>136</sup> The Court's effort to establish a takings theory when the petitioner lacked the requisite property rights ignored the logic and methodology of *Pennsylvania Coal Co.*<sup>137</sup> In that case, Justice Holmes found a regulatory taking in order to protect a property right in a coal mine<sup>138</sup> but acknowledged that the Court could not set forth a general proposition to predict when a regulatory taking would occur and left much room for new doctrine.<sup>139</sup> Justice Holmes perhaps saw the need to establish doctrines, principles, and standards of

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<sup>134</sup> See generally *id.* (failing to conclude as to the appropriate use of takings theory, advance regulatory takings theory, or the category of taking that should be utilized).

<sup>135</sup> *Id.* at 2612.

<sup>136</sup> *Id.* at 2613. The Court invoked the background common law principles to support its holdings in *Stop the Beach Renourishment*. *Id.* The Court stated that “[t]he Florida Supreme Court decision before us is consistent with these background principles of state property law. It did not abolish the Members’ right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied.” *Id.* at 2612 (citations omitted).

<sup>137</sup> See generally *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (discussing the necessity of having property rights to establish a takings theory).

<sup>138</sup> *Id.* at 416. Justice Holmes, writing for the majority, stated that “[s]o far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.” *Id.*

<sup>139</sup> See *id.* at 415. Justice Holmes states:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.

*Id.*

review that would add predictability, stability, and continuity to takings jurisprudence.<sup>140</sup>

The Roberts Court, however, fails to launch a judicial takings theory on the existence of property rights or standing of the right to receive just compensation.<sup>141</sup> In fact, the elevation of the right to receive just compensation to a more fundamental right would make it easier to show germaneness between the state court decision and the right to receive just compensation. This germaneness would support the need for a judicial takings theory and other laws to guarantee this right.<sup>142</sup> In *Stop the Beach Renourishment*, the Court established that existing regulatory or physical takings theories can guarantee the right to receive just compensation and shows that a new takings theory is not necessary on those facts.<sup>143</sup>

#### IV. THE TAKINGS CLAUSE AND ITS THEORY AND DOCTRINE

When the Court chooses not to follow a doctrine-making (rights-centered) approach and theory-making methodology, the Court must establish a new approach and methodology that are more than a string of arguments reciting history.<sup>144</sup> In *Pennsylvania Coal Co.*, Justice Holmes created and applied regulatory takings theory and concluded that a regulatory taking existed on the facts.<sup>145</sup> Furthermore, he placed a

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<sup>140</sup> See generally *id.* (showing that the Court's majority and dissenting opinions insinuate a need for predictability in outcomes as seen by the divergent views of the Court itself).

<sup>141</sup> See generally *Stop the Beach Renourishment*, 130 S. Ct. 2592 (leaving the takings conclusion open and ambiguous).

<sup>142</sup> See generally *id.*; *Stop the Beach Renourishment*, 998 So. 2d 1102 (explaining that the United States Supreme Court and the Florida Supreme Court decisions and theory may be more congruous had this been a fundamental right, thereby requiring a strict scrutiny substantive due process analysis).

<sup>143</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2612 (refusing to adopt different interpretations of precedent that would afford property rights more protection).

<sup>144</sup> *Pa. Coal Co.*, 260 U.S. at 415-16. Justice Holmes explained that in the past, the Court made decisions to specifically address temporary, emergency situations, therefore those decisions cannot mandate what the proper approach to takings shall be. *Id.*

<sup>145</sup> See *id.* at 416; see *supra* Part II.C (explaining the logic and analysis of Justice Holmes's rationale establishing a regulatory taking by identifying critical conclusions supporting the need for a new theory under the Takings Clause).

limit on substantive due process by showing that the Constitution contained an explicit prohibition against taking private property for public use.<sup>146</sup> He acknowledged that the Court could not set forth a general proposition to predict when a regulatory taking would occur and left much room for new doctrines and principles to shape regulatory takings theory.<sup>147</sup>

Decades later, the Rehnquist Court developed takings doctrines that advanced the regulatory takings theory of Justice Holmes.<sup>148</sup> These doctrines in *Lucas* and *Dolan* elevated the right to receive just compensation to a more fundamental right, justifying heightened scrutiny of a government regulation in order to protect private property rights.<sup>149</sup> *Lucas* and *Dolan* pushed the boundaries of regulatory takings theory when the Court examined the nature of the government action, and one must ask whether the logical stopping or starting point of the Roberts Court is a new takings theory.<sup>150</sup> In *Stop the Beach Renourishment*, the Court presented arguments and counterarguments that are merely a hit-and-miss approach, incorporating bits and pieces of the doctrine-making approach of the Rehnquist Court and the theory-making methodology of the Holmes (Taft) Court.<sup>151</sup>

#### ***A. The Need to Establish a Judicial Takings Theory on the Circumstances***

The nature of government power justifies the need to establish a judicial takings theory that guarantees the right to receive just compen-

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<sup>146</sup> *Pa. Coal Co.*, 260 U.S. at 415.

<sup>147</sup> *See id.* at 415-16.

<sup>148</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994) (quoting *Pa. Coal Co.*, 260 U.S. at 413).

<sup>149</sup> *Id.* at 389; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992); *see supra* Part II.A (explaining the creation of takings doctrine to advance regulatory takings theory).

<sup>150</sup> *See Dolan*, 512 U.S. at 384-86 (establishing that in order to sustain the government's use of private property against a constitutional challenge, there must be an "essential nexus" between the "legitimate state interest" and the taking); *Lucas*, 505 U.S. at 1027 (limiting the state's restriction of private property use only when exercising its legitimate police powers).

<sup>151</sup> *See generally* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (containing five separate opinions, each arguing the theories slightly differently).

sation.<sup>152</sup> Justice Scalia does not accept the argument that the judicial branch is not subject to the Takings Clause and need not pay just compensation for an elimination of property rights.<sup>153</sup> However, Justice Scalia does not elevate the right to receive just compensation; instead, he seems to be elevating property rights and preserving common law.<sup>154</sup> His failure is inconsistent with the rights-centered approach of *Dolan*.<sup>155</sup> Simply, it is difficult to destroy or avoid a fundamental right.<sup>156</sup> We agree that “the Taking[s] Clause . . . is not addressed to the action of a specific branch or branches.”<sup>157</sup> The Takings Clause states that “private property [shall not] *be taken* . . . [nor shall] the existence or the scope of a State’s power to expropriate private property without just compensation var[y] according to the branch of government effecting the expropriation.”<sup>158</sup> Consequently, state courts cannot do what the Takings Clause forbids the executive and legislative branches to do.<sup>159</sup> We agree; however, we do not find the plurality’s reliance on a branch- or power-centered approach persuasive. This approach focuses on the exercise of power to take private property and the existence of private property rather than elevating the right to just compensation and thereafter developing a takings inquiry to examine the nature of the Court’s decision.<sup>160</sup> This power-centered approach does not elevate the right to receive just compensation and as such, fails to bolster the guarantee of the right to receive just compensation in order to limit the exercise of government power.<sup>161</sup>

One might reason that the power-centered approach, when compared to the rights-centered approach and theory-making methodology, signals that the Court needs a lesser government threat to establish a

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<sup>152</sup> *Id.* at 2613 (Kennedy, J., concurring in part).

<sup>153</sup> *Id.* at 2602 (plurality opinion).

<sup>154</sup> *Lucas*, 505 U.S. at 1031.

<sup>155</sup> *Dolan*, 512 U.S. at 383-84 (emphasizing the constitutional rights granted to private property owners).

<sup>156</sup> *Id.* at 385.

<sup>157</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2601.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (citing *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of certiorari)).

<sup>160</sup> *Id.* at 2601-02.

<sup>161</sup> *Id.* at 2614 (Kennedy, J., concurring in part).

judicial takings theory.<sup>162</sup> *Lucas* and *Dolan* established doctrines to advance regulatory takings theory that limit exercises of government power by denying economically viable use and by forbidding the transfer of property rights to further a government interest.<sup>163</sup> *Pennsylvania Coal Co.* created regulatory takings theory when physical takings and substantive due process theories and doctrines could not limit an exercise of government power requiring that landowners leave pillars of coal.<sup>164</sup> It follows from *Pennsylvania Coal Co.*, *Lucas*, and *Dolan* that if the Court established a judicial takings theory, it would need to elevate the right to receive just compensation, and the exercise of judicial or government power would be less threatening to the property rights that *Lucas*, *Dolan*, and *Pennsylvania Coal Co.* had protected by elevating the right to receive just compensation.<sup>165</sup> Consequently, judicial takings theory that has limited grounds under the Takings Clause may not fully guarantee the right to receive just compensation, which would prohibit the elimination of private property rights.<sup>166</sup>

#### ***B. No Need to Consider a Judicial Taking on the Circumstances***

The Court must consider whether existing takings theory and doctrines apply to circumstances or facts involving an elimination of private property rights.<sup>167</sup> If existing takings law applies to the circumstances or facts, the Court need not consider new takings theory or doctrine.<sup>168</sup> In *Stop the Beach Renourishment*, Justice Breyer argued that the Court should follow its established takings law and consider only whether the Florida Supreme Court decision amounted to a taking because it denied the right of accretion and the right to contact with water.<sup>169</sup> Specifically, Justice Breyer placed the circumstances or facts surrounding *Stop the Beach Renourishment* in the context of takings

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<sup>162</sup> *Id.* at 2616.

<sup>163</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

<sup>164</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

<sup>165</sup> Compare *Dolan*, 512 U.S. at 385, and *Lucas*, 505 U.S. at 1029, and *Pa. Coal Co.*, 260 U.S. at 414, with *Stop the Beach Renourishment*, 130 S. Ct. at 2616-17.

<sup>166</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2616-17.

<sup>167</sup> See *supra* Part IV.A.

<sup>168</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2618-19 (Breyer, J., concurring in part).

<sup>169</sup> See *id.* at 2619.

and other constitutional law.<sup>170</sup> He has grave concerns about fashioning takings theory and doctrine that cannot be fully developed on the circumstances or facts.<sup>171</sup> As stated below, the theory-making methodology of *Pennsylvania Coal Co.* would support Justice Breyer's conclusion.<sup>172</sup>

On the matter of a takings inquiry and standard of review, Justice Breyer stated that "the plurality determines that it is 'not obviously appropriate' to apply this Court's 'fair and substantial basis' test, familiar from our adequate and independent state ground jurisprudence, when evaluating whether a state-court property decision enacts an unconstitutional taking."<sup>173</sup> He also pointed out that "[t]he plurality further concludes that a state-court decision violates the Takings Clause not when the decision is 'unpredictab[le]' on the basis of prior law, but rather when the decision takes private property rights that are 'established.'"<sup>174</sup> Justice Breyer concluded that Justice Scalia did not necessarily put forth untenable conclusions on the judicial takings question, but *Stop the Beach Renourishment* is not where the Court should set forth a new takings inquiry or standard of review.<sup>175</sup>

Justice Breyer made a valid point that creating a takings inquiry and heightened scrutiny on a set of facts that could never be a taking would create more confusion than *Pennsylvania Coal Co.*'s regulatory takings theory.<sup>176</sup> Justice Breyer adhered only partially to the theory-making methodology of Justice Holmes in *Pennsylvania Coal Co.* by preferring an actual taking but then stopped short when faced with un-

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<sup>170</sup> See *id.* at 2618-19.

<sup>171</sup> See *id.*

<sup>172</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922); *infra* note 177 and accompanying text.

<sup>173</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring in part) (quoting *id.* at 2608 (plurality opinion)).

<sup>174</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring in part) (quoting *id.* at 2609-10 (plurality opinion)).

<sup>175</sup> See *id.* at 2618-19; see *infra* Part V.A (explaining Justice Scalia's comments and arguments on the takings inquiry and standard of review).

<sup>176</sup> See *id.*; see also Guy & Holloway, *supra* note 77, at 335-36 ("The Supreme Court's *ad hoc* approach to determining whether a regulatory taking has occurred has made this form of constitutional jurisprudence a source of confusion and controversy.").

certainty on the facts and circumstances and refused to consider Justice Holmes's need for a factual inquiry and general propositions when no taking exists.<sup>177</sup> Justice Breyer questioned the need for a judicial taking that could lead to more litigation and interfere with state judicial power.<sup>178</sup> Moreover, he stated that "if we were to express our views on these questions, we would invite a host of federal taking claims . . . ."<sup>179</sup> Yet, Justice Breyer recognized the importance of doctrine making to establish takings theory that requires a complete consideration of constitutional theory and principles and stated that "we would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law."<sup>180</sup> Justice Breyer was reluctant to conclude that the Florida Supreme Court's taking should be categorized as a judicial or any other taking, and thus found no need to establish theory or its doctrine, a test, or a standard of review.<sup>181</sup> Justice Breyer exhibited tendencies to agree with the doctrine making and theory making of the Rehnquist Court but still came up short.<sup>182</sup>

Justice Scalia did not agree with Justice Breyer's doctrine making and theory making that must precede the need to establish a judicial taking.<sup>183</sup> Yet it was Justice Scalia who played, in our opinion, the major role in initiating and shaping the doctrine-making approach of the Rehnquist Court.<sup>184</sup> Justice Scalia launched the need for takings doctrine that applied the *Penn Central* takings inquiry (only considering the nature of the government action) and created a higher standard of review that guaranteed the right to just compensation in *Nollan v. Califor-*

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<sup>177</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2618-19 (Breyer, J., concurring in part). See generally *Pa. Coal Co.*, 260 U.S. at 413-17 (discussing the need for a factual inquiry into the circumstances of a regulatory taking and the consideration of the general proposition that government regulation of property is a taking when the regulation "goes too far").

<sup>178</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2618-19 (Breyer, J., concurring in part).

<sup>179</sup> *Id.* at 2618.

<sup>180</sup> See *id.* at 2618-19.

<sup>181</sup> See *id.* at 2619.

<sup>182</sup> See *id.* at 2618-19.

<sup>183</sup> See *id.* at 2602-03 (plurality opinion).

<sup>184</sup> See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 825-43 (1987).

nia Coastal Commission.<sup>185</sup> Now, Justice Scalia sees no need to conclude that the absence of a Takings Clause violation supports the application of theory or doctrine to justify the Court's holding.<sup>186</sup>

Rather, Justice Scalia is willing to fashion new takings theory and apply it to the circumstances or facts before the Court.<sup>187</sup> Justice Scalia stated that “[o]ne cannot know whether a takings claim is invalid without knowing what standard it has failed to meet.”<sup>188</sup> Justice Scalia pointed out that concluding that a taking has not occurred does not stop the Court from applying a standard of review.<sup>189</sup> He stated the Court has “often recognized the existence of a constitutional right, or established the test for violation of such a right (or both), and then gone on to find that the claim at issue fails.”<sup>190</sup> Perhaps so, the application of judicial takings theory to *Stop the Beach Renourishment* would show that a

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<sup>185</sup> See *id.* at 834-36, 841. In *Nollan*, Justice Scalia stated:

As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a “substantial advanc[ing]” of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

*Id.* at 841 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Justice Scalia noted that a conditional demand that requires a transfer of property could be a regulatory scheme to deny the right to receive just compensation. *Id.* Justice Scalia followed the decision in *Nollan* with new doctrine in *Lucas*. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (“We believe similar treatment must be accorded confiscatory regulations . . . regulations that prohibit all economically beneficial use of the land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”). The Rehnquist Court went even farther in *Dolan* by invoking the unconstitutional conditions doctrine to elevate and protect the right to receive just compensation. See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

<sup>186</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2602-03 (plurality opinion).

<sup>187</sup> See *id.* at 2602.

<sup>188</sup> *Id.* at 2603.

<sup>189</sup> See *id.* at 2603 n.6 (“[T]he landmark case of *Penn Central Trans. Co. v. New York* held that there was no taking only after setting forth a multi-factor test for determining whether a regulation restricting the use of property effects a taking.” (citation omitted)).

<sup>190</sup> *Id.* at 2603.

judicial taking does not exist and would provide state and federal courts little guidance when trying to determine whether a judicial taking exists on the facts or circumstances.<sup>191</sup> Justice Scalia has a short memory when considering that *Lucas* and *Dolan* established or used new takings doctrine and principles (test and standards of review) that advanced regulatory takings theory.<sup>192</sup> Justice Breyer never saw the theoretical need for this doctrine and sees no need to establish a takings theory on the merits of *Stop the Beach Renourishment*.<sup>193</sup> Justices Scalia and Breyer do not agree on the need to consider a judicial takings issue but do find the need for a takings test or inquiry that launches a new takings theory.<sup>194</sup>

### ***C. Other Laws Creating the Need Not to Consider a Judicial Taking***

In *Stop the Beach Renourishment*, Justice Kennedy's attention turned to additional considerations that the Court must weigh before it considers a judicial takings question.<sup>195</sup> Justice Kennedy seemed as though he was following the theory-making methodology of Justice Holmes, but then he changed course and reached just the opposite conclusion.<sup>196</sup> Rather than moving away from due process, Justice Kennedy embraced it and concluded that other constitutional provisions and public policy do not allow state courts to go too far.<sup>197</sup> Justice Kennedy wanted the Court to consider the role of the judiciary in the exercise of government power.<sup>198</sup> He found it highly unlikely that the Framers would have considered that the state court could exercise the power of eminent domain or similar regulation.<sup>199</sup> Such powers belong to the

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<sup>191</sup> See *supra* notes 173-77 and accompanying text.

<sup>192</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2603; see also *supra* Part III.A.

<sup>193</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring in part).

<sup>194</sup> *Id.* at 2604 (plurality opinion).

<sup>195</sup> *Id.* at 2613 (Kennedy, J., concurring in part).

<sup>196</sup> *Id.* at 2614-15.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 2614. See William P. Marshall, Keynote Address, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y, 2011, at 5 (considering the role and philosophy of judges and examining the political nature assigned by judicial takings).

<sup>199</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2616 (Kennedy, J., concurring in part).

executive and legislative branches and are subject to the conditional limitations of the Takings Clause on the political and executive branches.<sup>200</sup>

Next, Justice Kennedy found that the Due Process Clause, both procedurally and substantively, imposes sufficient limitations on judicial decisions taking or depriving owners of property rights.<sup>201</sup> But Justice Holmes noted in the theory-making methodology of *Pennsylvania Coal Co.* that due process does not always protect against a taking of ownership of private property, though it is a remedy for harm to private property.<sup>202</sup> Moreover, Justice Kennedy argued that a judicial taking tends to make state courts more active in bringing about social changes but shifts the cost of such changes to state legislatures that must pay just compensation if a taking occurs.<sup>203</sup> He found uncertainty in how a party must assert a judicial takings claim and what remedy courts could award for a temporary taking of private property.<sup>204</sup> Justice Kennedy found that the Court is not ready to address these issues at this time.<sup>205</sup> One might argue that Justice Kennedy would find that *Lucas* and *Dolan* have not run their course, and other constitutional doctrine is also applicable to a taking thought to be judicial.<sup>206</sup>

Of course, Justice Scalia did not agree with Justice Kennedy.<sup>207</sup> Although Justice Scalia agreed somewhat with Justice Holmes on due process concerns, Justice Scalia's interpretative theory and power-centered argument fall short in the face of Justice Kennedy's arguments.<sup>208</sup> Justice Scalia found that his argument overcomes any doubts or considerations that Justice Kennedy raised.<sup>209</sup> Justice Scalia found that the

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<sup>200</sup> *Id.* at 2613-14.

<sup>201</sup> *Id.* at 2614.

<sup>202</sup> *Pa. Coal Co.*, 260 U.S. at 415.

<sup>203</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2616 (Kennedy, J., concurring in part).

<sup>204</sup> *Id.* at 2616-17.

<sup>205</sup> *Id.* at 2617-18.

<sup>206</sup> *See id.* at 2618.

<sup>207</sup> *See id.* at 2604 (plurality opinion).

<sup>208</sup> *See id.* at 2612-13.

<sup>209</sup> *Id.* at 2607.

Due Process Clause is either inadequate<sup>210</sup> or outdated in limiting a taking by judicial decision under the Federal Constitution.<sup>211</sup> Of course, Justice Holmes made the same point ninety or more years ago in setting forth the theory-making methodology that Justice Scalia seems reluctant to totally embrace.<sup>212</sup>

The asserted reasons for the due-process limitation are that the legislative and executive branches ‘are accountable’ . . . [, and] [t]hese reasons may have a lot to do with sound separation-of-powers principles that ought to govern a democratic society, but they have nothing whatever to do with the protection of individual rights that is the object of the Due Process Clause.<sup>213</sup>

Justices Scalia and Kennedy share the need to advance regulatory takings theory by creating and relying on the takings doctrine in *Lucas* and *Dolan* but do not share the need to create another takings theory that advances and guarantees the right to receive just compensation.<sup>214</sup> Perhaps Justices can compromise when the facts and circumstances show that regulatory takings theory (and its test and standard of review) no longer guarantees the right to receive just compensation under specific circumstances.

Justice Scalia is not persuaded by Justice Kennedy’s constitutional interpretation of the Takings Clause.<sup>215</sup> He finds little merit in Justice Kennedy’s interpretation, which stated “that the Framers did not envision the Takings Clause would apply to judicial action. They doubtless did not, since the Constitution was adopted in an era when

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<sup>210</sup> *Id.* at 2606. Justice Scalia did not find substantive due process strong enough to limit judicial decisions eliminating an established property right. *Id.* (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994)); *see, e.g.*, *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949); *see Lochner v. New York*, 198 U.S. 45, 56-57 (1905).

<sup>211</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2605.

<sup>212</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922).

<sup>213</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2605.

<sup>214</sup> *Id.* at 2601, 2604.

<sup>215</sup> *See id.* at 2604.

courts had no power to ‘change’ the common law.’<sup>216</sup> Justice Scalia noted that

even after courts, in the 19th century, did assume the power to change the common law, it is not true that the new ‘common-law tradition . . . allows for incremental modifications to property law,’ so that ‘owners may reasonably expect or anticipate courts to make certain changes in property law . . . .’<sup>217</sup>

Moreover, Justice Scalia saw even less merit in Justice Kennedy’s last two considerations that a judicial taking could create active courts and that courts could face difficulty in awarding remedies.<sup>218</sup> Justice Scalia could not find where Justice Kennedy’s arguments would impose any restraints or limitations on state courts that had eliminated or taken established private property rights.<sup>219</sup>

If *Lucas* is an opening in the protection of property rights at common law, Justices Scalia and Kennedy may agree on the need for the unconstitutional conditions doctrine and background common law doctrine but do not share the belief that a state court is subject to the Federal Takings Clause.<sup>220</sup> It seems as though they cannot create new takings theory, but they can advance takings theory with takings doctrine that includes heightened scrutiny or a less deferential standard of review.<sup>221</sup> Perhaps, when takings doctrine can no longer guarantee the right to receive just compensation, the theoretical issue becomes whether state court decisions are germane to the right to receive just compensation to protect private property that the government takes for a public use not within the scope of due process.<sup>222</sup>

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<sup>216</sup> *Id.* at 2606 (citing *Rogers v. Tennessee*, 532 U.S. 451, 472-78 (2001) (Scalia, J., dissenting); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69-70 (1765)) (examining Justice Kennedy’s concurring opinion).

<sup>217</sup> *Id.* (citing *id.* at 2615 (Kennedy, J., concurring in part)).

<sup>218</sup> *See id.* at 2607.

<sup>219</sup> *See id.*

<sup>220</sup> *See id.* at 2602-05; *id.* at 2613 (Kennedy, J., concurring in part); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992).

<sup>221</sup> *See Stop the Beach Renourishment*, 130 S. Ct. at 2602-05; *id.* at 2613 (Kennedy, J., concurring in part).

<sup>222</sup> *See id.* at 2602-05; *id.* at 2613 (Kennedy, J., concurring in part).

## V. TAKINGS TEST, STANDARD, AND JUDICIAL IMPACT OF JUDICIAL TAKINGS THEORY

*Lucas* and *Dolan* use the takings inquiry and standards of review to advance the regulatory takings theory of *Pennsylvania Coal Co.*<sup>223</sup> Yet *Lucas* and *Dolan* still raise concerns regarding limitations imposed on the state's power to address land use, growth management, and environmental problems.<sup>224</sup> *Lucas* and *Dolan* were doctrines of takings and constitutional theories, respectively, and protect the use of private property rights, including both exclusive use and development.<sup>225</sup> *Lucas* and *Dolan*'s doctrines were the grounds for standards of review under regulatory takings theory and did not impose burdensome limits on government power to regulate land use and protect the environment.<sup>226</sup> Justice Scalia sets forth a theory of judicial taking but must also set forth a workable standard of review and weigh the nature of the impact of a judicial taking on state courts and their power and obligations.<sup>227</sup>

### A. *Test and Standard to Determine a Taking of Private Property Rights*

A judicial taking needs a test (a takings inquiry) and a standard of review (means-ends analysis) to determine the nature of the state court decision and the relationship between the state court decision and its rationale in changing property law and allegedly eliminating property rights.<sup>228</sup> Unlike state policy makers, state courts do not establish objectives for their decisions, but they still must set forth a rationale for

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<sup>223</sup> See *supra* notes 22-27 and accompanying text.

<sup>224</sup> See *Dolan*, 512 U.S. at 411 (Stevens, J., dissenting); *Lucas*, 505 U.S. at 1070 (Stevens, J., dissenting) (fearing that the majority's categorical approach rule may hamper the efforts of local officials to deal with complex problems in land-use and environmental regulations).

<sup>225</sup> See *supra* note 2 and accompanying text.

<sup>226</sup> See *supra* note 2 and accompanying text.

<sup>227</sup> See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2616-18 (2010) (Kennedy, J., concurring in part) (calling for the Court to clarify how a party can make a judicial takings claim, and discussing what remedy is available under a judicial takings theory).

<sup>228</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2602-04 (recognizing that the Court should establish a test to determine whether a judicial taking has occurred).

the existence of, the need to change, and a change to property rights.<sup>229</sup> The Rehnquist Court imposed heightened scrutiny of government regulation that denied all economically viable use in *Lucas*<sup>230</sup> and did not substantially advance a legitimate state interest in *Dolan*<sup>231</sup> under the nature of the government action of the *Penn Central* inquiry.<sup>232</sup> Much

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<sup>229</sup> See *id.* at 2615 (Kennedy, J., concurring in part) (stating that courts are not designed to make policy decisions about regulatory takings).

<sup>230</sup> *Lucas*, 505 U.S. at 1031-32.

<sup>231</sup> *Dolan*, 512 U.S. at 387-88. In *Pennsylvania Coal Co.*, the Court relied on a deferential standard of review to determine whether the regulation furthers a public interest that is justified under the circumstances. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Justice Holmes stated that “[t]he greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.” *Id.* Justice Holmes, writing for the majority, found that the public interest that the regulation furthered (needing to prevent subsidence) did not justify the impact of the regulation (leaving a pillar of coal) on private property. See *id.* Justice Holmes described this relationship by stating:

This is the case of a single private house. No doubt there is a public interest even in this . . . . But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public.

*Id.* Furthermore, the Court “assume[s] . . . that the statute was passed upon the conviction that an exigency existed that would warrant it.” *Id.* at 416. However, the Court assumed that the legislature should have exercised eminent domain to further public interest rather than an exercise of policy power. See *id.*

<sup>232</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The *Penn Central* inquiry is a three-pronged test to determine whether a government regulation effects a regulatory taking of private property for public use. See *id.* The Court considers the nature of the government action, economic impact of the regulation, and interference with the landowner’s reasonable investment-backed expectations. See *id.* The nature of the government action requires the regulation to “substantially advance a legitimate state interest,” see *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and not to deny all “economically viable” use, see *Penn Cent. Transp. Co.*, 438 U.S. at 138. The Court addressed how a government regulation substantially advances a legitimate state interest in *Nollan* and *Dolan* by using constitutional doctrine to justify heightened scrutiny of the degree of connection between a government regulation and state objectives. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan*, 512 U.S. at 387-89. Next, the Court decided whether a government regulation denied all economically viable use in *Lucas* by creating takings doctrine to justify a per se test. See *Lucas*, 505 U.S. at 1030-32. The Court fashions or creates the inquiry or test for the nature of the government

earlier, the Burger Court addressed the nature of the inquiry and standard of review for a physical taking where government regulation permits one individual to permanently occupy another person's land.<sup>233</sup> The Roberts Court needs to create takings doctrines that justify the nature of the inquiry and standard of review for an examination of state court decisions under the Takings Clause.<sup>234</sup>

The Roberts Court should follow the doctrine-making or rights-centered approach of the Rehnquist Court,<sup>235</sup> but it must consider whether it should use heightened scrutiny or a deferential standard. The Roberts Court needs to establish the nature of the inquiry (test) and the standard of review when determining if a state supreme court decision effects a judicial taking by interpreting or clarifying private property rights.<sup>236</sup> In *Stop the Beach Renourishment*, respondent, the State of Florida, requested the Court use a fair and substantial basis to determine if beachfront owners had a right to future accretion under the state envi-

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action factor and formulates an appropriate standard of review to determine whether the use restrictions were connected to and justified by the government action. *Id.*

<sup>233</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982). Another taking that is distinct from the regulatory taking is the physical taking. *Id.* The Court finds a physical taking where a government regulation permits another person or government agencies to permanently occupy private property. *Id.* The Court applies a per se test to determine whether a government regulation or action permanently occupies private property rather than temporary or permanently invading it. See *id.* at 437. The Court described the per se test by stating:

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* [sic] of the occupation as one relevant factor in determining the compensation due.

*Id.* at 437. Unlike the regulatory taking, the nature of the government action has little bearing on the determination of a physical taking that would allow the government to occupy private property or use regulation to permit another person to occupy for public use. See *id.* at 434-35.

<sup>234</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2618-19 (Breyer, J., concurring in part) (stating that there are many questions regarding state court decisions under the Takings Clause that the Court would need to address).

<sup>235</sup> See, e.g., *Dolan*, 512 U.S. at 396.

<sup>236</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2617 (Kennedy, J., concurring in part) (acknowledging the difficult issues the Court would have in deciding if a state court decision effects a judicial taking).

ronmental statute.<sup>237</sup> Justice Scalia acknowledged that the fair and substantial basis test is borrowed “from our jurisprudence dealing with the question whether a state-court decision rests upon adequate and independent state grounds, placing it beyond our jurisdiction to review”<sup>238</sup> and “[t]o assure that there is no ‘evasion’ of our authority to review federal questions . . . .”<sup>239</sup> Justice Scalia concluded that the fair and substantial basis test was not the appropriate test to decide a takings case.<sup>240</sup> Although Justice Scalia may not prefer this test, he claimed that if the Court applied it to the alleged judicial taking in *Stop the Beach Renourishment*, “it must mean (in the present context) that there is a ‘fair and substantial basis’ for believing that petitioner’s Members did not have a property right to future accretions which the Act would take away.”<sup>241</sup>

Next, the petitioner, a group consisting of beachfront owners, proposed an unpredictability test<sup>242</sup> and argued that “a judicial taking consists of a decision that ‘constitutes a sudden change in state law, unpredictable in terms of relevant precedents.’”<sup>243</sup> Justice Scalia found that the unpredictability test is either too narrow or too broad in establishing the appropriate inquiry that must protect the landowner challenging the state court’s decision and other landowners that the state court decision affects.<sup>244</sup> Justice Scalia concluded that the “unpredictability test” was not adequate when it could declare simple clarifications of property rights as a judicial taking and because it would not allow owners who did not participate in earlier decisions to challenge a judicial taking.<sup>245</sup>

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<sup>237</sup> *See id.* at 2608.

<sup>238</sup> *Id.* (citing EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 222 (9th ed. 2007)).

<sup>239</sup> *Id.* (citing *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930); *Ward v. Bd. of Cnty. Comm’rs*, 253 U.S. 17, 22-23 (1920)).

<sup>240</sup> *Id.* at 2608.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 2600, 2610 (relying on the unpredictability test that Justice Stewart set forth).

<sup>243</sup> *Id.* at 2610 (internal quotation marks omitted) (quoting *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring)).

<sup>244</sup> *See id.*

<sup>245</sup> *See id.* at 2610.

Justice Scalia proposed a new test to determine whether state courts are shifting a governmental burden to landowners by eliminating property rights and transferring them to the state.<sup>246</sup> Justice Scalia prefers an established property rights test,<sup>247</sup> as if the purpose of the Takings Clause is to ensure the permanence or self-perpetuating existence of common law. Justice Scalia concluded that elimination of an established property right is the more appropriate test when inquiring into whether a state judicial decision amounts to a taking of private property.<sup>248</sup> The elimination of an established property right is a takings inquiry, and when the federal judiciary applies this inquiry with heightened scrutiny of or little deference to the state court's rationale on purely state matters, the federal judiciary has the last say on changes to state common law.<sup>249</sup> Imprudently, the plurality wants to apply a broad test and a strict standard but does not justify the test or standard by showing the need to protect the right to receive just compensation.<sup>250</sup> Simply, the plurality ignores *Lucas* and *Dolan*, which established the need for takings doctrine to apply the *Penn Central* takings inquiry by justifying and establishing standards of review that were needed to implement regulatory takings theory.<sup>251</sup>

Justice Scalia appears to elevate property rights (no longer permissible in the post *Lochner* era) and seems to use the Takings Clause to classify them as established in the states.<sup>252</sup> The Takings Clause would classify property rights as established or unestablished, thus allowing federal courts to segregate property based on the nature of the

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<sup>246</sup> *See id.* at 2608 & n.9.

<sup>247</sup> *See id.* at 2606.

<sup>248</sup> *See id.* at 2608 & n.9. Justice Breyer explained the procedural limitations and judicial deference to state courts, but Justice Scalia sees no need for deference in light of the Court's application of other constitutional provisions to state court decisions. *Id.* at 2608 n.9.

<sup>249</sup> *See id.* at 2608 n.9.

<sup>250</sup> *See id.* at 2608 & n.9 (failing to mention just compensation as a justification of the broad test and strict standard).

<sup>251</sup> *Compare id.* (looking for deprivation of an established property right), with *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (analyzing whether and to what degree an "essential nexus" exists between a project and exactions), and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (recognizing categorical takings involving physical invasions of land and loss of economic benefits in or productive use of land).

<sup>252</sup> *See Stop the Beach Renourishment*, 130 S. Ct. at 2606.

right.<sup>253</sup> *Lucas* and *Dolan* establish takings doctrine to protect property rights, but Justice Scalia did not set forth takings doctrine that justified heightened scrutiny under his quiet standard of review.<sup>254</sup> The only *established* right of the Federal Takings Clause is the right to receive just compensation.<sup>255</sup> New takings theory to protect any property rights does not justify ignoring both the doctrine-making (rights-centered) approach and theory-making methodology of American takings jurisprudence.<sup>256</sup> Justice Scalia settled on the established property rights as a takings inquiry but quietly invokes heightened scrutiny that gives little, if any, deference to state supreme courts.<sup>257</sup> Here the Court would treat the judicial branch differently under the Takings Clause if the Court chooses not to defer to state courts but defers to state legislature on general matters.<sup>258</sup> The plurality, or perhaps the Court, wants the same result but is not adding enough genuine analytics when using the Federal Takings Clause to determine if state supreme courts misconstrued or misinterpreted property rights.<sup>259</sup> One would think that the federal judiciary would not reverse state supreme court decisions simply because the federal judiciary finds that state property rights were *established* under the Takings Clause.<sup>260</sup> We argue that this is a perverse use

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<sup>253</sup> See *id.* at 2602, 2608 & n.9.

<sup>254</sup> See *id.* at 2608 & n.9. Justice Scalia's silent standard of review is inferred from a lack of need for procedural limitations and judicial deference to state courts when he stated that "[i]t is true that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. . . . We do not defer to the judgment of state judges . . . ." *Id.* at 2608 n.9.

<sup>255</sup> See *id.* at 2617 (Kennedy, J., concurring in part) (citing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)).

<sup>256</sup> See *id.* at 2601 (plurality opinion) (describing different approaches to takings jurisprudence).

<sup>257</sup> See *id.* at 2608 & n.9.

<sup>258</sup> See *id.* at 2601.

<sup>259</sup> See *id.* at 2602.

<sup>260</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922). The Court found the existence of property rights to create takings doctrines in *Lucas* and *Dolan* and to make a theory in *Pennsylvania Coal Co.*; it did not question the existence of these property rights and found them subject to the protection of the Takings Clause. See *Dolan*, 512 U.S. at 384; *Lucas*, 505 U.S. at 1016 n.7; *Pa. Coal Co.*, 260 U.S. at 414. In *Pennsylvania Coal Co.*, the Court found that the owner reserved rights that included the right to the coal. *Pa. Coal Co.*, 260 U.S. at 414-15.

of the Takings Clause that establishes the right of a landowner to receive just compensation when a state supreme court shifts the public burden to this landowner.<sup>261</sup> Justice Scalia must do more than declare established property rights that are undefinable on the facts of *Stop the Beach Renourishment*.<sup>262</sup>

This declaration threatens to undermine or stall the development of state rights by preserving established common law notwithstanding the state's policies and concerns.<sup>263</sup> One could easily misconstrue this as substantive due process masquerading as a judicial taking to preserve a federal property rights regime.<sup>264</sup> The federal judiciary treads heavily on the forward-looking, innovative uses of state rights and judicial power and ignores *Pennsylvania Coal Co.*, *Lucas*, and *Dolan* when examining the nature of the relationship between the state court action and the need to interpret state property law.

### ***B. Denying State Courts Their Judicial Flexibility***

A federal judicial taking limits state judicial power and points to the need to consider restrictions on judicial flexibility, but arguments against *Lucas* and *Dolan* have raised similar concerns regarding the flexibility of local and state legislative and executive authority.<sup>265</sup> Justice Scalia invoked *Lucas* not for the rights-centered approach but rather extolled the virtues of property rights and missed the opportunity to extol a more fundamentally important *right*.<sup>266</sup> The Court must address the impact of a judicial takings theory on the state judicial power under our Federalism.<sup>267</sup> Simply, in *Stop the Beach Renourishment*, the re-

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Next, in *Lucas*, the Court found that Lucas had plead a fee simple interest that common law protects. *Lucas*, 505 U.S. at 1017 n.7. Finally, in *Dolan*, the Court found that if the public had access to landowner's property, the landowner would be "deprive[d] . . . of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 512 U.S. at 384 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

<sup>261</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2611.

<sup>262</sup> See *id.* at 2610.

<sup>263</sup> See *id.* at 2616 (Kennedy, J., concurring in part).

<sup>264</sup> See *id.* at 2615.

<sup>265</sup> See *id.* at 2609 (plurality opinion).

<sup>266</sup> See *id.* at 2601.

<sup>267</sup> See *id.* at 2608.

spondent did not believe that federal courts possessed the knowledge and should not be able to interpret state property law to decide if a state supreme court misinterpreted the law, causing landowners to lose land or property rights.<sup>268</sup> Justice Scalia responded that “federal courts must often decide what state property rights exist in nontakings contexts . . . [a]nd . . . must decide it to resolve claims that legislative or executive action has effected a taking.”<sup>269</sup> Justice Scalia explained how federal courts have determined the existence of property rights by using *Lucas* as an example, thus indicating the federal judiciary is the final arbiter on property rights.<sup>270</sup> He stated that the Court in *Lucas* based its decision on background principles of common law that were a part of title to the land.<sup>271</sup> He argued that the Takings Clause would be unenforceable if the federal courts could not decide whether property rights exist under state law.<sup>272</sup>

Justice Scalia overlooks the danger of the federal courts disrupting the body of state property law when state supreme courts do not support that an established property right exists.<sup>273</sup> Unlike *Lucas*, the Court was not trying to decide whether a state legislature went too far but was trying to decide whether the state supreme court took what never existed under state law.<sup>274</sup> *Lucas* establishes a per se test that is substantially less deferential than the *Penn Central* inquiry, and *Lucas* gives greater protection to the right to receive just compensation.<sup>275</sup> Furthermore, *Dolan* and *Lucas*’s rights-centered approach would require a level of germaneness between the elimination of property rights and the right to receive just compensation in order to justify heightened

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<sup>268</sup> *Id.* at 2609.

<sup>269</sup> *Id.* (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577-78 (1972) (analyzing the Due Process Clause)).

<sup>270</sup> *See id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

<sup>271</sup> *Id.* (citing *Lucas*, 505 U.S. at 1029 (“[A] regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction ‘inhere[s] in the title itself, in the restrictions that background principles of the [s]tate’s law of property and nuisance already place upon land ownership.’”)).

<sup>272</sup> *Id.*

<sup>273</sup> *See id.*

<sup>274</sup> *See id.* at 2610-11.

<sup>275</sup> *See Lucas*, 505 U.S. at 1027.

scrutiny for an examination of a state supreme court decision.<sup>276</sup> Here the Court must be cautiously prudent in deciding if property rights exist when state supreme courts say otherwise.<sup>277</sup> The federal judiciary must focus on interpreting the Takings Clause so as to guarantee the right to receive just compensation and to create takings doctrine that establishes a takings inquiry and a standard of review that do not second-guess state supreme courts.<sup>278</sup> Simply, a judicial taking permits the federal courts to apply the Takings Clause to state court decisions in order to guarantee the right to receive just compensation, which, in turn, protects property rights and does not certify or classify common law.<sup>279</sup>

The Court needs to follow a doctrine-making approach and theory-making methodology so as not to ignore the appropriate history and its lessons.<sup>280</sup> Although the Court weighs the history of common law, we do not consider the history of common law to be the most appropriate history.<sup>281</sup> Strictly, the Court must weigh the history of American property law when it divided the nation and caused unimaginable harm to some Americans.<sup>282</sup> Although the common law courts lacked judicial flexibility at the time the Takings Clause was adopted,<sup>283</sup> one must not ignore that the Takings Clause did not apply to the states (though it protected state citizens from the federal government), notwithstanding Justice Scalia's view from the cathedral.<sup>284</sup>

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<sup>276</sup> See *id.* at 1046-47; see also *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (setting forth a standard that an exaction must have an "essential nexus" between a "legitimate state interest"; if a nexus exists, the court must then consider the degree of connection between the exaction and proposed development).

<sup>277</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2618-19 (Breyer, J., concurring in part).

<sup>278</sup> See *id.* at 2612 (plurality opinion).

<sup>279</sup> See *id.* ("Even if there might be different interpretations of . . . Florida property-law cases that would prevent this arguably odd result, we are not free to adopt them. The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.").

<sup>280</sup> See *Dolan*, 512 U.S. at 386; *Lucas*, 505 U.S. at 1027; *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124-25 (1978).

<sup>281</sup> See, e.g., *Stop the Beach Renourishment*, 130 S. Ct. at 2606-07.

<sup>282</sup> See, e.g., *id.* (analyzing the history and affect common law had on property law); see also *Lucas*, 505 U.S. at 1055-58 (analyzing the history of American property law).

<sup>283</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2609.

<sup>284</sup> See generally *id.* at 2601 ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. . . . There is no textual justification for saying that

The federal government now wants to decide whether property rights exist under state law.<sup>285</sup> Judicial takings theory should not rest on the original intent of judges of English or American property law when these judges do not *make* common or other law.<sup>286</sup> Federal judges must be cautious not to create discontinuity within the body of state property law decisions; federal judges are not elected representatives or government experts on state norms, standards, or culture affecting state property law.<sup>287</sup> Common law courts that clarify and elaborate on property rights and interests do not take established private property rights,<sup>288</sup> and federal courts do not always possess the knowledge of state courts to decide whether the clarification of private property rights shifts to the landowner a public burden that the government should bear.<sup>289</sup> Although judicial flexibility may not be a substantial concern when establishing a judicial taking, the Court can show prudence and logic by relying on *Lucas* and *Dolan* to establish appropriate doctrinal or rights-centered tests and standards of review to examine state court decisions.<sup>290</sup> A well-grounded judicial takings theory should not restrict judicial flexibility by ignoring the appropriate history and should be a deterrent to risk-taking government officials by providing an appropriate takings inquiry and standard of review.<sup>291</sup>

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the existence or the scope of a [s]tate's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.”).

<sup>285</sup> See *id.* at 2609 (“A constitutional provision that forbids the uncompensated taking of property is quite simply unsusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.”).

<sup>286</sup> See *id.* at 2606.

<sup>287</sup> See *id.* at 2619 (Breyer, J., concurring in part). *But see id.* at 2609 (plurality opinion) (explaining a different approach to the role of the federal courts regarding the interpretation of state property law).

<sup>288</sup> See *id.* at 2609.

<sup>289</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that the Takings Clause protects property rights by not allowing the government to shift its burden to a landowner).

<sup>290</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (in addressing the Respondents argument for “needed [judicial] flexibility,” Justice Scalia explained, “[the] courts have no peculiar need for flexibility”); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *supra* Part II.B.

<sup>291</sup> See *Lucas*, 505 U.S. at 1018 (while addressing arguments supporting a compensation requirement, the Court alluded to the ever-present concern of an over-reaching government which need be deterred from pressing private property “into

### C. *Need to Avoid Premature Involvement in State Judicial Matters*

The finality of state court judgments and the role of lower federal courts to review takings claims originally brought in state courts remain seminal issues under the Takings Clause.<sup>292</sup> The Court has struggled to ensure that a regulatory takings claim cannot prematurely involve the federal judiciary in state judicial matters or allow claimants to avoid the state supreme court.<sup>293</sup> Respondents in *Stop the Beach Renourishment* argued that “applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the *Rooker-Feldman* doctrine.”<sup>294</sup> Justice Scalia acknowledged that the ripeness doctrine applies to a judicial taking and would require plaintiffs bringing a judicial takings claim to request review from the state supreme court before requesting a writ of certiorari from the Court.<sup>295</sup> Currently, regulatory takings claims that

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some form of public service under the guise of mitigating serious public harm”). *But see Stop the Beach Renourishment*, 130 S. Ct. at 2601-10 (struggling to reject any “special treatment” or flexibility in judicial takings but still appearing reluctant to completely ban any situation where some flexibility may be permissible).

<sup>292</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2609.

<sup>293</sup> *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). In *Williamson County*, the Court concluded that “if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Williamson Cnty.*, 473 U.S. at 195. Other commentators and authors were concerned by the Court’s decision in *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, which held that federal trial and intermediate appellate courts were precluded under the Pullman Abstention Doctrine from hearing takings issues that the state supreme court had decided and that the plaintiff bringing these issues must request review from the Court under the grant of writ of certiorari to the state supreme courts. *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 347-48 (2005). For an analysis of *San Remo Hotel* and the ripeness issue, see Donald C. Guy & James E. Holloway, *The Climax of Takings Jurisprudence in the Rehnquist Court Era: Looking Back from Kelo, Chevron U.S.A. and San Remo Hotel at Standards of Review for Social and Economic Regulation*, 16 PENN ST. ENVTL. L. REV. 115, 174-75 & n.376 (2007).

<sup>294</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (citing D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923)).

<sup>295</sup> *Id.* (citing *Williamson Cnty.*, 473 U.S. at 186). Justice Scalia may be correct, but what if the state supreme court develops a judicial takings theory and applies both federal and state takings theories? The writ of certiorari is the only avenue to the

begin in a state trial court are not appealable to a lower federal court, but a party can request a writ of certiorari from the Court.<sup>296</sup> If the Court does not grant a writ of certiorari, Justice Scalia found that the plaintiff still could not request a review or trial from a lower federal court because *res judicata* would bar the takings claim.<sup>297</sup> Moreover, other landowners or property owners who were not plaintiffs to the original judicial takings claims but later alleged that a state supreme court decision effected a taking would not be denied the right to challenge this decision as a judicial takings claim in a federal court.<sup>298</sup> We must point out that Justice Scalia has recognized that a landowner who was not party to an original judicial takings claim can later bring judicial takings claims in lower federal courts, and he has acknowledged that the federal judiciary can interpret state property law that state supreme courts have interpreted.<sup>299</sup> If Justice Scalia is offering only heightened scrutiny of or less deference to state court decisions, he may be backing into *Lucas* and *Dolan*'s doctrine-making approach, which candidly relied on heightened scrutiny to deny deference to legislative and executive decision makers.<sup>300</sup>

In *Stop the Beach Renourishment*, the plurality's wisdom, or lack thereof, may allow federal courts to usurp the judicial power of states by allowing these courts to second-guess state supreme courts on

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federal court. *San Remo Hotel*, 545 U.S. at 347-48. Although the writ of certiorari is only way to the federal courts, states still may develop their own judicial takings theory to decide those taking issues that may arise in state trial and appellate courts. We do not see state courts waiting idle for the Court to decide whether the state court made the proper interpretation of its property law that covers centuries of state institutional, cultural, and political turmoil and conflict. We do not think the states should wait for the Court to find another conflicted takings theory to judge interpretations of state property law under the Federal Takings Clause. State supreme courts should develop their own body of state judicial takings law so that judicial takings issues can be raised in state trial and appellate courts.

<sup>296</sup> See generally *San Remo Hotel*, 545 U.S. 323 (holding that lower federal courts were precluded under Pullman Abstention Doctrine from hearing issues on takings that state supreme courts had decided).

<sup>297</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2609.

<sup>298</sup> *Id.* at 2609-10.

<sup>299</sup> *Id.* at 2609.

<sup>300</sup> See *id.*; *supra* note 33 and accompanying text.

matters of state property law and related policies.<sup>301</sup> Ripeness was and still remains an unsettled issue, and Justice Scalia overlooked the fact that state supreme courts develop their own body of takings law, including judicial takings theory.<sup>302</sup> When the federal judiciary establishes heightened scrutiny, state supreme courts cannot establish more deferential scrutiny under state takings clauses.<sup>303</sup> In addition, the federal judiciary must not resolve judicial takings issues by undermining the judicial power of the states.<sup>304</sup> Landowners who are not parties to judicial takings claims can use the federal judiciary to challenge all state supreme court decisions involving the existence of state property rights and judicial takings claims.<sup>305</sup> We expect that state supreme court judges will see the judicial takings issue and address it, thus leaving the federal courts to intervene in state property matters.<sup>306</sup>

## VI. CONCLUSION

*Pennsylvania Coal Co.* established regulatory takings theory, and *Lucas* and *Dolan* established takings doctrines that advanced a regulatory takings theory guaranteeing the right to receive just compensation in order to protect private property rights.<sup>307</sup> *Lucas* and *Dolan*

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<sup>301</sup> See generally *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (dispelling the argument that Federal District Courts would be forced to review final state court judgments but failing to address whether those courts could voluntarily usurp the state courts).

<sup>302</sup> See *supra* note 298 and text accompanying note 300.

<sup>303</sup> See *supra* text accompanying notes 252, 260.

<sup>304</sup> See *supra* text accompanying note 261.

<sup>305</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2609-10. Addressing his discomfort, however, Justice Breyer questioned Justice Scalia's rationale of the effects the plurality's position will have on federal influence. *Id.* at 2618-19 (Breyer, J., concurring in part). "Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal taking claims." *Id.* Justice Breyer concluded the plurality's position will have a significant effect on takings claims in state courts. *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "As [the Court has] said, a 'State, by *ipse dixit*, may not transform private property without compensation . . .'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164

reflect a doctrine-making approach, and *Pennsylvania Coal Co.* reflects theory-making methodology.<sup>308</sup> Both approach and methodology occur so infrequently that one would think the Court would rely completely on them.<sup>309</sup> *Stop the Beach Renourishment* could not establish takings theory, and the question of a judicial taking still remains open.<sup>310</sup>

The Court should establish a judicial takings theory, but it must consider the current doctrine-making approach and theory-making methodology when fashioning a judicial takings theory and its doctrines, standards of review, and principles.<sup>311</sup> Straightforwardly, the Roberts Court must return to *Lucas*, *Dolan*, and *Pennsylvania Coal Co.* to consider the doctrine-making approach and weigh theory-making methodology that guarantees the right to receive just compensation.<sup>312</sup> Any other approach or methodology would lead the Roberts Court to establish a judicial takings theory that cannot ensure stability, continuity, and predictability that would guarantee the right to receive just compensation.<sup>313</sup> Simply, the Court must protect the right to receive just compensation by following a doctrine-making approach and theory-making methodology that establishes a judicial takings theory protecting private property rights by denying state courts the judicial power to shift the public burden to a landowner when avoiding the payment of just compensation.<sup>314</sup>

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(1980)); *see also* *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994) (describing just compensation as a “right” when private property is “taken for public purpose”).

<sup>308</sup> *See supra* text accompanying notes 25-26.

<sup>309</sup> *See supra* text accompanying notes 64-69; *see also* *Lucas*, 505 U.S. at 1061 (Blackmun, J., dissenting) (expressing a fear that the circumstances of *Lucas* will be interpreted “beyond [its] narrow confines”); *Guy & Holloway*, *supra* note 296, at 195 & n.471 (concluding the Court interprets *Lucas* and *Dolan* narrowly).

<sup>310</sup> *See supra* Part III.C.

<sup>311</sup> *See supra* text accompanying notes 239-41.

<sup>312</sup> *See supra* text accompanying notes 7-8; *see also* *Dolan*, 512 U.S. 374; *Lucas*, 505 U.S. 1003; *Pa. Coal Co.*, 260 U.S. 393.

<sup>313</sup> *See supra* text accompanying notes 10-13.

<sup>314</sup> *See supra* text accompanying notes 8, 11.