

ment of the significance of an officer's authority,⁸⁷ and thus this comment's proposal is at least as administrable and predictable.⁸⁸ Indeed, considering an official's powers only to the extent that they are not reviewable by a superior would be a more predictable and administrable rule: for example, it is obvious that statutes providing for administrative law judges (some of whom enjoy a second level of for-cause removal protections but whose decisions are reviewed de novo by their agency heads) would be constitutionally permissible.

The Court's opinion in *Free Enterprise Fund* needlessly focused on the Board's removal protections rather than giving doctrinal weight to the plenary oversight authority granted to the Commission. By upholding the statute on the basis of the Commission's powers to review and overturn all of the Board's significant decisions, the Court could have emphasized the importance of presidential power over the executive branch and still provided a formalist rule that was as simple and predictable as a prohibition on double-layered for-cause tenure protections. Such a holding would have helped shift the Court away from its fixation on removal provisions⁸⁹ in the domain of separation of powers and toward the administrative oversight powers that have become more varied and pervasive in the last century⁹⁰ — thereby offering greater insight for future cases and more accurately reflecting the requirements of the Constitution's Vesting and Take Care Clauses.

G. Takings Clause

Judicial Takings. — The Takings Clause of the Fifth Amendment states that “private property [shall not] be taken for public use, without just compensation.”¹ In the nineteenth century, courts wrestled with the question of what uses of property satisfied the clause’s “public use” requirement,² and in the twentieth century, the Supreme Court confronted the problem of deciding at what point a regulation of the

⁸⁷ See *id.* at 3160 (majority opinion). Under this comment's rule, the only authority a judge would need to consider is the officer's *unreviewable* authority.

⁸⁸ See *id.* at 3177–78 (Breyer, J., dissenting).

⁸⁹ See Barkow, *supra* note 77, at 3 (describing “[t]he obsessive focus on removal as the touchstone of independence” as “curious”).

⁹⁰ See, e.g., CARPENTER, *supra* note 85, at 37–39; Patricia W. Ingraham, *Political Direction and Policy Change in Three Federal Departments*, in *THE MANAGERIAL PRESIDENCY* 196, 196 (James P. Pfiffner ed., 2d ed. 1999).

¹ U.S. CONST. amend. V. The Fourteenth Amendment incorporates the Takings Clause as a limit on the states. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233–35 (1897).

² See *Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005) (describing briefly the evolution of the “public use” doctrine); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617–18 (1940).

use of property becomes a taking and thus must be compensated.³ But the Court has never directly addressed whether the strictures of the Takings Clause apply to actions of the courts just as they do to actions of legislatures and executive agencies. One finds scattered throughout the U.S. Reports in dicta and concurrences language both rejecting and declaring the doctrine that a court's decision interpreting and allocating property rights could itself violate the Takings Clause.⁴

Last Term, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,⁵ the Court split on whether the Takings Clause applied to the judiciary. The Court held unanimously that a decision of the Florida Supreme Court did not violate property owners' established rights and thus did not constitute a taking. But only a plurality of the Court was prepared to declare that a judicial decision allocating property rights between parties could run afoul of the Takings Clause.⁶ Because this case did not require the Court to decide the judicial takings question, the plurality should not have attempted to do so. But should a case ever squarely present that question, the Court would do well to hold that the Takings Clause does *not* apply to judicial decisions. The Takings Clause contains two conditions on a state's power to take property: that the taking be "for public use" and that the owner of taken property receive "just compensation." These conditions presuppose the exercise of quintessential legislative power.⁷ Thus, a careful reading of the text of the clause and an understanding of its framework make its application to judicial decisions unsound.

Florida's Beach and Shore Preservation Act⁸ allows local governments to conduct preservation projects after receiving authorization from the Florida Department of Environmental Protection. In 2003, the City of Destin and Walton County applied for authorization to restore 6.9 miles of beach along the Gulf of Mexico that had been eroded

³ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁴ For an example of language that rejects the idea that judicial changes in the law could violate the Constitution, see Justice Brandeis's dicta in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680-81 & n.8 (1930). For an example of language arguing for using the incorporated Takings Clause to limit the power of state courts to change the law, see Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 297-98 (1967) (Stewart, J., concurring).

⁵ 130 S. Ct. 2592 (2010).

⁶ Because a majority of justices did not join the portions of Justice Scalia's opinion that discussed the doctrine of judicial takings, the precedential value of *Stop the Beach Renourishment* lies only in the Court's interpretation of Florida property law and hence is very limited.

⁷ When an executive agency takes property, it exercises delegated legislative power. See *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551-52 (1946).

⁸ FLA. STAT. §§ 161.011-.45 (2006); see *Stop the Beach Renourishment*, 130 S. Ct. at 2599.

by Hurricane Opal.⁹ The contemplated project would transform the boundary between private beachfront (or “littoral”¹⁰) property and state-owned property to a fixed line from a line that moves over time through erosion or accretion (the imperceptibly slow addition of sand or other deposits¹¹).¹² Thus, littoral owners’ beachfront property would no longer expand if the beach expanded through accretion. Owners of the littoral property that would be affected by the remediation project formed a nonprofit corporation that brought suit against the Florida Department of Environmental Protection,¹³ claiming that the Department’s final order determining that the project could go forward violated the state constitution’s takings clause.¹⁴

The Florida District Court of Appeal for the First District held that the proposed project would unconstitutionally eliminate two of the littoral owners’ rights: the right to receive accretions and “the right to have the property’s contact with the water remain intact.”¹⁵ The court set aside the order approving the project and remanded the case to the Department of Environmental Protection.¹⁶ The district court of appeal also certified to the Florida Supreme Court the following question of “great public importance,”¹⁷ as rephrased by the higher court: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”¹⁸ The Florida Supreme Court “answer[ed] the rephrased certified question in the negative and quash[ed] the decision of the First District.”¹⁹ The beachfront owners “sought rehearing on the ground that the Florida Supreme Court’s decision itself effectuated a taking of [their] littoral rights contrary to the Fifth and Fourteenth Amendments to the

⁹ *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 50 (Fla. Dist. Ct. App. 2006).

¹⁰ “Littoral” property is property abutting an ocean, sea, or lake, in contrast to “riparian” property, which is property abutting a stream or river. *Stop the Beach Renourishment*, 130 S. Ct. at 2598 n.1.

¹¹ *Id.* at 2598.

¹² *Id.* at 2599.

¹³ *Id.* at 2600.

¹⁴ *See Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1106–07 (Fla. 2008).

¹⁵ *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 59 (Fla. Dist. Ct. App. 2006); *see also Stop the Beach Renourishment*, 130 S. Ct. at 2600.

¹⁶ *See Stop the Beach Renourishment*, 130 S. Ct. at 2600 (stating that the Florida District Court of Appeal remanded for a showing “that the local government owned or had a property interest in the upland property”).

¹⁷ *Save Our Beaches*, 27 So. 3d at 60 (order granting certification).

¹⁸ *Stop the Beach Renourishment*, 130 S. Ct. at 2600 (quoting *Stop the Beach Renourishment*, 998 So. 2d at 1105 (footnotes omitted)) (internal quotation marks omitted). The Court noted that “[t]he Florida Supreme Court seemingly took the question to refer to constitutionality under the Florida Constitution[’s]” version of the Takings Clause. *Id.* at 2600 n.3.

¹⁹ *Stop the Beach Renourishment*, 998 So. 2d at 1105.

Federal Constitution.”²⁰ The Florida court denied the request for rehearing, and the Supreme Court granted certiorari.²¹

The Supreme Court affirmed.²² Writing for the Court,²³ Justice Scalia held that the decision of the Florida Supreme Court “did not contravene the established property rights” of littoral owners and thus had not violated the Takings Clause by taking property without just compensation.²⁴ Although the Court was unanimous in affirming the decision of the Florida Supreme Court, it split on whether it should “determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause,”²⁵ with no opinion on this judicial takings question garnering a majority.

Relying on Florida precedent²⁶ not cited by the Florida Supreme Court below,²⁷ the Court concluded that “Florida law . . . allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership”²⁸ and therefore belonged to the State.²⁹ The Court also concluded that the littoral owners’ right to accretions was “subordinate to the State’s right to fill.”³⁰ Thus, the Court could not “say that the Florida Supreme Court’s decision eliminated a right of accretion estab-

²⁰ *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

²¹ *Id.* at 2600–01; *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 129 S. Ct. 2792 (2009) (mem.).

²² *Stop the Beach Renourishment*, 130 S. Ct. at 2613.

²³ Justice Scalia announced the judgment of the Court and wrote for a unanimous Court in Parts I, IV, and V of the opinion regarding Florida littoral law. In Parts II and III regarding the doctrine of judicial takings, Justice Scalia wrote for a plurality of four justices. Justice Stevens took no part in the decision of this case. *Id.* Per usual practice, Justice Stevens did not publicly state his reasons for recusing himself. However, a legal blog speculated that Justice Stevens recused himself because it became known that he owned a condominium in a beach renourishment zone in Fort Lauderdale, Florida, similar to the zone at issue in the case. See Tony Mauro, *Behind Justice Stevens’ Recusal in Florida Case*, THE BLT: THE BLOG OF LEGAL TIMES (Dec. 4, 2009, 1:41 PM), <http://legaltimes.typepad.com/blt/2009/12/behind-justice-stevens-recusal-in-florida-case.html>. At least one Takings Clause expert has suggested that Justice Stevens would likely have been a vote for the position that judicial rulings cannot violate the Takings Clause. See Tony Mauro, *Stevens’ Recusal Makes Difference in Florida Property Ruling*, THE BLT: THE BLOG OF LEGAL TIMES (June 17, 2010, 2:33 PM), <http://legaltimes.typepad.com/blt/2010/06/stop-the-beach-the-difference-a-recusal-can-make-.html> (quoting Fordham Law School Dean William Treanor).

²⁴ *Stop the Beach Renourishment*, 130 S. Ct. at 2613.

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

²⁶ *Martin v. Busch*, 112 So. 274 (Fla. 1927).

²⁷ See *Stop the Beach Renourishment*, 130 S. Ct. at 2612.

²⁸ *Id.* at 2611. An avulsion is a “sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed” below the water. *Id.* at 2598 (quoting *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987)) (internal quotation mark omitted).

²⁹ *Id.* at 2598 (“[F]ormerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State).”).

³⁰ *Id.* at 2611.

lished under Florida law.”³¹ Finally, the Court held that the Florida Supreme Court’s decision that there is no independent right of littoral owners “to have their property continually maintain contact with the water” similarly did not contravene established state property law.³²

Justice Scalia’s opinion for a plurality³³ of the Court advocated both for declaring that a judicial decision determining the rights of property owners can violate the Takings Clause and for establishing a test for when such a judicial taking occurs. Justice Scalia eschewed an originalist interpretation of the Takings Clause because he found the text of the clause to be clear.³⁴ He asserted that the text of the Takings Clause — “nor shall private property be taken for public use, without just compensation”³⁵ — “is not addressed to the action of a specific branch or branches” and thus “[t]here is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.”³⁶ Justice Scalia declared that “[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”³⁷

Justice Scalia found implicit support for his reading of the Takings Clause in the Court’s opinions in *PruneYard Shopping Center v. Robins*³⁸ and *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*.³⁹ The *PruneYard* and the *Webb’s Fabulous Pharmacies* Courts framed their holdings and analyses not in terms of the state courts’ actions but in terms of the state statutes or constitutional provisions at issue.⁴⁰ But according to Justice Scalia, in both cases the Court was clearly, even if not explicitly, reviewing the state courts’ *interpretations* of enacted positive law, and those judicial interpretations (not the enacted positive law) were the subjects of the takings challenges.⁴¹

³¹ *Id.* at 2612.

³² *Id.* at 2612–13.

³³ Parts II and III of Justice Scalia’s opinion discussing the doctrine of judicial takings were joined by Chief Justice Roberts and Justices Thomas and Alito.

³⁴ *Stop the Beach Renourishment*, 130 S. Ct. at 2606 (plurality opinion) (“Where the text [the Framers] adopted is clear, however (‘nor shall private property be taken for public use’), what counts is not what they envisioned but what they wrote.”).

³⁵ U.S. CONST. amend. V.

³⁶ *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (plurality opinion).

³⁷ *Id.* (citing *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting from denial of certiorari)).

³⁸ 447 U.S. 74 (1980). A commentator in these pages also recognized *PruneYard* as a judicial takings case when it was decided in 1980. See *The Supreme Court, 1979 Term — Leading Cases*, 94 HARV. L. REV. 77, 175–76 (1980) [hereinafter *1979 Leading Cases*]. That commentator criticized the Court for inappropriately using the Takings Clause to analyze a state court decision allocating property rights. See *id.*; *infra* note 74.

³⁹ 449 U.S. 155 (1980).

⁴⁰ *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality opinion).

⁴¹ See *id.* at 2601–02.

Confident that “the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking,” Justice Scalia stated that “[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property.”⁴² Thus the plurality’s proposed test for whether a judicial decision violates the Takings Clause is whether the decision contravenes an established property right.

Justice Breyer concurred in part and concurred in the judgment,⁴³ writing separately to express the view that “the plurality unnecessarily addresse[d] questions of constitutional law that are better left for another day.”⁴⁴ While expressing neither agreement nor disagreement with the plurality’s conclusions, Justice Breyer wrote that those conclusions need not have been stated to dispose of the case. He also wrote that if the Court were to express its views on the questions the plurality would have had the Court answer, the Court “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.”⁴⁵ Justice Breyer would simply have decided “that the Florida Supreme Court’s decision in this case did not amount to a ‘judicial taking,’” without deciding whether a right against judicial takings existed or what standard would apply to judicial takings cases if such a right did exist.⁴⁶ In his opinion for the plurality, Justice Scalia attacked what he called Justice Breyer’s “Queen-of-Hearts approach,” stating that Justice Breyer’s attempt to “decid[e] this case while addressing *neither* the standard *nor* the right is quite impossible.”⁴⁷

In an opinion concurring in part and concurring in the judgment, Justice Kennedy⁴⁸ agreed with Justice Breyer that “this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings

⁴² *Id.* at 2602.

⁴³ Justice Breyer was joined by Justice Ginsburg.

⁴⁴ *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring in part and concurring in the judgment).

⁴⁵ *Id.* at 2618–19.

⁴⁶ *Id.* at 2619.

⁴⁷ *Id.* at 2604 (plurality opinion). Justice Scalia asserted that “Justice Breyer must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the ‘unnecessary’ constitutional question whether there is such a thing as a judicial taking.” *Id.* at 2603.

⁴⁸ Justice Kennedy was joined by Justice Sotomayor.

Clause.”⁴⁹ But Justice Kennedy went further to address the substance of the plurality’s reading of the Takings Clause. He noted “certain difficulties that should be considered before accepting the theory that a judicial decision that eliminates an ‘established property right’ constitutes a violation of the Takings Clause.”⁵⁰ These difficulties include that of declaring that the politically unaccountable judicial branch could take property so long as compensation is paid⁵¹ and that of what remedy would be available should a court decide that a judicial taking had occurred.⁵² In particular, Justice Kennedy found declaring a doctrine of judicial takings to be problematic because doing so would implicitly recognize that the judiciary has the power to take property, so long as it pays just compensation — a proposition for which “[t]here is no clear authority.”⁵³ To avoid the difficulties raised by recognizing a doctrine of judicial takings, Justice Kennedy would have relied on the Due Process Clause — “in both its substantive and procedural aspects” — to “limit[] the power of courts to eliminate or change established property rights.”⁵⁴

Justice Scalia’s opinion for the plurality retorted that Justice Kennedy’s suggested reliance on the Due Process Clause “propels us back to what is referred to (usually deprecatingly) as ‘the *Lochner* era.’”⁵⁵ He responded to Justice Kennedy’s concerns about what remedy would be available in a judicial takings case by asserting that reversal *would* be available.⁵⁶ And to Justice Kennedy’s fear that recognition of a judicial takings doctrine could incentivize courts to take property, Justice Scalia facetiously replied that “[t]he only realistic incentive that subjection to the Takings Clause might provide to any court would be the incentive to get reversed, which in our experience few judges value.”⁵⁷

When Justice Scalia observed for the plurality that “[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches,”⁵⁸ he was surely correct to the extent that the clause does not

⁴⁹ *Stop the Beach Renourishment*, 130 S. Ct. at 2613 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁰ *Id.* (citation omitted).

⁵¹ *See id.* at 2616.

⁵² *See id.* at 2617.

⁵³ *Id.* at 2614.

⁵⁴ *Id.* *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Kennedy, J., concurring in the judgment and dissenting in part), for another instance in which Justice Kennedy would have preferred to rely on the Due Process Clause rather than the Takings Clause to dispose of a case. *Id.* at 546–47. Justice Kennedy cited his *Eastern Enterprises* opinion throughout his *Stop the Beach Renourishment* opinion.

⁵⁵ *Stop the Beach Renourishment*, 130 S. Ct. at 2606 (plurality opinion).

⁵⁶ *See id.* at 2607.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2601.

contain an explicit reference to any of the three branches. But it does not follow that an analysis of the Takings Clause's text therefore demands application of the clause to the judiciary. Indeed, a careful reading of the text of the Takings Clause, combined with an understanding of its framework, argues *against* its application to courts and at least brings into serious doubt Justice Scalia's claim that the text of the clause clearly demands the outcome the plurality supposes it does.

The Takings Clause permits a state to take private property as long as it fulfills two conditions: (1) the property must be taken for a "public use" and (2) the owner of the taken property must receive "just compensation."⁵⁹ These two conditions presuppose the exercise of legislative power; thus they make perfect sense in the context of the political branches while making little sense in the context of the judiciary.

First, the rule that property may be taken only for "public use" presupposes a choice between different uses, those of the 'property' owner and those of the 'public.'⁶⁰ It is a quintessential function of the political branches to make just such choices through the balancing of competing values. The Supreme Court thus stated in *United States ex rel. Tennessee Valley Authority v. Welch*,⁶¹ "We think that it is the function of Congress to decide what type of taking is for a public use and that [an] agency authorized to do the taking may do so to the full extent of its statutory authority."⁶² Similarly, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,⁶³ the Court reasserted the view that "the decision to exercise the power of eminent domain is a legislative function."⁶⁴ When a legislature — or an executive agency exercising delegated authority — makes such a decision, it exercises the police power,⁶⁵ and its determination of what serves the public interest is "well-nigh conclusive" because "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."⁶⁶

But whereas the political branches are said to be the arbiters of what is and what is not in the public interest, the courts are said to be without the power or competence to legitimately make such determinations. "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of [policy decisions]."⁶⁷ For this reason,

⁵⁹ See U.S. CONST. amend. V.

⁶⁰ Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 433.

⁶¹ 327 U.S. 546 (1946).

⁶² *Id.* at 551–52.

⁶³ 482 U.S. 304 (1987).

⁶⁴ *Id.* at 321.

⁶⁵ See Walston, *supra* note 60, at 433–34.

⁶⁶ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

⁶⁷ *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955).

the Supreme Court has repeatedly (and recently) announced that it defers to legislative judgments regarding whether a taking was for a public purpose in satisfaction of the Takings Clause's "public use" requirement.⁶⁸ Such deference reflects the Court's determination that what constitutes "public use" is in the first instance a decision best left to the political branches.

Because the "public use" requirement presupposes the exercise of discretion and explicit value balancing, it is logical to conclude that the text of the Takings Clause both contemplates and accommodates its application to the branches of government best suited to that sort of work: the political branches. And it is just as logical to conclude that the text of the Takings Clause neither contemplates nor accommodates its application to the judiciary, the function of which is not to make policy judgments but to interpret the law.⁶⁹

Second, just like the rule that private property may be taken only for "public use," the requirement that the owner of taken property receive "just compensation" "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."⁷⁰ As Justice Kennedy wrote in his *Stop the Beach Renourishment* opinion, applying the Takings Clause to the judiciary would implicitly recognize that courts have the power to take property so long as they pay just compensation.⁷¹ But satisfying the "just compensation" condition necessarily involves the exercise of powers usually thought to be political, not judicial, in nature. "Money can be raised only by the legislature,"⁷² and courts are rightly wary of encroaching on legislative prerogatives by "order[ing] the legislature to appropriate money to compensate for judicially ordered changes."⁷³ While it is one thing for a court to order the legislature to compensate a taking that had been authorized by the legislature or an agency exercising delegated authority, it is quite another thing for a court to order the legislature to compensate a taking that the legislature had neither authorized nor con-

⁶⁸ See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

⁶⁹ The objection could be raised that the Takings Clause regulates the *exercise* of legislative power, even if it is a court exercising that power. This reading of the clause is certainly possible, but it is not one the plurality advanced. Moreover, it runs counter to the (arguably outdated and perhaps discredited) Platonic ideal of the judiciary as the law-interpreting, not law-making, branch. Cf. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 26–38 (1997) (discussing the "great dichotom[y]," *id.* at 23, between adjudication and legislation, how the two often bleed into one another, and political and legal theories advanced to keep the two separate).

⁷⁰ *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987).

⁷¹ See *Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

⁷² Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 770 (1978).

⁷³ Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1514 (1990).

templated.⁷⁴ And even if the legislature were to statutorily override a court's decision that effectuated a taking, the legislature would still have to compensate the property owner for the temporary taking.⁷⁵

Justice Scalia and the plurality would get around the problem of the "just compensation" condition by declaring that the remedy for a judicial taking — unlike a legislative taking or a regulatory taking — is not damages but reversal of the state court's decision allocating property rights.⁷⁶ This solution runs into three problems. First, it is not supported by the Court's prior statement that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation";⁷⁷ thus the remedy for an uncompensated taking is not an injunction preventing or reversing the taking but an order that compensation be paid.⁷⁸ The Court could of course carve from this general rule an exception for judicial takings. But then a second problem arises: such special treatment for judicial takings is obviously inconsistent with the plurality's contention that a "taking" effectuated by the judiciary should be treated no differently from a legislative or regulatory taking.⁷⁹

Perhaps the plurality's contention that reversal is the proper remedy for a judicial taking is predicated upon the assumption, discussed above, that a court does not have the power to order a legislature to pay compensation when a judicial decision effects a "taking." Given that the Takings Clause apparently presupposes the power to pay compensation, the plurality's reversal remedy may be based on the intuition that no power to pay means no power to take. This, though, brings to light the third problem, because saying that a court does not have the power to "take" property is not the same thing as saying that a court's decision violated the Takings Clause. The clause consists of two limitations on a power possessed, and thus it can be violated only by an action pursuant to that power but in violation of those limitations. If, as argued above, it is incongruous to say that the judiciary

⁷⁴ See *id.* at 1517–18; 1979 *Leading Cases*, *supra* note 38, at 175–76 (“[W]hen the United States Supreme Court deems a *legislative* action a taking, the legislature can validate its action by condemning the property and compensating the owner; for a state court to validate a *judicial* action deemed a taking by paying for it would be a flagrant usurpation of an exclusively legislative function.” *Id.* at 176.).

⁷⁵ See *First English*, 482 U.S. at 318–19.

⁷⁶ See *Stop the Beach Renourishment*, 130 S. Ct. at 2607 (plurality opinion).

⁷⁷ *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

⁷⁸ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (“Equitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking.”).

⁷⁹ See *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (plurality opinion).

has the power to take property, then it is equally incongruous to say that a court can violate the Takings Clause.⁸⁰

Given the Takings Clause's two conditions and their presuppositions, it is easy to see why Justice Kennedy stated in his opinion that "select[ing] what property to condemn and . . . ensur[ing] that the taking makes financial sense from the State's point of view . . . are matters for the political branches — the legislature and the executive — not the courts."⁸¹

A careful reading of the text of the Takings Clause and an understanding of its framework not only call into serious doubt the plurality's proposition that the Takings Clause can be applied to the judiciary consistent with its text, but also contradict Justice Scalia's broad assertion that "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."⁸² As demonstrated above, such a textual justification does indeed exist.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Diversity Jurisdiction

Corporate Citizenship. — Federal district courts have subject matter jurisdiction over two types of cases: those presenting a federal

⁸⁰ A reading of the clause's text that forecloses its application to the judiciary is only bolstered by considering the original understanding of the clause. As scholars have observed, the Framers of the Takings Clause did not contemplate applying it to the judiciary. According to Professor Barton Thompson, Jr., the author of the seminal article on judicial takings, "[g]iven the original, limited understanding of a taking, . . . no one in the late-eighteenth century would have considered a mere judicial abandonment of precedent to constitute a taking — even where the abandonment expanded public rights in land and other resources." Thompson, *supra* note 73, at 1459; see also 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . [T]he legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce.").

Although Justice Scalia acknowledges that the original understanding of the Takings Clause cuts against applying it to the judiciary, he ignores the problem because he finds the text of the Takings Clause to be clear. See *Stop the Beach Renourishment*, 130 S. Ct. at 2606 (plurality opinion); cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) ("I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution.").

⁸¹ *Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

⁸² *Id.* at 2601 (plurality opinion).