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The Worst Property Opinion Ever

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So why is the plurality opinion in *Stop the Beach Renourishment* so awful?

1) It paralyzes judicial development of common law property rights and only in one direction. Owners can invoke the Constitution when courts reduce their rights but no one can complain when they increase them.

2) It presents a parody of “original meaning” constitutional interpretation by relying on the passive voice of the Takings Clause to justify extending its prohibition of the judiciary while acknowledging that no one in 1791 had ever thought that judges could take property.

3) It justifies its textual analysis by invoking the preposterous claim that common law judges could not change the common law prior to when the Fifth Amendment was adopted. What about the Rule Against Perpetuities, which seemingly would have violated the plurality’s rule by reducing the grantor’s rights of disposition? The correct date for any such argument, in any event, should have been 1868, when the Fourteenth Amendment was adopted, since the Court is concerned only with state court decisions; by then, the plurality concedes, state courts could change the common law.

4) It fails to explain how judges can take property when they never have had the power of eminent domain.

5) It establishes federal courts as overseers of state supreme court judges in reasonable and good faith interpretations of state property law, without identifying any systematic failure by state courts.

6) It misconstrues the common law of property as a fixed body of entitlements, when it has evolved to meet changing economic and social conditions. It thus requires state courts to follow existing property rules that courts view as outmoded or erroneous.

7) It totally ignores the most applicable Supreme Court precedent, *Sauer v. City of New York*, 206 U.S. 536 (1907), which held that changes in state common law property rules do not implicate the federal constitution and adopted the dissent of Justice Holmes’s in *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905). None of the precedents it invokes comes close to adopting a judicial takings theory.

8) It embraces a doctrine of judicial takings without specifying whether it applies only to common law rulings that enlarge government ownership at the expense of a private owner or also to such rulings that adjust rights among competing private owners. The regulatory takings doctrine applies to statutes that do either, but such an approach applied to common law decisions may create massive government liability or freeze property law.

9) It never explains whether a judicial change in a common law property rule is a taking per se or whether it should be analyzed under the multi-factor test of *Penn Central*.

10) It invades an area of traditional state authority, which elsewhere has triggered invalidations of congressional statutes by the same justices.

11) It encourages takings suits by any person adversely affected by a change in property law.

12) It does all this in case where it did not need to reach the judicial takings issue, not only because of the reason offered by Justice Breyer (namely, that the petitioners did not have a federal case against the Florida Supreme Court under any theory), but because the 1961 Florida Beach and Shore Preservation Act permissibly declared publically restored beach public property without regard to state common law baselines. *See* Byrne, *Rising Seas and common Law Baselines*, 11 Vt. J. Env’tl. L. 625 (2010).

13) Thankfully, it justifies itself in self-righteous and pugnacious rhetoric, gratuitously insulting potential allies, making it less likely that it ever actually will be the law.