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JUSTICE JOHN PAUL STEVENS (Ret.)

CHICAGO-KENT COLLEGE OF LAW
Chicago, Illinois
October 3, 2012

The Ninth Vote in the "*Stop the Beach*" Case

One thing that I have especially missed during my retirement is debating points of law with my former colleague, Justice Scalia. I think he may also miss those debates because last year when he delivered an address at the Chicago-Kent Law School discussing the Supreme Court's recent decision in *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*,[1] he went out of his way to describe my opinion for the Court in *Kelo* v. *City of New London*[2] as unpopular and unfaithful to the text of the Fifth Amendment Takings Clause, and therefore not "long for this world."[3] A few months later, in the Albritton Lecture at the University of Alabama Law School, I explained why our decision in *Kelo* was so unpopular,

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[1] 560 U. S. __, 130 S. Ct. 2592 (2010).
[2] 545 U. S. 469 (2005).
[3] Justice Antonin Scalia, Chicago-Kent Keynote Address: *Stop the Beach Renourishment*, at 14 (Oct. 18, 2011).

and how it was the dissenters rather than the majority in *Kelo* who wanted to change a settled rule of law.[4] Today I do not propose to repeat what I said in Alabama. Instead, I shall discuss the topic of judicial takings, which was debated among only eight members of the Supreme Court in *Stop the Beach*, because I had recused myself.

Stop the Beach involved a challenge to the constitutionality of an important Florida state statute.[5] Responding to extensive erosion of hundreds of miles of sand beaches on Florida's coast, in 1961 the State of Florida enacted its Beach and Shore Preservation Act.[6] Since the 1970s, over 200 miles of beaches have benefitted from restoration projects authorized by that statute.[7] Before the Act was amended in 1970, the border between privately owned beach

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[4] Justice John Paul Stevens, University of Alabama Abritton Lecture: *Kelo*, Popularity, and Substantive Due Process (Nov. 16, 2011). The criticism of the *Kelo* decision did not suggest that the $442,000 that Susette Kelo received from the City of New London in 2006 failed to provide her with "just compensation" for the taking of property she had purchased in 1997 for $53,500. See Jeff Benedict, Little Pink House: A True Story of Defiance and Courage (2009).

[5] 130 S. Ct., at 2599.

[6] *Id.* (citing 1961 Fla. Laws ch. 61-246, as amended, Fla. Stat. §§161.011-161.45 (2007)); *Walton Cnty.* v. *Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1107-1108 (Fla. 2008).

[7] *See* Brief of Amicus Curiae The Florida Shore and Beach Preservation Association et al. in Support of Respondents, at 6, *Stop the Beach Renourishment, Inc.* v. *Fla. Dept. of Envtl. Protection*, No. 08-1151 (Oct. 5, 2009).

property and the state-owned submerged lands under the Gulf of Mexico and the Atlantic Ocean was a constantly changing line established by common law rules.[8] Under those rules, the border was the mean high-water line (MHL) measured by the average reach of high tide over the preceding 19 years; the strip of sand on the shore between the low-tide line and the MHL, like the permanently submerged land, belonged to the State.[9] Gradual additions to the land, caused by forces of nature, became the property of the beach owner, while gradual losses of beach moved the property line in the other direction.[10] Sudden and dramatic changes caused, for example, by hurricanes, and known as avulsions, did not change the preexisting boundary between public and private property.[11]

The 1970 amendment to the Florida statute effectively treated a beach restoration project like an

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[8] *Stop the Beach*, 130 S. Ct., at 2598-2599.
[9] *Id.*, at 2597-2598.
[10] *Id.*, at 2598-2599.
[11] *Ibid.*

avulsion.[12] Under the amended statute, the common law no longer operates to increase or decrease the privately owned property in or adjacent to the restored beach.[13] Instead, an "erosion control line" - set by reference to the current MHL - now serves as the permanent border separating public and private property.[14] The statute contains other provisions that protect property owners by guarding their access to and view of the water[15] and establishing procedures for determining compensation for any necessary taking of property.[16] But it unquestionably authorizes projects that eliminate some property owners' right to accretions of land.[17]

In 2003, a city and county on the coast of the Gulf of Mexico applied for permits to restore almost seven miles of beach by dredging sand from deep water and depositing it along the shore.[18] A nonprofit

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[12] 1970 Fla. Laws ch. 70-276.
[13] *Id.* §6 (codified at Fla. Stat. §161.191(2)); *Stop the Beach*, 130 S. Ct., at 2599.
[14] *Id.* §§2-3 (codified at Fla. Stat. §§161.151(3), 161.141, 161.161); *Stop the Beach*, 130 S. Ct., at 2599.
[15] Fla. Stat. §§161.021, 161.052, 161.053, 161.191(2).
[16] Fla. Stat. §161.212(2), (3).
[17] Fla. Stat. §161.191(2).
[18] *Stop the Beach*, 130 S. Ct., at 2600.

corporation representing owners of beachfront property, called Stop the Beach Renourishment, Inc., objected to the project, contending that it would destroy the owners' right to future accretions as well as the right to retain contact between their property and the water.[19] The state agency approved the project, but the Florida District Court of Appeal set aside that approval.[20] That court certified to the Florida Supreme Court the question whether the statute was unconstitutional, apparently referring only to the Florida Constitution, rather than the Federal Constitution.[21] Over the dissent of two of the state court Justices, the Florida Supreme Court held that the statute was not unconstitutional on its face.[22] The plaintiffs had not specifically challenged the application of the statute to their property, and the Florida Supreme Court's decision did not foreclose future challenges to applications of the law.[23] In its

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[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] *Walton Cnty.*, 998 So. 2d 1102.
[23] *Id.*, at 1115-1116.

opinion, the court explained that the appellate court had failed to recognize the similarity between the common law rule that preserves an existing property line following an avulsive event and the statutory setting of a property line that remains the same during and after a restoration project.[24]

The Stop the Beach corporation filed a petition for rehearing in the Florida Supreme Court, arguing that the court's decision had so flagrantly misconstrued Florida law that the decision itself amounted to a judicial taking that violated the Fifth Amendment of the Federal Constitution.[25] The Florida Supreme Court denied the rehearing petition without opinion.[26] Presumably nothing in the petition persuaded that court that it had misinterpreted Florida law. It would necessarily follow, I suppose, that the court did not believe that any possible state law error was so egregious that it amounted to a violation of the United

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[24] *Id.*, at 1116-1118.

[25] *Stop the Beach*, 130 S. Ct., at 2600-2601.

[26] See Florida Supreme Court Docket for Case Nos. SC06-1447 & SC06-1449 (Dec. 18, 2008) ("Since there are not four votes to grant rehearing, appellant's motion for rehearing is denied.").

States Constitution. Indeed, with respect to the federal issue, which was first raised in the petition for rehearing, the Florida Court might simply have decided that it was too late to raise questions that were not encompassed within the question certified by the intermediate appellate court.[27]

Following the Florida Supreme Court's denial of the rehearing petition, Stop the Beach petitioned for certiorari in the United States Supreme Court.[28] I participated in the Conference at which the cert petition was considered. At that time I did not see how the outcome of the case could possibly impact the value of the condominium that my wife Maryan owns in Fort Lauderdale, Florida, or my own enjoyment of one of the most beautiful beaches in the world. The thought of disqualifying myself did not occur to me then. After the Court granted certiorari, however, news

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[27] See Fla. R. App. P. 9.330(a) (2007) ("A motion for rehearing . . . shall not present issues not previously raised in the proceeding."); *id.*, note on 2000 Amendment ("The amendment . . . codifies the decisional law's prohibition against issues in post-decision motions that have not previously been raised in the proceeding."); *Cleveland* v. *State*, 887 So. 2d 362, 364 (Fla. App. 2004) ("No new ground or position may be assumed in a petition for rehearing.").

[28] *Stop the Beach*, 130 S. Ct., at 2601.

stories suggesting that we might have an interest in the outcome persuaded me to recuse myself, so I did not thereafter participate in the decision of the case.[29] Had I done so, I would have tried to persuade my colleagues to dismiss the case as having been improvidently granted review, because there was no justification for using it as a vehicle for discussing the subject of judicial takings.

Ultimately, my recusal did not affect the Court's disposition of the case. Both Justice Kennedy and Justice Breyer explained in their separate opinions that there was no need to decide the judicial takings issue since the Court unanimously agreed that there was no merit to the claim that Florida's actions constituted any form of taking.[30] Nevertheless, Justice Scalia wrote an opinion that spoke for a plurality of four Justices in espousing a theory of "judicial

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[29] *See, e.g.*, Behind Justice Stevens' Recusal in Florida Case, The Blog of LegalTimes (Dec. 4, 2009), http://legaltimes.typepad.com/blt/2009/12/behind-justice-stevens-recusal-in-florida-case.html.

[30] *Stop the Beach*, 130 S. Ct., at 2613 (Kennedy, J., concurring in part and concurring in the judgment); *id.*, at 2618 (Breyer, J., concurring in part and concurring in the judgment).

takings."[31] The remainder of his opinion spoke for the entire Court in affirming the Florida Supreme Court's conclusion that there had been no taking.[32] In his talk at this law school last year, he was critical of his colleagues for their failure to join his advisory opinion about the subject of judicial takings.

Had I participated in deciding the case, I also would have refused to join Justice Scalia's advisory opinion, and probably would have identified at least three reasons for not discussing the subject of judicial takings in that case. First, if there had been any taking in the case, it would not have been a "judicial" taking. Any taking that might have occurred was effected either when the Florida state legislature passed the statute authorizing the creation of new permanent unchanging property lines to replace the ever-changing common law lines, or when the agency actually set the property lines that would preclude petitioners from acquiring further land by accretion.

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[31] *Id.*, at 2601 (Scalia, J.) (plurality opinion).
[32] *Stop the Beach*, 130 S. Ct., at 2610-2613 (majority opinion).

The main significance of Justice Scalia's characterization - that an appellate court's approval of challenged executive or legislative action is a "judicial taking" rather than solely a decision on the merits of an underlying takings challenge - was to provide a special procedural benefit to property owners who, like Stop the Beach, fail to claim a violation of the Federal Constitution until after state courts have rejected their state law claim.

As Justice Scalia explained in a footnote to his opinion, ordinarily the Court does not consider an issue first presented to a state court in a rehearing petition if the state court did not address it.[33] "But where the state court decision itself is claimed to constitute a violation of federal law," Justice Scalia wrote, "the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review."[34] For that proposition, Justice Scalia cited Justice Brandeis's opinion for the Court in

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[33] *Id.*, at 2601 n.4.
[34] *Id.*, at 2601 n.4.

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*,[35] but that case did not create a broad exception from ordinary procedural rules. It merely held that the state could not refuse to provide a taxpayer with any hearing whatsoever on its constitutional claim.[36] In *Stop the Beach*, however, the plaintiff corporation had ample opportunity to be heard. It could have raised a federal constitutional challenge to the alleged state taking under the Florida beach preservation statute well before its rehearing petition in the Florida Supreme Court. Indeed, the corporation's lawyers could have raised it, but did not, in the state court proceedings along with the corporation's state constitutional challenge.

Perhaps the most glaring omission in Justice Scalia's opinion is his failure to explain why there is any need to create a special procedural exception for property owners whose lawyers fail to advance a federal claim in state proceedings. He cites only one case to

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[35] 281 U.S. 673 (1930)
[36] *Ibid.*

illustrate the importance of policing "judicial takings": *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, in which county officials applied a Florida statute that expressly deemed interest on certain funds deposited with the courts to be public money.[37] Ironically, however, conventional appellate procedural rules enabled the Supreme Court in *Webb's* to decide the federal question: the plaintiff there had challenged the state statute on federal constitutional grounds before the Florida Supreme Court, which had found no unconstitutional taking.[38] In *Webb's*, unlike in *Stop the Beach*, the federal question was preserved and clearly passed on by the state court.

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The second point I would have stressed had I participated in deciding *Stop the Beach* is that it is the Due Process Clause of the Fourteenth Amendment, rather than the Takings Clause of the Fifth Amendment, that gives federal courts the authority to decide

[37] 449 U. S. 155 (1980).
[38] *Id.*, at 159 n. 5.

whether state judicial decisions announcing new rules of law violate the Federal Constitution. While the Court's 1897 decision in *Chicago, B. & Q. R. Co.* v. *Chicago*[39] is often cited for the proposition that the Fifth Amendment Takings Clause has been incorporated by the Fourteenth Amendment and therefore applies to state action,[40] in fact *Chicago* did not even cite the Fifth Amendment. As Justice Scalia more accurately stated in his *Stop the Beach* plurality opinion, *Chicago* held "that the Due Process Clause of the Fourteenth Amendment prohibits uncompensated takings."[41] In reaching that conclusion, the *Chicago* Court also answered in the affirmative the antecedent question whether the Due Process Clause applies to matters of substance as well as procedure.[42]

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[39] 166 U. S. 226 (1897).

[40] See, *e.g.*, *Stop the Beach*, 130 S. Ct., at 2613 (Kennedy, J., concurring) (citing *Chicago*); *Kelo* v. *City of New London*, 545 U. S. 469, 472 n. 1 (2005) (same); *Dolan* v. *City of Tigard*, 512 U. S. 374, 383-384 (1994) (same); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 122 (1978) (same); see also, *e.g.*, *PruneYard Shopping Ctr.* v. *Robins*, 447 U. S. 74 (1980); *Nollan* v. *Cal. Coastal Comm'n*, 483 U. S. 825, 827, 836 n.4 (1987).

[41] 130 S. Ct., at 2603 (plurality opinion).

[42] "But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the

While Justice Scalia correctly described *Chicago*'s holding, his *Stop the Beach* opinion elsewhere overlooks the difference between the Fifth and Fourteenth Amendments. For example, at the outset of its discussion of the Court's takings jurisprudence, Justice Scalia's opinion cites a case decided in 1871 - *Yates* v. *Milwaukee*[43] - for the proposition that the "Takings Clause - 'nor shall private property be taken for public use, without just compensation,' U. S. Const., Amdt 5 - applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land."[44] In fact, *Yates*, like *Chicago*, took the form of a substantive due process case that did not even cite the Fifth Amendment.[45]

The primary difference between the two Amendments, of course, is that the Fifth limits the power of the

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fourteenth amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans*, 96 U. S. 97, 102 [(1877)]." *Chicago*, 166 U. S., at 234-235.

[43] 10 Wall. 497, 504 (1871).

[44] *Stop the Beach*, 130 S. Ct., at 2601 (citing *Yates*).

[45] *Yates*, 77 U. S., at 504 ("This riparian right is property, . . . and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.").

federal government, while the Fourteenth limits the power of states. Even if we assume that the scope of the Fifth Amendment's limitation on the scope of a government's power to condemn private property is coextensive with the Fourteenth's, it is noteworthy that neither the text nor the history of the Fifth Amendment's Takings Clause places any limit on the scope of that power; the Clause imposes only a requirement that just compensation be provided for a taking.[46] Prior to the adoption of the Constitution, uncompensated takings had occurred both in England and in some States.[47] That history explains why the text of the Takings Clause prohibits uncompensated takings.

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[46] U. S. Const. amend. 5. Justice Rehnquist's opinion in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), acknowledges this compensation-focused nature of the Fifth Amendment Takings Clause. As he wrote,

> "As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."

First English, 482 U. S., at 314 (citations omitted) (citing *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 297 & n. 40 (1981); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336 (1893); *United States* v. *Jones*, 109 U. S. 513, 518 (1883)).

[47] See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785-798 (1995).

But the text does not limit the circumstances in which the government may take property. Instead, under the common law, as well as under the Due Process Clause, it was assumed that any taking, just like any regulation of the use of private property, must be justified by a public purpose.[48] The omission in the Takings Clause of any textual restriction on when the taking power may be exercised is consistent with the view that the prohibition against deprivations of property without due process expressed in both the Fifth and the Fourteenth Amendments is the true source of the prohibition against takings for a purely private purpose.

In both his Chicago-Kent talk last year, in which he referred to "the absurd notion of substantive process,"[49] and in *Stop the Beach*, Justice Scalia argued that the Due Process Clause cannot do the work of the Takings Clause. For a jurist who stresses the importance of text in the analysis of most legal

[48] See, *e.g.*, Justice Stevens, *supra* note 4; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527 (1906); *Clark* v. *Nash*, 198 U. S. 361 (1905); *Calder* v. *Bull*, 3 U. S. (3 Dall.) 386, 388 (1798).
[49] Justice Scalia, Chicago-Kent Keynote Address, *supra* note 3.

questions, that argument is surprising. The prohibition against deprivations of property "without due process of law" in the text of the Fourteenth Amendment is more naturally read to extend to state judicial decisions on property law than is the text of the Fifth Amendment, which - as I have explained—merely prohibits federal takings without just compensation. Moreover, in the only opinion I have found by a member of the Supreme Court that would have treated a state appellate court opinion as the equivalent of a "judicial taking" - Justice Stewart's solo writing in *Hughes* v. *Washington* - reliance was placed solely upon the Fourteenth Amendment, not the Fifth.[50] (Notably, *Hughes*, like *Webb's Fabulous Pharmacies*, decided the merits of a takings claim by following conventional rules of appellate procedure.)

[50] 389 U. S. 290, 298 (1967) (Stewart, J., concurring) ("Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended that when it is deliberate, I join in reversing the judgment.").

If the Court is to adopt a new judge-made doctrine expanding its authority to review the constitutionality of state appellate court opinions, it should be called "judicial deprivations" rather than "judicial takings," for surely such a doctrine should apply to deprivations of liberty as well as deprivations of property. Beach restoration projects affect public beaches as well as private beaches, and may affect liberty interests as well as property interests. Such projects theoretically could result in unconstitutional rules that deprive individual citizens of previously established rights to use public beaches and to walk along the shore of private beaches in the area between the high water mark and the low water mark. If the Florida Supreme Court were to adopt a rule limiting beach access to citizens who provide photo identification proving their local residency – or, to take a more clearly unconstitutional deprivation of liberty, a rule limiting access to members of a preferred political party or a preferred race – the

deprivation would be so egregious that appellate review of the judicial decision itself in the United States Supreme Court might well be justified even before the new judicial rule was enforced against a particular individual. I can find no principled basis for creating a new rule of appellate procedure that gives greater protection to property interests than to liberty interests when - as I have explained - both claims are, at bottom, due process challenges to action by a state.

In arguing that substantive due process cannot do the work of the Takings Clause, Justice Scalia relied on two opinions expressing a crabbed view of that doctrine - the plurality opinion in *Albright* v. *Oliver*, and Justice Black's opinion for the Court in *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*[51] The former involved the deprivation of an interest in liberty;[52] the latter involved the validity of an

[51] *Stop the Beach*, 130 S. Ct., at 2606 (citing *Albright* v. *Oliver*, 510 U. S. 266 (1994) (plurality opinion); *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 (1949)).
[52] *Albright*, 510 U. S., at 269.

economic regulation that was not claimed to be a taking.[53]

The question in *Albright* was whether the Due Process Clause of the Fourteenth Amendment constrains the power of state government to accuse a citizen of an infamous crime without probable cause.[54] Unlike the five other opinions in *Albright*,[55] none of which commanded a majority, I thought that the Clause applied and required the State to establish "the probable guilt of the defendant" before making a formal accusation.[56] In 1884, in *Hurtado* v. *California*, the Court had held that the State could use a procedure other than a grand jury to meet that requirement, but that was far different from a holding that there was no need for any probable cause determination.[57] My dissenting opinion

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[53] *Lincoln Fed. Labor Union*, 335 U. S., at 527-529.

[54] *Albright*, 510 U. S., at 268.

[55] *Id.*, at 268 (Rehnquist, J.) (plurality opinion); *id.*, at 275 (Scalia, J., concurring); *id.*, at 276 (Ginsburg, J., concurring); *id.*, at 281 (Kennedy, J., concurring in the judgment); *id.*, at 286 (Souter, J., concurring in the judgment).

[56] *Id.*, at 291-292 (Stevens, J., dissenting).

[57] 110 U. S. 516, 538 (1884) ("[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, *certifying to the probable guilt of the defendant*, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. . . . [I]n every circumstance of its administration, as authorized by the statute of

explained at some length how the Court had rejected Justice Black's view that the express guarantees in the Bill of Rights marked the outer limits of due process protection.[58] Instead, I explained, the Court had endorsed the reasoning in Justice Harlan's eloquent dissent in *Poe* v. *Ullman*, which described substantive due process as a guarantee of "freedom from all substantial arbitrary impositions and purposeless restraints."[59]

Justice Black's opinion in *Lincoln Fed. Labor Union* is, unsurprisingly, consistent with his narrow view of the guarantees afforded by substantive due process. As my *Albright* opinion explained, however, that view was rejected by the Court as time went on. While Justice Scalia cited *Lincoln Fed. Labor Union* for the proposition that the "liberties" protected by substantive due process do not include economic

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California, *it carefully considers and guards the substantial interest of the prisoner.*" (emphases added)).

[58] *Albright*, 510 U. S., at 287 (Stevens, J., dissenting).

[59] *Ibid.* (citing *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting)).

liberties,[60] it seems to me more accurate to say that *Lincoln* is one of many post-New Deal decisions that apply a deferential rational basis standard of review to economic regulations adopted by democratically elected legislatures and executives.[61] Moreover, in the 1977 case of *Moore* v. *City of East Cleveland*, my opinion concurring in the judgment expressed the view that the doctrine of substantive due process applied to invalidate a municipal zoning ordinance that placed an unjustified limitation on a grandmother's use of her property.[62] And substantive due process was the explicit basis for the 1897 decision in *Chicago*, which remains the principal authority for federal review of state taking decisions.[63]

It is true that the Court is always appropriately cautious whenever it is asked to apply the doctrine of substantive due process in new areas, as I noted in my

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[60] *Stop the Beach*, 130 S. Ct., at 2606.
[61] See *Lincoln Fed. Labor Union*, 335 U. S., at 533-537.
[62] 431 U. S. 494, 496, 502-504, 506 (1977) (plurality opinion); *id.*, at 520 (Stevens, J. concurring in the judgment); see also *id.*, at 548 (White, J. dissenting).
[63] *Chicago*, 166 U. S., at 234-235 ("In determining what is due process of law, regard must be had to substance, not to form.").
[63] 10 Wall. 497, 504 (1871).

opinion for a unanimous Court in *Collins* v. *City of Harker Heights*.[64] Still, it is quite wrong to say, as Justice Scalia did, that this doctrine, which has developed over the years through the common law process of adjudication and is appropriately respectful of judicial precedent, is "so flabby, so susceptible to judicial *ipse dixit*, that it creates a huge reservoir of discretion (that is to say, power) in the courts."[65] On occasion, a majority of the Supreme Court has misused the doctrine, most notably in the *Lochner* case,[66] and again recently in *McDonald* v. *Chicago*, which held that a constitutional provision - the Second Amendment - that was adopted to protect state control of their own militias should give federal judges a veto power over state regulations relating to firearms.[67] But generally speaking, in the area of takings by state official action, the Court's reliance on substantive

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[64] *Chicago*, 166 U. S., at 234-235 ("In determining what is due process of law, regard must be had to substance, not to form.").

[64] 503 U. S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

[65] Justice Scalia, Chicago-Kent Keynote Address, *supra* note 3.

[66] *Lochner* v. *New York*, 198 U. S. 45 (1905).

[67] 130 S. Ct. 3020 (2010).

due process doctrine - often articulated as the "incorporation" of the Fifth Amendment's Takings Clause into the Fourteenth Amendment - has produced an acceptable body of law.

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My third point can be briefly summarized. In his famous concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, Justice Brandeis cogently identified several rules that then limited the Court's approach to the adjudication of constitutional questions.[68] Two of those rules are relevant to our discussion today: First, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' "[69] Second, "[t]he Court will not 'formulate a rule of constitutional law that is broader than is required by the precise facts to which it is to be applied."[70] The rule defining "judicial takings" that Justice Scalia formulated in his *Stop the Beach*

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[68] 297 U. S. 288, 341-356 (1936) (Brandeis, J., concurring).
[69] *Id.*, at 346.
[70] *Id.*, at 347.

opinion and urged the Court to endorse would have violated both of these rules of judicial restraint that I have quoted.

Moreover, the heavy reliance on pre-existing state property law in Justice Scalia's opinion appears to vary from this comment by Justice Brandeis about federal courts' duty to defer to state judicial decisions—including those that change pre-existing common law rules:

> The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted

to their prejudice on the faith of earlier decisions.[71]

In *Stop the Beach*, there was no need for the Court to fashion a new rule of federal law for "judicial takings" or "judicial deprivations" or to referee the dispute between the majority and the dissenters on the Florida Supreme Court over questions of Florida law. Moreover, the Court should not have reached the merits of the underlying takings challenge to the Florida statute without applying ordinary procedural rules - that is, without first determining whether the federal claim had been decided by the Florida Supreme Court or at least presented to that court earlier than in the rehearing petition. I am sure Justice Brandeis would not have joined Justice Scalia's plurality opinion in *Stop the Beach*. Nor do I believe that Justice Brandeis would have found the reasoning in Justice Scalia's comments about that case in this forum last year

[71] *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 681 n.8 (1930).

persuasive. Those comments surely would not have affected my vote had I not been recused.

Thank you for your attention.