
CORNERSTONES AND KEYSTONES: CONFRONTING STEALTH ATTACKS ON THE REGULATORY STATE

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*This Article is the first to identify the Roberts Court's pattern of stealth overruling of several takings precedents by neutralizing or ignoring essential language from prior decisions. The Article explores six examples of this phenomenon and proposes a framework for identifying when a subsequent Court's critical assessment of key language from a prior decision, whether it technically qualifies as a "holding" or not, necessitates consideration of the stare decisis factors used in *Dobbs v. Jackson Women's Health Organization*. Rather than focusing on the sometimes-arbitrary distinction between holding and dictum, the Article introduces two other indicia of precedential language that warrant a robust stare decisis consideration à la *Dobbs*. First, the targeted language may be a cornerstone, that is, the foundation for a significant body of subsequent state and federal case law. Second, the passage in question may constitute a keystone, that is, language that was critical to the formation of a majority opinion or without which the opinion no longer makes sense.*

Litigators and their allies can mine several sources to identify cornerstones and keystones, allowing them to argue convincingly that the Court's attempt to ignore or abandon precedential principles warrants a full stare decisis analysis: state and federal cases, public papers of Supreme Court Justices, oral arguments, and party and amicus briefs. Relying on dozens of takings cases and snippets from the public papers of Justices Blackmun, O'Connor, Powell, and Stevens (reproduced here), the Article demonstrates how the Roberts Court has already overruled by stealth six essential principles of takings jurisprudence.

*While scholars, judges, and advocates have fixated on the Court's head-on confrontation with *Chevron* deference in *Loper Bright*, the Roberts Court has been issuing perturbing decisions with even greater implications*

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for the future of the regulatory state. Flying under the radar, the Court has followed a path that, if continued, could result in the gradual dismantling of police power and other regulations at all levels of government.

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I. INTRODUCTION

It is no longer an exaggeration to say that the Roberts Court is waging a determined campaign to undermine the regulatory state. The effort was in full bloom during the October 2023 Term, when the Justices issued their controversial rulings in *Loper Bright Enterprises v. Raimondo*¹ and *SEC v. Jarkesy*.² Not only lawyers and judges took note of these consequential moves, particularly the *Loper Bright* majority's reversal of a forty-year-old foundational administrative law precedent.³ There is a second front in this campaign, one being waged under the radar, but with the potential to achieve even greater impact in neutralizing state and local government regulations of property and business owners.⁴

1. 603 U.S. 369, 413 (2024) (“[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).

2. 603 U.S. 109, 120 (2024) (“This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. . . . The SEC’s antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.”).

3. *Loper Bright*, 603 U.S. at 412 (“*Chevron* [*U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)] is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”). A sampling of newspaper and online coverage includes Charlie Savage, *Weakening Regulatory Agencies Will Be a Key Legacy of the Roberts Court*, N.Y. TIMES (June 28, 2024), <https://www.nytimes.com/2024/06/28/us/politics/supreme-court-regulatory-agencies.html> [<https://perma.cc/XUZ7-CPQ2>] (“Twice in two days, the Supreme Court’s conservative supermajority has issued sweeping rulings that cut against established precedents and will hamstring the ability of regulatory agencies to impose rules on powerful business interests.”); Editorial Board, *Two Big Victories for Liberty*, WALL ST. J. (June 29, 2024, at 17:50 ET), <https://www.wsj.com/articles/supreme-court-chevron-deference-loper-bright-jan-6-fischer-d5958b01> [<https://perma.cc/55VD-JWJ6>] (“In arguably the most significant decision of the year, a 6-3 majority . . . overturned the Court’s 40-year-old *Chevron* doctrine that told judges to defer to agency interpretations of vague laws as long as they are ‘reasonable.’ Now regulators will have a harder time bending laws, and Congress will have to legislate more clearly. Imagine that.”); Michael E. Kanell & Drew Kann, *Justices Rewrite the Rules for Businesses*, ATLANTA J.-CONST. (July 8, 2024), at A1 (“In tossing out a 40-year-old doctrine for interpreting federal regulations, the U.S. Supreme Court has radically rewritten the rules for business planning and expansion, empowering challenges to the government if it gets in the way, say experts.”); Steve Vladeck, *Opinion: The Most Aggressive Restructuring of Government in Almost 90 Years*, CNN (July 2, 2024, at 17:51 ET), <https://www.cnn.com/2024/07/02/opinions/supreme-court-radically-restructures-government-vladeck/index.html> [<https://perma.cc/SM8G-C3YY>] (“Across most of the court’s highest-profile rulings (and a bunch of lower-profile ones), the justices took a massive amount of power away from Congress and executive branch agencies, and gave it, instead, to the courts.”); Brianna Herlihy, *‘Big Blow to Big Government’: Major SCOTUS Decision Strips Power of ‘Faceless Leviathan’ of Federal Agencies*, FOX NEWS (July 11, 2024, at 04:00 ET), <https://www.foxnews.com/politics/big-blow-big-government-major-scotus-decision-strips-power-faceless-leviathan-federal-agencies> [<https://perma.cc/MJF9-U92N>] (“The Supreme Court this term took a hammer to decades-old legal doctrine that largely saved executive branch agencies in legal disputes.”); Jordan Rubin, *The Roberts Court Continues Its Power Grab With Its Overturning of the Chevron Precedent*, MSNBC (June 28, 2024, at 12:58 CT), <https://www.msnbc.com/deadline-white-house/deadline-legal-blog/supreme-court-chevron-regulation-federal-agencies-rcna159468> [<https://perma.cc/J8XW-6AJL>] (“The Supreme Court achieved another goal of the conservative legal movement Friday when it overturned a long-standing precedent requiring deference to federal agencies when interpreting ambiguous laws on matters of environmental regulation and much more.”).

4. See Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427, 440 (2023). Citing a long list of responses to the Court’s expansive use of the Takings Clause, the authors note:

Only two months before *Loper Bright* and *Jarkesy*, the Court announced a unanimous decision involving state regulation that garnered much less attention: *Sheetz v. County of El Dorado*.⁵ There was a marked contrast in the Justices' treatment of troublesome precedent in the *Loper-Bright* and *Sheetz* rulings, a difference that demands attention because state and local regulations affecting property and businesses are much more pervasive than federal regulations.⁶ While in *Loper Bright* the Court confronted *head-on* the strictures, implications, and constitutional legitimacy of the *Chevron* decision, *Sheetz* is the latest in a line of Roberts Court takings cases in which the Justices have instead overruled key components of takings precedents by *stealth*.⁷

This Article, for the first time, identifies a troublesome pattern of stealth overruling of takings precedents and presents a framework for identifying when a subsequent Court's attempt to neutralize or ignore important language from a prior decision necessitates a robust consideration of the factors that the Roberts Court employed in *Dobbs v. Jackson Women's Health Organization*⁸ when deciding to overturn longstanding precedent.⁹ The *Dobbs* treatment should be

[A] wide range of distinguished scholars expressed either concern or excitement (depending on their worldviews) that *Cedar Point* jeopardized various antidiscrimination laws, antiretaliation provisions, regimes governing union access to employer email systems, rent control ordinances, environmental protection laws, consumer protection laws, protections for disabled tenants, COVID eviction moratoria, and mandatory inspection regimes.

Id. at 430. See also Aziz Z. Huq, *Property Against Legality: Takings After Cedar Point*, 109 VA. L. REV. 233, 238 (2023) (explaining that the article “explore[s] the possibility that the [*Cedar Point*] decision prefigures a dramatic and destabilizing shift in the nature of constitutional property. The legal uncertainty unleashed by that opinion is not likely to abate given the absence of any stable limit on the Court's apparent reworking of the concept of constitutional property”).

5. 601 U.S. 267, 279 (2024). See, e.g., Lee Anne Fennell & Timothy M. Mulvancy, *The Exactions Illusion: Sheetz's Missing Dissent*, 135 YALE L.J. (forthcoming Mar. 2025) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5193557 (“The case's framing which obscured the high institutional and constitutional stakes of the decision, allowed a seismic shift in authority over the built environment to proceed without pushback.”); Editorial Board, *A Bad Day for Greedy Politicians*, WALL ST. J. (Apr. 13, 2024, at 18:00 ET), [https://www.wsj.com/opinion/sheetz-v-county-of-el-dorado-supreme-court-amy-coney-barrett-george-sheetz-takings-clause-86a13ada?gaa_at=cafs&gaa_n=\[https://perma.cc/XJ7C-3TX8\]](https://www.wsj.com/opinion/sheetz-v-county-of-el-dorado-supreme-court-amy-coney-barrett-george-sheetz-takings-clause-86a13ada?gaa_at=cafs&gaa_n=[https://perma.cc/XJ7C-3TX8]) (“Good news. A unanimous Supreme Court on Friday ruled . . . that the Fifth Amendment's Takings Clause applies to legislatures that impose excessive fees. This is an important constraint on greedy governments.”); David G. Savage, *Builders May Fight 'Impact Fees' That Fund Municipal Projects in California*, SUPREME COURT RULES, L.A. TIMES (Apr. 13, 2024, at 17:13 PT), <https://www.latimes.com/politics/story/2024-04-12/supreme-court-developer-fees> [<https://perma.cc/27H2-TNHX>] (“The Supreme Court ruled Friday that developers and home builders in California may challenge the fees commonly imposed by cities and counties to pay for new roads, schools, sewers and other public improvements.”).

6. *Loper Bright*, 603 U.S. at 411; *Sheetz*, 601 U.S. at 279.

7. *Loper Bright*, 603 U.S. at 411; *Sheetz*, 601 U.S. at 279.

8. 597 U.S. 215, 268 (2022).

9. *Id.* (“In this case, five factors weigh strongly in favor of overruling *Roe* [*v. Wade*, 410 U.S. 113 (1973)] and [*Planned Parenthood v. Casey*], 505 U.S. 833 (1992)]: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”). Because *stare decisis* is a judge-made concept, and not a requirement imbedded in the text of the Constitution, the *Dobbs* Court was free to emphasize (or de-emphasize) whatever factors, themselves ground in precedent, that the majority deemed acceptable. See, e.g., *id.* at 263–90. By quoting these factors, this Article does not necessarily endorse this list. Indeed, words such as “workability,” “quality,” and “concrete” seem somewhat too pliable to form a conclusion free from controversy. See, e.g., *id.* Rather, this

required not only when the Supreme Court is reversing what is clearly the holding of a prior decision, but also in two additional instances.¹⁰ The first is when the targeted language from a prior decision is a *cornerstone*, that is, the foundation for subsequent court decisions that rely on that very language to resolve disputes. The second is when the targeted language from a prior decision is a *keystone*, that is, language that was an essential component of the prior decision. This Article will demonstrate how language from takings precedents that has been cavalierly abandoned or ignored by the Roberts Court constitutes a cornerstone of subsequent case law, the keystone for an important Supreme Court precedent, or both.

The Roberts Court's stealth takings trend poses a serious threat to the public coffers and to the ability of state and local regulators to protect public interests (health, safety, a clean environment, climate change adaptation, and more).¹¹ By negating key components of takings precedents, the Roberts Court has undone the détente between takings hawks and doves represented by the Rehnquist Court's unanimous ruling in 2005 in *Lingle v. Chevron U.S.A. Inc.*,¹² in which the Court reversed lower court rulings that had relied on the Takings Clause to invalidate a Hawaii statute that "limit[ed] the amount of rent that an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline."¹³

Article strongly suggests that the Justices, when questioning and reversing key principles from established Court precedents, use those factors that they themselves articulated. See *infra* Parts V–VII.

10. This Article acknowledges the conceptual and practical difficulties posed by the traditional holding-dicta dichotomy. Professor Kozel explains this cogently:

In some situations, broad interpretations of precedent are arguably consistent with the black-letter definition of judicial holdings as propositions that are "necessary" to a case's result. But that fact does not justify the inclusive paradigm of precedent. It simply demonstrates the ambiguity that resides within the terms "holding" and "dicta," terms that create far greater potential for mischief than illumination.

Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 183 (2014). See also Ryan C. Williams, *Plurality Decisions and the Ambiguity of Precedential Authority*, 74 FLA. L. REV. 1, 55 (2022) ("Although the distinction is a foundational feature of our law of precedent, the line between holdings and dicta is notoriously elusive and contested." (citations omitted)); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2005 ("The holding/dictum distinction suffers from a much more fundamental difficulty than peripheral ambiguity As currently understood, the distinction is almost entirely malleable."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). In none of the six cases discussed here did the Court explain that it was reversing the holding of a previous decision. In contrast, the Roberts Court in *Knick v. Township of Scott*, 588 U.S. 180 (2019), stated that it "granted certiorari to reconsider the holding of *Williamson County [Regional Plan. Comm'n v. Hamilton Bank of Johnson City]*, 473 U.S. 172 (1985) [that property owners must seek just compensation under state law in state court before bringing a federal takings claim under §1983]." *Id.* at 187. See also *infra* notes 240–52 and accompanying text.

11. See, e.g., Michael Allan Wolf, *Superfluous Judicial Activism: The Takings Gloss*, 91 GEO. WASH. L. REV. 287, 288–300 (2023) (noting that expanding the reach of the Takings Clause poses dangers to regulation in three areas: climate change mitigation and adaptation, pandemic orders, and land-use regulations to increase the supply of affordable housing and to create inclusive communities).

12. 544 U.S. 528, 545 (2024).

13. *Id.* at 533.

In *Lingle*, Justice O'Connor, just months before Chief Justice Rehnquist's death and her own resignation from the Court,¹⁴ reviewed several decades of often-conflicting decisions and isolated three strands of takings cases—(1) permanent physical invasions required by the government,¹⁵ (2) regulations that deprive owners of “all economically beneficial uses,”¹⁶ and (3) regulatory takings challenges that do not fall into the first two categories.¹⁷ She then identified the quality these types of cases had in common: “Each aims to identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹⁸ As a result of the Roberts Court's stealth jurisprudence, the Takings Clause has reached government activities that are far afield from the affirmative exercise of eminent domain and its functional equivalents, such as state labor laws, state and local government programs to fund important infrastructure and to protect critical wetlands, federal marketing orders designed to stabilize prices for agricultural products, and the operation of federal dams to extend the growing periods for local farmers.¹⁹

Compounding the problem, lower federal courts, and state courts who often piggyback onto Supreme Court jurisprudence when interpreting the takings clauses found in state constitutions, have threatened even more state and local regulations, most notably emergency provisions adopted during the COVID-19 pandemic,²⁰ none of which amount to the functional equivalent of what the *Lingle* Court labeled a “classic taking.”²¹ Before this trend gains even more impetus, a high likelihood given the anti-governmental leanings of many existing and anticipated federal and state judges,²² counsel appearing before and

14. See, e.g., Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 877 (2008) (“John Roberts commenced the October 2005 Term as the seventeenth Chief Justice, replacing William Rehnquist. And on January 31, 2006, Associate Justice Samuel Alito was sworn in to replace Sandra Day O'Connor.”).

15. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (“We affirm the traditional rule that a permanent physical occupation of property is a taking.”).

16. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (“We think, in short, that there are good reasons for our frequently expressed belief that 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, he has suffered a taking.”).

17. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”).

18. *Lingle*, 544 U.S. at 539 (emphasis added).

19. See discussion *infra* Part III.

20. See Hansen & Strahilevitz, *supra* note 4, at 447 (citing COVID-19 eviction moratoria cases in which takings were alleged); Michael Allan Wolf, *Fever Check: A Status Report on Judicial Treatment of COVID-19-Related Real Property Issues*, 58 REAL PROP., TR. & EST. L.J. 47, 67 (2023) (“The Supreme Court's expansion of regulatory and physical occupation takings, and hints by some justices that the hibernating Contracts Clause should be awakened have generated recovery theories for landlords that have been overwhelmingly, but not universally, rejected by federal appellate courts.”).

21. *Lingle*, 544 U.S. at 539.

22. See, e.g., Wolf, *supra* note 20, at 51–57.

submitting briefs to the Supreme Court should, where possible, anticipate and attempt to preempt further disintegration of the *Lingle* détente by stealth means.

This Article consists of six Parts, followed by a short Conclusion. Part II reviews the decades-old literature on stealth overruling to identify the problems commentators have noted with this practice generally. Part III moves from the general to the specific, focusing on six examples of the Roberts Court's neutralizing key principles from takings precedents rather than engaging in a full stare decisis analysis.

Part IV shows how several of the precedential principles discussed in Part III have served as cornerstones for subsequent decisions by state and federal courts. When the Roberts Court cavalierly dismissed or neutralized these key components of former decisions with minimal (if any) analysis and justification,²³ it cut short those decision trees as well.

Part V introduces four sources that counsel, amici, and commentators can mine to identify the important language appearing in precedents as keystones: dissenting opinions, oral arguments, and party and amici briefs, and the public papers of former Supreme Court Justices. Because a keystone is an essential part of a previous decision, not mere dictum that is unrelated to the prior holding, it warrants a full stare decisis analysis à la *Dobbs*.²⁴

Part VI explores the takings-law-specific ramifications of the Roberts Court's furtive decision-making, not just for the already tenuous reputation of the Court but, more importantly, for government officials who take seriously their responsibility to craft and enforce regulations to further public health, safety, and general welfare free from serious threats of enervating and costly lawsuits brought by disgruntled property and business owners. Each step the Court takes away from the *Lingle* détente—that is, the notion that *only* eminent domain and its functional equivalents merit the ownership protections embedded in the letter and spirit of the Takings Clause²⁵—promises to exacerbate the doctrinal confusion wrought by the current Court and endanger another component of the regulatory state.

On the one hand, for a conservative bloc that prides itself on fidelity to the text and original understanding of the Constitution,²⁶ and to the cause of correcting unwarranted expansions of individual rights that are not required by that text and understanding,²⁷ the redeployment of the Takings Clause to attack legislation

23. See discussion *infra* Part V.

24. See discussion *infra* Part VI; see *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263–90 (2022).

25. *Lingle*, 544 U.S. at 548.

26. An archetypal recent decision is *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) (“When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”).

27. See, e.g., *Dobbs*, 597 U.S. at 231 (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* [*v. Wade*, 410 U.S. 113 (1973)] and [*Planned Parenthood v. Casey*], 505 U.S. 833 (1992)] now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”).

that governs labor relations or provides for the financing of critical infrastructure is not a good look. On the other hand, if the conservatives on the Court share the anti-government philosophy of the second Trump Administration,²⁸ they should abandon the charade and explain to the American people that they feel a constitutional obligation not only to check the expansion, but also to repeal existing components, of the regulatory state at all levels.

The Article's Conclusion suggests that the Roberts Court needs to do a better job of adhering to the *stare decisis* factors it has identified and applied in the highly controversial *Dobbs* ruling. If litigators and their allies can identify cornerstones (foundations of subsequent rulings based on language from a prior decision) or keystones (language essential to the prior Court's opinion), and as a result the Court realizes that it has the obligation to justify such departures from precedent, perhaps the process of applying the *Dobbs* factors in the Takings Clause context will help rein in judicial excess. Should the Court choose instead to ignore cornerstones and keystones by failing to engage in a robust *stare decisis* analysis, its already shaky takings jurisprudence will be on even flimsier grounds, and commentators will have solid bases for questioning the sincerity of the current Court's commitment to history and precedent.

Because, in the end, the Supreme Court is not bound by any precedent (holding, dicta, and everything in-between), the act of applying the *Dobbs* factors is no guarantee that prior rulings will survive.²⁹ Still, there is an important function to be served by requiring the Justices to articulate their reasons for shaping a new jurisprudential path, particularly when, in the context of takings, so much important regulation designed to protect public health and safety is at stake. Engaging in this analysis is a relatively small price to pay for salvaging the already precarious reputation of the current Court.³⁰

II. WHAT'S WRONG WITH STEALTH OVERRULING?

Professor Barry Friedman, in his 2010 article, *The Wages of Stealth Overruling*,³¹ has provided the following "working definition" of this controversial judicial ploy:

"overruling" is (a) the failure to extend a precedent to its logical conclusion, drawing distinctions that are unfaithful to the prior precedent's rationale; or (b) reducing a precedent to essentially nothing, without justifying its *de facto* overturning. And stealth occurs when the Justices who do this know better, such that their decisions are in fact "dissembling."³²

28. Lauren McFerran & Celine McNicholas, *Trump's Assault on Independent Agencies Endangers Us All*, ECON. POL'Y INST. (Oct. 22, 2025), <https://www.epi.org/publication/trumps-assault-on-independent-agencies-endangers-us-all/> [<https://perma.cc/Y58K-DMGY>].

29. See *supra* notes 8–10 and accompanying text.

30. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014).

31. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 15 (2010).

32. *Id.* at 15–16. By no means did the practice of stealth overruling begin with the ascension of Chief Justice Roberts. In the area of regulatory takings itself, for example, the majority in *Keystone Bituminous Coal*

Friedman credits Ronald Dworkin for first identifying the “stealth” practices of the early Roberts Court.³³ In a 2007 essay, Dworkin accused conservative justices of “remaking constitutional law by overruling, most often by stealth, the central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed.”³⁴ Inspired by Dworkin, and in turn Friedman, several other commentators have made the exploration of stealth overruling a cottage industry in the legal literature.

While a full explication of the phenomenon is beyond the scope of this Article,³⁵ what is highly relevant are the arguments made against the current Court’s practice of overruling without engaging in a full stare decisis analysis.

Stealth overruling sends “mixed messages” to lower courts and government officials who look to the Court for guidance.³⁶ The precedential status of a previous decision is up in the air once the Supreme Court negates or denies a key part of that prior ruling.³⁷ Confusion results from a higher tribunal whose methods are no longer predictable.³⁸

Stealth overruling can breed “contempt for the law, and for the Court’s own pronouncements.”³⁹ If observers of the Court conclude that legal doctrine is fluid and not fixed, or that the Justices are making decisions in the shadows, the public perception of the law and the Court suffer.⁴⁰ Justices who, in their confirmation hearings, promised to adhere to precedent now appear to be more pharisee than solon.⁴¹

Ass’n v. DeBenedictis, 480 U.S. 470, 506 (1979), upheld coal-mining restrictions without directly reversing a 1922 precedent in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Chief Justice Rehnquist, writing for the four dissenters, was not convinced by the majority’s attempt to distinguish the earlier case:

In apparent recognition of the obstacles presented by *Pennsylvania Coal* to the decision it reaches, the Court attempts to undermine the authority of Justice Holmes’ opinion as to the validity of the Kohler Act . . . I would not so readily dismiss the precedential value of this opinion.

Id. at 507.

33. Friedman, *supra* note 31, at 3 n.2.

34. *Id.* (quoting Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sep. 27, 2007, at 92).

35. For a recent treatment of the subject, see Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1335–67 (2025). Hosie provides examples (none of them involving the Takings Clause) of seven varieties of “stealth reversals” (effected through “precedent ruination,” “precedent revisionism,” “precedent gating,” “certiorari erasures,” “shadow docket erasures,” “revisiting settled questions,” and “doctrinal and methodological destabilization”). *Id.* at 1335. The six examples of stealth overruling discussed in this Article are a variation on the first theme, which Hosie defines as “a new decision that is so inconsistent with the reasoning, principles, or form of a prior precedent that the new decision functionally strips the prior one of any remaining force or meaning as binding authority.” *Id.* at 1367.

36. Friedman, *supra* note 31, at 41.

37. *Id.*

38. Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067, 1079 (2008) (“The benefits of predictability—efficiency, individual autonomy and democratic self-government, fairness—are threatened to a greater degree by underruling than by straightforward overruling of precedent.”).

39. Friedman, *supra* note 31, at 53.

40. *Id.* at 52.

41. Peters, *supra* note 38, at 1100 (“Underruling allows a nominee to profess his or her strong commitment to the principle of stare decisis and then, as a Justice, effectively to ignore that principle without being seen as breaking a promise.”).

Stealth overruling is the opposite of transparent decision-making.⁴² Public faith in the ability of the Court to render justice wanes when there is a perception that the Justices are “up to something.”⁴³ Members of the public will be discouraged from engaging in litigation that will “make” new constitutional law.⁴⁴

Stealth overruling “excuses the Justices from having to justify their actions.”⁴⁵ It becomes a question of accountability to the public who, perhaps naively, place their faith in a Court that plays by the rules and expect that the members of the nation’s highest tribunal will be candid, open, respectful of their predecessors, and intellectually honest.⁴⁶

Stealth overruling “warps the participation of an informed citizenry in shaping American jurisprudence . . . by suppressing backlash and other forms of dialogic feedback that develop constitutional law.”⁴⁷ Even an informed public can be lulled into thinking that the current Court is staying on the course set by its predecessors, except when it clearly announces a departure from precedent.⁴⁸

Playing the contrarian role is Professor Richard Re, in his 2014 essay, *Narrowing Precedent in the Supreme Court*.⁴⁹ By “narrowing,” Professor Re means “interpret[ing] the precedent in a way that is more limited in scope than what you think is the best available reading,” rather than following or overruling the prior decision.⁵⁰ To Re, there are several legitimate reasons for employing the technique:

Sometimes . . . the Court takes the lesser step of narrowing in order to mitigate its own past errors or to experiment with new jurisprudential possibilities. At other times, the Court narrows overbroad statements of fundamentally correct principles. And at still other times, the Court narrows as a precursor to overruling. Finally, dissenting Justices sometimes propose narrowing in the hope of limiting a precedent’s future effect.⁵¹

It would appear (and it is feared) that the Roberts Court’s use of stealth overruling in the takings realm fits into Re’s “precursor to overruling” category, as will

42. Friedman, *supra* note 31, at 43.

43. Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. REFLECTION 113, 135–36 (2023) (“The Court’s failure to explain its overruling of *Grutter* calls into question the Justices’ sincerity and good faith And it undermines the impersonality of the Justices’ decisionmaking and thereby risks further eroding the Court’s perceived legitimacy.”).

44. Peters, *supra* note 38, at 1098 (“Undermining threatens to stifle, by misdirection, meaningful public participation in constitutional adjudication. Indeed, it is difficult to shake the suspicion that this is a large part of its point.”).

45. Friedman, *supra* note 31, at 60.

46. Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1534 (2008) (“The current majority of the Supreme Court . . . are failing not only to preserve and protect fundamental constitutional values but also to fulfill their judicial responsibilities in a manner that is analytically rigorous, closely reasoned, and intellectually candid.”).

47. Hosie, *supra* note 35, at 1410.

48. *Id.*

49. Re, *supra* note 30, at 1864.

50. *Id.* at 1862–63.

51. *Id.* at 1866.

be discussed below.⁵² By the time the Court might decide to announce its abandonment of the *détente* embodied in *Lingle*'s notion of functional equivalence, it would be a *fait accompli*, thanks to the stealth rulings in the cases described in Part III.

III. THE ROBERTS COURT'S STEALTH OVERRULING OF TAKINGS PRECEDENTS

The Supreme Court rarely makes new law suddenly. Instead, novel legal doctrines are often planted in dissents, take root in concurrences, form buds in dictum, and fully flower in the holding.⁵³ Instead of openly reversing troublesome precedents, over the last twenty years the Justices—property rights hawks, moderates, and doves alike—have merely neutralized bothersome language from earlier cases that stood in the way of the outcome they favored.⁵⁴ The problem is that by doing so the later Courts are actually removing a cornerstone or a keystone embedded in the precedent they choose not to overrule without engaging in a full *stare decisis* analysis—thus achieving the same result but by more subtle (and problematic) means.⁵⁵

A. *Sanguinetti and Arkansas Game*

Between 1993 and 2000, the U.S. Army Corps of Engineers, as part of a strategy to provide downstream farmers with an extended harvest period, authorized releases of accumulated water from the Clearwater Dam near Piedmont, Missouri, that were above historic norms.⁵⁶ The new flooding pattern interfered with the tree-growing seasons in the Dave Donaldson Black River Wildlife Management Area, located in northeast Arkansas, 115 miles downstream from the dam.⁵⁷ Following objections from the Commission, the Corps ceased its higher-than-normal releases.⁵⁸ Nevertheless, the Commission sued the Corps alleging “that the temporary deviations from the [Corps’ Water Control] Manual constituted a taking of property that entitled the Commission to compensation.”⁵⁹ A Court of Federal Claims ruling awarding \$5.7 million in compensation to the Commission was reversed by the Federal Circuit.⁶⁰

One important basis for the appellate court’s ruling was Supreme Court takings precedent, especially one 1924 ruling, *Sanguinetti v. United States*⁶¹:

52. *Id.*

53. See discussion *infra* Part VI.

54. See *supra* notes 12–13 and accompanying text.

55. See discussion *infra* Parts V–VI.

56. Ark. Game & Fish Comm’n v. United States, 568 U.S. 23, 27–28 (2012).

57. *Id.* at 28.

58. *Id.* at 28–29.

59. *Id.* at 29.

60. Ark. Game & Fish Comm’n v. United States, 87 Fed. Cl. 594, 647 (2009), *rev’d*, 637 F.3d 1366, 1367 (Fed. Cir. 2011) (“The Claims Court concluded that the United States had taken a temporary flowage easement over the Commission’s property and awarded a total of \$5,778,757.90 in damages. Because we conclude that the Corps’ deviations did not constitute a taking, we reverse.”).

61. 264 U.S. 146, 146–150 (1924).

Both Supreme Court precedent and our own precedent dictate that we must distinguish between a tort and a taking. An injury that is only ‘in its nature indirect and consequential,’ i.e. a tort, cannot be a taking. The Supreme Court has long recognized that to be considered a taking overflows must ‘constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.’⁶²

Because the flooding experienced by the Commission was temporary and intermittent, its takings claim fell short.⁶³

Writing in 2012 for all eight participating Justices in *Arkansas Game & Fish Commission v. United States*,⁶⁴ Justice Ginsberg “conclude[d] that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability.”⁶⁵ One potential barrier to relief for the Commission was this key and dispositive language from *Sanguinetti*: “[I]n order to create an enforceable liability against the Government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.”⁶⁶

Did the *Arkansas Game* Court engage in a robust stare decisis analysis, given the centrality of the problematic language to the 1924 ruling, a ruling that still had precedential gravitas? No, Justice Ginsburg could quickly and easily dispense with the key language from this pesky precedent:

We do not read so much into the word “permanent” as it appears in a non-dispositive sentence in *Sanguinetti*. That case, we note, was decided in 1924, well before the World War II-era cases and *First English [Evangelical Lutheran Church v. County of Los Angeles]*, 482 U.S. 304 (1987)], in which the Court first homed in on the matter of compensation for temporary takings. That time factor, we think, renders understandable the Court’s passing reference to permanence. If the Court indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence.⁶⁷

Justice Ginsberg cleverly invoked Chief Justice Marshall in her attempt to marginalize the problematic language from *Sanguinetti*.⁶⁸ What about holdings in post-1924 cases that relied on the temporary-permanent distinction? And how do

62. *Ark. Game & Fish Comm’n*, 637 F.3d at 1374 (quoting and adding emphasis to *Sanguinetti*, 264 U.S. at 149–50).

63. *Id.* at 1376.

64. 568 U.S. 23, 26 (2012).

65. *Id.* at 27 (emphasis added).

66. *Sanguinetti*, 264 U.S. at 149.

67. *Ark. Game & Fish Comm’n*, 568 U.S. at 35.

68. Justice Ginsberg wrote:

We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall’s sage observation that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

Id. at 35 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

we know that the now-elided language was not essential to forming the majority that coalesced in *Sanguinetti*?

B. Eastern Enterprises and Koontz

One year after *Arkansas Game*, in *Koontz v. St. Johns River Water Management District*,⁶⁹ a slim Roberts Court majority gave short shrift to troublesome language from another takings precedent.⁷⁰ The *Koontz* Court, in an opinion for a five-member majority by Justice Alito, reversed the holding of the Supreme Court of Florida, which had rejected an exactions takings claim brought by a landowner who was denied a permit to develop 3.7 acres of land, of which 3.4 were wetlands.⁷¹ The water district gave Koontz a choice: either deed the remainder of his parcel (about ten acres) for conservation purposes and mitigate the loss of wetlands by performing restoration work on district-owned lands located several miles away from his property, or limit development to one acre while setting aside the remainder of the parcel as a conservation area.⁷²

Koontz's action was based on two successful Supreme Court challenges to exactions of real property interests (easements) sought by government land regulators in exchange for development permission: *Nollan v. California Coastal Commission*⁷³ and *Dolan v. City of Tigard*.⁷⁴ The second option offered to Koontz, by contrast, did not involve a real property exaction.⁷⁵ Instead, he would be required to spend money to mitigate the loss of wetlands.⁷⁶ The state high court found that the difference between the two types of exactions was significant, indeed outcome-determinative:

[W]e conclude that the [lower court] erroneously applied the *Nollan/Dolan* exactions test to the offsite mitigation proposed by St. Johns. Since St. Johns did not condition approval of the permits on Mr. Koontz dedicating any portion of his interest in real property in any way to public use, this analysis does not apply.⁷⁷

Justice Alito and his colleagues in the majority disagreed.⁷⁸

In order to reach the conclusion that there was no difference between monetary and real-property exactions, Justice Alito had to contend with the district's (and dissenters') argument that, based on "the concurring and dissenting opinions in *Eastern Enterprises v. Apfel*,⁷⁹ . . . an obligation to spend money can

69. 570 U.S. 595, 599 (2013).

70. *Id.* at 604–06.

71. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1224 (2011), *rev'd and remanded*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 611–19 (2013).

72. *Koontz*, 570 U.S. at 601–02.

73. 483 U.S. 825, 842 (1987).

74. 512 U.S. 374, 396 (1994).

75. *Koontz*, 570 U.S. at 602.

76. *Id.*

77. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230–31 (2011) (emphasis added).

78. *Koontz*, 570 U.S. at 619.

79. 524 U.S. 498, 503 (1998) (plurality opinion).

never provide the basis for a takings claim.”⁸⁰ In that 1998 case, four Justices found that the federal government violated the Takings Clause when it passed a retroactive statute that imposed an obligation to pay medical benefits to retired coal miners and their families.⁸¹ Justice Kennedy added his vote in favor of unconstitutionality to the plurality, but based his conclusion on the Fifth Amendment’s Due Process Clause.⁸² Citing a long line of takings cases, Justice Kennedy pointed out an important distinction: “Until today, . . . one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a *specific property right or interest* has been at stake.”⁸³ The four *Apfel* dissenters agreed:

“The ‘private property’ upon which the [Takings] Clause traditionally has focused is a *specific interest in physical or intellectual property*. . . . This case involves not an interest in physical or intellectual property, but an *ordinary liability to pay money*, and not to the Government, but to third parties.”⁸⁴

Justice Alito’s attempt to dispel the objections of the water district and the four *Koontz* dissenters appeared to be an exercise in circular reasoning. The Takings Clause was relevant because the monetary exaction was real-property adjacent:

The fulcrum this case turns on is the direct link between the government’s demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.⁸⁵

Justice Kagan, writing for the four dissenters, noted how the majority’s analysis was missing an important ingredient—a *taking*.⁸⁶ She pointed out that “the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking.”⁸⁷

80. *Koontz*, 570 U.S. at 612.

81. *Apfel*, 524 U.S. at 503–04 (plurality opinion).

82. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part) (“In my view, which is in full accord with many of the plurality’s conclusions, the relevant portions of the Coal Industry Retiree Health Benefit Act of 1992 . . . must be invalidated as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment.”).

83. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

84. *Id.* at 554 (Breyer, J., dissenting) (emphasis added).

85. *Koontz*, 570 U.S. at 614.

86. *Id.* at 620 (Kagan, J., dissenting).

87. *Id.* at 622 (Kagan, J., dissenting). Furthermore, the dissent asserted, “*Nollan* and *Dolan* apply only if the demand at issue would have violated the Constitution independent of that proposed exchange. Or put otherwise, those cases apply only if the demand would have constituted a taking when executed *outside* the permitting process. And here, under *Apfel*, it would not.” *Id.* at 626 (Kagan, J., dissenting).

By summarily removing the *Apfel* requirement of a specific property interest, a whole new range of statutes and regulations were now at risk under the ever-expanding reach of the Takings Clause.⁸⁸ Before making such a significant step, shouldn't the Court have engaged in a more robust stare decisis analysis?

C. Lucas and Horne II

California raisins (not the singing ones⁸⁹) were the topic of another stealth takings decision by the Roberts Court in 2015—*Horne v. Department of Agriculture*.⁹⁰ The Hornes, growers and handlers of California raisins, prevailed for the second time in the Supreme Court,⁹¹ when another five-member majority relieved them of substantial fines and penalties.⁹² Chief Justice Roberts, writing for the Court, explained:

Under the United States Department of Agriculture's California Raisin Marketing Order, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is whether the Takings Clause of the Fifth Amendment bars the Government from imposing such a demand on the growers without just compensation.⁹³

The Hornes had refused to comply with the marketing order authorized by federal law, which was designed "to help maintain stable markets for particular agricultural products," in this case California raisins.⁹⁴ When the Hornes refused to set aside the required 47% of their crop (the reserve requirement) and refused access to government trucks, the Department of Agriculture assessed the fine based on the value of the missing raisins (more than \$480,000), along with "an additional civil penalty of just over \$200,000 for disobeying the order to turn them over."⁹⁵

When the Hornes sued the government alleging a violation of the Takings Clause, the Ninth Circuit panel had to decide whether the "requirement was a physical appropriation of property, giving rise to a *per se* taking, or a restriction on a raisin grower's use of his property, properly analyzed under the more

88. *Id.* at 630 (Kagan, J., dissenting).

89. *California Raisin*, NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/collections/object/nmah_1170672 [<https://perma.cc/PHD3-AS6Z>] (last visited Mar. 5, 2026) ("The California Raisins are sculpted clay figures used as advertising and merchandising characters by the California Raisin Advisory Board The California Raisins are often accompanied by a soundtrack of 'I Heard It Through the Grapevine,' originally popularized by singer Marvin Gaye.").

90. 576 U.S. 351, 354 (2015) [hereinafter *Horne II*].

91. *See* *Horne v. U.S. Dep't of Agric.*, 569 U.S. 513, 516 (2013) [hereinafter *Horne I*] ("Petitioners' takings claim, raised as an affirmative defense to the agency's enforcement action, was properly before the court because the AMAA [Agricultural Marketing Agreement Act of 1937] provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers.").

92. *Horne II*, 576 U.S. at 370.

93. *Id.* at 354–55.

94. *Id.* at 355–56.

95. *Id.* at 356.

flexible and forgiving standard for a regulatory taking.”⁹⁶ The appellate court quoted an important passage that Justice Scalia included in his majority opinion in *Lucas v. South Carolina Coastal Council*,⁹⁷ for the proposition that “the Takings Clause affords less protection to personal than to real property”:

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers And in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.⁹⁸

The important distinction between personal and real property drawn by Justice Scalia, a staunch protector of private property rights,⁹⁹ was apparent and persuasive to the Ninth Circuit, as it had been in two very similar cases decided decades previously by the United States Court of Federal Claims that were affirmed by the Federal Circuit.¹⁰⁰ Would Justice Scalia’s successors follow his lead?

Continuing the pattern established in *Arkansas Game* and *Koontz*, the majority in *Horne II* reversed the lower court decision that strongly relied on the pre-Roberts-Court takings precedent.¹⁰¹ The majority made a quick and meager attempt to distinguish *Lucas* by noting that the previous decision “was about regulatory takings, not direct appropriations,”¹⁰² even though Justice Scalia, in his opinion for the Court in *Lucas* had explained “that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”¹⁰³ Chief Justice Roberts reasoned: “The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred

96. *Id.* at 356–57.

97. 505 U.S. 1003, 1006–07 (1992).

98. *Home v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1139–40 (9th Cir. 2014), *rev’d*, 576 U.S. 351 (2015) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992)). The *Lucas* Court in turn had cited *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979), in which the Justices refused to find that regulations promulgated under the federal Eagle Protection Act and Migratory Bird Treaty Act prohibiting commercial transactions involving certain bird parts effected an unconstitutional taking. *Id.* at 66–68. The *Andrus* Court reasoned: “It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees’ property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking.” *Id.* at 66.

99. See J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 733 (2017).

100. See *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 247 (1994), *aff’d*, 73 F.3d 381 (Fed. Cir. 1995); *Evans v. United States*, 74 Fed. Cl. 554, 564 n.16 (2006), *aff’d*, 250 F. App’x 321 (Fed. Cir. 2007). See *infra* notes 347–53 and accompanying text.

101. *Horne II*, 576 U.S. at 361.

102. *Id.*

103. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

from the growers to the Government.”¹⁰⁴ According to this logic, however, the payment of taxes or any fee to the government would be a taking.¹⁰⁵ So would the forfeiture of items used in the commission of a crime and any number of other involuntary or voluntary transfers of personal property to any level of government.¹⁰⁶ In fact, the Hornes were engaged in a clever scheme designed to avoid the marketing order designed to stabilize prices for all of those engaged in growing California raisins.¹⁰⁷ By invoking the Takings Clause to mount a challenge to a longstanding public-private cooperative program to support California raisin growers and consumers, a context very far removed from eminent domain or the physical occupation of real property, the Hornes prevailed, at the expense of another important precedential principle that the Roberts Court stealthily eliminated.¹⁰⁸

D. Loretto and Cedar Point

The next cavalier abandonment of an important element of Supreme Court takings jurisprudence came in 2021’s *Cedar Point Nursery v. Hassid*.¹⁰⁹ In a decision demonstrating how far the tendrils of the Takings Clause can reach to nullify a regulation in the traditional wheelhouse of state police power, a divided Court invalidated a California Agricultural Labor Relations Board regulation granting a right of access to unions for the purpose of organizing agricultural employees.¹¹⁰ Chief Justice Roberts, writing for a six-member majority summed up the holding and rationale succinctly: “The access regulation grants labor organizations a *right to invade* the growers’ property. It therefore constitutes a *per*

104. *Horne II*, 576 U.S. at 361.

105. *Id.* at 362–63.

106. *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1139 (9th Cir. 2014), *rev’d*, 576 U.S. 351 (2015).

107. The Ninth Circuit detailed the Hornes’ ploy:

Instead of sending their raisins to a traditional packer, against whom the reserve requirement of the Marketing Order would clearly operate, the Hornes purchased their own handling equipment to clean, stem, sort, and package raisins. The Hornes then performed the traditional functions of a handler with respect to the raisins they produced. The Hornes believed that, by cleaning, stemming, sorting, and packaging their own raisins, they would not be “handlers” with respect to the raisins they produced. In addition, the Hornes performed the same functions for a number of other producers for a per-pound fee. Similarly, by not acquiring title to the raisins of other producers but rather charging those producers a per-pound fee, the Hornes believed they did not fall within the regulatory definition of “handler” with respect to the third-party producers’ raisins. With this set-up, the Hornes believed the requirements of the Marketing Order would not apply to them, relieving them of the obligation to reserve any raisins.

Id. at 1134. No unwary victim of confiscatory government officials, Marvin Horne stirred up this hornet’s nest purposefully. As the district court noted, “Mr. Horne consulted with many people, including attorneys, university professors, and officials, in an attempt to create a way to market his raisins without the use of the raisin packer system.” *Horne v. U.S. Dep’t of Agric.*, No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, at *2 (E.D. Cal. Dec. 11, 2009). In a letter to the Secretary of Agriculture, Horne, whose prior cooperation with the government program included serving as an alternate member of the USDA Raisin Administrative Committee, wrote: “[W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.” *Id.* at *3.

108. *Horne II*, 576 U.S. at 370.

109. 594 U.S. 139, 162 (2021).

110. *Id.* at 143–44.

se physical taking.”¹¹¹ As in the three previous cases discussed in Part III, the Court reversed a lower court decision that relied on a clear statement from an important takings precedent.¹¹²

In this instance the precedent was *Loretto v. Teleprompter Manhattan CATV Corp.*, a 1982 decision that found that a New York statute requiring a landlord to allow a cable television company to install its equipment on the roof and the side of a building constituted a *per se* physical-occupation taking.¹¹³ Justice Marshall explained the Court’s “very narrow” ruling: “We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.”¹¹⁴ The adjective “permanent” or the adjective “permanently” appeared no fewer than twenty-nine times in the majority opinion, and Justice Marshall contrasted the “traditional rule” with holdings denying a taking in cases involving “temporary” government invasions.¹¹⁵

A divided Ninth Circuit panel affirmed the district court’s grant of a motion to dismiss in the government regulators’ favor,¹¹⁶ and the majority relied heavily on *Loretto*’s permanent-temporary distinction:

In *Loretto*, the Supreme Court held that a state law requiring landlords to allow installation of cable facilities by cable television companies on their property constituted a *per se* taking because the installation was a permanent, albeit minor, physical occupation of the property. The Court noted the “constitutional distinction between a permanent occupation and a temporary physical invasion.”¹¹⁷

As in the previous cases discussed in Part III, the Supreme Court was undaunted by this precedential barrier. Despite the Court’s awareness of these strong signals that permanence was an essential aspect of the *Loretto* ruling, Chief Justice Roberts insisted that the Court had “held that a physical [occupation] appropriation is a taking whether it is permanent or temporary.”¹¹⁸ Even cursory readings of the cases cited for this proposition reveal that in reality only

111. *Id.* at 162 (first emphasis added).

112. *Id.*

113. 458 U.S. 419, 441 (1982).

114. *Id.*

115. *Id.* at 428–29 (“In *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879), the Court held that the city’s construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs’ property.”); *id.* at 428 (“[T]his Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner’s property that causes consequential damages within, on the other.”). *See also id.* at 428–29 (quoting language from *St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 98–99, 101–02 (1893), distinguishing “temporary” from “permanent” physical occupation).

116. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 529 (9th Cir. 2019), *rev’d*, *Cedar Point Nursery v. Hassid*, 694 U.S. 139 (2021).

117. *Id.* at 531 (quoting *Loretto*, 458 U.S. at 434) (citation omitted).

118. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021).

one was a physical-occupation case.¹¹⁹ Instead of tackling the distinction head-on, the *Cedar Point* Court attempted to sweep the pesky precedent under the table.

E. Dolan (Lingle) and Sheetz

The most recent examples of stealth takings decisions were announced within four days of each other in the spring of 2024. On April 12, 2024, a divided court added *Sheetz v. County of El Dorado*,¹²⁰ to the existing trio of exactions takings: *Nollan v. California Coastal Commission*,¹²¹ *Dolan v. City of Tigard*,¹²² and, as noted above, *Koontz v. St. Johns River Water Management District*.¹²³ As in *Koontz*, the government, here a California county, sought cash before granting development permission.¹²⁴

In her opinion for the majority, Justice Barrett explained how the county's imposition of a "traffic impact fee" frustrated George Sheetz's plans to build a "modest prefabricated house" on his land:

To address traffic congestion, the General Plan requires developers to pay a traffic impact fee as a condition of receiving a building permit. The County uses proceeds from these fees to fund improvements to its road system. The fee amount is determined by a rate schedule, which takes into account the type of development (commercial, residential, and so on) and its location within the County. The amount is not based on "the cost specifically attributable to the particular project on which the fee is imposed."¹²⁵

According to the rate schedule promulgated under the General Plan, Sheetz's fee came to \$23,420, which he paid under protest.¹²⁶ After the county refused to refund the fee, Sheetz sued, claiming an unconstitutional taking.¹²⁷

119. The *Cedar Point* opinion quotes dictum from an *unsuccessful regulatory takings* decision, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002), a decision that in turn had cited two cases that involved the *affirmative condemnation* of real property by the federal government, *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). *Cedar Point*, 594 U.S. at 153. The *Cedar Point* opinion also cites a third *condemnation* case, *United States v. Dow*, 357 U.S. 17 (1958). *Cedar Point*, 594 U.S. at 153. The last case cited is *United States v. Causby*, 328 U.S. 256 (1946). Chief Justice Roberts asserted: "after finding a taking by physical invasion, the Court in *Causby* remanded the case to the lower court to determine 'whether the easement taken was temporary or permanent,' in order to fix the compensation due." *Cedar Point*, 594 U.S. at 153 (citation omitted). *Causby* concerned overflights by U.S. Army and Navy planes flying over the plaintiffs' land beginning from June 1, 1942 (that is, during American involvement in World War II), which ruined their chicken business. *Causby*, 328 U.S. at 259. This is a far cry from the regulation challenged in *Cedar Point* by which the government required a landowner to allow private parties to step foot on the property for labor organizing purposes a few days a year. *Cedar Point*, 594 U.S. at 143.

120. 601 U.S. 267, 267 (2024).

121. 483 U.S. 825, 825 (1987).

122. 512 U.S. 374, 374 (1994).

123. 570 U.S. 595, 595 (2013).

124. *Id.* at 595; *Sheetz*, 601 U.S. at 272.

125. *Sheetz*, 601 U.S. at 272 (quoting *Sheetz v. Cnty. of El Dorado*, 300 Cal. Rptr. 3d 308, 312 (2022)).

126. *Id.*

127. *Id.*

The California Court of Appeal affirmed the trial court's ruling in favor of the county, explaining that under state case law, "the requirements of *Nollan* and *Dolan* apply to development fees imposed as a condition of permit approval where such fees are 'imposed . . . neither generally nor ministerially, but on an individual and discretionary basis.'"¹²⁸

There was apparently a sound reason for the California high court's position, as Chief Justice Rehnquist, in his opinion for the *Dolan* majority, distinguished land-use regulations that in other Supreme Court decisions had survived constitutional scrutiny in part because those regulations "involved *essentially legislative determinations* classifying entire areas of the city, whereas here the city made an *adjudicative decision* to condition petitioner's application for a building permit on an *individual parcel*."¹²⁹ The state appellate court quoted the following passage from the Supreme Court's *détente* ruling in *Lingle v. Chevron U.S.A., Inc.*¹³⁰ for this outcome-determinative legislative/adjudicative distinction:

In *Lingle*, the United States Supreme Court characterized *Nollan* and *Dolan* as involving "Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." We find *Nollan* and *Dolan* to be of no assistance to *Sheetz*, as neither case involved legislatively mandated, formulaic development impact fees that applied to a broad class of proposed developments. Rather, both cases involved a real property dedication condition imposed on an ad hoc basis upon an individual permit application.¹³¹

Justice O'Connor, writing these words for a unanimous Court a few months before resigning her seat, had good reason for this characterization of the seminal exaction takings holdings, because in his majority opinion in *Dolan*, Chief Justice Rehnquist sought to distinguish the case before the Court from cases that included language supporting land-use regulation, cases that "involved *essentially legislative determinations* classifying entire areas of the city, whereas here the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel."¹³² Later in his opinion, Rehnquist reiterated the distinction as he addressed an objection raised by a dissenter.¹³³

128. *Sheetz*, 300 Cal. Rptr. 3d at 316, *rev'd*, 601 U.S. 267 (2024) (quoting *San Remo Hotel v. City & Cnty. of S.F.*, 41 P.3d 87, 102 (Cal. 2002)).

129. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added) (cited in *San Remo Hotel*, 41 P.3d at 102).

130. 544 U.S. 528, 546 (2005). See *infra* note 244 and accompanying text.

131. *Sheetz*, 300 Cal. Rptr. 3d at 320 (quoting *Lingle*, 544 U.S. at 546).

132. *Dolan*, 512 U.S. at 385 (emphasis added).

133.

[Justice Stevens'] dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . . Here, by contrast, *the city made an adjudicative decision* to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. *Id.* at 391 n.8 (emphasis added) (citation omitted).

The narrow certiorari question, as phrased by Sheetz’s counsel, was “whether a permit exaction is exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation.”¹³⁴ After noting that, because “[s]tate courts have reached different conclusions on the question whether the Takings Clause recognizes a distinction between legislative and administrative conditions on land-use permits,”¹³⁵ Justice Barrett and her colleagues decided in *Sheetz* to resolve this nagging issue.

The case took an interesting turn during oral argument, as the county’s counsel conceded that the exactions taking analysis *could* apply in the legislative context.¹³⁶ As Justice Barrett framed it, “In fact, at oral argument, the parties expressed ‘radical agreement’ that conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them.”¹³⁷ It was therefore unsurprising that the Court rejected the notion that the legislative character of an exaction was an absolute bar to the unconstitutional conditions approach: “Nothing in constitutional text, history, or precedent” asserted Justice Barrett, “supports exempting legislatures from ordinary takings rules.”¹³⁸ Moreover, she asserted, “there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits.”¹³⁹

There is just one problem—Chief Justice Rehnquist, in a crucial passage from a key exactions case, noted the very distinction that the *Sheetz* Court so summarily dismissed.¹⁴⁰ Despite the lower courts’ discussions of the distinction, the careful reader will find no trace of Rehnquist’s words concerning “essentially legislative determinations”¹⁴¹ in *any* of the *Sheetz* opinions.¹⁴² There is no explanation (or justification) for this silence.

134. Petition for Writ of Certiorari at i, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024) (No. 22-1074) (emphasis added).

135. *Sheetz*, 601 U.S. at 273. Justice Barrett included the following representative opinions: *Compare* Home Builders Assn. of Dayton and Miami Valley v. Beaver Creek, 729 N.E.2d 349, 356 (2000) & Northern Ill. Home Builders Assn. v. County of Du Page, 649 N.E.2d 384, 389 (1995) (applying the *Nollan/Dolan* test to legislative permit conditions), *with* St. Clair Cnty. Home Builders Ass’n v. Pell City, 61 So. 3d 992, 1007 (Ala. 2010); Home Builders Ass’n of Central Ariz. v. Scottsdale, 930 P.2d 993, 1000 (1997) (following California’s approach). *Id.* at 273 n.3.

136. Transcript of Oral Argument at 51, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024) (No. 22-1074).

137. *Sheetz*, 601 U.S. at 279–80 (quoting Transcript of Oral Argument at 73, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024) (No. 22-1074)).

138. *Id.* at 276.

139. *Id.* at 279.

140. *See* *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

141. As discussed *supra* in notes 128–29 and accompanying text, this quote is from Chief Justice Rehnquist, in his opinion for the majority in *Dolan*, 512 U.S. at 385 (cited in *San Remo Hotel v. City & Cnty. of S.F.*, 41 P.3d 87, 102 (Cal. 2002)).

142. There were three concurring opinions. *Sheetz*, 601 U.S. at 281 (Sotomayor, J., concurring) (“The question presented in this case did not include [the] antecedent question [required in *Nollan/Dolan* cases]: whether the traffic impact fee would be a compensable taking if imposed outside the permitting context and therefore could trigger *Nollan/Dolan* scrutiny.”); *id.* at 283 (Gorsuch, J., concurring) (“[N]othing in *Nollan, Dolan*, or

F. First English *and* DeVillier

Four days after announcing its decision in *Sheetz*, the Court again took advantage of a concession by government counsel during oral argument in *DeVillier v. Texas*,¹⁴³ this time avoiding the need to affirm or reject a principle of takings law that can be traced back at least as far as 1987, to the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.¹⁴⁴ In a concise, unanimous opinion, Justice Thomas depicted the challenged faced by Richard DeVillier and more than 120 other owners of lands located north of Interstate 10 between Houston and Beaumont, Texas.¹⁴⁵ The state sought to use that part of the highway as a flood-evacuation route, "install[ing] a roughly 3-foot-tall barrier along the highway median to act as a dam, preventing stormwater from covering the south side of the road."¹⁴⁶

Disaster struck in the form of Hurricane Harvey in August 2017:

The new median barrier performed as intended, keeping the south side of the highway open. But, it also flooded petitioners' land to the north, displacing them from their homes, damaging businesses, ruining crops, killing livestock, and destroying family heirlooms. The same thing happened during Tropical Storm Imelda in 2019. . . . Because heavy rainfall is not uncommon in southeast Texas, the median barrier will continue to cause flooding on DeVillier's land during future storms.¹⁴⁷

When DeVillier and other landowners sued in state court, alleging that the state had effected a taking of his land under the federal and state constitutions, the state responded by removing the consolidated inverse-condemnation action to federal court.¹⁴⁸

Because the state (and not its political subdivisions) was the defendant, DeVillier could not use Title 42 U.S.C. § 1983.¹⁴⁹ Instead, DeVillier asserted "that the Takings Clause is 'self-executing,' which, he argued, means that the Clause itself provides a cause of action for just compensation."¹⁵⁰ The federal district court judge was amenable to this theory, citing *First English*:

The Fifth Amendment's Takings Clause is self-executing in that it creates a substantive right to just compensation that springs to life when the government takes private property. . . . This stands in stark contrast to most

today's decision supports distinguishing between government actions against the many and the few any more than it supports distinguishing between legislative and administrative actions. In all these settings, the same constitutional rules apply."); *id.* at 284 (Kavanaugh, J., concurring) ("[T]oday's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property.").

143. 601 U.S. 285, 291 (2024).

144. 482 U.S. 304, 309 (1987).

145. *DeVillier*, 601 U.S. at 286–88.

146. *Id.* at 288.

147. *Id.* at 288–89. The Court's opinion features two color photographs demonstrating the flooding caused by the "dam." *Id.* at 289.

148. *Id.* at 289–90.

149. *Id.* at 290.

150. *Id.*

other constitutional provisions which do not expressly provide a remedy for a constitutional violation.¹⁵¹

First English also involved potential government liability for an alleged taking effected by flood response measures. In that instance an “interim flood protection area” that negatively affected a church was not permitted to rebuild camp structures destroyed during a flood.¹⁵² Chief Justice Rehnquist, writing for the majority, explained: “We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of ‘the self-executing character of the constitutional provision with respect to compensation’”¹⁵³ He then cited additional precedents for the proposition that “the Court has frequently repeated the view that, in the event of a taking, *the compensation remedy is required by the Constitution.*”¹⁵⁴

A Fifth Circuit panel was not impressed by the district court’s invocation of longstanding precedent. In a terse (one-paragraph) ruling, the appellate court held that “the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state.”¹⁵⁵ The court vacated the lower court’s decision and remanded the case to state court.¹⁵⁶

The Supreme Court agreed to hear the case, limiting its focus to the following question: “May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action?”¹⁵⁷ The oral argument, specifically an exchange between Justice Gorsuch and Texas Solicitor General Aaron Nielson, revealed that there *was* a potential cause of action for DeVillier and the other flooding victims:

JUSTICE GORSUCH: So Texas has represented to this Court that there is a state constitutional cause of action?

MR. NIELSON: Yes, Your Honor. . . .

JUSTICE GORSUCH: . . . And what—what cause of action remains pendent as you understand it?

MR. NIELSON: So they still have claims for federal due process, and they still have claims for the Texas Constitution.

JUSTICE GORSUCH: Would you oppose leave to amend to add a Texas constitutional claim on – on an email?

151. *DeVillier v. Texas*, No. 3:20-CV-00223, 2021 WL 1200893, at *4 (S.D. Tex. Feb. 22, 2021) (citing *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 309, 315 (1987)), *vacated and remanded*, 53 F. 4th 904 (2022) (per curiam), *vacated and remanded*, 601 U.S. 284 (2024).

152. *First English*, 482 U.S. at 307.

153. *Id.* at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

154. *Id.* at 316 (emphasis added).

155. *DeVillier v. Texas*, 53 F.4th 904, 904 (2022) (per curiam), *vacated and remanded*, 601 U.S. 285 (2024).

156. *Id.*

157. *Petition for Writ of Certiorari at i, DeVillier v. Texas*, 601 U.S. 285 (2024) (No. 22-913).

MR. NIELSON: On behalf of the State of Texas, we would not oppose that in the district court.¹⁵⁸ As in *Sheetz*, the *DeVillier* Court now had a way quickly to dispose of the certiorari question.

Taking note of several exchanges during oral argument, Justice Thomas wrote:

As Texas explained at oral argument, its state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause. . . . And, although Texas asserted that proceeding under the state-law cause of action would require an amendment to the complaint, it also assured the Court that it would not oppose any attempt by DeVillier and the other petitioners to seek one. . . . This case therefore does not present the circumstance in which a property owner has no cause of action to seek just compensation.¹⁵⁹

As a result, both sides could feel equally vindicated and frustrated—the Court *did not* hold that the Takings Clause was self-executing (a victory for Texas), and the landowners *did* have a cause of action that could be heard in federal court (a victory for DeVillier).¹⁶⁰

How did Justice Thomas treat *First English*'s recognition of the self-executing nature of the Takings Clause? After a quick review of the precedents offered by DeVillier's counsel, he could find none that "directly confront[ed] whether the Takings Clause provides a cause of action [for just compensation]." ¹⁶¹ Indeed, Thomas noted that "*First English* itself proceeded under a state-law cause of action."¹⁶² The *DeVillier* opinion then took a curious turn. Rather than acknowledging the precedential value of *First English* and its predecessors, Justice Thomas first asserted that "[o]ur precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause,"¹⁶³ and then noted that "this case does not require us to resolve that question"¹⁶⁴ because (given the concession during oral argument) it "does not present the circumstance in which a property owner has no cause of action to seek just compensation."¹⁶⁵ The Court, as in all of the other cases discussed above, has thus marginalized another important element of pre-Roberts-Court takings jurisprudence.

158. Transcript of Oral Argument at 59–61, *DeVillier v. Texas*, 601 U.S. 284 (2024) (No. 22-913).

159. *DeVillier*, 601 U.S. at 293 (citations omitted).

160. *Id.*

161. *Id.* at 291. In fact, one of the cases cited by DeVillier's counsel was not a takings case at all. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926), which was decided on due process and equal protection grounds.

162. *DeVillier*, 601 U.S. at 291.

163. *Id.* at 292.

164. *Id.*

165. *Id.* at 293.

IV. UNRAVELING THE *LINGLE DÉTANTE*

The six takings cases discussed in Part III constitute a disturbing pattern, and not only because of the problems identified by critics of stealth jurisprudence—sending mixed messages, breeding contempt for the law, lacking transparency, and excusing Justices’ failure to justify their actions.¹⁶⁶ We know that the Roberts Court understands how to conduct a robust *stare decisis* analysis, and not just from *Dobbs*.¹⁶⁷

Three years prior to that controversial abortion ruling, the Court engaged in a similar multi-factor analysis before reversing one element of a multi-pronged ruling in an important *takings* case. In *Knick v. Township of Scott*,¹⁶⁸ a five-member majority, in an opinion written by Chief Justice Roberts, overruled that part of a 1985 precedent, *Williamson County Regional Planning Commission v. Hamilton Bank*,¹⁶⁹ holding that “a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation.”¹⁷⁰ The *Knick* Court demurred, finding that, “[c]ontrary to *Williamson County*,¹⁷¹ a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.”¹⁷²

What is most relevant to this Article is that the *Knick* majority’s dismissal of precedent was far from stealthy or cavalier. Section IV of Chief Justice Roberts began: “The next question is whether we should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error.”¹⁷³ In a harbinger of *Dobbs*, Roberts wrote:

We have identified several factors to consider in deciding whether to overrule a past decision, including ‘the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.’ . . . All of these factors counsel in favor of overruling *Williamson County*.¹⁷⁴

166. See *supra* notes 57–69 and accompanying text.

167. See *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019).

168. *Id.* at 180.

169. 473 U.S. 172, 172 (1985).

170. *Id.* at 195.

171. *Knick*, 588 U.S. at 189.

172. *Id.* See also *id.* at 194 (“[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.”).

173. *Id.* at 202.

174. *Id.* at 203 (quoting *Janus v. State, Cnty., and Mun. Emps.*, 585 U.S. 878, 917 (2018)). Cf. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 268 (2022) (“In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”). Writing for four dissenters, Justice Kagan wrote that the “consequence” of the majority ruling “is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts. And it transgresses all usual principles of *stare decisis*.” *Knick*, 588 U.S. at 208 (Kagan, J., dissenting). There may well be practical and theoretical problems with allowing more takings challenges to proceed in federal courts, but they

The fact that the Roberts Court had engaged in a *robust* stare decisis analysis in a *takings* case begs the question of why they failed to do the same in the six cases discussed in Part III.

The answer may lie in the fact that *Knick* in no way departs from the *Lingle* détente, that is, the unanimous ruling in 2005 (noted above¹⁷⁵) that brought within the Fifth Amendment takings umbrella those “regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹⁷⁶ The regulation challenged in *Knick*, “an ordinance requiring that ‘[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours,’”¹⁷⁷ fits comfortably within that framework. This is in stark contrast to the government regulations and actions that were challenged in the six stealth takings cases decided by the Roberts Court.¹⁷⁸ Unlike in *Knick*, in all of the six instances detailed above, the lower courts that followed a key principle from a takings precedent were acting in furtherance of the *Lingle* détente.¹⁷⁹ Stated otherwise, the Supreme Court’s failure to uphold each of these six principles was unwise, either because it allowed a property owner to proceed with a takings claim even though the government had not placed the owner in a quandary that was the functional equivalence of an actual taking, or it failed to support the essential notion that the words of the Takings Clause themselves mandate protection for victims of takings even in the absence of authorizing legislation.

Temporary flooding that “severely damaged the root systems of the oak species prevalent in the [Arkansas Game and Fish] Management Area”¹⁸⁰ is far from the functional equivalence of the exercise of eminent domain. The same can be said about the suggestion that a landowner pay for wetlands reclamation, a public-private price-support scheme for raisin growers, a labor regulation allowing labor organizers to reach agricultural workers, and a legislatively imposed traffic impact fee.¹⁸¹ Ironically, in the only case in which the Court was confronted with state activity that could fit within the *Lingle* framework—serious flooding caused by the damming of an interstate highway—the Court entertained the idea that the Takings Clause did *not* require relief in the form of damages.¹⁸²

With the possible exception of *DeVillier*,¹⁸³ the Roberts Court, in moving beyond the logical confines of functional equivalence is expanding the reach of

are beyond the confines of this Article. Instead, *Knick* is presented as evidence that the Roberts Court knows how to apply a multi-factor stare decisis analysis in the *takings* context. *See id.*

175. *See supra* notes 130–31 and accompanying text.

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

177. *Knick*, 588 U.S. at 186.

178. *See discussion supra* Part III.

179. *See discussion supra* Part III.

180. *Ark. Game & Fish Comm’n v. United States*, 87 Fed. Cl. 594, 600 (2009), *rev’d*, 637 F.3d 1366 (Fed. Cir. 2011), *rev’d & remanded*, 568 U.S. 23 (2012), *aff’d*, 736 F.3d 1364 (Fed. Cir. 2013).

181. *See discussion supra* Part III.

182. *See discussion supra* Section III.F.

183. In its own way, by entertaining arguments that the Takings Clause is not self-executing, the Court in *DeVillier* undermines the *Lingle* détente. The suggestion that the Takings Clause does not provide relief in an

the already-attenuated Takings Clause, which, particularly in the area of *per se* takings, departs from the traditional deference accorded government regulators of property, real and otherwise.¹⁸⁴ In doing so, the Court has latched onto a tool that is a potentially effective compliment to the withdrawal of deference to federal regulators embodied most clearly in *Loper Bright Enterprises v. Raimondo*.¹⁸⁵ When taking that important step toward dismantling the regulatory state, the *Loper Bright* majority engaged in a much more robust (more than five pages) stare decisis analysis than found in the six takings cases combined.¹⁸⁶ The contrast is telling.

Because the Roberts Court in its takings cases is operating in stealth mode, the use of the Takings Clause to dismantle the regulatory state is taking place under the radar, in stark contrast to the attention garnered by *Loper Bright* before and after the decision.¹⁸⁷ This effort to depart from the traditional deference afforded the government in its exercise of the police power and while conducting other traditional functions,¹⁸⁸ in order to protect the rights of property owners who have suffered negative impacts at the hands of government regulators, is both untethered from the Clause's textual and original understanding foundations,¹⁸⁹ and operates far afield from eminent domain and its functional

inverse condemnation suit based on serious damage caused by severe flooding challenges the notion of functional equivalence to the affirmative exercise of eminent domain. See *DeVillier v. Texas*, 601 U.S. 285, 287–93 (2024).

184. See discussion *supra* Part III.

185. 603 U.S. 369, 412–13 (2024) (“Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).

186. *Id.* at 407–12.

187. According to a Shepard's search conducted in early 2025, fewer than eight months after the Court announced the *Loper Bright* decision in June of 2024, the decision had already been cited by federal and state courts more than 550 times, in law reviews and treatises more than 300 times, and in court filings more than 1800 times. This is in stark contrast with citations to *Sheetz*, which appeared in April of 2024: 18 in cases, 31 in articles and treatises, and 72 in court filings. Even *Cedar Point*, which was decided three years before *Loper Bright*, has generated citations at a much slower rate: 341 case citations, 331 law review and treatise citations, and 726 court filings. Even the D.C. Circuit's opinion in *Loper Bright* was cited in 88 law review articles. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

188. In contrast to the generous deference afforded property regulators normally, the Court has recognized *per se* takings for government-required physical occupations and regulations depriving owners of all “economically beneficial uses.” See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 434–35 (1982) (“[W]hen the ‘character of the governmental action’ . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (“[T]here are good reasons for our frequently expressed belief that 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, he has suffered a taking.”).

189. See, e.g., Michael Allan Wolf, *The Takings Blunderbuss: From Pennsylvania Coal to Dobbs*, 13 BRIGHAM-KANNER PROP. RTS. J. 111, 113 (2024) (“[T]he text and original understanding, as far as we can discern, indicate that the Takings Clause was designed to ensure that owners receive payment when they are forced to sacrifice ownership of their tangible property for public use, most commonly through the process of eminent domain.”). Cf. *Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting) (“The Court . . . has never purported to ground those [regulatory takings] precedents in the Constitution as it was originally understood [I]t would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”).

equivalents. If certiorari petitions are any indication, the future holds great potential for even more problematic Supreme Court forays.¹⁹⁰

In all six cases discussed in Part III, losing counsel could and did point to strong, clear statements in their favor from Supreme Court takings precedents, statements that the courts below relied upon at least in part for their rulings against the private claimants.¹⁹¹ These attorneys and their clients may well have been surprised that, when the Supreme Court departed from those precedents, the Justices did not take the time and the care that stare decisis demands. In future cases, counsel are forewarned that they should now arm themselves with strategies designed to demonstrate to the Court that the language from previous Court decisions upon which their clients (and lower courts) rely is not mere dictum; it is key language that warrants a robust, multi-factor stare decisis analysis before it is upheld or devalued and discarded.

The next two parts of this Article explore two strategies. First, counsel can demonstrate that the precedential statements upon which they are relying became cornerstones for subsequent rulings. State and federal judges have planted these seeds from Supreme Court decisions, and they have yielded rulings that would be uprooted should the Justices act as they have in the six cases discussed in Part III. Second, based on a deep dive into the precedent itself (opinions, particularly dissents), oral arguments, briefs, and Justices' accounts of the case found in their public papers), counsel can reveal that the key language upon which they are basing their arguments (at least in part) are keystones, that is, essential, foundational elements for the Supreme Court decisions in which they originally appeared. Because removing that keystone would jeopardize the logical flow or integrity of the precedential opinion, a multi-factor, *Dobbs*-type analysis is warranted.

V. CORNERSTONES: REVEALING THE LEGACY OF PRECEDENTIAL PRINCIPLES

Lower-court rulings in all six of the takings cases discussed in Part III cited favorably language from a Supreme Court precedent that was later ignored or explained away by the Court. These state and federal decisions are not one-offs, however, as each of the precedential principles at issue in the six cases are cornerstones upon which a number of courts have relied in reaching their decisions.¹⁹² Part V presents the readers with four examples of how the precedential language rejected by the Roberts Court served as cornerstones for a variety of state and federal decisions. All of these cases (and many more), at least in part, are now in legal limbo as a result of the Roberts Court's stealth taking jurisprudence.¹⁹³

190. See *infra* notes 357–74 and accompanying text.

191. See discussion *supra* Part III.

192. See discussion *supra* Part III.

193. It is not uncommon for state high courts to model their takings jurisprudence on Supreme Court precedents and analyses, especially in those states with state constitutional takings clauses that resemble the one found in the Fifth Amendment. See, e.g., *Monaghan Farms, Inc. v. Bd. of Cnty. Comm'rs*, 527 P.3d 1195, 1215–19 (Wyo. 2023) (citing and quoting no fewer than seven U.S. Supreme Court cases in order to determine whether

A. Intermittent Flooding Is Not a Taking

In 1924, the Supreme Court, in *Sanguinetti v. United States*,¹⁹⁴ cited and followed precedent holding that “in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.”¹⁹⁵ In the eighty-eight years between *Sanguinetti* and *Arkansas Game and Fish Commission v. United States*,¹⁹⁶ state and federal courts quoted that key phrase—“actual, permanent invasion”—nearly sixty times.¹⁹⁷ While that language was not essential to many of the rulings in those cases, there are more than a dozen examples of courts citing that language as a basis for a ruling that no compensable taking had occurred.¹⁹⁸

In a 1990 case, for example, the Supreme Court of Utah rejected a takings claim brought by the owner of a commercial mall whose property was damaged by “loss of lateral support and water seepage” when the city diverted a creek “during the construction of [a] culvert.”¹⁹⁹ The court quoted key language from *Sanguinetti* and cited several federal cases that followed the Supreme Court’s lead.²⁰⁰ Returning to the facts of the case, the Utah court concluded: “In the language of the Court in *Sanguinetti*, the damages alleged by Farmers are not the ‘direct result of the structure,’ they do not ‘constitute an actual permanent invasion of the land,’ nor do they amount to an ‘appropriation’ of Farmers’ property interest.”²⁰¹

In similar fashion, a Pennsylvania Commonwealth Court in 1986 rejected the takings claim brought by a landowner against the Pennsylvania Department of Transportation, alleging that maintenance work by the department that “resulted in the periodic flooding of approximately six acres of his farmland effected a de facto taking of that property entitling him to compensation.”²⁰² The

“the Board’s approval of the WECS special use permit [was] a taking of private property in violation of Wyo. Const. art. 1, § 32”) (bold omitted). There are occasions when state high court justices emphasize that their state takings clauses provide greater protections for property owners. See, e.g., *Rafaelli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 449–50 (Mich. 2020) (“While we draw on authority discussing and interpreting both [takings] clauses, we must keep in mind that Michigan’s Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state’s ability to take private property for a public use under the power of eminent domain.”). In addition, state constitutions in most states cover damage or injury to property in addition to takings. See Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 344 (2018) (“More than half of the state constitutions contain a takings clause that is materially different from the federal one, in that it prohibits property from being both ‘taken’ and ‘damaged’ or ‘injured’ for public use without just compensation.”).

194. 264 U.S. 146, 146–50 (1924).

195. *Id.* at 149.

196. 568 U.S. 23, 23 (2012).

197. This is based on a Shepard’s search conducted by the Author.

198. See, e.g., *Farmers New World Life Ins. v. Bountiful City*, 803 P.2d 1241, 1247 (Utah 1990).

199. *Id.* at 1243.

200. *Id.* at 1247 (“The court of claims and other federal courts have applied the same reasoning in a number of subsequent cases involving damage from the overflow and seepage of water.”).

201. *Id.* at 1248 (quoting *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924)).

202. *In re Condemnation by Commonwealth, Dep’t of Transp.*, 506 A.2d 990, 993 (Pa. Commw. Ct. 1986).

appellate court agreed with the court below that “the situation presented here is similar to that presented in” *Sanguinetti*, in which the Court ruled that “the overflow must constitute an actual, permanent invasion of the land amounting to an appropriation thereof, and not merely an injury to the property.”²⁰³

In 2010, the Supreme Court of New Hampshire issued a similar ruling in turning down a takings claim brought against the states of New Hampshire and Massachusetts by an insurance company and the manufacturer it insured, alleging “that, but for the design and construction of I-95 [in New Hampshire], Henkel’s property would not have flooded. As to the Commonwealth of Massachusetts, they allege that construction of the deceleration lane contributed to the conditions that caused the flood.”²⁰⁴ Once again, the permanent-temporary distinction from *Sanguinetti* was outcome-determinative.²⁰⁵ After quoting the “actual, permanent invasion” language from *Sanguinetti*, the state high court concluded that “the plaintiffs have produced no evidence that the circumstances which caused the flood damage are inevitably recurring. On the contrary, experts for both sides agreed that the 2006 storm was a rare event. Under the circumstances, we conclude that there has been no taking of Henkel’s real property.”²⁰⁶

The three cases discussed above are representative of a large body of decisions whose rulings are now in limbo after *Arkansas Game*.²⁰⁷ This long and impressive decisional legacy of the distinction drawn in *Sanguinetti* warranted a more careful discussion than the Court provided in its dismissive ruling.

B. *A Temporary Physical Occupation by the Government Is Not a Per Se Taking*

Loretto itself was another decision that relied in part on the absence of permanent flooding in *Sanguinetti*.²⁰⁸ The problematic claim by Chief Justice Roberts in *Cedar Point* that “we have held that a physical appropriation is a taking whether it is permanent or temporary”²⁰⁹ flies in the face of then-existing

203. *Id.* at 993–94; *see also* *Snap-Tite, Inc. v. Millcreek Twp.*, 811 A.2d 1101, 1107 (Pa. Commw. Ct. 2002) (citing *Sanguinetti* and *In re Commonwealth* and noting that “the flooding of Snap-Tite’s property was sporadic and was not shown to be a direct or necessary consequence of any Township actions”).

204. *Allianz Glob. Risks U.S. Ins. Co. v. State of New Hampshire*, 13 A.3d 256, 258–59 (N.H. 2010).

205. *Id.* at 260.

206. *Id.* (quoting *Sanguinetti*, 264 U.S. at 149).

207. *See, e.g.*, *Goodman v. United States*, 113 F.2d 914, 918 (8th Cir. 1940) (“When considered in the light of the evidence both the allegation of the complaint and the finding of the court leave the permanent or temporary effects of the construction of the government works wholly in conjecture.”); *Cox v. Tenn. Valley Auth.*, No. 92-5641, 1993 U.S. App. LEXIS 5875, at *12 (6th Cir. Mar. 15, 1993) (“[A]ssuming that higher lake levels behind the dam caused plaintiffs’ property to flood in 1989 and 1990, the condition was temporary and could not constitute a ‘taking’ as a matter of law.”); *Snap-Tite, Inc.*, 811 A.2d at 1107 (“[T]he flooding of Snap-Tite’s property was sporadic and was not shown to be a direct or necessary consequence of any Township actions. In addition, Snap-Tite provided no evidence that its land had substantially changed in character or that its customary use was prevented, except for short periods of time, years apart.”).

208. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (quoting “actual, permanent invasion” language from *Sanguinetti*, 264 U.S. at 149).

209. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021).

precedent and runs contrary to a large number of state and federal court cases decided in the wake of *Loretto*.²¹⁰

In a 1996 case, the Court of Appeals of Wisconsin affirmed the lower court's dismissal of a takings claim brought by a property owner "against the City after raw sewage from the city's sewer system had twice flooded her basement."²¹¹ After quoting *Loretto*'s discussion regarding the distinction between temporary and permanent flooding, the Wisconsin court concluded: "The flooding of the basement was not a permanent physical occupation of Menick's property. The first episode occurred while Menick was away; by the time she returned home, the flooding had subsided. The second incident also spontaneously receded. Under the *test required by Loretto*, no taking occurred."²¹² Even though the sewage came from the city's system, this physical occupation did not effect a taking.²¹³

The Federal Circuit, in a 2002 decision, rejected a *Loretto*-based claim brought by the owner of old-growth forest land that was "based on the denial of its right to exclude spotted owls from its property and the requirement that it allow government personnel to enter the property to conduct owl surveys during the pendency of the preliminary injunction" issued by the district court.²¹⁴ The temporary nature of the intrusion by government officials was a key factor for the holding:

Under a plain reading of *Loretto*, Boise cannot claim that the government's brief intrusions onto its land to conduct owl surveys constitute a *per se* taking. Transient, nonexclusive entries by the Service to conduct owl surveys do not permanently usurp Boise's exclusive right to possess, use, and dispose of its property. The government's incursion into Boise's property is more in the nature of a temporary trespass—though, obviously, sanctioned by the district court and therefore not unlawful—rather than a permanent physical occupation or an easement of some kind.²¹⁵

The *Cedar Point* majority's contrary reading of *Loretto*, in which "brief intrusions" authorized by the state were somehow elevated to the status of a *per se* taking,²¹⁶ now calls into question the validity of this ruling.

The Supreme Court of South Dakota issued a similar ruling in a 2006 lawsuit brought by farmers and ranchers who "operate private hunting lodges and maintain private hunting preserves on their properties."²¹⁷ Unfortunately for the plaintiffs, a state statute authorized hunting certain small game from highways and other public rights-of-way, so long as the game were "in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying

210. See discussion *supra* Section V.A.

211. *Menick v. City of Menasha*, 547 N.W.2d 778, 780 (Wis. Ct. App. 1996).

212. *Id.* (emphasis added).

213. See *id.*

214. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1342–43 (Fed. Cir. 2002).

215. *Id.* at 1355.

216. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021).

217. *Benson v. State*, 710 N.W.2d 131, 138 (S.D. 2006).

over the highway or public right-of-way.”²¹⁸ Once again, the temporary nature of the government-authorized physical occupation was crucial to the outcome: “Landowners themselves have indicated in their affidavits that the activity does not occur constantly throughout the hunting season. The conduct is therefore temporary in nature during the hunting season, or in the alternative, it is a criminal act outside the protection of the statute.”²¹⁹ Because “[t]he acts of the hunters result in temporary and intermitted physical invasions rather than a permanent occupation” they did not amount to a *per se* taking.²²⁰

The language in *Loretto* viewing certain permanent (as opposed to temporary) physical occupations as *per se* takings is the cornerstone for these three, and other state and federal court, rulings.²²¹ Chief Justice Roberts’s stealth overruling of *Loretto*’s key distinction runs contrary to this long line of cases.

C. *Conditional Permitting Can Be an “Exaction Taking” if it Is Based on an Adjudicative, Not Legislative, Decision*

When the Supreme Court pounced on the government counsel’s concession during the *Sheetz* oral argument “that there are legislative exactions that could be subject to *Nollan/Dolan* scrutiny,”²²² several state and federal court decisions were relegated to legal limbo.²²³ Rather than quoting and addressing Chief Justice Rehnquist’s distinction in *Dolan*, Justice Barrett and her colleagues acted as if one county attorney could effect a significant change in exactions takings jurisprudence.²²⁴ The *Sheetz* Court did note that “[s]tate courts have reached different conclusions on the question whether the Takings Clause recognizes a distinction between legislative and administrative conditions on land-use permits,”²²⁵ citing in a footnote two examples of state high courts, that, like California’s, maintained the *Dolan* distinction: *St. Clair County Home Builders*

218. *Id.* (quoting S.D. CODIFIED LAWS § 41-9-1.1 (2025)).

219. *Id.* at 152.

220. *Id.*

221. *See, e.g., In re Prop.* Located at 14255 53rd Ave., S., Tukwila, King Cnty., Wash., 86 P.3d 222, 225 (Wash. Ct. App. 2004) (“Central to the Court’s decision in *Loretto* was the permanently invasive nature of the cable installations. . . . A *per se* taking occurs only where there is a permanent physical occupation, not where the invasion is temporary or where government action outside the property causes some consequential damage within it.” (citation omitted)); *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1311 (N.D. Okla. 2007), *rev’d on other grounds*, *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) (“[T]he invasion in this case is permanent only in that individuals are granted a ‘permanent’ right to enter Plaintiffs’ property engaging in the unwanted activity should they choose to do so. However, the invasion itself is not ‘permanent’ because the individuals engaging in the unwanted activity do not remain on the property at all times, as would an actual physical structure.”); *Prop. Rsrv., Inc. v. Superior Ct.*, 375 P.3d 887, 923 (“Unlike the cable box in *Loretto*, which was owned and controlled by the cable company and which the property owner was not permitted to remove, the Department will retain no continuing interest in the grout after its testing activities are completed.”).

222. *See* Transcript of Oral Argument at 51, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024) (No. 22-1074).

223. *See infra* notes 224–40 and accompanying text.

224. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 270 (2024).

225. *Id.* at 273.

*Association v. Pell City*²²⁶ and *Home Builders Association of Central Arizona v. Scottsdale*.²²⁷

In *St. Clair County*, the Supreme Court of Alabama quoted Chief Justice Rehnquist's response to Justice Stevens's dissent in the 1994 Court case for its conclusion that "*Dolan* does not apply to generally applicable legislative enactments, such as the ordinance [Establishing Impact Fees for Sewer Service and Capital Recovery Fees for Water Service]."²²⁸ For this and other reasons, the state supreme court upheld the trial court's judgment in favor of the county regulation.²²⁹

In *Scottsdale*, a unanimous Supreme Court of Arizona echoed its Southern counterparts when the court affirmed the appellate court's ruling upholding "a water resources development fee on all new realty developments."²³⁰ The supreme court explained:

In *Dolan*, the Chief Justice was careful to point out that the case involved a city's *adjudicative* decision to impose a condition tailored to the particular circumstances of an individual case. . . . Because the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply.²³¹

The supreme court justified the distinction, contrasting "cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land," with situations in which "the exaction is embodied in a generally applicable legislative decision."²³²

There are many more examples of state courts that maintained the *Dolan* distinction than the two cited by Justice Barrett. In *Krupp v. Breckenridge*

226. 61 So. 3d 992 (Ala. 2010) (cited in *Sheetz*, 601 U.S. at 273 n.3).

227. 930 P.2d 993 (Ariz. 1997) (cited in *Sheetz*, 601 U.S. at 273 n.3).

228. *St. Clair County*, 61 So. 3d at 1007.

229. *Id.* at 1012.

230. *Scottsdale*, 930 P.2d at 994.

231. *Id.* at 1000 (citation omitted). In its opinion, the court did indicate that at least one U.S. Supreme Court Justice was uncomfortable with the *Dolan* distinction. The court cited *Parking Ass'n v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of cert.). In *Parking Ass'n*, the Supreme Court of Georgia upheld a city zoning measure, applicable to certain parking lots, that mandated "minimum barrier curbs and landscaping areas equal to at least ten percent of the paved area within a lot, ground cover (shrubs, ivy, pine bark or similar landscape materials) and at least one tree for every eight parking spaces." 450 S.E.2d at 201–02. In dissenting from the Court's decision not to hear the case, Justice Thomas, joined by Justice O'Connor, noted the early split in state court decisions regarding *Dolan*'s legislative-adjudicative distinction and offered his perspective: "The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of cert.). Justice Thomas again raised objections in 2016. This time he concurred in the denial of a writ of certiorari, in a case involving "a housing ordinance that compels all developers of new residential development projects with 20 or more units to reserve a minimum of 15 percent of for-sale units for low-income buyers." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring in denial of cert.). After noting that the division in lower courts over the *Dolan* distinction "shows no signs of abating," substantive and procedural concerns with the specific challenge convinced Thomas that this was not the right vehicle "to resolve the conflict." *Id.* at 1180–81 (Thomas, J., concurring in denial of cert.). Justice Thomas would have to wait another eight years before getting his way.

232. *Scottsdale*, 930 P.2d at 1000.

Sanitation District,²³³ the Supreme Court of Colorado unanimously upheld “a plant investment fee (PIF) on all building projects within the District.”²³⁴ The court found that, “[u]nlike the landowners in *Nollan* and *Dolan*, whose conditions for development were determined on an individualized adjudicative basis, the Krupps were charged a fee that was assessed on all new development within the District.”²³⁵ Similarly, Maryland’s highest state court held that, because a “legislatively-imposed development impact fee is predetermined, based on a specific monetary schedule, and applies to any person wishing to develop property in the district,” the judicial challenge “falls squarely within *Dolan*’s recognition that impact fees imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis.”²³⁶

Federal courts had their say, too, some adopting the *Dolan* distinction. For example, a Ninth Circuit panel rejected the takings claim brought to a city’s request that property owners “install a 24-inch pipe in exchange for the City approving their permit application and waiving certain permit and facilities fees.”²³⁷ After noting that this was a question of first impression in the circuit and reviewing the contrasting positions taken by state and federal courts,²³⁸ the court concluded:

Unlike *Nollan* and *Dolan*, the facts of this case involve neither an individual, adjudicative decision, nor the requirement that the McClungs relinquish rights in their real property. Ordinance 1603 was the source of the 12-inch storm pipe requirement, not an adjudicative determination applicable solely to the McClungs. . . . To extend the *Nollan/Dolan* analysis here would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers.²³⁹

The thoughtful consideration of this court, like so many other state and federal courts that chose to adhere to the *Dolan* distinction,²⁴⁰ has now been swept away, owing to the Supreme Court’s problematic opinion²⁴⁰ taking advantage of a concession made by counsel during oral argument.

233. 19 P.3d 687, 689 (Colo. 2001) (en banc).

234. *Id.*

235. *Id.* at 696.

236. *Dabbs v. Anne Arundel Cnty.*, 182 A.3d 798, 811 (Md. 2018).

237. *McClung v. City of Sumner*, 548 F.3d 1219, 1222 (9th Cir. 2008), *abrogated by Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

238. *Id.* at 1225.

239. *Id.* at 1227–28.

240. The *Sheetz* opinion is troublesome not only because the Court did not perform a robust *stare decisis* analysis, despite the many cases adhering to the *Dolan* dictum. For example, the Court’s summary of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), is a substantive departure from the familiar multi-factor test associated with that ruling. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 274 (2024) (“A use restriction that is ‘reasonably necessary to the effectuation of a substantial government purpose’ is not a taking unless it saps too much of the property’s value or frustrates the owner’s investment-backed expectations.”) (quoting *Penn Cent.*, 438 U.S. at 123, 127). The opinion claims that “nothing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules,” without acknowledging that *Nollan* and *Dolan* are not ordinary takings cases involving the condemnation or physical destruction of property. *Id.* at 276. The Court asserts that “[s]o far as the Constitution’s text is concerned, permit conditions imposed by the legislature and other

D. Owners of Personal Property Ought to Be Aware that Regulations Can Render Such Property Worthless

In *Lucas*, Justice Scalia drew a contrast between owners of personal property—who “by reason of the State’s traditionally high degree of control over commercial dealings, . . . ought to be aware of the possibility that new regulation might even render his property economically worthless”—and landowners—whose property is not “held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use.”²⁴¹ In so doing, the Court inspired a set of subsequent rulings in state and federal court that likewise acknowledged the more precarious position business owners face vis-à-vis local, state, and federal regulators.²⁴² That distinction did not survive the Court’s decision in *Horne II*.²⁴³

Less than a month after the Court handed down its ruling in *Lucas*, an Indiana federal district court judge rejected a takings challenge brought against a state statute designed to ban “gill net fishing in the Indiana waters of Lake Michigan and provide for automatic and permanent termination of the commercial fishing license of anyone taking fish from Lake Michigan by means of a gill net.”²⁴⁴ Citing and following *Lucas*, the court observed that “[w]hen an individual or corporate entity purchases personal property (as opposed to real property) to engage in a commercial venture the purchaser is taking a risk that government regulation will diminish the value of that property.”²⁴⁵ The takings claim proved fruitless because the plaintiff was “well aware that the terms under which it was permitted to fish in Lake Michigan could change at any time that the DNR [Department of Natural Resources] determined to change those terms.”²⁴⁶

In a case very close to the facts of *Horne II*, the U.S. Court of Federal Claims stymied an effort by handlers and producers of California almonds to establish that the marketing controls established by the U.S. Department of Agriculture effected a taking because of alleged “losses in crop value.”²⁴⁷ In a passage evocative of the passage from *Lucas*, the court justified its holding:

Government regulation of the almond industry in the manner herein described has been a fact of life for now well over forty years. Thus, parties, like our plaintiffs, who have been active participants in that industry throughout that time, must be understood to have accepted, as a condition

branches stand on equal footing,” *id.* at 277, with full knowledge that the text of the Constitution says nothing about land-related permits or conditions.

241. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992).

242. *See id.* at 1070–71 (Stevens, J., dissenting).

243. *Horne v. Dep’t of Agric.*, 576 U.S. 351, 358 (2015) (stating that the Takings Clause protects “private property” without any distinction between different types).

244. *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722, 724 (S.D. Ind. 1992).

245. *Id.* at 726.

246. *Id.* at 726–27.

247. *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 244 (1994), *aff’d*, 1995 U.S. App. LEXIS 36175 (Fed. Cir. Dec. 20, 1995).

of their continuing presence in that industry, the very mode of regulation about which they now complain.²⁴⁸

In the next paragraph the court cited the key passage from *Lucas* in further support of its holding.²⁴⁹

In 2006, the same court reached a similar conclusion in a case even closer to *Horne II*. In *Evans v. United States*,²⁵⁰ California raisin growers alleged that the federal raisin marketing order, among other statutory and regulatory provisions, “result[s] in an uncompensated taking of the ‘reserve tonnage’ portion of the raisins they transfer to handlers.”²⁵¹ Again, previous knowledge of the regulatory landscape was fatal to the takings claim: “However harsh the consequences of the raisin marketing order, the consequences attendant to marketing raisins were known in advance.”²⁵² The reader will not be surprised to learn that the *Lucas* language was cited in support of this reasoning.²⁵³

The array of federal and state controls that were unsuccessfully challenged as takings in the many cases relying on Justice Scalia’s statement about subjecting personal property to burdensome government regulation is impressive. Subject matter included (among other topics):

- selling body parts from endangered species,²⁵⁴
- requiring pet owners to turn over their pets for rabies testing,²⁵⁵
- restricting small signs,²⁵⁶
- licensing charitable gaming establishments,²⁵⁷
- outlawing cockfighting,²⁵⁸
- revoking fishery permits,²⁵⁹
- classifying an invention as a machine gun,²⁶⁰
- banning “monitor vending machines” (lottery dispensers that are similar to slot machines),²⁶¹

248. *Id.* at 246–47.

249. *Id.* at 247.

250. 74 Fed. Cl. 554, 555 (2006), *aff’d*, 250 F. App’x 321 (Fed. Cir. 2007).

251. *Id.* at 556.

252. *Id.* at 564 n.16.

253. *Id.*

254. *United States v. Hill*, 896 F. Supp. 1057, 1062–63 (D. Colo. 1995) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)).

255. *Raynor v. Md. Dep’t of Health & Mental Hygiene*, 676 A.2d 978, 990 (Md. Ct. Spec. App. 1996) (quoting *Lucas*, 505 U.S. at 1027–28).

256. *Wilson v. City of Louisville*, 957 F. Supp. 948, 954–55 (W.D. Ky. 1997) (citing *Lucas*, 505 U.S. at 1027–28).

257. *Bobbie Preece Facility v. Commonwealth*, 71 S.W.3d 99, 104 (Ky. Ct. App. 2001) (quoting *Lucas*, 505 U.S. at 1027).

258. *Edmondson v. Pearce*, 91 P.3d 605, 619 (Okla. 2004) (quoting *Lucas*, 505 U.S. at 1027–28).

259. *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1377 (Fed. Cir. 2004) (quoting *Lucas*, 505 U.S. at 1027).

260. *Akins v. United States*, 82 Fed. Cl. 619, 623 (Fed. Cl. 2008) (quoting *Lucas*, 505 U.S. at 1027–28).

261. *Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F. Supp. 2d 822, 855 (N.D. Iowa 2006), *aff’d sub nom.*, *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007) (quoting *Lucas*, 505 U.S. at 1027–28).

- outlawing video game machines,²⁶²
- removing the cap on the issuance of taxicab licenses,²⁶³
- suspending airworthiness certificate for helicopter,²⁶⁴
- prohibiting the sale of fireworks,²⁶⁵ and
- regulating ownership, purchase, and sale of exotic animals.²⁶⁶

To a libertarian, the prospect of using a supercharged Takings Clause to eliminate these and other forms of state interference with personal liberty may be a dream come true. To those interested in preserving responsible police power and environmental regulations and in protecting the public coffers from the need to defend or settle costly lawsuits, the same prospect is a nightmare.²⁶⁷

VI. KEYSTONES: ASCERTAINING DECISIVE LANGUAGE

There is a second tactic counsel in future takings litigation (indeed in many areas of constitutional law) can use to demonstrate that a key passage or principle from a Court precedent warrants serious consideration of the *stare decisis* factors used in *Dobbs*. On occasion, the precedential language at risk is far from dictum; it is a keystone for the Court's ruling in the case, an essential element upon which other aspects of the case depend. Because the Justices rarely write, "this sentence is the heart of the matter," or "without this passage we could not have put together a majority,"²⁶⁸ counsel need to accumulate circumstantial evidence that the language currently at risk is indeed a keystone. That evidence can be found in four places—oral arguments, dissenting and concurring opinions, party and amicus briefs, and the public papers of the former Supreme Court Justices. The reader will find examples of all four below.

A. *Dissents and Concurrences*

The first method for identifying a precedential principle as a keystone is to glean information from dissenting and concurring opinions. The best example from the group of six precedents discussed in Part III is the exchange in *Dolan*

262. *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 410 (4th Cir. 2007) (quoting *Lucas*, 505 U.S. at 1027).

263. *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 509 (8th Cir. 2009) (quoting *Lucas*, 505 U.S. at 1027–29).

264. *Mike's Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Fed. Cl. 2010) (quoting *Lucas*, 505 U.S. at 1027–28).

265. *Scott v. Galaxy Fireworks, Inc.*, 111 So. 3d 898, 901 (Fla. Dist. Ct. App. 2012) (quoting *Lucas*, 505 U.S. at 1027–28).

266. *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 543 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409 (6th Cir. 2014) (quoting *Lucas*, 505 U.S. at 1027).

267. This is not to say that the plaintiffs in all (or even most) of the unsuccessful takings challenges based on principles that the Roberts Court has overruled by stealth would have ultimately prevailed. By removing these barriers to relief, however, the Court is making it harder for regulators to defend their activities and is increasing owners' leverage in settlement negotiations.

268. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 377–96 (1994) (providing an example of a case in which the Justices did not expressly write such statements).

v. *City of Tigard*²⁶⁹ between Chief Justice Rehnquist in his majority opinion and Justices Stevens and Souter in their dissents. As noted above,²⁷⁰ Rehnquist stressed the adjudicative, as opposed to legislative, nature of the city's decision to impose the exactions on Florence Dolan. The exaction in *Dolan* was different from the land-use regulations upheld in cases such as *Village of Euclid v. Ambler Realty Company*²⁷¹ in two ways:

First, they involved essentially *legislative determinations* classifying entire areas of the city, whereas here the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel. Second, the 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.²⁷²

After settling on the "rough proportionality" standard for such exactions, Rehnquist returned to the legislative-adjudicative standard:

[Justice Stevens'] dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . . Here, by contrast, the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.²⁷³

That Rehnquist took the time to address Stevens' objection is a strong indication that the distinction abandoned by the *Sheetz* Court in 2024,²⁷⁴ was a key component of the decision thirty years before.

In his dissent, Stevens was troubled that the majority adopted a "rough proportionality" (as opposed to a "reasonable relationship") standard for development exactions and, compounding the problem, shifted the burden to the government regulator to demonstrate that the new standard has been met.²⁷⁵ He raised the dreaded specter of *Lochner v. New York*,²⁷⁶ accusing the Chief Justice and his colleagues of "appl[y]ing the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker's liberty interest in working 60 hours a week and 10 hours a day."²⁷⁷ The majority not only abandoned the presumption of validity afforded normal business regulations, but, too, exacerbated the problem by misallocating the burden of proof: "The burden of demonstrating that those

269. See generally *id.* (demonstrating the exchange between the Justices in the majority and dissenting opinions).

270. See *supra* notes 189–95 and accompanying text.

271. 272 U.S. 365, 379 (1926).

272. *Dolan*, 512 U.S. at 385 (emphasis added).

273. *Id.* at 391 n.8 (emphasis added) (citation omitted).

274. *Id.*; see *supra* notes 196–203 and accompanying text.

275. *Dolan*, 512 U.S. at 406 (Stevens, J., dissenting).

276. 198 U.S. 45, 64–65 (1905).

277. *Dolan*, 512 U.S. at 406 (Stevens, J., dissenting) (citing *Lochner*, 198 U.S. at 60–61).

conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past."²⁷⁸

Justice Souter also expressed his concern with the burden shift, because "it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally."²⁷⁹ In a footnote in support of this proposition, Souter challenged the majority's characterization of "this case as involving an '*adjudicative decision*' to impose permit conditions," noting that in fact "the permit conditions were imposed pursuant to Tigar's Community Development Code."²⁸⁰ The exchange between Rehnquist on one side and Stevens and Souter on the other would be news to the reader of Justice Barrett's opinion in *Sheetz*, in which the majority concluded that "[t]he Takings Clause does not distinguish between legislative and administrative permit conditions."²⁸¹ Not once did the Roberts Court, in departing from the *Lingle* détente,²⁸² indicate that in doing so it was removing the keystone from an established precedent.

A second example of identifying a keystone revealed by studying *all* of the Court's opinions concerns the exchanges among the Justices in *Eastern Enterprises v. Apfel*,²⁸³ in which five members of the Court rejected the plurality's conclusion that the obligation to pay money could constitute a taking that requires compensation under the Fifth Amendment.²⁸⁴ Justice Kennedy agreed that the retroactive application of a coal miner benefits statute constituted a constitutional violation.²⁸⁵ Unlike the plurality that found an unconstitutional taking,²⁸⁶ Kennedy asserted that the federal government had violated the Due Process Clause.²⁸⁷

In a well-reasoned and logical exploration of the relevant precedents, Justice Kennedy concluded that "[u]ntil today, . . . one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a *specific property right or interest* has been at stake."²⁸⁸ The four dissenting Justices agreed.²⁸⁹ Justice Breyer wrote, "[a]s a preliminary matter, I agree with [Justice Kennedy] . . . that the plurality views this case through the wrong legal

278. *Id.* at 411 (Stevens, J., dissenting).

279. *Id.* at 413 (Souter, J., dissenting).

280. *Id.* at 410 n.13* (Souter, J., dissenting) (emphasis added).

281. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 270–71 (2024).

282. See discussion *supra* Part IV.

283. 524 U.S. 498, 498 (1998).

284. *Id.* at 503–04.

285. *Id.* at 568 (Kennedy, J., concurring in the judgment and dissenting in part).

286. *Id.* at 538 (plurality opinion) ("[W]e conclude that the Coal Act's allocation of liability to Eastern violates the Takings Clause . . .").

287. *Id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part) ("The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process.")

288. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

289. See *id.* at 550 (Stevens, J., dissenting).

lens. The Constitution's Takings Clause does not apply. . . . The 'private property' upon which the Clause traditionally has focused is a *specific interest in physical or intellectual property*."²⁹⁰

As noted above, the *Koontz* Court summarily dismissed this well-reasoned conclusion that was backed by decades of takings precedents.²⁹¹ The Court did not take the time to go through its own *Dobbs* factors before allowing yet another tranche of landowners required to follow sensible government regulations to claim that their situation was the functional equivalence of a classic government taking.²⁹²

B. Oral Arguments

Counsel and commentators faced with the task of defending a significant, though vulnerable, passage embedded in a Court precedent should also review the oral argument, which may reveal that the passage was a keystone for the Justices' decision. Such was the situation in *Apfel*, in which Justice Kennedy asked the attorney for the claimants:

What are the cases in which there is a taking but the government has not been enriched? Here the government doesn't take property and use it for a firehouse or a park or a school. As the government projects the argument to us, this is simply an adjustment of liability between two private parties. What, what case do you have where that occurred and we found there was a taking?²⁹³

Combined with Justice Kennedy's and the *Apfel* dissenters' conclusions regarding the inapplicability of the Takings Clause,²⁹⁴ this question (and the nonresponsive answer provided by counsel) is very revealing.

Similarly, the following exchange from the oral argument in *Loretto v. Teleprompter Manhattan CATV Corporation*²⁹⁵ highlighted the permanent-temporary distinction that helped determine the outcome of this, and many subsequent,²⁹⁶ decisions:

[Justice O'Connor:] Is there a qualitative difference, however, between a temporary use of property and a permanent occupation of a portion of the space?

Erwin N. Griswold [counsel for appellees]: Well, Justice O'Connor, that's just the point I am coming to. Our friends say that this is a permanent occupation. I would suggest in the first place that it is not a permanent occupation. It's an occupation only as long as the landlord chooses to use this for rental purposes. The landlord can occupy the building himself and

290. *Id.* at 554 (Breyer, J., dissenting) (emphasis added) (citation omitted).

291. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 618–19 (2013). *See supra* notes 111–32 and accompanying text.

292. *See Koontz*, 570 U.S. at 620 (Kagan, J., dissenting).

293. Transcript of Oral Argument at 18, *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (No. 97-42).

294. *See supra* notes 121–28 and accompanying text.

295. 458 U.S. 419, 421–22 (1982).

296. *See discussion supra* Section V.B.

Section 828 no longer has any application. In other words, it is what we call a use-dependent regulation.²⁹⁷

This exchange, and the majority opinion that followed, emphasized the Court's view that this was, contrary to *Griswold's* noble try, permanent in nature.²⁹⁸ One would not know that from reading the *Cedar Point* Court's assertion that "we have held that a physical appropriation is a taking whether it is permanent or temporary."²⁹⁹

A third example of the salience of oral argument in the search for keystones took place during the following exchange between Justices Scalia and O'Connor and the landowner's attorney in *First English*³⁰⁰ regarding the self-executing nature of the Takings Clause:

[Justice Scalia:] Mr. Berger, the Solicitor General has suggested that, rather than implying a damage remedy directly from the Constitution or inferring one directly from the Constitution, you would have the remedy of using Section 1983. What's wrong with that, apart from the fact that you haven't used it here, I mean. If you knew about it, why wouldn't that give you as satisfactory. . . why wouldn't that give everybody as satisfactory a remedy as implying a direct monetary cause of action as the Constitution would?

[Michael M. Berger:] Let me answer that in several ways, Your Honor. First, although it's never been mentioned in this case, the allegations of the facts in this case would support an action under 1983. 1983, as this Court knows, creates no substantive rights. It's just a remedial vehicle. And what we've been arguing about in this case is the substantive right to just compensation. So the issue of what remedial vehicles get used hasn't been brought up. I think that the allegations in this complaint are adequate to state a 1983 cause of action if that were true. . . .

[Justice O'Connor:] But you haven't commented on the underlying theory of the SG's suggestion in his brief.

[Berger:] No.

[Justice O'Connor:] That the Fifth Amendment is not self-executing at all.

[Berger:] The underlying theory of the Solicitor General, Your Honor, I candidly found insulting to this Court because it was based on expressly stating that a whole raft of opinions of this Court, including most recently *U.S. versus Clarke*, in which this Court said the Fifth Amendment just compensation guarantee is self-executing, are simply wrong. . . .³⁰¹

That these are just *excerpts* from this significant chunk of the oral argument is an indication, along with the notations from the Justices' papers,³⁰² that the self-

297. Transcript of Oral Argument at 38–39, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (No. 81-244).

298. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

299. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021).

300. See generally *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304 (1987) (outlining the exchange between Justices Scalia and O'Connor and the landowner's attorney).

301. Transcript of Oral Argument at 21–23, *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304 (1987) (No. 85-1199).

302. See discussion *supra* Section VI.A.

executing concept was very much on the minds of the members of the Court. Indeed, it was a keystone of the Court's ruling in *First English*,³⁰³ and before the Court completely discards or casts additional doubt on this important concept, or any keystone, the Justices should give them the *Dobbs* factors treatment they deserve.

C. Party and Amicus Briefs

Party and amicus briefs constitute a third source for counsel and commentators to mine in support of an argument that a precedential principle or passage qualifies as a keystone. The appellant's brief in *Sanguinetti v. United States*,³⁰⁴ for example, acknowledged the necessity of proving permanence, as counsel emphasized that "[t]he effect on appellant's lands of the levee . . . is not a case of temporary flooding or consequential injury, but a permanent condition."³⁰⁵ Unfortunately, the Court made a contrary finding.³⁰⁶

The brief for the United States in *Apfel* took care to point out that the statute being challenged could not amount to a taking because of the absence of a connection to identifiable property:

There is also no merit to petitioner's suggestion . . . that an economic regulation like the one at issue here must be deemed a taking in the absence of a direct causal connection between the problem addressed and property burdened. Petitioner appears to derive that standard . . . from *Dolan v. City of Tigard*, . . . and *Nollan v. California Coastal Commission* Those cases, however, involved uses of real property—specifically, regulations that impaired private landowners' right to exclude the general public from their land.³⁰⁷

The authors of the Brief for Respondents the UMWA Combined Benefit Fund and its Trustees agreed: "Eastern attempts to treat the Coal Act as if it were a physical invasion of real property or a form of land-use regulation. This Court has rejected such efforts to equate economic regulatory measures with deprivations of the use of land."³⁰⁸

The exchange of party briefs prior to the Court's decision in *Dolan* highlighted for the Justices one of the key questions in the case: was this a familiar situation in which the property owner bore the burden of proof to show the invalidity of a legislative act?³⁰⁹ In response to the implication in petitioner's brief

303. *First English*, 482 U.S. at 315.

304. Brief for Appellant, *Sanguinetti v. United States*, 264 U.S. 146 (U.S. 1924) (No. 130).

305. *Id.* at 7.

306. *Sanguinetti*, 264 U.S. at 149 ("[I]n order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. These conditions are not met in the present case.").

307. Brief for the Federal Respondent at 40, *E. Enters. v. Apfel*, 524 U.S. 498 (U.S. 1998) (No. 97-42).

308. Brief for Respondents the UMWA Combined Benefit Fund at 43, *Apfel*, 524 U.S. 498 (No. 97-43).

309. See *infra* notes 310–12 and accompanying text.

“that this Court eliminated the presumption of constitutionality that the Court has long applied to legislative decisions,”³¹⁰ the city’s brief asserted:

It is well settled that where, as in this case, a private party claims that a state law is unconstitutional, “the existence of facts supporting the legislative judgment is to be presumed.” . . . Land use regulation is certainly no exception. . . . [T]he Court has, in a variety of constitutional contexts repeatedly made clear that the burden of proof—to rebut the validity of legislative findings and the constitutionality of the legislature’s judgment—rests on those challenging the government’s action.³¹¹

The parties thus “teed up” the issue for the Court, resulting in Chief Justice Rehnquist’s discussion of the adjudicative (as opposed to legislative) character of the city’s exaction.³¹²

Similar examples can be found in the appellant’s brief in *Loretto*, in which the property owner stressed the permanence of the installation of cable equipment that allegedly effected the *per se* taking,³¹³ and in several *First English* briefs (including, of course, the brief filed by the U.S. Solicitor General³¹⁴) that discussed in detail the question of whether the Takings Clause is self-executing.³¹⁵ In future cases in which the Court threatens to ignore or explain away a precedential principle that stands in the way of expanding the reach of the Takings Clause even further, counsel and commentators should be prepared to point to substantive discussions of that principle to bolster their insistence that the Justices apply their own *Dobbs* factors rather than overruling by stealth.

D. Supreme Court Justices’ Papers

There is a fourth (and most intriguing) source for identifying as keystones principles from prior Supreme Court cases. Over the past few decades, several Justices who served on the Warren, Burger, Rehnquist, and Roberts Courts have made their Court papers available to the public, sometimes with relatively few restrictions.³¹⁶ While it would be easy to make too much of a short comment in a

310. Brief for Respondent at 22–23, *Dolan v. City of Tigard*, 512 U.S. 374 (U.S. 1994) (No. 93-518). *See id.* at 32 (“The scrutiny employed by the Oregon Supreme Court treats the city’s action like a legislative enactment and would legitimize any and every land use decision of the city unless totally arbitrary or based on an invidious rationale. This ‘standard’ is based on the presumption that the city acts properly.”).

311. *Id.* at 23–25 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

312. *See supra* notes 189–95 and accompanying text.

313. Brief for Appellant at 17, 22, 61–68, 72–73, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (U.S. 1982) (No. 81-244).

314. Brief for the United States as Amicus Curiae Supporting Appellee at 23–26, *First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304 (U.S. 1987) (No. 85-1199). *See* discussion *supra* Section VI.A.

315. Appellant’s Reply Brief at 7–8, *First English*, 482 U.S. 304 (No. 85-1199) (“While lengthy and intricate, the argument of the Solicitor General is not sufficient to gainsay the common sense notion that, when the Fifth Amendment said that property shall not be taken for public use without just compensation, it plainly meant that, *when property has in fact been taken*, compensation is due.”) (emphasis added); Brief of American College of Real Estate Lawyers as Amicus Curiae in Support of Appellant at 18, *First English*, 482 U.S. 304 (No. 85-1199) (“The just compensation remedy provision in The Fifth Amendment is self-executing and does not need any legislative action to give its effect.”).

316. *See infra* notes 318–41 and accompanying text.

memorandum between the Justices or to speculate about the reasons why a certain phrase in an early draft did not make the final cut, sometimes the papers reveal solid evidence that the Justices deemed elements of the final decision important, if not crucial.³¹⁷ This is the case with the principle that the Takings Clause is self-executing.

On January 6, 1987, Robert A. “Bob” Long, a U.S. Supreme Court clerk, submitted an eleven-page Bench Memorandum to the Justice Powell in case number 85-119, *First English Evangelical Lutheran Church v. County of Los Angeles*.³¹⁸ Long cited with approval a brief submitted by Solicitor General Charles Fried and Department of Justice colleagues:

The most persuasive argument on the other [government] side, in my view, is made by the SG. He argues that the “original understanding” of the Fifth Amendment was that it did not by its own terms require payment of damages for takings. The SG relies particularly on the doctrine of sovereign immunity.³¹⁹

As shown in Figure 1, Justice Powell’s attention was drawn to several pages in this passage, as evidenced by underlining in blue and red ink. In marginal comments, Powell’s skepticism was patent: “SG’s argument relying on sovereign immunity—but would SG’s [sic] extend to public utility? What about TVA?”³²⁰

317. See *infra* notes 318–41 and accompanying text.

318. Robert A. Long, Law Clerk, U.S. Sup. Ct., Bench Memorandum, *First English Evangelical Lutheran Church v. Cnty. of L.A.*, No. 85-1199 (Jan. 6, 1987) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 668, Folder 7–10) (with written comments by Justice Powell), <https://scholarlycommons.law.wlu.edu/casefiles/719/> (last visited Mar. 5, 2026). The author of the Bench Memorandum is named “Bob.” The initials “ral” appear at the top of the page, indicating that the author is Robert A. Long, a Powell clerk that Term. See *Robert A. Long*, COVINGTON, <https://www.cov.com/en/professionals/l/robert-long> [<https://perma.cc/5R4N-VM3X>] (last visited Mar. 5, 2026).

319. Long, *supra* note 318, at 9 (quoting Brief for the United States as Amicus Curiae Supporting Appellee, *First English*, 482 U.S. 304 (1987) (No. 85-1199)).

320. *Id.* (with written comments by Justice Powell).

FIGURE 1

The most persuasive argument on the other side, in my ^{SG's argument} view, is made by the SG. He argues that the "original ^{relying on} understanding" of the Fifth Amendment was that it did not by its own terms require payment of damages for takings. The SG relies ^{sovereign immunity} particularly on the doctrine of sovereign immunity. He cites several early state court decisions holding that the remedy for a taking is to hold the unconstitutional statute "a nullity," or to sue the state officers for trespass. SG brf. 19-20. The SG also ^{- but would SG's expand to public utility?} relies on Art. I, §9, cl. 7, which, in the SG's view, provides that damage awards may not be paid out of the Treasury without legislation creating such a remedy. There are arguments on the other side. It has been argued that the Just Compensation Clause was motivated by a distrust of legislatures. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694 (1985). If this is so, it is ^{What about TWA?}

Later in the same memorandum, Long noted that "[t]he SG concedes that the Court has stated in dicta that the Just Compensation Clause has a 'self-executing character,'"³²¹ but recommended, in a passage Justice Powell underlined in red, that the Supreme Court hold "that it is unnecessary to decide the difficult question whether property owners may sue directly under the Taking Clause, because they may do so under [Title 42 U.S.C.] § 1983 or the Tucker Act."³²²

One day later, Justice Powell spelled out his concerns about the Solicitor General's brief:

I do note my surprise that the SG argues that the taking clause of the Fifth Amendment, applicable to the states under the Fourteenth Amendment, "does not give rise to a constitutionally compelled damage remedy against the government." For me, this would be a shocking position for the federal government to take.³²³

Notes that Justice Powell prepared prior to oral argument in the case show that the Justice's deep concern had not abated (Figure 2). At the bottom and along both sides of the page, Justice Powell wrote out questions and objections directed to the Solicitor General.³²⁴ Unfortunately, Powell would not get the opportunity to grill Fried, as the federal government did not participate in the oral argument.³²⁵

321. *Id.* at 10 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

322. *Id.*

323. Justice Lewis F. Powell, Jr., Memo to File 7, *First English*, No. 85-1199 (Jan. 7, 1987) (on file Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 380, Folder 7).

324. *See id.*

325. *See* Transcript of Oral Argument at 2, *First English*, 482 U.S. 304 (1987) (No. 85-1199).

FIGURE 2

85-1199 First Eng. Lutheran Church

The permanent Ordinance allows construction of "accessory bldgs" with approval of County Engineer. But this is a building "incidental" to the main use of the land. ~~The~~ The Church now has no buildings.

Ask: Would restoration of the Camp Dormitory + Cafeteria be "accessory bldgs" - accessory to what?

Ask S.G. He says sovereign immunity, unless waived, forecloses the payment of damages. What remedy for condemnation? Public Utility? TWA?

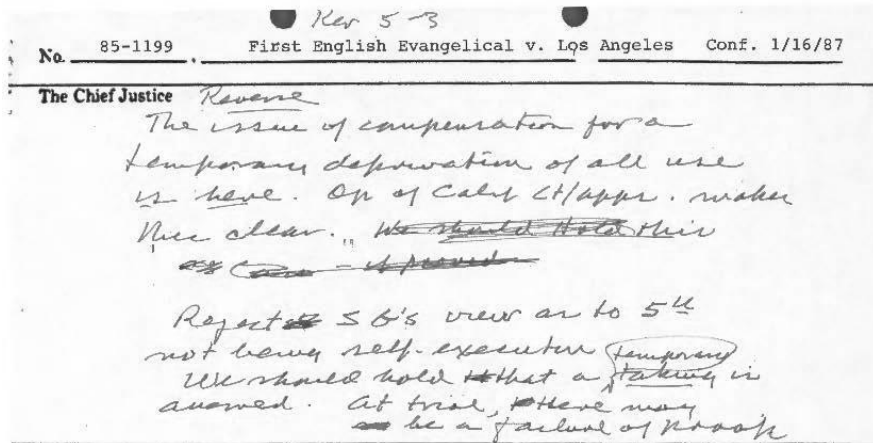
56 says legislation must authorize damages. But in U.S. v. Clayton 445 P.2d 253 we said "Just compensation" clause is only "relief-awarding" clause.

56 says whether taking clause is itself "relief-awarding" or "remedial": Church may not under 56.

Justice Powell's Conference Notes, dated January 16, 1987 (Figure 3), show that he was not the only backer of the self-executing notion. According to Powell, Chief Justice Rehnquist wanted to "[r]eject SG's view as to 5th [Amendment] not being self-executing."³²⁶

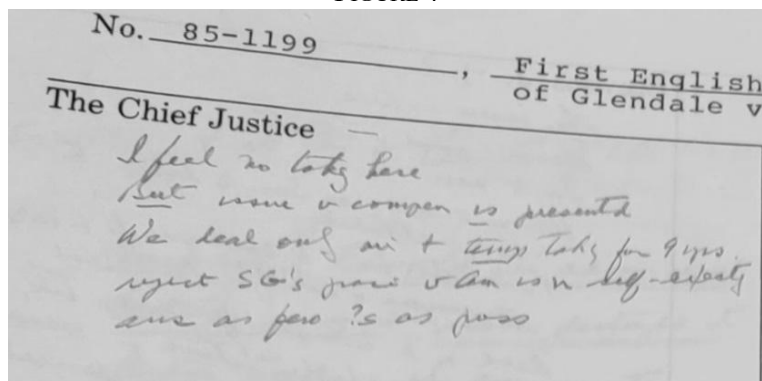
326. Justice Lewis F. Powell, Jr., Conference Notes, *First English*, No. 85-1199 (Jan. 16, 1987) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 380, Folder 7). The notes also indicate that several Justices expressed doubts that the plaintiff had proved a taking in fact had occurred. *See id.* According to Justice Powell's notes, Chief Justice Rehnquist stated: "At trial, there may be a failure of proof." *Id.* Justice O'Connor is recorded as saying that "there probably was no taking here." *Id.*

FIGURE 3



Justice Blackmun's notes for the same conference (Figure 4) confirm Powell's impression of Rehnquist's comments: "reject SG's [position?] 5[th] Am[endment] is n[ot] self-exec[ut]i[n]g."³²⁷

FIGURE 4



According to Blackmun (Figure 5), Justice Scalia agreed: "need n[ot] go so far as SG."³²⁸

327. Justice Harry A. Blackmun, Conference Notes, *First English*, No. 85-1199 (Jan. 16, 1987) (on file with Libr. of Cong., Harry A. Blackmun Papers, Box 469, File 7).

328. *Id.* Justice Scalia reportedly stated that this was "n[ot] a tak[ing]." *Id.*

FIGURE 5

Scalia, J. +
 this is like temp imprisonment
 interim period & a take
 need to go so far as SG
 a disaster!
 in a take
 can be done in D.P.

Justice Stevens's Conference notes (Figure 6) confirm that Chief Justice Rehnquist raised the issue: "Reject SG: find th[at] 5[th] A[mendment] not self-execut[ing]." ³²⁹

FIGURE 6

① PROBABLY NO TAKING HERE
 [Cf. MUELLER] -
 CHIEF JUSTICE
 ... ISSUED in Comp. f. - Turkey Turkey in
 ② Temp. Dep. of ALL USE - f 9 years -
 OK & get DAMAGES -
 ③ Right SG: limits the 5A not
 WACOB: only relevant
 ④ ANSWER AS FIN @ - in
 LIMIT TO ALL USE

Justice O'Connor's notes (Figure 7) are in agreement, recording Rehnquist as saying, "Reject SG's pos[ition] re not self-executing." ³³⁰

329. Justice John Paul Stevens, Conference Notes, *First English*, No. 85-1199 (Jan. 16, 1987) (on file with Libr. of Cong., John Paul Stevens Papers, Box 477).

330. Justice Sandra Day O'Connor, Conference Notes, *First English*, No. 85-1199 (Jan. 16, 1987) (on file with Libr. of Cong., Sandra Day O'Connor Papers, Box II: 99, File 7).

FIGURE 7

No. 85-1199, First English Evangelical Church v. Los Angeles

The Chief Justice Reverse

Equus rule in Calif on regulatory tkg is at issue. Probly was not a tkg here beca of police power of CA - but issue presented pure + simple is validity of equis. I think even a temporary depriv of all use entitles owner to compensation + charges. Here was a period of 9 yrs. Reject SG's pos re self execut. Contrary to dicta. Answer as far as poss. will result in litig. Alleged depriv of all use, and delay are outside this case. Justice Brennan Since he came to this in every other sphere this won't add ~~the~~ much.

O'Connor also recorded (Figure 8) Justice Powell as stating that the "SG's suggestion is shock[ing]."³³¹

FIGURE 8

Justice Powell Reverse

Case is here. Issue was presented. Don't want to strike out 5X. Agree w JB. SG's suggestion is shock[ing].

Justice O'Connor noted that Justice Scalia asserted (Figure 9): "Don't have to go as far as SG to say a temp[orary] t[a]k[in]g for interim period does not amount to a 5th Am[endment] t[a]k[in]gs viol[ation]. Can get gov[ernment] by other means."³³²

FIGURE 9

Justice Scalia Affirm!

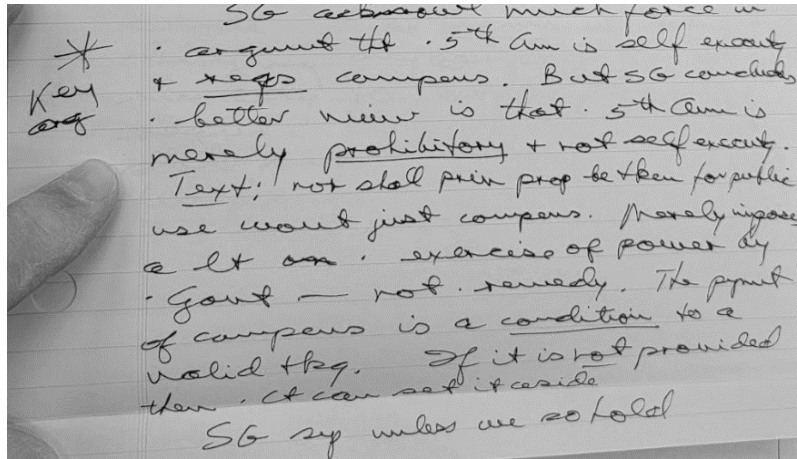
Don't have to go as far as SG to say a temp tkg for interim period does not amount to a 5th Am tkg viol. Can get Govt by other means. Scores. devil out of me

Figure 10 shows Justice O'Connor wrestling with the issue in a long passage from a three-page, handwritten memorandum she prepared (perhaps prior to oral argument). She noted (and highlighted in the margin as "*Key") that the Solicitor General had "acknowl[edged] much force in [the] argument th[at] the

331. *Id.*332. *Id.*

5th Am[endment] is self executing & req[ui]re[s] compens[ation].³³³ But SG concludes better view is that 5th Am[endment] is merely prohibitory & not self executing.³³⁴ Her discussion carries over into the top half of the third page as well.³³⁵

FIGURE 10



The Chief Justice circulated a draft of his majority opinion on February 18, 1987, which asserted (as does the final version) that “the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.”³³⁶ Following a string citation of cases in support of this proposition, Rehnquist included a footnote that also appeared verbatim in the final version.³³⁷ Justice Powell exclaimed (Figure 11): “Amazing! From this able & conservative SG.”³³⁸

FIGURE 11

³³⁶The Solicitor General urges that the prohibitory nature of the Fifth Amendment, see *supra*, at —, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that “the Constitution does not, of its own force, furnish the basis for a court to award monetary damages against the government.” Brief for the United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that

Amazing!
From this
able &
conservative
SG.

There is thus ample evidence that the question of the self-executing nature of the Takings Clause was an important concern to the Justices as the Court

333. O'Connor, *supra* note 330.

334. *Id.*

335. *See id.*

336. Chief Justice William H. Rehnquist, First Draft of Majority Opinion 10, *First English*, No. 85-1199 (Feb. 18, 1987) (on file with Wash. & Lee Univ. Sch. of L., Lewis F. Powell, Jr. Papers, Box 668, Folder 7-10).

337. *First English*, 482 U.S. at 316 n.9.

338. Chief Justice William H. Rehnquist, First Draft of Majority Opinion 10, *First English*, No. 85-1199, *supra* note 336.

considered the takings challenge in *First English*. Three Justices who helped form the majority (Rehnquist, Powell, and Scalia) expressed concerns about the Solicitor General's dismissal of the principle that found its way into the Court's opinion and that has been quoted on numerous occasions by state and federal courts.³³⁹ One Justice who dissented (O'Connor) was more sympathetic to Solicitor General Fried's position.³⁴⁰ Unfortunately, the Roberts Court's *DeVillier* opinion failed either to confirm this keystone of *First English* or to use the *Dobbs* factors to reverse it before remanding the case to the lower court.³⁴¹

VII. CONCLUSION: TAKING *DOBBS* SERIOUSLY

This Article has identified a definite and problematic pattern in Roberts Court cases that have expanded the reach of the (already hyper-extended) Takings Clause. The practice of engaging in stealth overruling of key principles embedded in established precedents, as opposed to employing the robust stare decisis analysis presented in *Dobbs v. Jackson Women's Health Organization*,³⁴² is disturbing not just on a theoretical or conceptual level, however. The Supreme Court is not a static entity. Even with its reduced caseload, as the cases highlighted in this article (and others³⁴³) illustrate, the Roberts Court has shown a keen interest in takings cases.³⁴⁴ In the years since the Court announced the six cases discussed in Part III, counsel representing property owners have attempted to push the takings envelope even further by exploiting the breaches impacted by stealth overruling.³⁴⁵

We can get a glimpse of the future takings litigation landscape by sampling petitions for writs of certiorari filed in the Supreme Court during the October 2024 Term. Not surprisingly, counsel for property owners, in a diverse array of

339. A LexisNexis search revealed more than ninety cases in which "self-executing" appeared in close proximity to "Takings Clause." LEXISNEXIS, "Self-executing" /7 "Takings Clause", 95 results (Nov. 12, 2025) (on file with the University of Illinois Law Review).

340. See O'Connor, *supra* note 330; *First English*, 482 U.S. at 322–41.

341. See *DeVillier v. Texas*, 601 U.S. 285, 285–92 (2024).

342. See 597 U.S. 215, 263–90 (2022).

343. See, e.g., *Murr v. Wisconsin*, 582 U.S. 383, 406 (2017) ("Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.").

344. See, e.g., *id.*

345. The Supreme Court itself relied on *Arkansas Game* to expand takings law further. *Horne v. Dep't of Agric.*, 576 U.S. 351, 357 (2015) (*Horne II*) ("The first question presented asks 'Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property" applies only to real property and not to personal property.' The answer is no.") (quoting *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012)). Then, the Court used *Horne II* in *Sheetz*. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 278 (2024) ("In *Horne [II]*, we held that an administrative order effected a taking because it required farmers to give the Federal Government a portion of their crop to stabilize market prices. The branch of government that authorized the appropriation did not matter to the analysis . . ."); see also *Darby Dev. Co. v. United States*, 112 F.4th 1017, 1035 (Fed. Cir. 2024) ("[A]t a fundamental level, we cannot reconcile how forcing property owners to occasionally let union organizers on their property infringes their right to exclude, while forcing them to house non-rent-paying tenants (by removing their ability to evict) would not.") (citing and quoting *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149–52, 155 (2021); *Sheetz*, 601 U.S. at 274).

settings, attempted to push the takings envelope even further by building on the questionable foundation laid by the Roberts Court in the problematic cases discussed in this Article.³⁴⁶

In the petition in *The Gym 24/7 Fitness, LLC v. State of Michigan*,³⁴⁷ a takings challenge brought against the state's COVID-19 pandemic restrictions, attorneys for the Pacific Legal Foundation presented two arguments: (1) the government-friendly, ad hoc factors the Court employed in *Penn Central Transportation Company v. New York City*³⁴⁸ for partial regulatory takings should be replaced by “[a] takings test grounded upon the property owner’s market-based, reasonable rate of return,” and (2) the Justices should resolve the tension between a 2002 takings decision finding that development moratoria did not amount to a taking—*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*³⁴⁹—and *Cedar Point*,³⁵⁰ in which the “Court held that the duration of the physical taking was irrelevant to determining liability.”³⁵¹ That tension was the result of the Court’s stealth overruling of *Loretto*.³⁵²

The Roberts Court’s stealth handiwork in *Horne II* played a significant role in another recent petition, alleging that “[t]he HSTPA [New York’s Housing Stability and Tenant Protection Act] restrictions on an owner’s use and control of its property without compensation are physical takings.”³⁵³ Another petition relied on *Sheetz* to support a utility company’s claim for relocation costs caused by a city transit project, criticizing the lower courts for “allowing deference to

346. See *infra* notes 347–64 and accompanying text.

347. Petition for Writ of Certiorari, *Gym 24/7 Fitness, LLC v. State of Michigan*, 928 N.W.2d 844 (2025) (No. 24-757), 2025 WL 234479. *Gym 24/7 Fitness, LLC v. State of Michigan*, 145 S. Ct. 2752 (2025) (No. 24-757) (2025) (mem.) (cert. denied).

348. 438 U.S. 104, 124 (1978).

349. Petition for Writ of Certiorari, *supra* note 347, at 24; 535 U.S. 302, 335 (2002) (“A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication.”).

350. *Cedar Point*, 594 U.S. at 153.

351. Petition for Writ of Certiorari, *supra* note 347, at 29 (citing *Cedar Point*, 594 U.S. at 153). The brief quoted the *Cedar Point* majority’s troublesome assertions that “a physical appropriation is a taking whether it is permanent or temporary,” and that “the duration of an appropriation—just like the size of an appropriation, bears only on the amount of compensation.” *Id.* at 29–30 (quoting *Cedar Point*, 594 U.S. at 153).

352. See discussion *supra* Section III.B.

353. Petition for Writ of Certiorari at *7, *Bldg. & Realty Inst. of Westchester & Putnam Cntys. v. New York*, No. 23-1220 (2024), 2024 WL 2274419. The petitioner sought to build on *Horne II*’s refusal to dismiss the claimants’ takings arguments even though they voluntarily chose to participate in the government price-support program:

In *Horne [II]*, the Court rejected the argument that a property owner’s decision to participate in a particular market could absolve the government of takings liability. If it is a physical taking to compel a property owner to rent initially to a person it did not select, then it is also a taking to compel it to accept a second tenant or the continued occupancy by someone it would reject.

Id. at *12–13 (citing *Horne v. Dep’t of Agric.*, 576 U.S. 351, 365 (2015) (*Horne II*); 301, 712, 2103, & 3151 LLC v. City of Minneapolis (27 F.4th 1377, 1383 (8th Cir. 2022)). This petition was unsuccessful. *Bldg. & Realty Inst. of Westchester & Putnam Cntys. v. New York*, 145 S. Ct. 563 (2024) (No. 23-1220) (mem.) (cert. denied).

statutory authority and legislative findings,”³⁵⁴ and noting that the “Court reiterated just last Term that there is no ‘special deference for legislative takings.’”³⁵⁵ *Koontz* was the stealth taking precedent upon which yet another petitioner heavily relied, asking the Court to answer “[w]hether valuation-based building permit fees are exempt from unconstitutional conditions analysis under *Koontz*”³⁵⁶

The most intriguing of this recent set of certiorari petitions links two stealth takings cases—*Cedar Point* and *Sheetz*—with *Lingle v. Chevron USA, Inc.*³⁵⁷ and *Loper Bright v. Raimondo*.³⁵⁸ The petitioner alleged that in denying a zoning change that would have allowed a landowner to build one house on his property in Monterey County, California, the county had violated his rights under the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause, and the Takings Clause.³⁵⁹ The federal district court granted summary judgment to the county, and the Ninth Circuit affirmed.³⁶⁰

The third question presented to the Court in the brief was precedent-packed: “Do the decisions in *Loper Bright Enters. v. Raimondo*, *Cedar Point Nursery v. Hassid*, *Sheetz v. Cnty. of El Dorado* and *Lingle v. Chevron USA, Inc.*, change the way courts should evaluate the ‘character of governmental action’ factor in a *Penn Central* analysis?”³⁶¹ While at first glance the reader might be curious as to why an administrative law case is keeping company with three takings decisions, the landowner’s attorney provided the element the newer decisions have in common: in each the Court questioned deference to government regulators.³⁶² According to the petition, “[t]his *deference* shown [by the district court] to the Board of Supervisors’ interpretation of the CALUP [Carmel Area Land Use Plan] was never appropriate and is certainly not supportable after *Loper*, and *Cedar Point*.”³⁶³ Constitutional history instructs us that the most effective judicial means to dismantle the regulatory state is to replace deference to legislators and administrators with second-guessing.³⁶⁴

354. Petition for Writ of Certiorari at *30, *So. Cal. Edison Co. v. Orange Cnty.* Transp. Auth., No. 24-775 (2025), 2025 WL 283147. *So. Cal. Edison Co. v. Orange Cnty.* Transp. Auth., 145 S.Ct. 1310 (2025) (No. 24-775) (mem.) (cert. denied).

355. *Id.* (quoting *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 277 (2024)).

356. Petition for Writ of Certiorari at *i, *Hous. First Minn. v. Cities of Corcoran & Dayton*, No. 24-268 (2024), 2024 WL 4150375. The Court declined to hear this case. *Hous. First Minn. v. Cities of Corcoran & Dayton*, 145 S. Ct. 381 (2024) (No. 24-268) (mem.) (cert. denied).

357. 544 U.S. 528, 531–32 (2005).

358. 603 U.S. 369, 377–79 (2024).

359. Petition for Writ of Certiorari at *12–18, *Collins v. Monterey Cnty.*, No. 24-487 (2024), 2024 WL 4648702. *Collins v. Monterey Cnty.*, 145 S. Ct. 1169 (2025) (No. 24-487) (mem.) (cert. denied).

360. *Collins v. Cnty. of Monterey* No. 22-cv-02560-NC, 2023 WL 5743236 (N.D. Cal. Aug. 18, 2023), *aff’d*, No. 23-16153, 2024 WL 3066046 (9th Cir. June 20, 2024) (mem.).

361. Petition for Writ of Certiorari, *supra* note 359, at *i (footnotes omitted).

362. *See id.* at *32.

363. *Id.* (emphasis added); *see also id.* at *19 (“Recent decisions in this Court should significantly change the evaluation of the ‘character of government action’ factor in *Penn Central*—making clear that property rights are not poor relations to other constitutional rights and by making clear that local government interpretations of their own regulations are not entitled to particular *deference*.” (emphasis added)).

364. *Id.* at *19 (“This extreme deference to local government infects substantive Due Process claims, Takings Clause claims and, at least in this case, Equal Protection claims alike. It is symptomatic of the hesitancy of courts to appear to second guess legislative decisions about the need for, and potential effectiveness of

The future thus appears to be bright for property owners' counsel hoping to continue the project of further weaponizing the Takings Clause in an effort to dismantle the regulatory state. Is it asking too much of the Justices to employ *their own* stare decisis factors when rendering rulings that reverse or question longstanding principles derived from takings (and perhaps other) precedents? After all, the Roberts Court, in *Knick v. Township of Scott*,³⁶⁵ demonstrated that it knew how to render a reversal of takings precedent in the sunshine: the majority used the *Dobbs* factors to make it easier for property owners to bring regulatory takings challenges in federal court.³⁶⁶ The members of the nation's highest and most influential tribunal are not obliged to explain their rulings.³⁶⁷ Even if a majority of Justices agreed on a rule that *required* a full-bodied stare decisis analysis before abandoning key principles from Court precedents, that rule itself, like the rules on levels of scrutiny for different alleged constitutional violations,³⁶⁸ would be subject to the whim of that same Court and its successors.

So how should counsel and commentators confront stealth overruling *before* it occurs? The answer is sunshine. In cases in which lower courts have based their rulings at least in part on principles derived from precedents (most likely at the behest of counsel for the prevailing party), attorneys representing and in support of respondents should shine a light on the past by discussing in their briefs how those principles are cornerstones, keystones, or both. As explained and illustrated above, a cornerstone is the foundation for a number of state and federal court rulings,³⁶⁹ and a keystone is language that—based on evidence gleaned from Court opinions, oral arguments, briefs, and the papers of Supreme Court Justices—was essential to a prior ruling.³⁷⁰ This should be an effective means to check opposing counsel and, it is hoped, appeal to conscientious Justices who would otherwise ignore the key language or deem it mere dictum.

Commentators should shine their own light on the present by calling out the Court each time it engages in the stealth practices presented in this Article. With due respect to originalists of all ilks,³⁷¹ the American version of constitutional law, like its common-law predecessor, is primarily based not on the (frozen-in-time) vocabulary and legal milieu of the distant past but on the words and

legislation.”); *see also* *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) (“For years the Court struck down social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system.”); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *YALE L.J.* 2331, 2409 (2003) (“The classic critique of *Lochner* is that the Court should not second-guess legislative judgments and, in the absence of clear constitutional restrictions, it should let majorities govern.”).

365. 588 U.S. 180, 202–05 (2019).

366. *See supra* notes 168–74 and accompanying text.

367. *See, e.g.*, Amy Howe, *Supreme Court Clears the Way for Trump Administration to Massively Reduce the Size of the Department of Education*, SCOTUSBLOG (July 14, 2025), <https://www.scotusblog.com/2025/07/supreme-court-clears-the-way-for-trump-administration-to-massively-reduce-the-size-of-the-department-of-education/> [<https://perma.cc/W98J-4R5C>].

368. *See* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022).

369. *See* discussion *supra* Part V.

370. *See* discussion *supra* Part VI.

371. *See* JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 20 (2024) (“There are now several distinct brands of originalism, each with its own emphases and priorities.”).

logic of judicial rulings that have evolved over the decades.³⁷² It is ironic that a Court that has distinguished itself for its faithfulness to America's "historical tradition"³⁷³ should behave in such an ahistorical fashion. The past teaches us that the Court that makes it a practice to treat its stare decisis obligations lightly runs the great risk that its own work will garner equal disrespect in the future.³⁷⁴

372. *Id.* at 81.

373. *Bruen*, 597 U.S. at 17. In *Bruen*, announced just one day before *Dobbs*, the majority, without engaging in a stare decisis analysis, departed from decades of precedent by articulating a new standard of judicial review for the alleged violation of an individual constitutional right, here the Second Amendment right to keep and bear arms. Justice Thomas wrote:

[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

Id. Justice Breyer, joined by Justices Sotomayor and Kagan, were not persuaded. *Id.* at 102–03 (Breyer, J., dissenting) (“[T]he Court refuses to employ what it calls ‘means-end scrutiny.’ . . . Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court’s near-exclusive reliance on that single tool today goes much too far.”).

374. The current Justices are quite aware of how easily a Court can fall into disfavor. As Justice Alito noted in his most controversial opinion to date:

On occasion, when the Court has ignored the ‘[a]ppropriate limits’ imposed by “respect for the teachings of history,” . . . it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* The Court must not fall prey to such an unprincipled approach. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240 (2022) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). This Article demonstrates how unmooring the Court’s rulings from precedent without sufficient justification is more “freewheeling” than not.

