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## **The Florida Beach Case and the Road to Judicial Takings**

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# THE FLORIDA BEACH CASE AND THE ROAD TO JUDICIAL TAKINGS

MICHAEL C. BLUMM\* & ELIZABETH B. DAWSON\*\*

## ABSTRACT

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, the U.S. Supreme Court unanimously upheld a state beach restoration project against landowner claims of an unconstitutional taking of the property. This result was not nearly as surprising as the fact that the Court granted certiorari on a case that turned on an obscure aspect of Florida property law: whether landowners adjacent to a beach had the rights to future accretions of sand and to maintain contact with the water.

The Court's curious interest in the case was piqued by the landowners' recasting the case from the regulatory taking claim they unsuccessfully pursued in the Florida courts to the judicial taking claim they argued before the Supreme Court. The petitioners contended that the Florida Supreme Court's interpretation of Florida property law warranted constitutional compensation because the effect was to replace an eroded, hurricane-ravaged private beach with a restored, publicly-accessible beach. Although no member of the Court agreed that the lower court's opinion amounted to a taking, a four-member plurality, led by Justice Scalia and encouraged by numerous amicus briefs filed by libertarian property groups, gave a ringing endorsement to the concept of judicial takings. Moreover, two other members of the Court, Justices Kennedy and Sotomayor, claimed that state court property law interpretations could be cabined by the Due Process Clause. The result portends ominous implications for state courts' capability to perform their traditional common law function of updating property law to reflect contemporary values and may unsettle federal-state judicial relations by encouraging litigants to appeal adverse state property law decisions to federal courts.

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## INTRODUCTION

Five years into its tenure, the Roberts Court has shown little of the restraint its Chief Justice espoused in his confirmation hearings.<sup>1</sup> As one commentator observed, “judicial minimalism is gone, and the court has entered an assertive and sometimes unpredictable phase.”<sup>2</sup> Even former Supreme Court Justice Sandra Day O’Connor quipped, “I step away for a couple of years and there’s no telling what’s going to happen.”<sup>3</sup> From striking down programs promoting racial diversity,<sup>4</sup> to restricting local governments’ ability to regulate guns,<sup>5</sup> to giving corporations the right to speak with their money in political election campaigns,<sup>6</sup> the Roberts Court has issued a startling array of opinions reversing longstanding decisions. During the 2009 Term, the Court brought its activism to bear on two improbable candidates: Florida’s sand beaches and the concept of judicial takings.

Due to hurricanes, tropical storms, and other, slower-moving erosive forces, many of Florida’s beaches are in peril.<sup>7</sup> To remedy this problem,

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<sup>1</sup> Jeffrey Toobin, *Activism v. Restraint*, THE NEW YORKER, May 24, 2010, [http://www.newyorker.com/talk/comment/2010/05/24/100524taco\\_talk\\_toobin](http://www.newyorker.com/talk/comment/2010/05/24/100524taco_talk_toobin) (“Roberts and his allies . . . profess to believe in judicial restraint . . . and respect for precedent, but their actions belie their supposed values.”). In his confirmation hearings, Chief Justice Roberts spoke of the judge’s duty to “have the self-restraint to recognize that [the judge’s] role is limited to interpreting the law and does not include making the law.” *Transcript: Day Two of the Roberts Confirmation Hearings (Part VI: Sens. Graham and Schumer)*, WASH. POST, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301838.html>. On another day of the hearings, he reiterated that “judicial self-restraint is the key check on the authority of the court.” *Transcript: Day Three of the Roberts Confirmation Hearings (Morning Session: Sens. Brownback and Coburn)*, WASH. POST, Sept. 14, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401445.html>.

<sup>2</sup> Adam Liptak, *News Analysis; Roberts Court Comes of Age*, N.Y. TIMES, June 30, 2010, at A19, available at <http://query.nytimes.com/gst/fullpage.html?res=9406E7DF163CF933A05755C0A9669D8B63&sec=&spon=&pagewanted=1>.

<sup>3</sup> See Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, at A1, available at [http://www.nytimes.com/2010/07/25/us/25roberts.html?\\_r=1&scp=1&sq=conservative%20roberts%20court&st=cse](http://www.nytimes.com/2010/07/25/us/25roberts.html?_r=1&scp=1&sq=conservative%20roberts%20court&st=cse).

<sup>4</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (rejecting the schools’ diversity programs as illegitimate racial balancing).

<sup>5</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (incorporating the Second Amendment right to keep and bear arms against the states through the Fourteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (recognizing an individual right to bear arms under the Second Amendment).

<sup>6</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (prohibiting the government from restricting political speech on the basis of corporate status).

<sup>7</sup> See TIMOTHY BEATLEY et al., *COASTAL ZONE MANAGEMENT* 117 (Island Press 2d ed. 2002).

nearly four decades ago the legislature enacted a statute authorizing the state to restore the beaches, so long as the new beach belongs to the state.<sup>8</sup> The state's claim to ownership of the restored beaches caught the ire of some beachfront property owners when the state sought to restore the beach in front of their homes, prompting them to sue the state, alleging a taking of their property.<sup>9</sup> Although the Florida Supreme Court upheld the legislation against their claims,<sup>10</sup> the landowners recharacterized their argument to successfully pique the interest of four Supreme Court Justices—alleging that the Florida Supreme Court's decision upholding the state's action itself effected the taking: in other words, a judicial taking.<sup>11</sup>

The judicial takings doctrine assumes that the Fifth Amendment's Takings Clause can be applied to the judiciary, not just the legislative and executive branches, as has been the historical practice.<sup>12</sup> The concept is not entirely foreign to American law, but until the Roberts Court, it had largely remained the subject of scholarly articles.<sup>13</sup> Although some dicta in case law as far back as the late nineteenth century had suggested the notion,<sup>14</sup> the cases were always decided on other grounds.<sup>15</sup> But in 2010, the U.S. Supreme Court confronted the judicial takings doctrine and nearly endorsed it. In the Florida beach case, the Court could not agree on what exactly a judicial taking would look like, if indeed it occurred,<sup>16</sup> and some Justices thought the Court should not have spoken on the issue at all.<sup>17</sup>

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<sup>8</sup> See FLA. STAT. ANN. §§ 161.011-.25, 161.141-.161(5), 253.12 (2010).

<sup>9</sup> See *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot. (SOB I)*, Case Nos. 04-2960, 04-3261, at 13 (Fla. Dep't of Env'tl. Prot. June 30, 2005) (recommended order), available at [http://www.dep.state.fl.us/legal/Final\\_Orders/2005/DEP05-0791.pdf](http://www.dep.state.fl.us/legal/Final_Orders/2005/DEP05-0791.pdf).

<sup>10</sup> See *id.*

<sup>11</sup> See *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008); Petition for Writ of Certiorari at 16; Motion for Leave to File Brief of Pacific Legal Foundation as Amicus Curiae Supporting the Petitioner at 1, *Stop the Beach Renourishment v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151).

<sup>12</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010).

<sup>13</sup> See, e.g., David J. Benderman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487 (2004).

<sup>14</sup> See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 234–36, 244–46, discussed *infra* notes 156-67 and accompanying text.

<sup>15</sup> See, e.g., *id.* at 258 (1897) (upholding a jury award of just compensation to the railroad for its loss of a right of way over its tracks).

<sup>16</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2603–07; *id.* at 2618–19 (Kennedy, J. concurring).

<sup>17</sup> *Id.* at 2618 (Breyer, J., concurring); *id.* at 2613 (Kennedy, J., concurring).

The result was a plurality opinion whose influence may exceed its precedential value, possibly serving to stifle the evolution of state property law in the process.

This Article maintains that the latest example of the Roberts Court's activism departs considerably from the Court's prior deference to the state courts' primary role in articulating state property law, and that the result could portend significant ramifications. Part I describes the precarious situation of Florida's beaches and explains the state's response to beach erosion. Part II examines the litigation in the lower courts that led the Supreme Court to grant certiorari. Part III takes a step back to look at the concept of judicial takings and examines how that doctrine may have influenced the Court's decision in the Florida case. Part IV discusses the Court's Florida beach decision, including the plurality and concurring opinions. Part V assesses the implications of the Court's decision, both in terms of its immediate effects and its long-term legacy. The Article concludes that the plurality opinion, should the Court adopt it, would be a radical departure from judicial restraint and from the original meaning of the Takings Clause, imposing an obstacle to state courts' ability to adapt state property law to changing circumstances without second-guessing from federal courts.

## I. FLORIDA'S BEACHES

When most people think about Florida, its beaches are among the first characteristics that come to mind. Although recent events, like the Deepwater Horizon oil rig disaster in the Gulf of Mexico,<sup>18</sup> have highlighted the vulnerability of coastal ecosystems,<sup>19</sup> Florida's beaches have long experienced changing fortunes. This section explains the precarious nature of Florida's beaches in some detail and the state's response to that vulnerability.

### A. *Coastal Restoration in Florida*

Before examining Florida's beach restoration scheme, some background on beach restoration is in order. This foundation will supply an

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<sup>18</sup> See *Deepwater Horizon Response and Restoration*, U.S. DEP'T OF THE INTERIOR, <http://interior.gov/deepwaterhorizon/index.cfm> (last visited Feb. 21, 2010).

<sup>19</sup> See generally *Emergency Authorization for Protective Measures, Restoration, and Certain Other Measures Made Necessary by the Deepwater Horizon Oil Spill*, OGC No. 10-1610, (Fla. Dep't of Env'tl. Prot. June 18, 2010) (second amended final order), available at <http://www.dep.state.fl.us/beaches/publications/pdf/emergency/DEP2ndAmndEFO6-18-10.pdf> (providing guidance as to how to protect public safety and wildlife resources).

understanding of the evolution of Florida's legislation and explain why coastal restoration has become such a contentious issue.

### 1. An Introduction to Beach Nourishment

Coastal dwellers understand the ongoing push and pull of the sea, usually limited to the routine changes of the tides.<sup>20</sup> Occasionally, however, major events like tropical storms and hurricanes alter the shoreline drastically.<sup>21</sup> Of course, gradual, natural erosion occurs in places as well.<sup>22</sup> Taken together, coastal erosion could destroy one out of every four houses within 500 feet of the U.S. shoreline by 2060, according to one estimate.<sup>23</sup> In all, as much as one-fourth of the coast may be eroding.<sup>24</sup> In response, governments undertake beach restoration, an arguably effective, but unquestionably temporary, solution to the continual battle against coastal erosion.<sup>25</sup>

Beach restoration often occurs through a process called "nourishment" (used interchangeably with "renourishment"), in which sand is dredged from the ocean floor, mixed with water, and then piped onto an eroded beach.<sup>26</sup> The water then drains away, leaving the sand behind.<sup>27</sup> Some questions exist as to the environmental viability, or even necessity, of this process. Opponents of nourishment argue that, unless replacement sand matches the qualities of the existing sand, projects can interfere with the animal life using the beach.<sup>28</sup> Not only do critics worry about the beach, they also question the effects of the dredging process on the ocean floor.<sup>29</sup> Moreover, because by their very nature beaches erode, any restoration

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<sup>20</sup> See BEATLEY, *supra* note 7, at 33.

<sup>21</sup> *Id.* at 72–73.

<sup>22</sup> *Id.* at 73, 117.

<sup>23</sup> *Id.* at 117.

<sup>24</sup> See JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 303 (2007).

<sup>25</sup> See BEATLEY, *supra* note 7, at 72–74, 118.

<sup>26</sup> See Cornelia Dean, *Surfers Deal a Blow to a Beach Dredging Project*, N.Y. TIMES, Mar. 9, 2009, at A11, available at <http://www.nytimes.com/2009/03/09/science/earth/09surfers.html>.

<sup>27</sup> See *id.* (describing a failed attempt to repair a section of Palm Beach). Replacement sand can also bring with it extra material that is sometimes dangerous. For example, sand from a beach renourishment project in New Jersey contained an unexploded bomb fuse dating from World War II, which a father and his children mistakenly took for a pin from an old ship. See Chris Dixon, *Re-engineering America's Beaches, 1 Tax Dollar at a Time*, POPULAR MECHANICS, Oct. 1, 2009, <http://www.popularmechanics.com/science/environment/4217981>.

<sup>28</sup> See Dean, *supra* note 26.

<sup>29</sup> See *id.*

project will have to be continually replenished, sometimes earlier than engineering estimates predict.<sup>30</sup> Over the course of a decade, maintaining a beach may cost up to \$6 million a mile.<sup>31</sup> More fundamentally, some critics contend that the need to restore beaches is a problem only to the extent that landowners continue to build close to the shoreline, interfering with the ecosystem's natural process of shoreline change.<sup>32</sup>

The U.S. Army Corps of Engineers, the federal agency most involved in beach nourishments, counters that nourishment projects create habitat for endangered animals residing on the beach, like sea turtles and piping plovers.<sup>33</sup> Although acknowledging short-term detriment to some organisms, the Corps believes that "sound management practices" can alleviate these adverse effects.<sup>34</sup> Additionally, when the federal government funds a renourishment project, the new land becomes public land and subject to the Corps' public access policies.<sup>35</sup> The federal shore protection program, authorized initially under the Rivers and Harbors Act<sup>36</sup> and currently funded through the Water Resources Development

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<sup>30</sup> *Id.*; BEATLEY, *supra* note 7, at 73. "[R]ecent studies of beach renourishment projects suggest that the practice is very expensive and short-lived. The length of time before additional renourishing is necessary has been consistently overestimated (especially by the U.S. Army Corps of Engineers . . .)." *Id.* For example, a 1982 project in Ocean City, New Jersey, costing \$5.2 million, lasted 2.5 months. *Id.* at 118.

<sup>31</sup> BEATLEY, *supra* note 7, at 74.

<sup>32</sup> See Orrin H. Pilkey & Andy Coburn, *Beach Nourishment: Is It Worth The Cost?—Perspective*, COASTAL SERV. CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.csc.noaa.gov/beachnourishment/html/human/dialog/series1a.htm> (last visited Feb. 10, 2010).

<sup>33</sup> DENNIS P. ROBINSON, LAURA ZEPP & HARRY M. SHOUDY, U.S. ARMY CORPS OF ENGINEERS, THE DISTRIBUTION OF SHORE PROTECTION BENEFITS: A PRELIMINARY EXAMINATION viii (Draft 2001) [hereinafter ROBINSON], available at [http://www.saw.usace.army.mil/coastal/ShoreProtectionBenefits\\_Part1.pdf](http://www.saw.usace.army.mil/coastal/ShoreProtectionBenefits_Part1.pdf).

<sup>34</sup> *Id.*

<sup>35</sup> BEATLEY, *supra* note 7, at 148. See also U.S. ARMY CORPS OF ENGINEERS, ER 1165-2-130, WATER RESOURCES POLICIES AND AUTHORITIES: FEDERAL PARTICIPATION IN SHORE PROTECTION (6)(h)(3) (1989), available at <http://140.194.76.129/publications/eng-regs/er1165-2-130/entire.pdf> ("Reasonable public access must be provided in accordance with the recreational use objectives of the particular area."); U.S. ARMY CORPS OF ENGINEERS, SHORE PROTECTION ASSESSMENT, HOW BEACH NOURISHMENT PROJECTS WORK 9 (2007), available at <http://chl.erdc.usace.army.mil//Media/7/4/7/HowBeachNourishmentWorks.pdf> (specifying that projects with "federal involvement . . . must be accessible to the public"). 33 C.F.R. § 209.315(c) (2009) (providing for public access to all "navigation works of general public interest" that do not present hazards or where public access would not interfere with the site's operations).

<sup>36</sup> ROBINSON, *supra* note 33, at 5; Rivers and Harbors Appropriations Act of 1899 ("RHA"), 33 U.S.C. §§ 401–467n (2006). Specifically, in 1930, Congress amended the RHA to include

Act,<sup>37</sup> has cost the government around \$100 million a year as recently as 2001.<sup>38</sup>

Despite questions about the efficacy of beach nourishment, all coastal states bordering the Atlantic Ocean, the Pacific Ocean, and the Gulf of Mexico have undertaken beach nourishment projects of some kind.<sup>39</sup> Even some Great Lakes states have restored portions of their beaches.<sup>40</sup> Wealthy and coastally dependent cities, such as Virginia Beach, Virginia, and Ocean City, Maryland, have invested heavily in such projects, reflecting their attractiveness when significant property investments are at stake.<sup>41</sup> By 1996, governments had undertaken some 418 beach restoration projects, with a total of 1448 individual sand placements, costing \$3.4 billion (in 1996 dollars).<sup>42</sup> Between 2000 and 2009, beach nourishment projects placed the equivalent of \$1.1 billion in dredge material on the country's shores, with forty-eight projects beginning in 2006 alone.<sup>43</sup> Beach nourishment has thus become a popular middle ground between building physical structures to keep erosion at bay and succumbing to coastal

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section 426, which authorizes the Secretary of the Army to study the necessity of erosion control. *Id.* § 426; Pub. L. No. 71-520, § 2, 46 Stat. 945 (1930).

<sup>37</sup> Water Resources Development Act of 1986 ("WRDA"), 33 U.S.C. §§ 2201-2339 (2006). In the view of the Corps, the WRDA shifted the permissible purpose of federally-funded projects from beach erosion control to hurricane and storm damage reduction but allowed beach erosion costs to be included as appropriate. ROBINSON, *supra* note 33, at ix; 33 U.S.C. § 2213(d).

<sup>38</sup> ROBINSON, *supra* note 33, at 16.

<sup>39</sup> See Arthur C. Trembanis, Orrin H. Pilkey & Hugo R. Valverde, *Comparison of Beach Nourishment Along the U.S. Atlantic, Great Lakes, Gulf of Mexico, and New England Shorelines*, 27 COASTAL MGMT. 329, 330-32 (1999), available at [http://www.wcu.edu/WebFiles/PDFs/psds\\_Comparison\\_Nourishment\\_1999.pdf](http://www.wcu.edu/WebFiles/PDFs/psds_Comparison_Nourishment_1999.pdf). In fact, nearly all the Los Angeles County beaches are artificial, made of dredged sand. CORNELIA DEAN, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* 99 (1999).

<sup>40</sup> Trembanis, Pilkey & Valverde, *supra* note 39, at 330. All told, at least twenty-three states have undertaken, are planning, or are constructing shore restoration projects that include beach nourishment: Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, California, Washington, Ohio, Pennsylvania, and Indiana. *Id.* at 331-32; *Program for the Study of Developed Shorelines, Beach Nourishment*, W. CAROLINA U., <http://www.wcu.edu/1038.asp> (last visited Feb. 10, 2011); THEODORE M. HILLYER, U.S. ARMY CORPS OF ENGINEERS, *THE CORPS OF ENGINEERS AND SHORE PROTECTION 66* (2003), available at [http://www.nationalshorelinemanagement.us/docs/National\\_Shoreline\\_Study\\_IWR03-NSMS-1.pdf](http://www.nationalshorelinemanagement.us/docs/National_Shoreline_Study_IWR03-NSMS-1.pdf).

<sup>41</sup> See BEATLEY, *supra* note 7, at 73.

<sup>42</sup> See Trembanis, Pilkey & Valverde, *supra* note 39, at 332 tbl.1.

<sup>43</sup> See Dixon, *supra* note 27.

retreat.<sup>44</sup> With climate change promising rising sea levels,<sup>45</sup> increased pressure for beach nourishment seems inevitable.

## 2. Florida's Beach and Shore Preservation Act

The state of Florida possesses the longest stretch of coastline of any of the lower contiguous states<sup>46</sup>—some 825 miles.<sup>47</sup> Its coastline features predominantly sandy beaches, which are major tourist attractions,<sup>48</sup> but these beaches are also prone to erosion.<sup>49</sup> Consequently, the state is uniquely vulnerable, both economically and ecologically, to hurricanes and tropical storms. Responding to this vulnerability, in 1961 the Florida legislature enacted the Beach and Shore Preservation Act (“BSPA”),<sup>50</sup> declaring a “necessary governmental responsibility” to 1) protect such beaches from erosion and 2) restore those beaches already eroded.<sup>51</sup> The BSPA gave the Florida Department of Environmental Protection (“DEP”) responsibility to administrate the program,<sup>52</sup> but the statute also made county commissioners the “beach and shore preservation authority” within each county.<sup>53</sup>

To comply with its responsibilities under the BSPA, the DEP first issued a report of the condition of the state's coastline in 1989, identifying 217.6 miles of critically-eroded beaches.<sup>54</sup> By June 2010, the amount of critically-eroded beaches rose steadily to 398.6 miles, despite

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<sup>44</sup> BEATLEY, *supra* note 7, at 72.

<sup>45</sup> The U.S. Environmental Protection Agency stated that the confluence of climate-induced sea level rise and storm damage poses a particular threat to Florida. *See* U.S. ENVTL. PROT. AGENCY, SAVING FLORIDA'S VANISHING SHORES (2002), *available at* [http://www.epa.gov/climatechange/effects/coastal/saving\\_FL.pdf](http://www.epa.gov/climatechange/effects/coastal/saving_FL.pdf).

<sup>46</sup> FLA. DEP'T OF ENVTL. PROT., 1994 FLORIDA SEDIMENT QUALITY ASSESSMENT GUIDELINES 6 (1998), *available at* [http://www.dep.state.fl.us/waste/quick\\_topics/publications/documents/sediment/volume1/chapter2.pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/documents/sediment/volume1/chapter2.pdf).

<sup>47</sup> FLA. DEP'T OF ENVTL. PROT., STRATEGIC BEACH MANAGEMENT PLAN 1 (2008) [hereinafter MAY 2008 SBMP], *available at* <http://www.dep.state.fl.us/beaches/publications/pdf/SBMP/Cover%20and%20Introduction.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> FLA. STAT. § 161.088 (2010).

<sup>50</sup> *Id.* § 161.011; *see also id.* § 161.088.

<sup>51</sup> *Id.* § 161.088.

<sup>52</sup> *Id.* § 161.031.

<sup>53</sup> *Id.* § 161.25.

<sup>54</sup> BUREAU OF BEACHES & COASTAL SYS., FLA. DEP'T OF ENVTL. PROT., CRITICALLY ERODED BEACHES IN FLORIDA 1 (2010) [hereinafter CRITICALLY ERODED BEACHES IN FLORIDA], *available at* <http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt07-10.pdf>.

renourishment of several areas.<sup>55</sup> Currently, over 485 miles of the state's beaches—fifty-nine percent in 2010—are experiencing some type of erosion.<sup>56</sup>

Once the DEP lists a beach as critically-eroded, the beach becomes eligible to receive state funding for beach management.<sup>57</sup> In 2008, 197.8 of those critically-eroded miles were under “active management,” which includes restoration, nourishment, and other mitigation efforts.<sup>58</sup> Since its enactment, Florida's beach erosion control program has helped restore over 200 miles of the state's beaches.<sup>59</sup> Through fiscal year 2006, the state legislature allocated over \$582 million for beach restoration and hurricane recovery.<sup>60</sup>

As might be imagined, beach restoration projects often affect private property. One of the most important preliminary steps in carrying out a beach restoration project is to determine where private property ends and public property begins.<sup>61</sup> The Board of Trustees of the Internal Improvement Fund (“Board of Trustees” or “Board”) is the trustee of all Florida submerged tidal lands, holding them in trust for the benefit of the people of the state.<sup>62</sup> The Board is the ultimate authority with respect to setting tidal property lines.<sup>63</sup>

The Board first attempts to define the pre-erosion mean high water line (“MHWL”),<sup>64</sup> a shifting boundary that has traditionally served as the demarcation between private and public property in Florida.<sup>65</sup> Second, using the MHWL as a guide, the Board establishes a permanent “Erosion Control Line” (“ECL”) to prospectively divide public and private property.<sup>66</sup> After setting the ECL, all seaward land belongs to the state.<sup>67</sup> Because

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<sup>55</sup> *See id.* at 3.

<sup>56</sup> *Beach Erosion Control Program*, FLA. DEP'T OF ENVTL. PROT., <http://www.dep.state.fl.us/beaches/programs/bcherosn.htm> (last visited Feb. 11, 2011).

<sup>57</sup> MAY 2008 SBMP, *supra* note 47, at 1–2.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> FLA. DEP'T OF ENVTL. PROT., *supra* note 56.

<sup>60</sup> *Id.*

<sup>61</sup> *See* FLA. STAT. § 161.141 (2010).

<sup>62</sup> *Id.* § 253.12.

<sup>63</sup> *Id.* § 161.161(5).

<sup>64</sup> *Id.*

<sup>65</sup> *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs.*, 512 So.2d 934, 940 (Fla. 1987). This line is based on the nineteen-year average height of the high tide. FLA. ADMIN. CODE ANN. r. 18-21.003(37) (2010).

<sup>66</sup> FLA. STAT. § 161.161(3)–(5).

<sup>67</sup> *Id.* § 161.191(1).

the public owns land seaward of the ECL,<sup>68</sup> upland owners may no longer have constant contact with the water, losing the right to future accretions as a result.<sup>69</sup> But, in exchange, landowners obtain the protection of the state against future beach erosion.<sup>70</sup>

If the ECL does not accurately reflect the pre-erosion MHWL, but instead encroaches upon riparian land, Florida law requires condemnation proceedings to compensate riparian owners.<sup>71</sup> Ordinarily, the Board of Trustees' regulations require governmental entities to show "sufficient upland interest" to conduct projects on sovereign submerged lands.<sup>72</sup> However, in the case of beach restoration, sufficient governmental upland ownership need not be shown, so long as the restoration does not "unreasonably infringe upon riparian rights."<sup>73</sup> Finally, once the beach has been restored,<sup>74</sup> if the entity responsible for the project fails to maintain the ECL, the upland owner's rights revert to the pre-project status quo.<sup>75</sup>

At first glance, this program seems unlikely to upset beachfront property owners, given its inherent benefits to the landowners' property. Indeed, according to the federal National Oceanic and Atmospheric Administration, "[o]wners of beachfront property and businesses that depend on beaches . . . demand shore protection or beach renourishment."<sup>76</sup> From 1961

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

<sup>69</sup> Under Florida law, accretion is the "gradual and imperceptible accumulation of land along the shore or bank of a body of water." *Sand Key*, 512 So. 2d at 936 (citations omitted). Reliction, conversely, occurs when water recedes gradually and imperceptibly, revealing new land. *Id.* In contrast with these gradual changes, when a sudden change occurs, that is an avulsion, whether the cause is an addition of new land or a receding of water. *Id.* See generally 1 WATERS AND WATER RIGHTS, § 6.03(b)(2) (Robert E. Beck & Amy K. Kelley, eds. LexisNexis/Matthew Bender, 3d ed. 2009) (discussing the difference between accretion, reliction, and avulsion, and the legal implications of each).

<sup>70</sup> See FLA. STAT. § 161.191(2) (2010).

<sup>71</sup> See *id.* § 161.141.

<sup>72</sup> FLA. ADMIN. CODER. 18-21.004(3)(b) (2010). The regulations define "satisfactory evidence of sufficient upland interest" to require documentary proof of a property interest in the riparian land, for example, an easement or a lease. *Id.* r. 18-21.003(60).

<sup>73</sup> *Id.* r. 18-21.004(3).

<sup>74</sup> Although beach restoration can take several forms, the DEP prefers nourishment. FLA. DEP'T OF ENVTL. PROT., *supra* note 56. A benefit of this method, according to the DEP, is a quick restoration of habitat for shorebirds and marine turtles. *Id.*

<sup>75</sup> See FLA. STAT. § 161.211(2).

<sup>76</sup> *Beach Nourishment: A Guide for Local Government Officials, Social and Demographic Trends that Affect the Need for Beach Nourishment*, COASTAL SERV. CTR., NAT'L OCEANIC AND ATMOSPHERIC ADMIN. ("NOAA"), <http://www.csc.noaa.gov/beachnourishment/html/human/socio/change.htm> (last visited Feb. 11, 2011). These projects undoubtedly also

to 2003, no one challenged the validity of the BSPA as it applied to these projects.<sup>77</sup> For example, Delray Beach, in Palm Beach County on Florida's Atlantic coast, has been renourished consistently since the 1970s.<sup>78</sup>

*B. The Destin Beach: From Sugary Sand to Critical Erosion*

The city of Destin, Florida, has been described as “the world’s luckiest fishing village.”<sup>79</sup> Between the late 1970s, when Destin was still a town of just 2000 permanent residents, and today, an influx of beachgoers and developers descended, transforming the fishing village into a tourist mecca. Newcomers found pristine sand and sparkling water, took advantage of the lack of development, and built a virtual playground on the beach. Some longtime Destin residents were skeptical about this boom, however, especially when developers built on newly-accreted land that history showed could disappear much faster than it arrived. The skeptics were right. In 1995, Hurricane Opal ravaged Destin’s beaches, destroying dunes and changing tidal patterns, beginning a decade of further erosion. To remedy the situation, the city turned to the state government and its erosion control program. Ordinarily, the renourishment program is a popular way to protect both the state’s tourism industry and the coastal ecosystem.<sup>80</sup> But Destin proved to be different.

Destin beachfront property owners and tourists have long been at odds; the property owners fight to keep tourists from leaving the wet sand

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have an effect on the tax base. With a more stable shoreline, not only do property values increase and property tax revenues rise, but tourist activity also increases, providing a source of funds for the continued maintenance and renourishment. *See Beach Nourishment: A Guide for Local Government Officials, Impact of Beach Nourishment on the Tax Base and Associated Revenues*, NOAA, <http://www.csc.noaa.gov/beachnourishment/html/human/socio/taxbase.htm> (last visited Feb. 11, 2011). In states like Florida that have a cap on property taxes, however, that source of revenue may plateau. *See id.*

<sup>77</sup> Searches for citing references to the BSPA in both Westlaw and LexisNexis reveal several previous cases applying the BSPA to specific circumstances, but none assessing its validity until the current dispute. For more on the popular acceptance of beach restoration, *see* BEATLEY, *supra* note 7 and accompanying text.

<sup>78</sup> DEAN, *supra* note 39, at 99.

<sup>79</sup> Andrew Rice, *A Stake in the Sand*, N.Y. TIMES, Mar. 19, 2010, at MM66 (Sunday Magazine), available at <http://www.nytimes.com/2010/03/21/realestate/keymagazine/21KeyBeachfront-t.html>. The following three paragraphs are derived from Rice’s article, except where otherwise noted.

<sup>80</sup> *See* Virginia Smith, *Sand & Dollars*, DAYTONA BEACH NEWS-JOURNAL (Nov. 14, 2004), <http://www.news-journalonline.com/special/beacherosion/111404.htm> (describing the economic success of the Miami Beach nourishment project and other cities’ subsequent rush to imitate it).

between the high and low tides, which belongs to the public as part of Florida's public trust, and encroaching on their dry sand. For their part, the tourists and beachgoers claimed an inherent right to enjoy the beach. The property owners' attempt to settle the dispute coincided with the city's initiation of its beach restoration project. Some of the property owners challenged the Destin ECL that the Board of Trustees set under the BSPA prior to beginning the restoration process, claiming a violation of their constitutional property rights. They formed an organization, Save Our Beaches ("SOB"), to challenge the project in court.<sup>81</sup>

Further down the coast, beachfront landowners who had experienced erosion to a greater extent than Destin and who had been clamoring for restoration for years expressed astonishment that a group like SOB was fighting the project. Still others thought that humans should retreat from the coast altogether and let nature take its course. Nevertheless, SOB proceeded with its lawsuit.

## II. THE DESTIN BEACH CASE

Winding its way through Florida's administrative and judicial systems, Save Our Beaches proposed several different theories in different forums, picking up additional plaintiffs (and eventually being forced out of the suit) along the way.<sup>82</sup> The case that eventually reached the United States Supreme Court in 2009 hardly resembled the relatively simple permit challenge that began in 2004.<sup>83</sup> Nevertheless, understanding where the case came from allows a full appreciation of the context of the case that the Supreme Court ultimately decided.

### A. *The DEP's Draft Permit*

On July 30, 2003, the city of Destin (in Okaloosa County), in a joint effort with neighboring Walton County, submitted an application to the DEP for a permit to use coastal submerged lands to restore 6.9 miles of

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<sup>81</sup> Eventually, the group grew to about 150 members. See Gary K. Oldehoff, *Florida's Beach Restoration Program Weathers a Storm in the Courts: Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 84 FLA. BAR J. 10 (2010), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/80b1e04e426a3a9c852577c9005539ce!OpenDocument>; see *SOB I*, *supra* note 9, at 13.

<sup>82</sup> *Id.*

<sup>83</sup> See *SOB I*, *supra* note 9, at 13; Rice, *supra* note 79.

beach and to conduct dune restoration.<sup>84</sup> Nearly a year later, on July 15, 2004, the DEP issued a notice of intent to issue a permit,<sup>85</sup> a draft final permit,<sup>86</sup> and a final notice to inform the public of the permit's issuance and the availability of an administrative appeal.<sup>87</sup> The DEP described the purpose of the project as a response to severe erosion of recreational beaches caused by Hurricanes Erin, Opal, and Georges, and Tropical Storm Isidore.<sup>88</sup> In the notice the DEP also indicated that the applicants (Destin and Walton County) would have to work with the Florida Fish and Wildlife Conservation Commission ("FWC") to take precautions to minimize adverse effects to nesting turtles and shorebirds.<sup>89</sup> Nevertheless, the DEP did not expect the project to significantly adversely affect water quality, nesting sea turtles, beach quality, or public use of the beach (except during construction).<sup>90</sup> In addition, the DEP determined the project was in the public interest.<sup>91</sup>

The DEP also made the requisite finding that the project would not interfere with the riparian rights of those who owned property adjacent

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<sup>84</sup> Application for Permit/Water Quality Certification, and Authorization to Use Sovereign Submerged Lands, 0218419-001-JC, (Fla. Dep't of Env'tl. Prot. July 15, 2004) (Notice of Intent to Issue Permit) [hereinafter Notice of Intent], *available at* [http://bcs.dep.state.fl.us/env-prmt/walton/issued/0218419\\_Walton\\_County%20\(Feasibility%20Study,%20Taylor%20Engineering,%202003\)/001-JC/Intent%20to%20Issue%20\(07-15-04\)/Final%20Intent%20to%20Issue%20\(07-15-04\).pdf](http://bcs.dep.state.fl.us/env-prmt/walton/issued/0218419_Walton_County%20(Feasibility%20Study,%20Taylor%20Engineering,%202003)/001-JC/Intent%20to%20Issue%20(07-15-04)/Final%20Intent%20to%20Issue%20(07-15-04).pdf). To better understand the scope of the project, currently Walton County has 15.7 miles of critically eroded beaches of its twenty-five miles of shoreline. *See* CRITICALLY ERODED BEACHES IN FLORIDA, *supra* note 54, at 8; *see also* EMMETT R. FOSTER, DARREN L. SPURGEON, & JENNY CHENG, SHORELINE CHANGE RATE ESTIMATES: WALTON COUNTY 3 (2000), *available at* <ftp://ftp.dep.state.fl.us/pub/water/beaches/HSSD/reports/walsre.pdf>.

<sup>85</sup> Notice of Intent, *supra* note 84.

<sup>86</sup> Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization, Permit No. 0218419-001-JC (Fla. Dep't of Env'tl. Prot. Draft 2004) [hereinafter Draft Final Permit], *available at* [http://bcs.dep.state.fl.us/env-prmt/walton/issued/0218419\\_Walton\\_County%20\(Feasibility%20Study,%20Taylor%20Engineering,%202003\)/001-JC/Intent%20to%20Issue%20\(07-15-04\)/Draft%20Final%20Permit%20\(07-15-04\).pdf](http://bcs.dep.state.fl.us/env-prmt/walton/issued/0218419_Walton_County%20(Feasibility%20Study,%20Taylor%20Engineering,%202003)/001-JC/Intent%20to%20Issue%20(07-15-04)/Draft%20Final%20Permit%20(07-15-04).pdf).

<sup>87</sup> Public Notice: State of Florida Department of Environmental Protection Consolidated Notice of Intent to Issue Permit and Authorization to Use Sovereign Submerged Lands (Fla. Dep't of Env'tl. Prot. 2004) [hereinafter Public Notice], *available at* [http://bcs.dep.state.fl.us/env-prmt/walton/issued/0218419\\_Walton\\_County%20\(Feasibility%20Study,%20Taylor%20Engineering,%202003\)/001-JC/Intent%20to%20Issue%20\(07-15-04\)/Final%20Public%20Notice%20\(07-15-04\).pdf](http://bcs.dep.state.fl.us/env-prmt/walton/issued/0218419_Walton_County%20(Feasibility%20Study,%20Taylor%20Engineering,%202003)/001-JC/Intent%20to%20Issue%20(07-15-04)/Final%20Public%20Notice%20(07-15-04).pdf).

<sup>88</sup> Notice of Intent, *supra* note 84, at 2.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.* at 3-4.

<sup>91</sup> *Id.* at 3.

to the project.<sup>92</sup> In the notice of intent, the DEP noted that the current boundary was already surveyed to be at the MHWL,<sup>93</sup> indicating that the draft permit's directive to the Board to "establish the line of mean high water . . . to establish the boundary line between sovereignty lands . . . and the upland properties" would result in the same conclusion.<sup>94</sup> Until the ECL was recorded no work could proceed.<sup>95</sup> Despite proposing to set the ECL at the MHWL, the DEP acknowledged that due to the project's "size, potential effect on the environment or the public, controversial nature, or location," appellants might request further administrative proceedings.<sup>96</sup> The DEP proved prescient in its prediction.<sup>97</sup>

### B. *The Administrative Appeal*

SOB and Stop the Beach Renourishment, Inc. ("STBR"), a similarly-minded citizens' group, challenged the DEP's draft permit in August of 2004.<sup>98</sup> STBR also challenged the erosion control line that the Board of Trustees established, a challenge SOB subsequently joined.<sup>99</sup> Both parties also filed constitutional claims, but Destin and Walton County moved to dismiss those claims unopposed, as the groups were already challenging the constitutionality of the BSPA in state circuit court.<sup>100</sup> The constitutional challenge had to occur separately from the administrative appeal, because under Florida law administrative law judges ("ALJs") may not hear constitutional claims, being limited by the legislature to applying state statutes.<sup>101</sup>

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<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.* On the survey, see *SOB I*, *supra* note 9, at 11.

<sup>94</sup> Draft Final Permit, *supra* note 86, at 4. For more about setting the ECL, see *supra* notes 65–75 and accompanying text.

<sup>95</sup> Draft Final Permit, *supra* note 86, at 5.

<sup>96</sup> Notice of Intent, *supra* note 84, at 5.

<sup>97</sup> See generally *SOB I*, *supra* note 9; see also *infra* notes 101, 117.

<sup>98</sup> See generally *SOB I*, *supra* note 9. The plaintiffs named as defendants DEP, the Board of Trustees, the City of Destin, and Walton County, and filed their appeal before DEP could issue its final permit. See *id.* at 1–3.

<sup>99</sup> *Id.* at 3.

<sup>100</sup> *Id.* A docket search of "Stop the Beach Renourishment" and "Save Our Beaches" reveals a Leon County circuit court case named *Tammy N. Alford v. Craig Barker*, filed August 27, 2004, which includes the groups as plaintiffs. The case is currently still open, and the plaintiffs moved to amend their complaint following the Supreme Court's decision. A hearing was scheduled for March 29, 2011.

<sup>101</sup> See *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.* (*SOB III*), 27 So. 3d 48, 54 n.3 (Fla. App. First Dist. 2006) (citation omitted).

SOB and STBR challenged DEP's findings regarding turbidity and mixing zones,<sup>102</sup> arguing that DEP erred in its calculations concerning its proposal to dredge sand from an ebb shoal, using either a cutter head dredge (which vacuums sand into a pipe) or a hopper dredge (which is self-filling and then moves to the shore).<sup>103</sup> But the ALJ decided that the DEP sufficiently supported its finding that the project would not violate water quality standards.<sup>104</sup>

Importantly for SOB, the ALJ determined that although sixty-two of its 150 members had shorefront property,<sup>105</sup> because only one landowner testified to owning four properties in the area affected by the beach nourishment project,<sup>106</sup> SOB lacked the required associational standing under Florida law.<sup>107</sup> On the other hand, the ALJ decided that all of STBR's six members were landowners affected by the project, and therefore satisfied standing requirements because they all owned land adjacent to the sovereign submerged lands in question.<sup>108</sup>

Concerning riparian rights, based on a survey conducted in September of 2003 the ALJ noted that the Trustees set the ECL at the MHWL, and that construction would take place both landward and seaward of that line.<sup>109</sup> However, according to the survey, the post-construction MHWL would be located seaward of the ECL.<sup>110</sup> SOB and STBR claimed that this meant that the project would affect the landowners' right to accretion.<sup>111</sup> But, assuming constitutionality of the statute upon which the ECL allocation was based, the ALJ determined that no unreasonable infringement existed.<sup>112</sup> Nor did the petitioners' argument that they had the right to contact the water persuade the ALJ, who considered this claim to be the same as the right to accretions.<sup>113</sup> Ultimately, even if the project

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<sup>102</sup> *SOB I*, *supra* note 9, at 8, 9.

<sup>103</sup> *See id.* at 6.

<sup>104</sup> *Id.* at 19.

<sup>105</sup> *Id.* at 13.

<sup>106</sup> *Id.* at 13. That landowner was one of the landowners featured in Andrew Rice's *New York Times* article, *supra* note 79.

<sup>107</sup> *Id.* at 16–17 (citing Fla. Home Builders Ass'n v. Dep't of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982)).

<sup>108</sup> *See SOB I*, *supra* note 9, at 17.

<sup>109</sup> *Id.* at 11.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 22.

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.* at 25. The ALJ may not have been entirely correct on this point. As explained below, the Florida Supreme Court considered the right of contact to be subsumed within the right

did infringe upon riparian rights, the ALJ concluded that the two groups failed to show that the infringement was unreasonable,<sup>114</sup> the only way the groups could defeat such a project.<sup>115</sup> Thus, on June 30, 2005, the ALJ recommended that the DEP issue the permit.<sup>116</sup> A month later, the Secretary of the DEP issued a final order, reiterating and adopting the ALJ's recommendations.<sup>117</sup>

C. *The Florida Court of Appeal's Decision*

SOB and STBR appealed to Florida's First District Court of Appeal,<sup>118</sup> challenging the DEP's final order and alleging that, as applied to this project, the BSPA unconstitutionally deprived the landowners of their riparian rights without just compensation.<sup>119</sup> The court recognized the ALJ's unchallenged ruling on SOB's lack of standing because only one of SOB's 150 members testified to owning land in the area.<sup>120</sup> But the court ruled that STBR had standing, because all of its members, though they numbered only six, owned land in the proposed project area.<sup>121</sup> However, unlike the ALJ, the Florida court of appeal agreed with STBR that the BSPA was unconstitutional as applied to the Destin and Walton County restoration project because the court concluded that the project would divest the landowners of their riparian rights to accretions and contact with the water.<sup>122</sup>

Important to the court of appeal's analysis was Florida's historical reliance on the MHWL to separate private property from sovereign land and the BSPA's alteration of that long-standing custom by fixing the

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of access, not the right to accretions. *See* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1119 (Fla. 2008).

<sup>114</sup> *See SOB I*, *supra* note 9, at 25.

<sup>115</sup> *Id.*; *see also* FLA. ADMIN. CODE r. 18-21.004(3) (2010).

<sup>116</sup> *SOB I*, *supra* note 9, at 28–29.

<sup>117</sup> Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot. (*SOB II*), DEP 05-0791, at 10 (Fla. Dep't of Env'tl. Prot. July 27, 2005) (final order), *available at* [http://www.dep.state.fl.us/legal/Final\\_Orders/2005/DEP05-0791.pdf](http://www.dep.state.fl.us/legal/Final_Orders/2005/DEP05-0791.pdf).

<sup>118</sup> Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot. (*SOB III*), 27 So. 3d 48, 54 n.3 (Fla. App. First Dist. 2006).

<sup>119</sup> *See id.* at 50. The court of appeal did not mention whether the taking was alleged to have occurred under the United States Constitution or Florida's constitution.

<sup>120</sup> *See id.* at 55. The court reiterated and adopted, without explanation or elaboration, the ALJ's findings of fact on the matter. *Id.* at 55–56.

<sup>121</sup> *Id.* at 56.

<sup>122</sup> *Id.* at 58.

boundary in the form of the ECL.<sup>123</sup> The court ruled that by establishing a fixed ECL that no longer guaranteed that landowners' property lines would be at the MHWL,<sup>124</sup> the BSPA deprived the landowners of their right to accretions and relictions.<sup>125</sup> The court also disagreed with the ALJ's determination that the right to contact the water was the same as the right to accretions, deciding that the BSPA eliminated that right as well.<sup>126</sup>

Because the court of appeal concluded that the statute produced a taking of riparian rights by eliminating the landowners' rights to accretions and contact, it ruled that the project infringed upon the landowners' riparian rights.<sup>127</sup> Under the statute, the Board would need to determine whether Destin and Walton County could show "satisfactory evidence of sufficient upland interest" to conduct the project.<sup>128</sup> The court therefore remanded to the Board to determine if such an interest existed.<sup>129</sup> If Destin and Walton County did not acquire the necessary property interests, eminent domain proceedings would be necessary.<sup>130</sup> Given the importance of the constitutional issue, the court certified a question to the Florida Supreme Court, asking whether, as applied to the City of Destin and Walton County's beach restoration project, the BSPA was unconstitutional.<sup>131</sup>

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<sup>123</sup> See *SOB III*, 27 So. 3d. at 59.

<sup>124</sup> The court acknowledged that none of STBR's members' deeds were in the record to firmly establish exactly how far their property lines extended prior to the setting of the ECL, but the court considered testimony regarding the property boundaries' extension to the high water mark to be sufficient. *Id.*

<sup>125</sup> *Id.* On the distinction between accretions and relictions, see *supra* note 69. Although at different points in the litigation courts discussed both accretions and relictions as being in dispute, because STBR only alleged a loss of the right to future accretions, see *Petition for Writ of Certiorari 16, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151), and because the Supreme Court only used the term "accretions," see *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010), we refer to both accretions and relictions as simply "accretions."

<sup>126</sup> *SOB III*, 27 So. 3d at 59.

<sup>127</sup> See *id.* at 60. Although the court concluded that the BSPA infringed upon the landowners' riparian rights, it made no finding as to the infringement's unreasonableness, in keeping with the Board of Trustees' rules. See *id.* Presumably, ruling the infringement unconstitutional amounted to a finding of unreasonableness.

<sup>128</sup> *Id.* at 52; see also *supra* notes 72–73 and accompanying text.

<sup>129</sup> *SOB III*, 27 So. 3d at 60.

<sup>130</sup> *Id.*; see also *supra* notes 72–73 and accompanying text. Because the Board first needed to determine whether the governmental entities could acquire the requisite interest, the court did not decide whether eminent domain proceedings would be necessary. *SOB III*, 27 So. 3d at 60 n.7.

<sup>131</sup> *Id.* The full question was:

D. *The Florida Supreme Court's Decision*

The Florida Supreme Court examined the certified question by first admonishing the court of appeal for hearing the case because a facial challenge was already pending in the circuit court.<sup>132</sup> The supreme court also concluded that although the court of appeal phrased the question as an as-applied challenge, it actually decided a facial challenge, and the supreme court rephrased the question accordingly.<sup>133</sup> Proceeding to determine that the BSPA was constitutional on its face, the court limited the scope of its ruling to cases like the one in question, where the BSPA was being used to restore critically eroded beaches.<sup>134</sup>

The Florida Supreme Court acknowledged that state courts had yet to determine how the rights of the state and the upland owners inter-related.<sup>135</sup> After explaining relevant portions of the BSPA,<sup>136</sup> the court examined Florida's constitutional and common law duties and powers over land below the MHWL under the public trust doctrine.<sup>137</sup> According to the

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Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

*Id.* at 60–61.

<sup>132</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 n.1 (2008). See *supra* note 101 and accompanying text. Additionally, the Florida Supreme Court did not specify under which constitution the statute passed muster, but instead cited to other Florida cases for the proposition that the state cannot take littoral rights without just compensation. *Walton County*, 998 So. 2d at 1111.

<sup>133</sup> *Walton County*, 998 So. 2d at 1105.

<sup>134</sup> *Id.* at 1105, 1121. Professor Donna Christie has expressed concern with the limited nature of the court's holding in this case. See Donna R. Christie, *Of Beaches, Boundaries, and SOB's*, 25 J. LAND USE & ENVTL. L. 19, 58–59 (2009). She interpreted the Florida Supreme Court's decision to be limited to situations where the state reclaims land lost by an avulsive event, leaving open numerous future challenges based on different factual scenarios. *Id.* However, a broader reading is at least arguable. Although the court stated that “[i]n light of th[e] common law doctrine of avulsion, the provisions of the [BSPA] at issue are facially constitutional,” *Walton County*, 998 So. 2d at 1117, both at the beginning and the end of its opinion did the court use the phrase “restoring critically eroded beaches under the Beach and Shore Preservation Act,” without specifically mentioning post-avulsive restoration.

<sup>135</sup> *Walton County*, 998 So. 2d at 1109.

<sup>136</sup> *Id.* at 1107–09.

<sup>137</sup> *Id.* at 1109.

court, in conjunction with the state's constitutional duty to "conserve and protect Florida's beaches as important natural resources," the public trust doctrine requires the state to protect its shoreline.<sup>138</sup> With respect to upland owners, Florida law stipulates that they have the same rights as the general public (bathing, fishing, navigation, and so forth), but by virtue of their ownership of riparian land they also have rights of access, reasonable use, accretion and reliction, and view.<sup>139</sup> This explanation of rights differed little from that of the court of appeal.<sup>140</sup>

But the Florida Supreme Court disagreed with the appellate court's interpretation of the scope of the landowners' rights, rejecting the lower court's interpretation that the right of access included the "independent right of contact with the water."<sup>141</sup> Instead, the court viewed the contact right as merely ancillary to the right of access, particularly because contact with the water is variable, depending on the water level on any given day.<sup>142</sup> The supreme court also interpreted the right to accretions to be a future contingent interest, not a vested interest; thus, the BSPA's substitution of a fixed boundary line—the ECL—for the previously variable MHWL merely foreclosed the possibility that these interests would become vested in the upland owners.<sup>143</sup>

Under common law principles, littoral<sup>144</sup> owners reaped the benefits of accretions but also faced the risk of erosion,<sup>145</sup> but under the BSPA the state assumed responsibility for maintaining an upland owner's property line and preventing further erosion.<sup>146</sup> Since the BSPA both protects upland owners' property lines and guarantees landowners' other common law rights, the court decided that the act effected "no material or substantial

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<sup>138</sup> *Id.* at 1110 (citing FLA. CONST. art. II § 7(a)).

<sup>139</sup> *Id.* at 1111.

<sup>140</sup> Compare *id.* with *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot. (SOB III)*, 27 So. 3d 48, 57 (Fla. App. First Dist. 2006).

<sup>141</sup> *Walton County*, 998 So. 2d at 1119.

<sup>142</sup> *Id.* Indeed, it is possible that, due to changing tide patterns, landowners' property lines may not contact the water for months, or even years, particularly considering that the MHWL relies on a nineteen-year average. See Christie, *supra* note 134, at 70–71; see also *supra* note 65.

<sup>143</sup> *Walton County*, 998 So. 2d at 1112.

<sup>144</sup> The terms "riparian" and "littoral" technically refer to distinct types of ownership in Florida law, "riparian" meaning adjacent to rivers and streams, and "littoral" adjacent to the ocean. But the term "riparian" has become ubiquitous in its application to both types of parcels, and for the purposes of this Article the two terms are used interchangeably. See *SOB III*, 27 So. 3d at 56–57 citing Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs. Ltd, 512 So. 2d 934, 936 (Fla. 1987).

<sup>145</sup> *Walton County*, 998 So. 2d at 1118.

<sup>146</sup> *Id.*

impairment of these littoral rights.”<sup>147</sup> Further, because under Florida law a landowner (here the state) has the right to reclaim land lost by an avulsion (in this case, a hurricane), the BSPA gave the state no additional power beyond its rights under the common law.<sup>148</sup> By striking an appropriate balance between the state’s duty to protect the beaches and the private landowners’ rights, the court ruled that the BSPA was facially constitutional.<sup>149</sup> Thus, the state seemed to win a resounding victory. Since the decision did not conflict with other cases, and since the case turned on an interpretation of Florida property law, the Florida Supreme Court’s decision appeared to settle the matter.

But the landowners filed a petition for certiorari with the U.S. Supreme Court. Facing long odds,<sup>150</sup> but bolstered by support from an influential libertarian property group,<sup>151</sup> the landowners attempted to transform their regulatory takings claim in the Florida courts into a judicial takings claim in the Supreme Court.

### III. THE CONCEPT OF JUDICIAL TAKINGS

A judicial taking is the idea that a court decision, no less than a legislative or executive act, can violate the Takings Clause in the Fifth

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<sup>147</sup> *Id.* at 1115.

<sup>148</sup> *Id.* at 1117. Professor Christie pointed out that it may seem that the state seemingly did not have any “land” to reclaim since the state’s trust land was already submerged. However, she argued that because under principles of avulsion the boundary between the landowners’ parcels remains unchanged, without filling in some of the newly-submerged land to restore the shore to where the MHWL was, the public would have no right to use the remaining beach to access the newly submerged public lands. Christie, *supra* note 134, at 49. As discussed below, this use of the doctrine of avulsion differed from the way the Supreme Court applied the doctrine in deciding the case. *See infra* note 285 and accompanying text.

<sup>149</sup> *Id.* at 1115.

<sup>150</sup> The Supreme Court’s docket has risen to over 10,000 cases per year. The Court grants petitions for certiorari in about 100 of those cases, giving petitioners a one in one hundred, or one percent, chance of their case being heard. *The Justices’ Caseload*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/justicecaseload.aspx> (last visited Feb. 16, 2011).

<sup>151</sup> At the petition stage, the Pacific Legal Foundation, a self-proclaimed “limited government and private property rights” advocacy organization, filed an amicus brief in support of STBR’s petition. Motion for Leave to File and Brief Amicus Curiae of Pacific Legal Fdn. in Support of Petition for Writ of Certiorari at 1, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Protection*, 130 S. Ct. 2592 (2010) (No. 08-1151). Subsequent to the Supreme Court’s grant of certiorari, however, many more like-minded groups joined the fray. *See infra* note 254 and accompanying text.

Amendment.<sup>152</sup> In the Florida beach case, in their certiorari petition the landowners redirected attention from the state renourishment project to the Florida Supreme Court's interpretation of the effect of the project.<sup>153</sup> They maintained that this allegedly unprecedented interpretation radically and unexpectedly changed Florida property law and, in the process, unconstitutionally took their property.<sup>154</sup> Four members of the Supreme Court thought this idea was powerful enough to warrant hearing the case,<sup>155</sup> and a four-member plurality enthusiastically endorsed the concept. This section explains the judicial takings concept and its slender pedigree.

The story begins with a vague mention in the late-nineteenth century case that incorporated the Takings Clause, applying it to the states for the first time, proceeds to a sole concurrence by Justice Stewart in a 1960s case, and includes a dissent from denial of certiorari by Justice Scalia as well as an academic article, both from the 1990s.

A. *The Beginning: Chicago, Burlington & Quincy Railroad Co. v. Chicago*<sup>156</sup>

In 1880, the Chicago City Council passed an ordinance to widen a street.<sup>157</sup> Consistent with state statutes, in 1890 the city filed a petition with the Cook County Circuit Court to condemn a right of way belonging to the Chicago, Burlington and Quincy Railroad, to be used as a street crossing.<sup>158</sup> The jury, statutorily charged with deciding the proper amount of compensation, returned a verdict of only one dollar for the railroad.<sup>159</sup> The railroad moved for a new trial, but was denied, and the Illinois Supreme Court upheld the verdict.<sup>160</sup> Before the U.S. Supreme

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<sup>152</sup> See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Protection*, 130 S. Ct. 2592, 2602 (2010).

<sup>153</sup> Petition for Writ of Certiorari at 14, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Protection*, 130 S. Ct. 2592 (2010) (No. 08-1151).

<sup>154</sup> *Id.*

<sup>155</sup> *Stop the Beach Renourishment*, 130 S. Ct. 2592, 2597 (2010).

<sup>156</sup> *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1896).

<sup>157</sup> *Id.* at 230.

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

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* Although Chicago asserted that the Court lacked jurisdiction because the Illinois Supreme Court did not decide the case based on the U.S. Constitution, the Court deemed it sufficient that the railroad had raised the constitutional issue below. *Id.* at 231–32.

Court, the railroad argued that the judgment of one dollar deprived it of due process of law under the Fourteenth Amendment.<sup>161</sup>

Deciding that it was not enough for the lower court to merely follow the statutory condemnation procedure if the compensation awarded would violate due process,<sup>162</sup> the Court ruled that it had jurisdiction to review the state court judgment to ensure compliance with the U.S. Constitution.<sup>163</sup> The Court reiterated an earlier declaration that “the prohibitions of the Fourteenth Amendment extend [] to ‘all acts of the State, whether through its legislative, its executive, or its judicial authorities.’”<sup>164</sup> Although most of the *Chicago Burlington* opinion seemed to suggest that the trial court violated due process by misstating the law to the jury, in the end the Court affirmed the state court’s decision, ruling that just compensation required only nominal compensation.<sup>165</sup> The Court reasoned that all the railroad was losing was the exclusivity of its right-of-way where the city proposed a street crossing, on a parcel that “was used, and was always likely to be used, for railroad tracks.”<sup>166</sup> For all its strongly-worded statements regarding applying due process of law to the state courts, the Court affirmed the Illinois Supreme Court based on the trial court’s jury instructions.<sup>167</sup> It did not rule that the Illinois Supreme Court took the railroad’s property.

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<sup>161</sup> *Id.* at 232–33.

<sup>162</sup> *Chicago Burlington*, 166 U.S. at 234–35, 236.

<sup>163</sup> *Id.* at 244. However, because the Court did not consider itself empowered to retry the facts, it could only assess whether the trial court “prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company’s right to just compensation,” emphasizing that not every state court ruling implicated the U.S. Constitution and would be subject to federal scrutiny. *Id.* at 246.

<sup>164</sup> *Id.* at 234 (citing *Scott v. McNeal*, 154 U.S. 34, 45 (1894)) (declaring that the selling of a parcel of land made available through a probate court order whose owner was actually still alive was a deprivation of property without due process, because the owner was never notified of the sale). *Chicago Burlington* is the case that incorporated the Fifth Amendment against the states through the Fourteenth Amendment. See W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1534 (2004) (also suggesting that the Supreme Court’s holding in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), provided a rationale for applying the Takings Clause to state courts).

<sup>165</sup> *Chicago Burlington*, 166 U.S. at 258.

<sup>166</sup> *Id.* at 256.

<sup>167</sup> In dissent, Justice Brewer noted the disconnect between the majority’s discussion of the law and its ultimate conclusion, agreeing with the majority’s statements regarding “the potency of the Fourteenth Amendment to restrain action by a State through either its legislative, executive or judicial departments,” but dissenting as to the result. *Id.* at 258–59 (Brewer, J., dissenting).

B. *Justice Stewart's Concurrence in Hughes v. Washington*<sup>168</sup>

During the next seven decades, the Court gave little attention to its isolated statement in *Chicago Burlington*, apparently rejecting judicial takings in several decisions and recognizing that state courts had the authority to shape state law free from federal judicial intervention.<sup>169</sup> However, in 1967, Justice Potter Stewart breathed new life into the idea that federal courts could review state court property law decisions for federal constitutionality.<sup>170</sup> In *Hughes v. Washington*, the Court reviewed a state constitutional provision that, according to the Washington Supreme Court, denied private landowners the right to future accretions to ocean-front property, a right the landowners had enjoyed prior to statehood.<sup>171</sup> The U.S. Supreme Court decided that federal law, not state law, governed the landowner's parcel, because the landowner's parcel traced its title to a federal patent, so the state's constitutional provision could not apply, thereby preserving the landowner's right to accretions.<sup>172</sup>

Justice Stewart agreed with the outcome, but thought that the Court should have addressed the validity of the state's attempt to change the law of accretions.<sup>173</sup> He took issue with the majority's idea that federal law governed where a landowner's title traced to a federal patent because he thought that would mean that no state that was once a federal territory could shape its own property law.<sup>174</sup> Although agreeing with the notion that states may "develop and administer" property law,<sup>175</sup> he asserted that in this case "state and federal questions are inextricably

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<sup>168</sup> *Hughes v. Washington*, 389 U.S. 290 (1967).

<sup>169</sup> See, e.g., *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680, 681 n.8 (1930) (recognizing that "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions . . . does not give rise to a claim under the Fourteenth Amendment," and that "[t]he process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law.") See also *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364–66 (1932) (upholding a state court's prospective overruling of property law precedent and suggesting that retropective overruling would not offend the Constitution); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("[T]he mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law.")

<sup>170</sup> *Hughes*, 389 U.S. at 295 (Stewart, J., concurring).

<sup>171</sup> *Id.* at 291 (majority op.).

<sup>172</sup> See *id.* at 291–94.

<sup>173</sup> *Id.* at 294–95 (Stewart, J., concurring).

<sup>174</sup> *Id.* at 295.

<sup>175</sup> *Id.*

intertwined,” because the Washington court’s decision may have implicated federal constitutional property protections.<sup>176</sup>

Thus, Justice Stewart advocated assessing the Washington Supreme Court’s interpretation of the state constitutional provision to determine whether it represented a “sudden change in the law, unpredictable in terms of the relevant precedents,” in which case “no deference would be appropriate.”<sup>177</sup> Examining the case law on which the Washington court relied to conclude that its ruling was “not startling,”<sup>178</sup> Stewart disagreed. He found the state court’s decision to be “unforeseeable,”<sup>179</sup> “effecting a retroactive transformation of private into public property—without paying for the privilege of doing so.”<sup>180</sup> Justice Stewart grounded his conclusion on the Due Process Clause of the Fourteenth Amendment, opining that the clause forbids not only state legislatures, but also state courts, from taking property, whether intended or not.<sup>181</sup> Although not the majority opinion, Justice Stewart’s ideas have proved influential, at least in the legal academy.

### C. Professor Thompson’s “Judicial Takings”

In 1990, Professor Buzz Thompson published an article<sup>182</sup> that would become an oft-cited source for the judicial takings movement.<sup>183</sup> Professor Thompson argued that there was no reason why courts should not be held liable for the taking of private property under the Fifth Amendment, and that given the Framers’ concern over cabining both executive and judicial powers, constitutional history, in fact, supported the premise.<sup>184</sup> Thompson discussed *Chicago Burlington*, maintaining

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<sup>176</sup> *Hughes*, 389 U.S. at 296–97 (Stewart, J., concurring).

<sup>177</sup> *Id.* at 296.

<sup>178</sup> *Id.* at 297 (quoting *Hughes v. State*, 410 P.2d 20, 28 (Wash. 1966)).

<sup>179</sup> *Id.* at 297.

<sup>180</sup> *Id.* at 298.

<sup>181</sup> *Id.* Cf. Justice Kennedy’s concurrence, discussed *infra* notes 332–50 and accompanying text.

<sup>182</sup> Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

<sup>183</sup> See, e.g., David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1381 (1996) (attempting to reconcile valid uses of the doctrine of custom with judicial uses that, in the author’s view, amount to a judicial taking); Sarratt, *supra* note 164, at 1494–95 (referring to Thompson’s article as “seminal,” but also noting that a majority of other works reject his theories). A Westlaw search reveals over 100 items, including journals, law reviews, treatises, and briefs referencing Professor Thompson’s article.

<sup>184</sup> Thompson, *supra* note 182, at 1458–63. Justice Scalia did not agree with this view of the

that the Supreme Court recognized that the takings protections in the Fourteenth Amendment applied to state courts through the Due Process Clause at least since 1897.<sup>185</sup> Although he recognized that the 1897 Court did not discuss whether a state court's changing of the law could effect a taking, Thompson characterized the decision as resolving whether "the fourteenth amendment [sic] prohibited the Illinois judiciary from awarding one dollar in compensation for a right clearly worth far more."<sup>186</sup> He did not mention that the Court affirmed that the right-of-way was worth exactly that.<sup>187</sup>

Professor Thompson also characterized the Court's 1980 decision in *PruneYard Shopping Center v. Robins*<sup>188</sup> as a "judicial takings" case,<sup>189</sup> although he acknowledged that the Supreme Court (again) did not address the issue.<sup>190</sup> Despite citing these cases and a few others to support his judicial takings theory,<sup>191</sup> Thompson was unable to point to any definitive source confirming that the Takings Clause applies to the courts.

Thompson separated the idea of a judicial taking into two distinct actions: first, "the decision to change current property rules in a way that would constitute a taking,"<sup>192</sup> and second, "the decision to require compensation."<sup>193</sup> Although vague about the former,<sup>194</sup> he

Framers' intent, considering it "doubtless" that the "Framers did not envision the Takings Clause would apply to judicial action," because "the Constitution was adopted in an era when courts had no power to 'change' the common law." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2606 (2010) (plurality op.). Nevertheless, adopting a textualist approach, Justice Scalia maintained that "what counts is not what they envisioned but what they wrote." *Id.*

<sup>185</sup> Thompson, *supra* note 182, at 1463; *see supra* notes 156–67 and accompanying text (discussing *Chicago Burlington*).

<sup>186</sup> *Id.*; *see also* Sarratt, *supra* note 164, at 1503 (noting that the Chicago City Council was responsible for the initial condemnation, and hence the court "was not dealing with a purely judicial change in the law").

<sup>187</sup> *See* *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 230 (1896).

<sup>188</sup> 447 U.S. 74 (1980).

<sup>189</sup> Thompson, *supra* note 182, at 1469–70.

<sup>190</sup> *Id.* at 1470.

<sup>191</sup> *Id.* at 1468 (citing *Hughes v. Washington*, 389 U.S. 290 (1967)); *id.* at 1469 n.85 (citing *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)).

<sup>192</sup> Thompson, *supra* note 182, at 1515.

<sup>193</sup> *Id.*

<sup>194</sup> *See id.* at 1513. Thompson seemed to indicate that not all changes in property law, or decisions concerning property rights, would produce an unconstitutional taking. *See id.* at 1455 (suggesting that a judicial taking may constitute "any judicial *change* in property rights that would be a taking if undertaken by the legislative or executive branch" (emphasis in original)). *Cf. id.* at 1449 n.1 (noting the "cloudy" question of what a taking

suggested that the latter presented a court with three options: 1) maintain the legal status quo by not changing existing law, 2) change the law and order compensation unless the legislature overrode the decision, or 3) rule that the change in the law would take effect only if the legislature authorized compensation within a prescribed period of time.<sup>195</sup> Regardless of the option chosen, Professor Thompson contended that holding the judiciary accountable for drastic changes in property law would “encourage courts to be more sensitive to the impact that their decisions have on property holders,” forcing them to “reexamine . . . the definition of property for constitutional purposes.”<sup>196</sup> He did not suggest that a state court should never change property law, and he even allowed that sometimes “a court is better equipped or situated to make the change,”<sup>197</sup> but he did maintain that if a court decided to change the law in such a way as to effect an unconstitutional taking, compensation should be required. Despite the foothold his ideas have gained in judicial takings scholarship,<sup>198</sup> until the Florida case, only a few lower courts had entertained the notion of a judicial taking.<sup>199</sup>

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comprises); *id.* at 1451 n.8 (recognizing the historical practice of judicial shaping of property law but arguing that courts are accelerating the pace of their changes); *id.* at 1453 (accepting current jurisprudence on when legislative or executive actions effect takings); *id.* at 1517 (acknowledging the premise that “[m]ost courts . . . have concluded that they do have the authority to modify the common law, at least to meet changing circumstances and information”); *id.* at 1526–27 (suggesting that the Supreme Court must embrace some normative idea of what constitutional property is, “otherwise virtually every right established by state law could be viewed as protected by the takings provisions”).

<sup>195</sup> *Id.* at 1513.

<sup>196</sup> *Id.* at 1544.

<sup>197</sup> Thompson, *supra* note 182, at 1514.

<sup>198</sup> See *supra* note 183 and accompanying text. For Professor Thompson’s assessment of the Florida beach case, see *infra* note 380.

<sup>199</sup> See, e.g., *Robinson v. Ariyoshi*, 753 F.2d 1468 (1985), *vacated and remanded in light of Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), 477 U.S. 902 (1986) (ruling that the Hawaii Supreme Court could not, through changing the common law, divest rights holders of rights that had vested prior to the change without paying just compensation). For more unsuccessful lower court attempts to bring judicial takings claims to the Supreme Court, see Thompson, *supra* note 182, at 1469 n.84. See also Sarratt, *supra* note 164, at 1495 (describing the lower courts suggesting judicial takings to be possible as “outliers at best”). The Court of Federal Claims’s research in *Brace v. United States* revealed that *Robinson* was the only case to hold that “a judicial decision that overturned prior case law could be considered a taking.” 72 Fed. Cl. 337, 359 n.35 (Fed. Cl. 2006) (rejecting the plaintiff’s claim that a court-ordered consent decree produced a taking). Apart from Justice Kennedy’s concurrence in *Stop the Beach Renourishment*, in which he noted Thompson’s two-pronged approach to judicial takings while expressing concern about how a party would raise a judicial takings claim, see *Stop the Beach*

D. *Justice Scalia's Dissent from Denial of Certiorari in Stevens v. City of Cannon Beach:*<sup>200</sup> *Resurrecting Judicial Takings*

Eschewing at least one chance to take up the idea of judicial takings,<sup>201</sup> the Court avoided the issue until 1994, when Justice Scalia (joined by Justice O'Connor) vociferously dissented from a denial of a writ of certiorari in *Stevens v. City of Cannon Beach*,<sup>202</sup> a case challenging an earlier decision of the Oregon Supreme Court, in *State ex rel. Thornton v. Hay*.<sup>203</sup> Given Justice Scalia's strong opinions on the matter,<sup>204</sup> this 1994 dissent foreshadowed the Court's granting certiorari in *Stop the Beach Renourishment*.

In *Thornton*, in 1969, the Oregon Supreme Court heard a challenge to the state's attempt to prevent a beachfront landowner from restricting public access to its dry-sand beach.<sup>205</sup> Although the landowners conceded that the state owned the wet-sand area, or the area between the high and low tides, as a "state recreation area,"<sup>206</sup> they contested the state's ability to prevent them from fencing in the dry-sand area, or the area between the high-tide line and the vegetation line, located on their property.<sup>207</sup> The state argued that it had the right to do so, either through a preexisting public easement appurtenant to the wet-sand area or through zoning regulations enacted pursuant to state statute.<sup>208</sup>

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Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot., 130 S. Ct. 2592, 2616 (2010) (Kennedy, J., concurring), only one other court has cited Thompson's article, according to searches in both Westlaw and LexisNexis. See *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 549 (Fed. Cl. 2001) (declining to address the issue of a judicial taking because the plaintiffs withdrew the argument, but not foreclosing the possibility for the future, particularly in bankruptcy proceedings), although many appellate briefs have cited the article.

<sup>200</sup> *Stevens v. City of Cannon Beach (Stevens II)*, 510 U.S. 1207 (1994) (Scalia, J. dissenting from *cert. denied*).

<sup>201</sup> See *Ariyoshi v. Robinson*, 477 U.S. 902 (1986) (vacating and remanding for reconsideration). On *Ariyoshi*, see *supra* note 199 and accompanying text.

<sup>202</sup> See *Stevens II*, 510 U.S. at 1207.

<sup>203</sup> 462 P.2d 671 (Or. 1969).

<sup>204</sup> See *Stevens II*, 510 U.S. at 1211–12.

<sup>205</sup> *Thornton*, 462 P.2d at 672.

<sup>206</sup> See *id.* at 672–73 (citing OR. REV. STAT. § 390.720 (1967)). For the current statutory provision referring to the land between the high and low tides as a "state recreation area," see OR. REV. STAT. § 390.615 (2009).

<sup>207</sup> *Thornton*, 462 P.2d at 672–73. The Hays were owners of a beachfront resort and wanted to provide exclusivity to their guests. See *id.* at 674.

<sup>208</sup> *Id.* at 672 (citing OR. REV. STAT. § 390.640 (1967), allowing the state to regulate shoreline improvements and requiring permits for such activities).

The Oregon Supreme Court evaluated several alternatives that would support affirming the lower court's finding of a public easement to use ocean beaches in the state, including "implied dedication" and prescription.<sup>209</sup> But the court decided that those alternatives were either unsupported by the factual record (in the case of implied dedication),<sup>210</sup> or insufficient to prevent future litigation (in the case of prescription).<sup>211</sup> Instead, the court ruled that within the state the public's use rights to the dry-sand area adjacent to the ocean were justified under the doctrine of custom.<sup>212</sup> The court reasoned that the public's use of the Oregon ocean beaches satisfied custom's requirements of 1) usage from antiquity, 2) uninterrupted use, 3) peaceable and undisputed use, 4) reasonable use, 5) certainty as to the area's boundaries, 6) uniformity of application, and 7) consistency with other law.<sup>213</sup> Further, the landowners conceded that they knew when they bought the land that the public regularly used the dry-sand area,<sup>214</sup> a concession consistent with the existence of customary rights.<sup>215</sup> Thus, the court denied the Hays the right to fence in the dry-sand portion of their land while simultaneously affirming the rights of the public to all the Oregon dry-sand beaches adjacent to the ocean.<sup>216</sup>

Roughly two decades later, *Stevens v. City of Cannon Beach* presented a similar scenario of landowners wanting to build a seawall on the portion of their property that was on the dry-sand beach.<sup>217</sup> The city denied the permit, prompting an inverse condemnation action.<sup>218</sup> The landowners attempted to rely on *McDonald v. Halvorson*,<sup>219</sup> a 1989 case in which the Oregon Supreme Court distinguished *Thornton* by denying that custom applied to the dry-sand area of a cove beach not adjacent to

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<sup>209</sup> *Thornton*, 462 P.2d at 675.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 675–76.

<sup>212</sup> *Id.* at 676–78.

<sup>213</sup> *Id.* at 677.

<sup>214</sup> *Id.* at 678 (“The public use of the disputed land in the case at bar is admitted to be continuous for more than sixty years.”).

<sup>215</sup> *Thornton*, 462 P.2d at 678.

<sup>216</sup> *Id.* at 672–73. A federal district court subsequently rejected a judicial takings claim in *Hay v. Bruno*, 344 F. Supp. 286, 289 (D. Or. 1972) (noting the history of public recreational beach use and state regulation dating to at least 1892). See also *infra* note 375 and accompanying text for further discussion of *Hay v. Bruno*.

<sup>217</sup> See *Stevens v. City of Cannon Beach (Stevens II)*, 510 U.S. 1207, 1208 (1994) (Scalia, J. dissenting from denial of certiorari).

<sup>218</sup> *Id.*

<sup>219</sup> 780 P.2d 714 (Or. 1989).

the ocean, and which had not been historically used by the public<sup>220</sup> to similarly distinguish their case.<sup>221</sup> But the Oregon Supreme Court affirmed the trial court's dismissal and the appellate court's affirmance, reasoning that, under *Thornton*, custom was a background principle of state law inhering in the landowner's title,<sup>222</sup> and therefore the landowners could not interfere with the public's rights to the dry-sand area of any ocean beaches.<sup>223</sup> The Supreme Court denied certiorari, over a strenuous objection by Justice Scalia, joined by Justice O'Connor.<sup>224</sup>

Justice Scalia criticized the *Thornton* ruling, which the Supreme Court did not review, for its "questionable constitutionality,"<sup>225</sup> suggesting that the decision may have ratified a "landgrab" that "may run the entire length of the Oregon coast."<sup>226</sup> Analyzing the Oregon court's application of the doctrine of custom to the beaches at issue,<sup>227</sup> he maintained that the court misunderstood the doctrine.<sup>228</sup> Scalia asserted that a state court could not simply declare a doctrine, like custom, to be a background principle of state law applicable to a piece of property, referring to the Court's opinion in *Lucas v. South Carolina Coastal Council*,<sup>229</sup> and then use that doctrine to "'assert[] retroactively that the property it has taken never existed at all."<sup>230</sup> Justice Scalia conceded that the factual record in *Stevens* was insufficient to support a Court decision whether a taking had occurred because the trial court dismissed the claim without factual development.<sup>231</sup> Nevertheless, he maintained that the landowners' due process claim was reviewable because they were not original parties to *Thornton*, and therefore they had no day in court to argue why custom should not apply to

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<sup>220</sup> *Id.* at 724.

<sup>221</sup> *See Stevens II*, 510 U.S. at 1210.

<sup>222</sup> *Stevens v. City of Cannon Beach (Stevens I)*, 854 P.2d 449, 456 (Or. 1993). The "background principle" terminology stems from *Lucas v. South Carolina Coastal Council*, in which the Supreme Court decided that if a regulation that prohibited certain uses of land merely effectuated a "background principle[]" of state nuisance or property law, a taking would not lie. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). *See also infra* note 270.

<sup>223</sup> *Stevens I*, 854 P.2d at 456.

<sup>224</sup> *Stevens II*, 510 U.S. at 1207.

<sup>225</sup> *Id.* at 1212.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at n.5.

<sup>229</sup> *Id.* at 1211 (citing *Lucas*, 505 U.S. at 1031).

<sup>230</sup> *Stevens II*, 520 U.S. at 1211–12 (quoting *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring)).

<sup>231</sup> *Id.* at 1214.

their land.<sup>232</sup> Notwithstanding his acknowledgment that the Court could not decide whether a taking had occurred,<sup>233</sup> Justice Scalia endorsed the concept of judicial takings, declaring: “No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation.”<sup>234</sup>

But Scalia failed to consider whether other doctrines, like prescription, would have produced the same result in *Stevens*. Although the Oregon Supreme Court in *Thornton* invoked the doctrine of custom to avoid relitigation of the same issue for every coastal parcel,<sup>235</sup> the trial court decided the case on the basis of prescription, and the Oregon Supreme Court could have upheld the ruling on that basis alone.<sup>236</sup> Although the landowners in *Stevens* attempted to distinguish their case from *Thornton*, their beach was in the same city,<sup>237</sup> hardly creating a distinct factual scenario.<sup>238</sup>

Justice Scalia also failed to discuss the peculiar facts involving the Oregon beach in *Stevens*. In contrast with Florida’s beaches,<sup>239</sup> the beaches in Oregon were unsuited for development.<sup>240</sup> The border between the dry-sand area and the foreshore is constantly shifting, sometimes as much as 180 feet eastward or westward, depending on the forces affecting erosion

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<sup>232</sup> *Id.*

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* at 1212 (citing *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980)).

<sup>235</sup> *See Thornton*, 462 P.2d at 676–77 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*75–78).

<sup>236</sup> *See id.* at 673, 676 (discussing the trial court’s ruling that the public acquired an easement over the dry-sand area); *see also id.* at 676 (“[W]e conclude that the law in Oregon, regardless of the generalizations that may apply elsewhere, does not preclude the creation of prescriptive easements in beach land for public use.”).

<sup>237</sup> *Stevens II*, 510 U.S. at 1210.

<sup>238</sup> Justice Scalia was not the only one to overlook this fact. Oregonians in Action (“OIA”), a group focused on limiting regulatory imposition on private land, filed an amicus brief in *Stop the Beach Renourishment* in which it criticized the Oregon Supreme Court’s “creative[.]” application of custom in *Thornton* and suggested that “various groups with the focus and goal of organizing and funding lobbying and litigation” were partially to blame (without acknowledging its own status as just such a group). Brief of Oregonians in Action Legal Center as Amicus Curiae Supporting the Petitioner at 16–17, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Protection*, 130 S. Ct. 2592 (2010) (No. 08-1151). OIA did not recognize the possibility that the landowners in both *Thornton* and *Stevens* would likely have lost their cases on grounds other than custom. *See id.*

<sup>239</sup> *See, e.g.*, text following *supra* note 79.

<sup>240</sup> *Thornton*, 462 P.2d at 674 (describing the dry-sand area as “unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures”).

and accretion.<sup>241</sup> Consequently, Oregon beaches largely remained as they were at statehood. The public enjoyed unquestioned use of the undeveloped beaches, and both the dry and wet sand areas were open to all.<sup>242</sup> Not until many decades later did upland landowners begin to attempt to exploit the development potential of the Oregon beaches.<sup>243</sup> As a result, the 1967 Oregon legislature declared the preservation of the public's rights in the beaches to be state policy.<sup>244</sup> Thus, the real novelty in *Thornton* was the prospect of allowing unprecedented development on Oregon's beaches, not affirming the public's customary rights to use them.

#### IV. THE SUPREME COURT'S FLORIDA BEACH DECISION

Some fifteen years after Justice Scalia's dissent in *Stevens*, the Florida beach case presented an opportunity to revisit the judicial takings issue, but only after the landowners recast their claim from a regulatory taking to a judicial taking in their petition for certiorari.<sup>245</sup> That the Court would grant certiorari under such circumstances is a measure of how enthusiastically at least four of the Justices viewed the prospect of a viable judicial takings doctrine. Or perhaps how persuasive Justice Scalia is to some of his colleagues. Or perhaps both.<sup>246</sup>

##### A. *The STBR Petition for Certiorari*

STBR first unsuccessfully attempted to persuade the Florida Supreme Court to rehear the case.<sup>247</sup> The group then filed a petition for a writ of certiorari on March 13, 2009, supported by a brief from the Pacific Legal Foundation.<sup>248</sup> Instead of claiming that the statute was

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

<sup>242</sup> *Id.* at 673 (noting the public use of the beaches for such activities as clam-digging, building fires for cooking, and general recreation).

<sup>243</sup> *See id.* at 674 (describing the recognition of a lack of potential building locations on the Oregon beach as having "[r]ecently . . . attracted substantial private investments in resort facilities").

<sup>244</sup> *Id.* at 674 (citing OR. REV. STAT. § 390.610 (1967)).

<sup>245</sup> Petition for Writ of Certiorari, *supra* note 125, at (i).

<sup>246</sup> It is also possible that the Pacific Legal Foundation's support of the certiorari petition, *supra* note 151, was influential.

<sup>247</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), *reh'g denied* Dec. 18, 2008.

<sup>248</sup> Petition for Writ of Certiorari, *supra* note 125; Motion for Leave to File and Brief of Pacific Legal Fdn. as Amicus Curiae, *supra* note 151.

unconstitutional as applied to its case, STBR now argued that the Florida Supreme Court's opinion, by approving the BSPA, took their property.<sup>249</sup> The petitioners claimed that the state court had unconstitutionally interpreted legislation to both eliminate littoral rights and replace them with inadequate statutory rights,<sup>250</sup> while allowing an agency to "unilaterally modify a private landowner's property boundary without a judicial hearing or payment of just compensation."<sup>251</sup> Although the petitioners had raised no such "judicial takings" claim in the proceedings below,<sup>252</sup> and there were no conflicting decisions in the lower courts, the Supreme Court granted certiorari June 15, 2009.<sup>253</sup>

The case attracted the attention of several additional libertarian property rights groups on the side of STBR.<sup>254</sup> Several non-profit organizations and numerous governmental bodies, including states, counties, cities, and the federal government, supported the state DEP.<sup>255</sup> The amici on the

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<sup>249</sup> Petition for Writ of Certiorari, *supra* note 125, at (i).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Brief for the United States as Amicus Curiae Supporting Respondents at 18, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Protection*, 130 S. Ct. 2592 (2010) (No. 08-1151).

<sup>253</sup> *Stop the Beach Renourishment*, 129 S. Ct. 2592. That the Supreme Court would take a case raising entirely new arguments without any grounding in existing law reflects the activism of the Court.

<sup>254</sup> In all, seventeen groups, either jointly or alone, filed amici briefs in support of STBR, including the Owners' Counsel of America, the National Association of Home Builders, the Florida Home Builders Association, the Center for Constitutional Jurisprudence, Citizens for Constitutional Property Rights Legal Foundation, Inc., the Eagle Forum Education & Legal Defense Fund, the New Jersey Land Title Association, Save Our Shoreline, the American Civil Rights Union, Save Our Beaches, the Southeastern Legal Foundation, the Coalition for Property Rights, Inc., the New England Legal Foundation, the Cato Institute, Inc., the NFIB Legal Center, the Pacific Legal Foundation, and the Oregonians in Action Legal Center. *Proceedings and Orders: Stop the Beach Renourishment, Inc. Petitioner v. Florida Department of Environmental Protection*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-1151.htm> (last visited Feb. 17, 2011).

<sup>255</sup> On the DEP's side were the United States, the Surfrider Foundation, the states of California, Arkansas, Delaware, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, Wyoming, the American Planning Association, the Florida Chapter of the American Planning Association, the Florida Shore and Preservation Association, the Florida Association of Counties, the Florida League of Cities, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the International City/County Management Association, the International Municipal Lawyers Association,

side of STBR exhorted the Supreme Court to recognize judicial takings as a viable doctrine to limit the state's ability to alter private property rights, many asserting that the Framers of the Constitution intended the Takings Clause to apply to all branches of government, not just the legislative and executive.<sup>256</sup>

On the other hand, the amici supporting the state DEP reminded the Court of its previous deference to state courts' decisions concerning the definition of property rights.<sup>257</sup> For example, the amicus brief of the United States succinctly stated: "This Court should not recognize a 'judicial takings' claim in this case because, at bottom, the action complained of was not that of a court."<sup>258</sup>

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the Coastal States Organization, and Brevard County. *Id.*

<sup>256</sup> See, e.g., Brief of Cato Inst., et al., as Amicus Curiae Supporting Petitioner at 12, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151); see generally Brief of the Eagle Forum Educ. & Legal Def. Fund as Amicus Curiae Supporting the Petitioner, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151) (discussing the history of the Takings Clause and arguing for its application to all branches of government). However, several briefs for the other side contested that historical reading. See Brief of the Am. Planning Ass'n and the Fla. Chapter of the Am. Planning Ass'n as Amicus Curiae Supporting Respondents at 13, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151); Brief for the States of California, et al. as Amici Curiae Supporting Respondents at 5, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151). Further, one brief raised the history of common law property reform in the nineteenth century and the abolition of such anachronistic rules as coverture and primogeniture, neither of which were challenged on the premise that the courts ratifying the changes effected takings. Brief of the Nat'l Ass'n of Counties, et al. as Amici Curiae Supporting Respondents at 8–9, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151).

<sup>257</sup> See Brief Amicus Curiae of the Am. Planning Ass'n, *supra* note 256, at 6. The American Planning Association's brief also drew a distinction between a state law that takes property and a court's definition of a property interest, maintaining that the Supreme Court decides the former types of cases but declines to hear the latter. *Id.* at 7, 10–11, 28–29. In particular, the brief emphasized *Sauer v. City of New York*, 206 U.S. 536, 549 (1907), in which the Court declared that it "has neither the right nor the duty . . . to reduce the law of the various states to a uniform rule which it shall announce and impose." Brief of the Am. Planning Ass'n as Amicus Curiae, *supra* note 256, at 7. According to the Court, "[s]urely such questions [of state law] must be for the final determination of the state court." *Sauer*, 206 U.S. at 548.

<sup>258</sup> Brief for the United States as Amicus Curiae Supporting Respondents at 18, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151). Then-Solicitor General and now Supreme Court Justice Elena Kagan signed the brief for the United States as Counsel of Record. *Id.* at cover. The federal government's brief highlighted the fact that during the entire process of the litigation before reaching the Supreme Court, the plaintiffs had been arguing a "conventional takings claim." *Id.* at 18. The federal brief argued that the petitioners were merely asserting that the Florida Supreme Court made the wrong decision, not that it effected a taking. *Id.*

Surprisingly, even though he had participated in earlier proceedings, Justice Stevens was absent at the oral argument on December 2, 2009.<sup>259</sup> His absence was due to his ownership of a condominium near a Florida beach,<sup>260</sup> an absence that would materially affect the case's outcome.<sup>261</sup>

At oral argument, the remaining eight Justices wasted little time questioning the advocates about the case. The attorney for STBR hardly managed an introduction before Justice Ginsburg asked why in the proceedings below STBR argued that the state statute produced a taking, but now before the Supreme Court it urged a judicial taking.<sup>262</sup> Justice Scalia raised the question of construing the beach nourishment project as an avulsion instead of an accretion from the outset, foreshadowing his ensuing opinion.<sup>263</sup> The arguments eventually digressed into conjecture concerning hot dog stands on the beach,<sup>264</sup> spring break beach parties,<sup>265</sup> and "port-a-johns,"<sup>266</sup> as the Justices grappled with Florida property law and the lack of definitive precedent. Due to the scattered arguments raising hypothetical factual issues and rarely-discussed doctrines of Florida

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<sup>259</sup> Richard Lazarus, *The Logic of High Court Decisions*, THE ENVTL. FORUM, March/April 2010, at 14, available at <http://www.law.georgetown.edu/faculty/lazarus/docs/columns/ELIColumnMarApr2010.PDF>.

<sup>260</sup> *Id.*

<sup>261</sup> See *infra* notes 352-56 and accompanying text. Not all of the Justices felt compelled to recuse themselves despite potentially conflicting interests: for example, Justice Scalia's family owns beachfront property in the Outer Banks, North Carolina, an area that has experienced its own struggle between private landowners and the public. Joan Biskupic, *Fla. Property Case No Day at the Beach for Supreme Court*, USA TODAY (Dec. 3, 2009), [http://www.usatoday.com/news/washington/2009-12-02-florida-property-rights\\_N.htm](http://www.usatoday.com/news/washington/2009-12-02-florida-property-rights_N.htm). Justice Scalia declined to comment on the issue. *Id.* Chief Justice Roberts owns waterfront property in Maine. Nina Totenberg, *High Court Weighs Florida Beach Case*, NATIONAL PUBLIC RADIO, Dec. 2, 2009, <http://www.npr.org/templates/story/story.php?storyId=121030772>.

<sup>262</sup> Transcript of Oral Argument at 4, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151).

<sup>263</sup> *Id.* at 6. Justice Scalia stated that he thought two avulsions actually occurred in the case: the first when the hurricane eroded the shoreline, the second when the state replenished it. *Id.* at 6-7. Although counsel for the petitioners argued that no Florida law supported the idea that the state could respond to the hurricane's avulsion with an artificial avulsive event of its own, *id.* at 7, ultimately the Court declared that although "perhaps state-created avulsions ought to be treated differently . . . nothing in prior Florida law makes such a distinction," meaning that the Florida Supreme Court did not change the existing precedent. *Stop the Beach Renourishment*, 130 S. Ct. at 2612 (2010) (majority op.).

<sup>264</sup> Transcript of Oral Argument, *supra* note 262, at 9.

<sup>265</sup> *Id.* at 39.

<sup>266</sup> *Id.* at 46.

law, the argument concluded without providing much of a hint as to how the Court would decide the case.

*B. The Supreme Court's Opinions*

The Supreme Court issued its opinion towards the end of its term, on June 17, 2010.<sup>267</sup> Somewhat surprisingly, the easiest issue for the Court was whether a taking had occurred. The answer was a resounding “no,” with all eight Justices in agreement.<sup>268</sup> Considerably more contentious was the question of whether the question of a judicial taking should be reached in a case that involved no taking. Justice Scalia’s plurality opinion addressed the issue in detail at the outset and gave the concept a ringing endorsement,<sup>269</sup> perhaps predictable given his longstanding interest in the issue.<sup>270</sup> Justice Scalia undertook a lengthy exposition of why the Takings Clause should apply to courts,<sup>271</sup> but he was unable to muster enough votes to write a majority opinion. However, neither the concurring nor the dissenting opinions squarely rejected the concept of a judicial taking,<sup>272</sup> thus leaving the issue very much in play.

1. 8-0: No Taking Under Florida Law for an Avulsive Event

Ironically, with respect to the element of the case most important to the petitioners—whether the beach nourishment project produced a taking—the Supreme Court quickly assessed Florida property law and disposed of the issue, concluding that no taking occurred.<sup>273</sup> Although the

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<sup>267</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2592.

<sup>268</sup> All eight Justices joined in Parts I, IV, and V of the opinion, but only a plurality joined Justice Scalia in Parts II and III. *Id.* at 2597. Consequently, when this Article refers to “the Court” it is referencing either Parts I, IV, or V, and when it refers to “the plurality” it is referencing either Parts II or III.

<sup>269</sup> *Id.* at 2596.

<sup>270</sup> See *supra* notes 225-34 and accompanying text; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031, 1032 n.18 (1992) (positing that while the question of background principles is one of state law, ultimately a state court’s interpretation of its law will be subject to federal court review to determine whether it is “an objectively reasonable application of relevant precedents” (emphasis in original)).

<sup>271</sup> See *infra* notes 291–328 and accompanying text.

<sup>272</sup> See *infra* notes 331–33 and accompanying text.

<sup>273</sup> Rick E. Rayl, *Supreme Court Issues Decision in Florida Beach Takings Case*, CAL. EMINENT DOMAIN REPORT (June 17, 2010), <http://www.californiaeminentdomainreport.com/2010/06/articles/court-decisions/supreme-court-issues-decision-in-florida-beach-takings-case/>.

Florida Supreme Court had focused on the BSPA and its effects on private property rights,<sup>274</sup> Justice Scalia relied on more fundamental tenets of state law such as the state's right, as sovereign owner of the submerged land in question, to fill trust land, provided the fill does not interfere with the rights of littoral property owners or the rights of the public.<sup>275</sup> Equally important, according to the Court, was the principle that the owner of the submerged land, in this case the state, retained title to any land exposed by an avulsive event.<sup>276</sup>

STBR grounded its Supreme Court argument on the claim that the Florida Supreme Court deprived the landowners of both their right to accretions and their right to contact with the water.<sup>277</sup> The Court dismissed these concerns without lengthy discussion, noting that to prevail the petitioner would have to "show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land,"<sup>278</sup> which the Court found too high a bar to overcome.<sup>279</sup>

The Court adopted the Florida Supreme Court's decision that the right to accretions "was not implicated by the beach-restoration project, because the doctrine of avulsion applied."<sup>280</sup> Interestingly, although the state court considered the avulsive event in question to be a hurricane's washing away dry land,<sup>281</sup> and ruled that the state had the right to restore the land the avulsion destroyed,<sup>282</sup> the Supreme Court considered the state's creation of dry land through beach nourishment as the kind of rapid change that also constituted an avulsion.<sup>283</sup> Either way, because the Court interpreted Florida law to favor the state's right to fill over a riparian landowner's right to future accretions, the opinion observed that the petitioner's allegation was not grounded in a right "established under Florida law."<sup>284</sup> Citing different Florida authority than the Florida Supreme

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<sup>274</sup> See *supra* notes 143–49 and accompanying text.

<sup>275</sup> *Stop the Beach Renourishment Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2611 (2010).

<sup>276</sup> *Id.* (citing *Bryant v. Peppe*, 238 So. 2d 836, 837, 838–39 (Fla. 1970)).

<sup>277</sup> Petition for Writ of Certiorari, *supra* note 125, at 17–18, 21–23.

<sup>278</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2611.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 2612.

<sup>281</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116 (Fla. 2008).

<sup>282</sup> See *supra* note 148 and accompanying text.

<sup>283</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2611.

<sup>284</sup> *Id.* at 2611–12. Although the Court also noted that the state's right to fill was only superior to the extent that it "does not interfere with the rights of the public and the rights

Court relied upon on its decision, but nonetheless upholding the Florida court's opinion, the Supreme Court recognized the State's right to fill its submerged lands through avulsion.<sup>285</sup> Since the Court uncovered no conclusive distinction in Florida law between natural (e.g., hurricane-induced) and artificial (e.g., state-created) avulsions, it could not conclude that the Florida court erred.<sup>286</sup>

With respect to the right to contact the water, STBR was similarly unable to convince the Court that the scant evidence of such a right in Florida case law<sup>287</sup> was sufficient to overcome Florida's superior rights under the law of avulsion.<sup>288</sup> The Court concluded that the Florida court could reject the notion that riparian owners had a perpetual right for their uplands to abut the MHWL, since STBR relied solely on dicta in one case that hardly established the right.<sup>289</sup> Because the Court concluded that the Florida Supreme Court's interpretations were "consistent with [] back-

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of littoral landowners," *id.* at 2611, the Court did not explicitly decide that no interference occurred. Indeed, its statement that the landowners' property "has been deprived of its character (and value) as oceanfront property" due to the state's action indicated the opposite. *Id.* at 2612. However, it is also possible that the court simply did not consider worth mentioning the BSPA's benefits to the landowners, including preserving the rights of access and view free of structures, rights not necessarily preserved under Florida common law avulsions. See Christie, *supra* note 134, at 61–62. The Court did note that STBR's criticisms regarding the BSPA's replacing common law rights with statutory rights were unfounded, because the source of the right does not matter "so long as the property owner continues to have what he previously had." *Stop the Beach Renourishment*, 130 S. Ct. at 2613, n.12.<sup>285</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2613 (citing *Martin v. Busch*, 112 So. 274 (Fla. 1927)) (deciding that the state retained ownership to land that was once part of a lake when the state itself drained the water, and that the doctrine of accretion did not apply). Professor Christie made a similar argument in her article on the Florida Supreme Court's decision, maintaining that the BSPA may have been intended to reflect the existing common law of avulsion, and so "[f]inding that beach restoration . . . is avulsion is a straightforward way of applying common law principles to carry out the intent of the legislature to continue state ownership of the land created seaward of [the] ECL." See Christie, *supra* note 134, at 60.

<sup>286</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2611–12.

<sup>287</sup> The petitioner relied almost exclusively on dicta in the *Sand Key* decision to support its argument. *Stop the Beach Renourishment*, 130 S. Ct. at 2612–13. See also *Bd. of Tr. of the Internal Improvement Trust Fund v. Sand Key Assocs.*, 512 So.2d 934, 936, 940 (Fla. 1987) (mentioning as included within riparian rights "the right of access to the water, including the right to have the property's contact with the water remain intact," but ruling on the narrow issue of whether a statute reserving to the state the title to accreted lands created by a beach renourishment project applied to private landowners who did not participate in the project, and deciding that it did not).

<sup>288</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2612–13.

<sup>289</sup> *Id.* (citing *Sand Key*, 512 So.2d 934, 936 (Fla. 1987)); see *supra* note 287.

ground principles of state property law,” it could not rule that a taking had occurred.<sup>290</sup>

## 2. Justice Scalia’s Plurality: Endorsing Judicial Takings

Perhaps because the issue of whether a taking had actually occurred was not a close decision, Justice Scalia devoted the bulk of the plurality opinion to a hypothetical judicial taking.<sup>291</sup> The absence of context enabled Scalia to write what was essentially an advisory opinion, devoting substantial effort to describing what the Court would do had it decided the Florida Supreme Court’s opinion effected a taking.<sup>292</sup> In this academic exercise, Justice Scalia endeavored to give judicial sanction to the concept of judicial takings, resting his argument primarily on the absence of any specific precedent to the contrary and thirty-year-old dicta in two cases in which the Supreme Court neither confirmed nor denied that a judicial taking was possible.<sup>293</sup>

First, the plurality stated that the Takings Clause “is not addressed to the action of a specific branch or branches,”<sup>294</sup> citing *Prune Yard Shopping Center v. Robins*<sup>295</sup> as a case “arguably suggest[ing] that the same [takings] analysis applicable to taking by constitutional provision would apply” to judicial action.<sup>296</sup> But nowhere in *Prune Yard* did the Court attempt to apply

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<sup>290</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2612. The Florida Supreme Court was essentially deciding a matter of first impression, applying existing law to new factual circumstances. See *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008) (noting the relative paucity of case law detailing the relationship between public and private beachfront property rights). For example, whereas STBR was claiming a vested right to future accretions, the majority of prior Florida law concerned already-accreted land. See Christie, *supra* note 134, at 70–71 (discussing the lack of case law on future accretions and the sparse mention of the right to contact with the water in Florida case law).

<sup>291</sup> See generally *Stop the Beach Renourishment*, 130 S. Ct. at 2601–2610 (plurality op.).

<sup>292</sup> *Id.*

<sup>293</sup> Although Justice Scalia cited *Chicago Burlington* for the proposition that “the Due Process Clause of the Fourteenth Amendment prohibits uncompensated takings,” *id.* at 2603, he did not refer to that case to support his theory of judicial takings. This approach differed from that of Professor Thompson, who argued that *Chicago Burlington* was the foundation of the judicial takings doctrine. See *supra* note 185 and accompanying text.

<sup>294</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (plurality op.). Justice Scalia’s textual approach here was quite similar to his concurrence in *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring) (“[t]he [First] Amendment is written in terms of ‘speech,’ not speakers . . . [and] offers no foothold for excluding any category of speaker.”).

<sup>295</sup> 447 U.S. 74 (1980).

<sup>296</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality op.).

the takings analysis to judicial decisions. Its sole sentence mentioning “judicial reconstruction of a State’s laws of private property”<sup>297</sup> was a reference to the appellants’ contentions, not the Court’s own understanding of the case.<sup>298</sup> Further, although Justice Scalia characterized the *PruneYard* Court as “treat[ing] the California Supreme Court’s application of the constitutional provisions as a regulation,”<sup>299</sup> what the Court actually did was analogize the California Constitution’s free speech provision to a statute solely for the purpose of obtaining federal jurisdiction.<sup>300</sup> Justice Scalia acknowledged that the Court in *PruneYard* did not actually decide the case on the issue of whether the California Supreme Court produced a taking, but he was convinced that the opinion “certainly does not suggest that a taking by judicial action cannot occur . . . .”<sup>301</sup>

Second, Scalia relied on *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*,<sup>302</sup> as a case allegedly “even closer in point.”<sup>303</sup> In *Webb’s*, the Florida Supreme Court interpreted two Florida statutes to allow the clerk of a county court to both assess a fee for holding money in an interpleader account and to take the interest accruing on the account.<sup>304</sup> The U.S. Supreme Court described its task as deciding “whether the second exaction by Seminole County amounted to a ‘taking,’ ”<sup>305</sup> not whether the Florida Supreme Court’s decision produced the taking. In a fact-specific, limited holding, the Court determined that there was no justification for the interest charge since the county had alternate means of being compensated for holding the funds.<sup>306</sup> Justice Scalia accurately quoted the case as saying that “[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as ‘public money . . . .’ ”<sup>307</sup> However, read in context, the Court was referring to the state statute’s

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<sup>297</sup> *PruneYard*, 447 U.S. at 79.

<sup>298</sup> *Id.*

<sup>299</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality op.).

<sup>300</sup> *PruneYard*, 447 U.S. at 79. The statute under which the Court granted jurisdiction allows the Court to hear cases from the highest state court “where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution.” 28 U.S.C. § 1257(a) (2006).

<sup>301</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality op.).

<sup>302</sup> 449 U.S. 155 (1980).

<sup>303</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality op.).

<sup>304</sup> *Webb’s*, 449 U.S. at 159–60.

<sup>305</sup> *Id.* at 160.

<sup>306</sup> *Id.* at 164.

<sup>307</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (quoting *Webb’s*, 449 U.S. at 164).

effect, not to the Florida Supreme Court's decision.<sup>308</sup> These two cases, then, while not explicitly rejecting the notion that a court decision could effect an unconstitutional taking, hardly comprise a ringing endorsement of the proposition.

With respect to how a judicial takings claim would reach the court, the plurality was terse at best. Brushing off Justice Kennedy's concern over "when the claim of a judicial taking must be asserted,"<sup>309</sup> the plurality opined that if a party thought a lower state court produced a taking, it would first appeal to the state supreme court, then to the U.S. Supreme Court if it was still not satisfied; if denied certiorari, the state supreme court's decision would become *res judicata*.<sup>310</sup> The plurality did not stop there, however. Instead, it proceeded to state that even persons not parties to the original suit could claim a taking by challenging a state supreme court decision in federal court, seemingly unconcerned with the prospect of unleashing a flood of litigation.<sup>311</sup>

The plurality next attempted to devise a test that a federal court would use to determine whether a state court effected a taking, as it was not entirely in agreement with the respondents' proffers.<sup>312</sup> First, Justice Scalia considered the state's suggestion of requiring a state court's decision to have a "fair and substantial basis" in state law<sup>313</sup> to be essentially the same as whether the state court eliminated an "established property right."<sup>314</sup> However, he distinguished between a wholesale elimination of a property right and a situation where a court would "clarify and elaborate property entitlements that were previously unclear,"<sup>315</sup> the latter not necessarily rising to the level of unconstitutionality.<sup>316</sup> The plurality also criticized the state's argument that federal courts "lack the knowledge of

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<sup>308</sup> See *Webb's*, 449 U.S. at 164.

<sup>309</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2607 (plurality op.); *id.* at 2616–17 (concurring op. of Kennedy, J.); see also *infra* notes 346–50 and accompanying text.

<sup>310</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2609–10 (plurality op.).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 2610.

<sup>313</sup> *Id.* at 2608; see also Brief for Respondents Walton County and City of Destin 30–31, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (2010) (No. 08-1151) (presuming that "fair support" was the correct standard of review) (citations omitted).

<sup>314</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2608 (plurality op.).

<sup>315</sup> *Id.* at 2609. Indeed, the Florida Supreme Court undertook just such a clarification. See *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109, 1111 (Fla. 2008) (noting the lack of detail and explanation in prior Florida law concerning riparian rights).

<sup>316</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (plurality op.).

state law required to decide” whether a judicial taking occurred.<sup>317</sup> Justice Scalia responded that without “the power to decide what property rights exist under state law,” federal courts would not be able to enforce the Takings Clause at all,<sup>318</sup> a statement that may fuel the fire of advocates wishing to have federal courts become the final arbiters of state property law.<sup>319</sup>

The plurality also rejected the landowners’ proffered test suggesting that a federal court could look to the “unpredictability” of the state court’s decision, in keeping with Justice Stewart’s opinion in *Hughes v. Washington*,<sup>320</sup> because the plurality considered a decision’s predictability to have little bearing on its constitutionality.<sup>321</sup> Instead, the plurality again turned to whether an “established property right[]” had been eliminated.<sup>322</sup> Under this test, to ascertain whether a judicial taking had occurred, a court would need to 1) determine that a property right was “established” under state law, and 2) decide that the state court’s decision “eliminat[ed]” that right.<sup>323</sup> This focus on the elimination of an established property right, rather than Justice Stewart’s emphasis on unforeseeable changes,<sup>324</sup> would appear to equip federal courts with wide berth to overrule changes in state property law. If a court were to determine that such an established property right was eliminated, the plurality seemed to tacitly adopt Professor Thompson’s idea of remanding the invalidated law to the legislature,<sup>325</sup> which would then either have to compensate the private property owner or acknowledge the invalidity of the state court’s application of the law.<sup>326</sup>

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.* The entire quote reads: “A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exit under state law.” *Id.*

<sup>319</sup> Perhaps because the plurality opinion does not have the force of law, *see infra* notes 351–56 and accompanying text, Justice Scalia felt entitled to paint with a broad brush. This lack of precision is certain to provide fodder for future federal-state property law disputes.

<sup>320</sup> *See supra* notes 173–81 and accompanying text.

<sup>321</sup> *See Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality op.).

<sup>322</sup> *Id.*

<sup>323</sup> *See id.* at 2610–11.

<sup>324</sup> *See supra* note 179 and accompanying text.

<sup>325</sup> *See supra* note 195 and accompanying text.

<sup>326</sup> *See Stop the Beach Renourishment*, 130 S. Ct. at 2607 (plurality op.) (maintaining that if the Court were to decide that the Florida Supreme Court’s application of the BSPA effected a taking, the legislature “could either provide compensation or acquiesce in the invalidity of the offending features of the Act”).

Although Justice Scalia convinced three other Justices to join him in recognizing a sweeping new doctrine resting on scant judicial precedent,<sup>327</sup> he could not construct a majority. Further, by neither adopting the parties' tests for a judicial taking nor endorsing Justice Stewart's language in *Hughes* concerning "sudden" or "unpredictable" changes in state law,<sup>328</sup> the plurality veered off into uncharted territory, authorizing federal courts to overrule state court interpretations of state property law by substituting federal court judgments concerning state law. This is a startling authorization for federal courts to reshape federal-state juridical relations.

### 3. The Breyer and Kennedy Concurrences: Dodging the Question

Justice Breyer, in a brief concurring opinion in which Justice Ginsburg joined, agreed that no taking had occurred in the case, but questioned the need to address the question of judicial takings at all.<sup>329</sup> Breyer expressed concern at the plurality's willingness to "invite a host of federal takings claims" without setting some limits on federal courts' authority to reinterpret state property law.<sup>330</sup> Although not expressly disavowing the idea of judicial takings, Breyer thought that addressing the issue was wholly unnecessary to decide the case.<sup>331</sup>

In contrast, Justice Kennedy, somewhat surprisingly joined by Justice Sotomayor,<sup>332</sup> while concurring that no taking occurred and agreeing with Justice Breyer that the Court need not reach the issue of a judicial

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<sup>327</sup> For example, Justice Scalia justified the plurality opinion by stating that "this Court has had no trouble deciding matters of much greater moment, contrary to congressional desire or the legislated desires of most of the States, with no special competence except the authority we possess to enforce the Constitution," although he declined to provide examples. *Id.* at 2605.

<sup>328</sup> See *supra* notes 177–79 and accompanying text. Professor Sarratt, an advocate of the judicial takings doctrine, preferred adopting Justice Stewart's *Hughes* approach as well. See Sarratt, *supra* note 164, at 1530. Focusing on whether the state court upset reasonable expectations, Sarratt suggested, would be more "workable" than forcing a federal court to substitute its own conceptions of property rights for the state's. *Id.* at 1532.

<sup>329</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring) ("[T]he plurality unnecessarily addresses questions of constitutional law that are better left for another day.").

<sup>330</sup> *Id.* at 2618–19. The full quote reads, "if we were to express our views on these questions, we would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law." *Id.*

<sup>331</sup> *Id.* at 2619.

<sup>332</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2613 (Kennedy, J., concurring).

taking,<sup>333</sup> suggested a different vehicle to hold a state court accountable for its decisions concerning private property—invoking the Due Process Clause.<sup>334</sup> Justice Kennedy interpreted the Takings Clause to be properly limited to the executive and legislative branches, the “political” branches that are accountable for the way in which they manage the public fisc.<sup>335</sup>

A major problem Justice Kennedy saw with applying the Takings Clause to judicial decisions was the idea that, so long as the court ordered compensation for private landowners, a state court could eliminate property rights, which he considered to be an attempt to create a constitutional means to effect an inherently unconstitutional end.<sup>336</sup> He believed that there was no authority for the notion that a court has the power to “eliminate established property rights by judicial decision” in the first place.<sup>337</sup> But the Due Process Clause, according to Kennedy, provides an established way to constrain judicial overreach,<sup>338</sup> as it allows higher courts to review lower court rulings without having to address thorny issues of compensation and proper procedure.<sup>339</sup>

Justice Kennedy was unsure that the Constitution’s Framers understood the Takings Clause to apply to the judiciary, since only the legislature had eminent domain authority.<sup>340</sup> Indeed, Justice Kennedy did not see the judicial branch as the proper governmental body to be making policy decisions about what property rights should and should not exist.<sup>341</sup> Although he recognized that the Court had expanded the application of the Takings Clause beyond the Framers’ likely intent,<sup>342</sup> he cautioned the

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<sup>333</sup> *Id.* at 2613, 2615.

<sup>334</sup> *Id.* at 2614. Justice Kennedy has often invoked the Due Process Clause when confronted with potential governmental overreach. See Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and the Environment: Property, States’ Rights, and a Present Search for Nexus*, 82 WASH. L. REV. 667, 691–92, 709–10, 723 (2007) (providing examples of Justice Kennedy applying the Due Process Clause, often in lieu of the Takings Clause, in the contexts of retroactive legislation and governmental regulation).

<sup>335</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2613 (Kennedy, J., concurring).

<sup>336</sup> *Id.* at 2614 (“If the Court were to hold that a judicial taking exists, it would presuppose that a judicial decision eliminating established property rights is ‘otherwise constitutional’ so long as the State compensates the aggrieved property owners.” (citation omitted)).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* (calling the Due Process Clause “a central limitation upon the exercise of judicial power”).

<sup>339</sup> *Id.* at 2616–17.

<sup>340</sup> *Id.* at 2616.

<sup>341</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2614–15, 2616 (Kennedy, J., concurring).

<sup>342</sup> Justice Kennedy indicated that the Framers’ most likely intended the Takings Clause to apply “only to physical appropriation pursuant to the power of eminent domain.” *Id.* at

Court to take care not to adopt a doctrine that could be “inconsistent with historical practice.”<sup>343</sup>

Procedural and remedial questions also troubled Justice Kennedy.<sup>344</sup> Thus, he argued that the Court should take up the question of judicial takings in the future only if absolutely necessary.<sup>345</sup> The plurality’s cursory explanation of how a judicial takings claim could be raised did not convince Kennedy. He observed that, under the plurality’s approach,<sup>346</sup> a state court could “determine the substance of state property law” in one case, and then the original plaintiff could file a separate lawsuit alleging a taking, since the second lawsuit would not be barred by *res judicata*, as the issue had not been litigated.<sup>347</sup> Under this two-case model, Justice Kennedy worried that a court would be able to order only just compensation, without the option of invalidating the previous decision.<sup>348</sup> Even if one case decided all the issues, and the highest court reversed the taking, the court effecting the taking would still, according to Kennedy, be liable for a temporary taking.<sup>349</sup> Given the difficulties of these issues and presented with a factual scenario that made addressing them completely unnecessary,

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2614 (Kennedy, J., concurring) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1991)). He also noted that the legislature was the traditional branch making the appropriations decisions. *Id.* Justice Scalia retorted in the plurality opinion that the intent of the Framers was not relevant, since “the Constitution was adopted in an era in which the courts had no power to ‘change’ common law.” *Id.* at 2606 (citing Blackstone, as well as his dissent in *Rodgers v. Tennessee*, 532 U.S. 451, 472-78 (2001) (Scalia, J., dissenting)). However, well before the Constitution was adopted common law courts invented the Rule Against Perpetuities to mediate between the desires of landed testators, who sought to perpetuate dead-hand control, and the concerns of grantees, who wanted alienable property rights. The signature case was the Duke of Norfolk’s Case, 22 Eng. Rep. 931 (Ch. 1681), a seventeenth century decision. See JESSE DUKEMINIER, *PROPERTY*, 285 (7th Ed., 2010); George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origin of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

<sup>343</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2616.

<sup>344</sup> *Id.* at 2616–17.

<sup>345</sup> *Id.* at 2618 (“If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented.”).

<sup>346</sup> See *supra* notes 309–11 and accompanying text.

<sup>347</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2617. Justice Kennedy expressed doubt that “parties would raise a judicial takings claim on appeal, or in a petition for writ of certiorari,” in the first case, because the issue was not previously litigated. *Id.* But that is exactly what happened in the Florida beach case.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

Justice Kennedy considered the Due Process Clause adequate to protect private property owners from errant judicial decisions until a change in circumstances made deciding the question of judicial takings unavoidable.<sup>350</sup>

## V. THE LEGACY

Like *Rapanos v. United States*,<sup>351</sup> *Stop the Beach Renourishment* is a case without a majority opinion on the issue of judicial takings. The only part of the case to obtain a majority of votes was the part that ruled that no taking occurred.<sup>352</sup> Thus, the decision will have binding effect only on the parties to the suit<sup>353</sup>—further reason to question why the Court heard the case. Unlike the opinions in *Rapanos*,<sup>354</sup> the Justices did not address which opinion controlled, but in such a situation the lower courts are bound only by the “position taken by those Members who concurred in the judgments on the narrowest grounds . . . .”<sup>355</sup> It would then seem that Justice Breyer’s opinion should govern, since he would not have taken up the idea of judicial takings at all,<sup>356</sup> leaving the question of judicial takings for another case. Nonetheless, some lower federal courts may rely on Justice Scalia’s opinion and declare state court opinions to have effected takings.

### A. *Ratifying Beach Nourishment Projects, For Now*

The immediate and most visible effect of the Court’s decision is that the Florida Department of Environmental Protection may continue to issue

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<sup>350</sup> *Id.* at 2618.

<sup>351</sup> 547 U.S. 715, 718 (2006) (vacating a lower court decision concerning the scope of the Clean Water Act’s jurisdiction over navigable waters without producing a majority as to which navigability test to apply).

<sup>352</sup> See *supra* notes 273-90 and accompanying text.

<sup>353</sup> One court has already noted the lack of precedential weight of the plurality opinion. See *Sagarin v. City of Bloomington*, 932 NE 2d 739, 745 n.2 (Ind. App. 2010) (rejecting the appellant’s argument that, under *Stop the Beach Renourishment*, other remedies exist for inverse condemnation besides compensation because, according to the court, the plurality opinion is “without precedential authority”).

<sup>354</sup> See *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (suggesting that Justice Kennedy’s concurrence supplied the rule of decision); *id.* at 810 n.14 (Stevens, J., concurring) (noting the likelihood that “Kennedy’s approach will be controlling in most cases”).

<sup>355</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>356</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2618–19 (Breyer, J., concurring).

permits for beach restoration, setting ECLs, and filling trust lands.<sup>357</sup> Other states with beach restoration programs may similarly proceed in their efforts to reclaim property lost to the waves.<sup>358</sup> For example, in a case argued the same day as *Stop the Beach Renourishment*, the New Jersey Supreme Court unanimously ruled that a landowner did not acquire title to beachfront land created by a nourishment project, and therefore could not be compensated in an eminent domain proceeding because the state's common law doctrine of avulsion allowed the state to make its submerged public trust land dry land.<sup>359</sup>

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<sup>357</sup> See generally *Stop the Beach Renourishment*, 130 S. Ct. 2592 (majority op.).

<sup>358</sup> For some states, however, the effect may not quite be the same. For example, in Texas and North Carolina, the doctrine of avulsion is of questionable use with respect to coastal waters. See Christie, *supra* note 134, at 27 n.48. In Texas, the state supreme court recently decided that an avulsive event cannot encumber private property with a public easement where no such easement previously existed. *Severance v. Patterson*, 2010 WL 4371438 at \*1, 54. Tex. Sup. Ct. J. 172 (Tex. Nov. 5, 2010), *reh'g granted* (Mar. 11, 2011). In *Severance*, the state argued that a public easement could "roll" from one parcel to another when the originally-encumbered parcel became submerged. *Id.* After Hurricane Rita essentially wiped out the property that was subject to the easement, *Severance's* land was left seaward of the new vegetation line. See *id.* at \*2.

When the state attempted to enforce a public easement on *Severance's* now ocean-front property under the Texas Open Beaches Act, a statute which prevents private landowners from obstructing public access to beaches encumbered by a public easement, *Severance* sued the state alleging a taking. *Id.* at \*2, 6. Quoting *Stop the Beach Renourishment* for the proposition that "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established," the Texas Supreme Court found no background principles in Texas law that provided an independent basis for public ownership or use of beachfront property. *Id.* at \*2-4 (quoting *Stop the Beach Renourishment*, 130 S. Ct. at 2612 (majority op.)). Absent proof of a reservation or an easement of some kind, no public rights existed in Texas' dry sand area. *Id.* Recognizing that Texas courts had never applied the doctrine of avulsion to "upset" the mean high tide line, the court ruled that in Texas an easement for the public use of privately-owned land cannot move when the original land burdened becomes submerged. *Id.* at \*9-10. To the extent that contrary cases existed in Texas law, the Texas Supreme Court disapproved of them. *Id.* at \*15. Because the court was answering questions certified to it by the federal Fifth Circuit, it did not decide the merits of the plaintiff's claim. However, in practical terms, the case means that, for now, at least one Texas beach restoration project is on hold. See Harvey Rice, *State Calls off Big Galveston Beach Project*, HOUS. CHRON. (Nov. 16, 2010), <http://www.chron.com/disp/story.mpl/business/realestate/7295713.html> (citing *Severance* as having effectively halted the project, because state law prohibits the use of public funds for the benefit of private property).

<sup>359</sup> *City of Long Branch v. Jui Lung Yiu, et al.*, 4 A.3d 542, 551-52 (N.J. 2010). Possibly anticipating a petition for certiorari alleging a judicial taking, the New Jersey court stressed that "[i]n deciding this case, we therefore rely on traditional common-law principles." *Id.* at 553.

Whether continuation of beach renourishment projects will benefit the environment is hardly clear. In light of the prospect of rising sea levels and increasingly intense storm events, continuing to dredge sand from the bottom of the ocean and dump it onshore may prove to be a fool's errand. More importantly, state courts must apparently find ways of using existing principles of state property law to justify such programs, and they may decide to apply their law quite narrowly in order to avoid the risk of a landowner challenge in federal court.<sup>360</sup>

Even if STBR had prevailed in the case, its members would have gained very little. After the Florida District Court of Appeal decided *Save Our Beaches*,<sup>361</sup> the Florida legislature amended the BSPA, stipulating that if any claimant alleged a taking in response to a beach renourishment project, the reviewing court must take into consideration the added value a landowner would obtain through the project and offset it against the damage done to the rest of the property.<sup>362</sup> In this case, any "damage" done to the STBR members' remaining upland property would almost certainly be offset by the increased value provided by the renourishment project.<sup>363</sup> Further, if the state were *not* to assert ownership of sand that was publicly-financed and built on publicly-owned trust land, the result would grant a windfall to private landowners.<sup>364</sup> Given the generally uncontroversial nature of beach restoration programs until this case,<sup>365</sup> and with no split among the state courts or the federal circuits on the issue, coupled with the fact that these plaintiffs had hardly anything to gain economically from prevailing in the case, the Supreme Court's grant of certiorari is astonishing.

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<sup>360</sup> See *supra* text accompanying note 311.

<sup>361</sup> See *supra* notes 127–30 and accompanying text.

<sup>362</sup> FLA. STAT. § 161.141 (2010); see also Christie, *supra* note 134, at 57–58.

<sup>363</sup> Smith, *supra* note 80 (quoting a Florida Atlantic University economist as saying "[w]hen you renourish, the value of the land goes up"). For example, on Captiva Island, one of Florida's barrier islands on the Gulf Coast, property values increased by five times their original value in the decades following a 1980s nourishment project. *Id.*

<sup>364</sup> Bd. of Tr. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 946–47 (Fla. 1987) (Ehrlich, J., dissenting) ("The giving away of [sovereign] lands is not only not authorized by our Constitution, it is wrong, wrong, wrong."). Cf. Brief for Respondents Walton County and City of Destin, *supra* note 313, at 48 (emphasizing that "[t]he property petitioner says has been taken was created by the government on land owned by the government with funding provided by the government," so STBR's members did not "lose" rights to any land that was rightfully theirs). The Board of Trustees may sell trust land or authorize private use, but may only do so when consistent with the public interest. FLA. CONST. art. 10, § 11. The Florida Constitution does not contemplate giving away public land. See *id.*

<sup>365</sup> See *supra* notes 76–78 and accompanying text.

*B. Disrupting the Federal-State Relationship*

One of the potentially most significant ramifications of the plurality's activism may be its effect on the dynamic between the federal and state judiciaries. In the words of Professor Frank Michelman, "giving federal judges the last word on questions of the meaning of laws emanating from state authorities . . . seems to be a gross contravention of Our Federalism."<sup>366</sup> The current Court has not demonstrated the deference to the principles of federalism that the Rehnquist Court did,<sup>367</sup> and it has begun to accelerate the pace at which it allows the federal government to encroach into state territory, an example being the recent decision incorporating the Second Amendment against the states.<sup>368</sup>

By asserting that federal courts have the power to reinterpret state property law, Justice Scalia and the plurality would have effectively reversed the historic practice of allowing the highest state courts to determine their state's law.<sup>369</sup> Federal courts would therefore not only have the power

<sup>366</sup> Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 305 (1993–94): "Our Federalism" refers to three principles Justice Black outlined: 1) keeping the lines between state and federal law clear, 2) ensuring that the federal courts respect the role of the state courts, and 3) maintaining a position of judicial restraint within the federal judiciary. *Id.* at 302–03. See also Williamson B. C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57, 58 (1979) (arguing that allowing district courts to review state court decisions concerning state property law, as *Robinson v. Ariyoshi* suggested, could "completely reorder our system of federalism").

<sup>367</sup> Liptak, *supra* note 2 ("Federalism has less salience with this court than it did with the Rehnquist court." (quoting Sri Srinivasan)).

<sup>368</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Justice Stevens alluded to the growing federal involvement in state law in his *McDonald* dissent, quoting Justice Scalia's statement in *Stop the Beach Renourishment* that "[g]enerally speaking, state law defines property interests," to argue that the Chicago gun ordinance the Court struck down was "unexceptional" as an exercise of state property law. *Id.* at 3109 (Stevens, J., dissenting) (quoting *Stop the Beach Renourishment*, 130 S. Ct. 2592, 2597 (2010) (op. of Scalia, J.)). This criticism of increasing federal oversight indicates how pivotal Justice Stevens could have been in defeating the idea of judicial takings.

<sup>369</sup> See, e.g., *Sauer*, 206 U.S. 536, 546, 549 (1907) (recognizing that the United States Supreme Court "is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent," and citing Chief Justice Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264 (1821), for the proposition that the Supreme Court has no jurisdiction to "correct any supposed errors of the state courts in the determination of the state law"). The *Sauer* Court decided that the New York Court of Appeals, not the United States Supreme Court, had the right to determine what easements existed appurtenant to a piece of property under New York law. *Id.* at 548; see also *supra* note 257 and accompanying text.

to decide state property law, but they would also have to become fluent in the law of each state.<sup>370</sup> And by outlining such a permissive approach for bringing a judicial takings claim—in which the original party could appeal a state's highest court's decision to the Supreme Court, or a non-party could collaterally attack the decision later in federal court<sup>371</sup>—the plurality seemed to have opened the floodgates to scores of takings claims challenging state court decisions that clarify state property law and adapt it to new circumstances and social needs.<sup>372</sup>

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<sup>370</sup> At oral argument, Justice Kennedy did not seem pleased with the prospect of the Court “hav[ing] to become real experts in Florida law.” Transcript of Oral Argument, *supra* note 262, at 24.

<sup>371</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (plurality op.). The plurality's assertion that adopting the judicial takings doctrine would not violate the *Rooker-Feldman* doctrine, *id.* at 22–23, may suggest that these four Justices will begin voting to grant more petitions for certiorari, since the Supreme Court would necessarily become the court of last resort. (The *Rooker-Feldman* doctrine stands for the proposition that only the Supreme Court can review final state court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–16 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).) Further, under the plurality opinion's sanctioning of collateral attacks, lower federal courts should likewise prepare for a deluge of judicial takings litigation.

However, at least one federal circuit judge has expressed doubt that a lower federal court would be a proper forum for a judicial takings claim. See *Bettendorf v. St. Croix County*, 631 F.3d 421, 435 n.5 (7th Cir. 2011) (Hamilton, J. concurring in part and dissenting in part) (expressing the view that a judicial takings claim “could be brought to the Supreme Court but probably not to lower federal courts” (citing *Stop the Beach Renourishment*, 130 S. Ct. at 2602, 2609)). But this view overlooks Justice Scalia's apparent distinction between an original party's ability to challenge a state supreme court decision at the Supreme Court and a subsequent party's ability “to challenge in *federal court* the taking effected by the state supreme-court opinion.” *Stop the Beach Renourishment*, 130 S. Ct. at 2609–10 (emphasis added).

<sup>372</sup> For example, the Cato Institute, which also filed a brief in support of the landowners in *Stop the Beach Renourishment*, *supra* note 254, filed a brief in support of a certiorari petition in *PPL Montana, LLC v. State of Montana*, arguing that the Montana Supreme Court effected a judicial taking by deciding that the beds of certain rivers were navigable, thus vesting title of the beds in the state. Brief for the Montana Farm Bureau Federation and the Cato Institute as Amici Curiae in Support of Petitioner 15, *PPL Montana, LLC v. Montana*, 79 U.S.L.W. 3102 (U.S. Aug. 12, 2010) (No. 10-218). The Cato brief claimed that the Montana Supreme Court disregarded the federal test for navigability and created its own test, thus unsettling property expectations that had existed for a century. *Id.* at 15-16.

In *PPL Montana*, the Montana Supreme Court ruled that the Clark Fork, Missouri, and Madison Rivers were navigable at statehood for purposes of state ownership of the riverbeds. 229 P.3d 421, 443, 2010 MT 64, ¶¶ 78–79, 355 Mont. 402 (Mont. 2010). The court considered the federal navigability test to be “very broadly construed,” relying primarily on whether a river was capable of being used for commerce at the time of statehood. *Id.* at 446-47, 2010 MT ¶¶ 99–100. Under this broad interpretation, the court decided that present-day conditions of a river could assist in making a determination of navigability

Take the doctrine of customary rights governing Oregon beaches, for example. Given Justice Scalia's vigorous dissent from the denial of certiorari in *Stevens*,<sup>373</sup> he may have seen in the Florida beach case a vehicle to encourage a collateral attack on the public property rights recognized by the Oregon Supreme Court.<sup>374</sup> At least in the case of *Thornton*, however,

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and upheld the trial court's determination that the rivers were navigable. *Id.*, 2010 MT ¶¶ 100–101. Thus, the beds of the rivers belonged to the state since statehood under the Equal Footing Doctrine. *Id.*, 2010 MT ¶ 110.

Although the court disagreed with the trial court's determination that the beds were school trust lands for whose use compensation was required, it decided that, since the lands were in fact public trust lands, the state legislature could require compensation for their use. *Id.* at 450, 460, 2010 MT ¶¶ 116, 117, 170. The court noted that its decision was limited to the facts of the case, and that its determination that the rivers were navigable and thus subject to the public trust doctrine did not necessarily mean that every use of the riverbeds would subject a user to a state fee. *Id.* at 460, 2010 MT ¶ 170. On November 1, 2010, the U.S. Supreme Court invited the Acting Solicitor General "to file a brief in th[e] case expressing the views of the United States," perhaps reflecting the importance of the case to the Court. Supreme Court of the United States, Docket No. 10-218, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-218.htm>.

The Cato Institute also filed a brief in support of landowners in *Maunalua Bay Beach Ohana 28 v. Hawaii*, 222 P.3d 441 (Haw. Ct. App. 2009), cert. denied, 2010 WL 2329366 (Haw. June 9, 2010), and cert. denied, \_\_\_ S. Ct. \_\_\_, 79 U.S.L.W. 3141 (U.S. Nov. 1, 2010) (No. 10-331), 2010 WL 3525699, a case in which the landowners alleged that a state statute prescribing rules for accretions took their property rights to both future accretions and unregistered previously accreted lands, by placing them in the conservation district. *Id.* at 443. The trial court found for the landowners, concluding that the statute, which prevented the building of structures even on registered accreted lands unless previously eroded, unconstitutionally took their rights to both existing and future accreted land. *Id.*

The appeals court affirmed that the statute was unconstitutional with respect to the existing accretions, but ruled that it was constitutional as to the future accretions. The court noted that any right to future accretions was "purely speculative," and that no vested right to them existed under Hawaii law. *Id.* at 460. As to existing accreted land, the court acknowledged that the statute took unregistered accreted land by declaring it to be state property. *Id.* at 462. But because the landowners failed to allege what specific tracts of land had been taken, the appeals court remanded to the trial court for further proceedings. *Id.* at 464.

The Cato Institute's Supreme Court brief questioned Hawaii's ability to "extinguish" the right to future accretions in light of "this Court's recognition of littoral rights as unqualifiedly vested property interests," asserting that, "[e]ven in the wake of this Court's decision in *Stop the Beach Renourishment* . . . the answer is far from clear." Brief Amicus Curiae of Pacific Legal Foundation and the Cato Institute in Support of Petitioners 3, *Maunalua Bay Beach Ohana 28 v. Hawaii*, 79 U.S.L.W. 3141 (U.S. Sept. 7, 2010) (No. 10-331).

<sup>373</sup> See *supra* notes 210–32 and accompanying text.

<sup>374</sup> Indeed, one of the amicus briefs supporting the petitioners seemed more focused on the Oregon case than the Florida case. See Brief of Oregonians in Action Legal Center as Amicus Curiae Supporting the Petitioner, *supra* note 238, at 1 (expressing in its statement of interest the group's belief that "its experience with takings jurisprudence in Oregon

it is unlikely that the original plaintiffs would desire to become involved in the case once again since they were already unsuccessful in bringing a takings challenge in federal court shortly after the Oregon Supreme Court's decision.<sup>375</sup> Consequently, a new party would need to take up the cause and attempt to collaterally attack the decades-old *Thornton* decision. At the outset, the idea that someone not a party to the original suit could challenge a prior state court decision as a taking in federal court presents a host of difficulties for a reviewing court.<sup>376</sup> As Justice Scalia

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can be helpful to this Court in formulating its decision"). The brief's final section was entirely devoted to Oregon law. *Id.* at 16–21. Following the Supreme Court's Florida beach decision, at least two Oregon attorneys indicated the possibility of resurrecting *Thornton*. Edward Sullivan & Carrie Richter, *Florida Homeowners Cannot Stop the Beach Renourishment*, DAILY J. OF COMMERCE, July 9, 2010, <http://djcoregon.com/news/2010/07/09/florida-homeowners-cannot-stop-the-beach-renourishment/> ("with *Stop the Beach*, there may now be an avenue to have federal courts look at this issue anew").

<sup>375</sup> *Hay v. Bruno*, 344 F. Supp. 286, 290 (D. Or. 1972) (dismissing the Hays' claim that enforcing the state statute recognizing public rights in the dry sand area amounted to a taking). Applying Justice Stewart's language from *Hughes*, *supra* notes 177–81 and accompanying text, the court noted that "there was no sudden change in either the law or the policy of the State of Oregon" and "[t]here was no unpredictable result." *Hay*, 344 F. Supp. at 289; *see also supra* note 216.

<sup>376</sup> Some state court property law decisions would be nearly impossible for federal courts to take up. For example, the Washington Supreme Court recently decided that a landowner who built a house entirely on the adjacent landowner's property due to a faulty survey did not have to abate the encroachment, but instead could pay the adjacent landowner for the value of the land encroached upon. *Proctor v. Huntington*, 238 P.3d 1117, 1118 (Wash. 2010), *cert. denied*, 562 U.S. \_\_\_, 79 U.S.L.W. (Mar. 21, 2011). Upholding the trial court, the Washington Supreme Court recognized "the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach." *Id.* at 1123. Four justices dissented, and the dissenting opinion characterized the majority opinion as a "judicial taking," *id.* at 1125 (Sanders, J., dissenting), and as an exercise in "judicial eminent domain," *id.* at 1129, perhaps inviting the Supreme Court to take up the case. In *Proctor's* petition to the U.S. Supreme Court for a writ of certiorari, the statement of the case reads as follows: "The Washington Supreme Court upheld a judicial taking forcing the transfer of private property from one party to another in violation of the Fourteenth Amendment to the United States Constitution." Petition for Writ of Certiorari 3, *Proctor v. Huntington*, 2011 WL 381116 (U.S. Feb. 1, 2011) (No. 10-996). Instead of grounding the petition on Justice Scalia's analysis of judicial takings in *Stop the Beach Renourishment*, the petition focuses on Washington property law, *id.* at 8–16, and takings jurisprudence in general, *id.* at 16–20. In fact, the petition does not cite *Stop the Beach Renourishment* once, possibly indicating that the use of the phrase "judicial taking" was meant more to attract the Court's attention than to put forth a substantive argument on the issue.

According to Justice Scalia's reasoning, even if the landowner decided not to pursue an appeal, another landowner could challenge the court's ruling in federal court. Questions

acknowledged in his *Stevens* dissent, the lack of a factual record is troubling.<sup>377</sup> Further, as Justice Kennedy noted, the remedy a later court could provide is unclear.<sup>378</sup> Would the reviewing court invalidate the earlier decision, or would it simply order compensation?<sup>379</sup> These unanswered questions may have kept Justice Kennedy from endorsing the judicial takings doctrine.

Although the adoption of judicial takings only received four votes, with Justice Kennedy's concurrence in which Justice Sotomayor joined, at least six Justices seem to have endorsed some form of restraint on—or federal review of—state property law opinions.<sup>380</sup> Thus, the plurality opinion is not the only authority a federal court could rely on to justify its interpreting state property law.<sup>381</sup>

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of ripeness and standing aside, the case, like *Stop the Beach Renourishment*, highlights the gradual evolution of state property law in keeping with evolving values, here valuing the substantial improvements made to the land, (i.e., an entire house built on the basis of a good faith mistake), over one particular acre in a large tract of land. *See generally* JESSE DUKEMINIER ET AL., PROPERTY 141 (7th ed. 2010) (noting the drift away from a “rather harsh” rule requiring an “innocent improver” to remove any improvement built on another’s land toward allowing the improver to buy the land or the adjacent landowner to buy the improvement).

<sup>377</sup> *Stevens II*, 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

<sup>378</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2617 (Kennedy, J., concurring).

<sup>379</sup> *See id.*

<sup>380</sup> *See id.* at 2597, 2613. When Professor Thompson recently critiqued the case, he similarly concluded that “a majority of the sitting Supreme Court justices have publicly concluded that the United States Constitution constrains the ability of state courts to eliminate or significantly modify at least some established economic rights.” Barton H. Thompson, *Judicial Takings Redux: Stop the Beach Renourishment v. Florida Department of Environmental Protection 2*, The 13th Annual Conference on Litigating Takings and Other Legal Challenges to Land Use and Environmental Regulation (Nov. 5, 2010), available at [http://www.vermontlaw.edu/Documents/2010TakingsConference/20101104\\_Thompson.pdf](http://www.vermontlaw.edu/Documents/2010TakingsConference/20101104_Thompson.pdf). However, in Professor Thompson’s opinion, because the Court set such a high bar for invalidating state court decisions, “[t]hose who worry about an activist court applying Constitutional provisions to restrain state court decision making on property issues probably can stop worrying.” *Id.* at 6.

<sup>381</sup> *Cf.* Gibson v. Am. Cyanamid, No. 07-C-864, 2010 WL 3062145, at \*3 (E.D. Wis. Aug. 2, 2010) (interpreting Kennedy’s concurrence as endorsing the proposition that “judicial development of the common law . . . can violate the constitution [sic]”). The Cato Institute’s Brief supporting certiorari in *PPL Montana*, *supra* note 372, asserted that both Scalia’s plurality opinion and Kennedy’s concurrence led to the same result: that “state judges cannot do by decree what state legislatures cannot do by fiat.” Brief for the Montana Farm Bureau Federation and the Cato Institute, *supra* note 372, at 17 (citation omitted).

C. *Judicial Takings: A Doctrine With a Shaky Foundation*

Perhaps the most astonishing aspect of the Florida case was the plurality's rush to ratify the judicial takings doctrine in the absence of any concrete facts. Justice Kennedy cautioned against expanding the application of the Takings Clause, noting that the Court has already expanded it "beyond the Framers' understanding" by applying it to regulatory actions.<sup>382</sup> Justice Scalia similarly acknowledged a lack of original intent to subject regulations to scrutiny under the Takings Clause.<sup>383</sup> But at least regulatory takings have some relation to the legislative and executive branches' eminent domain authority.<sup>384</sup> In contrast, by ascribing to the judiciary the power to "take" property under the meaning of the Takings Clause, the plurality would further attenuate the clause from the Framers' original intent.<sup>385</sup>

A better approach to aberrant judicial decisionmaking might well be Justice Kennedy's suggestion of employing the Due Process Clause.<sup>386</sup> Because the remedy for a violation of due process would be injunctive

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<sup>382</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2616 (Kennedy, J., concurring) (referring to the application of the Takings Clause to "regulations that are not physical appropriations").

<sup>383</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (asserting that "the text of the Clause can be read to encompass regulatory as well as physical deprivations," while acknowledging that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

<sup>384</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2616 (Kennedy, J., concurring). Professor John Echeverria, who wrote The American Planning Association's amicus brief in support of the government, *supra* note 256, has suggested five reasons why the Takings Clause should not apply to the judiciary: 1) the judiciary has no eminent domain authority, 2) the rationale that takings liability constrains the majoritarian leanings of the political branches does not translate to the courts, 3) judicial takings would undermine federal-state relations, 4) state courts' institutional structure assures a strong fidelity to constitutional values, and 5) judicial interpretation of property rights tend to apply broadly rather than single out particular landowners. John A. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 487-93 (2010).

<sup>385</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (asserting that the Takings Clause as originally intended applied only to actual physical appropriations of property, not to regulations limiting property's use); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985) (describing James Madison's intent that the Fifth Amendment apply "only to the federal government and only to physical takings," while serving as "a statement of national commitment to the preservation of property rights").

<sup>386</sup> U.S. CONST., AMEND. 5, 14.

relief, a reviewing court could avoid valuing compensation.<sup>387</sup> The Court could also rely on the “fair or substantial support” test the respondents’ amici suggested, which would better respect federalism concerns by simply assessing whether the state court’s decision “was consciously designed to ‘evade’ or ‘subvert’ a federal constitutional right.”<sup>388</sup> Or the Court could have adopted the test for judicial takings that Justice Stewart advanced in *Hughes*.<sup>389</sup> That test, by attempting to discern whether a decision effected a “sudden” or “unpredictable” change in state law,<sup>390</sup> seems more respectful of state court decisionmaking than the test the plurality endorsed.<sup>391</sup> Instead, the plurality’s preferred mechanism would equip federal courts with far-reaching authority to investigate and redirect state property law. Given the available alternatives for addressing judicial overreach at the state level,<sup>392</sup> the plurality’s rush to adopt the judicial takings doctrine in the Florida beach case is baffling.

#### CONCLUSION

The plurality’s recognition of judicial takings may stifle the evolution of common law property, an evolution that has been taking place for centuries, and which has allowed property law to reflect contemporary

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<sup>387</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring); see also Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 435–36 (2001) (describing the application of the Due Process Clause to judicial decisions).

<sup>388</sup> See Brief of the Am. Planning Assoc. as Amicus Curiae *supra* note 256, at 31–34 (quoting *Fox River Paper Co. v. R.R. Comm’n*, 274 U.S. 651, 655 (1927), discussing Supreme Court precedent for the “fair or substantial support” test).

<sup>389</sup> See *supra* notes 177–81 and accompanying text. It is worth noting that in *Hughes* Justice Stewart objected to the application of federal law because he thought that such a result would deprive states of the ability to shape their property law. See *supra* note 174 and accompanying text.

<sup>390</sup> *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

<sup>391</sup> See generally Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 258, at 22–29 (analyzing the Florida Supreme Court’s decision under the *Hughes* test and concluding that the court did not depart from existing law); Brief for Respondents Walton County and City of Destin, *supra* note 313, at 32–39 (arguing that the Florida Supreme Court did not alter Florida law in a significant way); Respondent Florida Department of Environmental Protection’s Brief in Opposition at 11, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (2010) (No. 08-1151) (“[T]he decision neither reverses prior precedent nor marks an unpredictable and sudden change in state law.”). The plurality seemed dismissive of the Florida Supreme Court’s interpretation of Florida property law. See, e.g., *supra* text accompanying note 285.

<sup>392</sup> See, e.g., *supra* notes 338–42 and accompanying text.

values.<sup>393</sup> Justice Kennedy, who is so often determinative,<sup>394</sup> did not rule out the possibility of adopting a judicial takings doctrine in the future.<sup>395</sup> But Kennedy also has expressed concern that states should be able to respond to changing conditions with new regulations, and he believes that the Takings Clause does not demand a “static body of state property law.”<sup>396</sup> In fact, he made this argument in the unique context of coastal property.<sup>397</sup> Even Justice Scalia has acknowledged that the law must adapt to new situations, recognizing that “changed circumstances or new knowledge may make what was previously permissible no longer so.”<sup>398</sup> Nevertheless, the plurality opinion may effectively restrict state courts’ ability to adjust their property law out of the apprehension that a federal court will strike down their interpretation of state law.<sup>399</sup> When the U.S. Supreme

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<sup>393</sup> Cf. Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 336–39 (2005) (describing the evolution of nuisance background principles in light of changing environmental concerns); ERIC T. FREYFOGLE, *THE LAND WE SHARE* 121 (2003) (“To argue that change [to common law property rules] is always wrong . . . is to call into question both the history of the institution and the legal mechanisms that have kept landowner rights in line with shifting values and circumstances for centuries.”); *id.* at 259 (asserting that to hamper the evolution of property law would “sever property’s link to the culture that it serves,” and that “a static property regime would inevitably become an anachronism and would gradually be perceived as an obstacle to progress”).

<sup>394</sup> See Blumm & Bosse, *supra* note 334, at 669–70 (noting that advocates before the Supreme Court often tailor their arguments to Justice Kennedy since his vote is often pivotal).

<sup>395</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2613 (Kennedy, J., concurring).

<sup>396</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring in the judgment).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 1031 (majority op.). Cf. *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (plurality op.) (recognizing that courts “clarify and elaborate property entitlements that were previously unclear”); Brief of the Am. Planning Assoc. as Amicus Curiae, *supra* note 256, at 4–11 (surveying the history of federal court deference to state court decisions regarding state law and arguing that although federal law can govern whether a taking has occurred, it cannot decide how to define the property interest at issue).

<sup>399</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring). Professor Ben Barros has suggested that the Court should distinguish between so-called private-public transfers (e.g., the Oregon beach case, where the public’s customary rights trumped the landowner’s right to exclude) and so-called private-private transfers (e.g., a change in the rules of adverse possession concerning boundary disputes favoring one landowner over another). See *Ben Barros*, PROPERTY PROF BLOG (Sept. 1–8, 2010), <http://lawprofessors.typepad.com/property/takings> (providing a number of examples of each type of transfer). See also Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. \_\_\_\_ (forthcoming, 2011), available at <http://ssrn.com/abstract=1699355> (last visited Feb. 28, 2011). Although Barros was not explicit about the purpose of such a distinction, presumably applying judicial takings only to private-public transfers would allow state courts to

Court decides to review a state supreme court's reversal of an isolated decision by a state court of appeal on an obscure topic of state littoral rights law, other state courts are likely to take notice.

One thing seems evident: a substantial segment of the Roberts Court is willing to venture into uncharted waters like judicial takings,<sup>400</sup> even in the absence of factual context and over objections that adopting such a doctrine would permit federal court intrusions into matters traditionally left to state courts.<sup>401</sup> Although Justice Scalia's plurality was one

continue at least some of their historic function of adjusting property law to reflect contemporary values.

But the distinction is problematic for several reasons. First, the assumption seems to be that state courts need the discipline of federal court oversight through the Takings Clause because they will otherwise favor public over private rights. However, public choice theory suggests that favoring the unorganized public is unlikely. *See* PHILLIP P. FRICKEY & DANIEL A. FARBER, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). Moreover, American law has long been suspicious of private-private transfers. *See, e.g.,* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (suggesting that "a law that takes property from A, and gives it to B" is a violation of natural law). And the text of the Takings Clause requires a public use. U.S. CONST., amend. V. So, if a distinction is to be drawn, the private-private transfers would be more, not less likely to be subject to judicial takings, or perhaps to due process limits. (Barros does suggest that private-private transfers would be subject to due process review.)

Second, so-called private-public transfers would likely be the product of governmental regulation. But of course subjecting regulation to takings claims is inconsistent with the Framers' intent, as even Justice Scalia has acknowledged. *See supra* notes 342, 383, 385 and accompanying text. Expanding the application of the Takings Clause to include federal court review of state court interpretations of state regulations seems at least one bridge too far.

Third, Barros' position that private-public transfers should be subject to judicial takings review is problematic because the state created the property rights in the first instance and might reasonably readjust those rights in the interest of the community. *See* *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420, 548 (1837) ("While the rights of private property are sacredly guarded, we must not forget that the community also have rights . . ."); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851) ("We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government . . .") Absent singling out certain landowners for disparate treatment, *see* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 307 (1992), the Takings Clause appears unnecessary to discipline government regulators or state judges interpreting state law.

<sup>400</sup> *See id.* at 2618 (noting the plurality unnecessarily addresses the question of judicial taking).

<sup>401</sup> Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 258, at 12 (urging the Court to be cautious before taking the "extraordinary step" of ruling that

vote short of a majority in the Florida beach case,<sup>402</sup> and although the newest member of the Court, Justice Elena Kagan, signed the federal brief in support of the state,<sup>403</sup> the judicial takings doctrine now appears to be in play. Whether this development will retard the evolution of state property law to meet the challenges that will be imposed by climate change, sea level rise, and increased catastrophic storm events remains to be seen. But with several decades likely left in the tenure of Chief Justice Roberts,<sup>404</sup> state property law may become no more stable than the Florida beaches.

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a state supreme court can effect a taking); Brief for Respondents Walton County and City of Destin, *supra* note 313, at 27–29 (outlining several reasons “why opening the door to federal court review of state interpretations of state property law would be undesirable”); Brief for the State of California, et al. as Amici Curiae Supporting Respondents, *supra* note 256, at 5 (cautioning against adopting STBR’s proffered rule because it “would not only authorize federal judicial review of state real property law decisions but also a wide range of other state court decisions interpreting state laws”).

<sup>402</sup> See *Stop the Beach Renourishment*, 130 S. Ct. at 2597 (noting four of nine justices who signed onto the plurality opinion).

<sup>403</sup> See Brief for the United States as *Amicus Curiae*, *supra* note 258, at 13–14 (noting the lack of historical support for applying the Takings Clause (or, to use the brief’s terminology, the “Just Compensation Clause”) to the judiciary).

<sup>404</sup> See Liptak, *supra* note 2 (noting that Chief Justice Roberts is only 55 years old).