The Florida Beach Case and the Road to Judicial Takings

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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 right to maintain contact with the water and the right to future accretions of sand.

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 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 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 juridical relations by encouraging litigants to appeal adverse state property law decisions to federal courts.

I. Introduction

Five years into its tenure, the Roberts Court has shown little of the restraint its Chief Justice espoused in his confirmation hearings.¹ As one commentator observed, “judicial

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¹ Jeffrey Toobin, *Activism v. Restraint*, The New Yorker, May 24, 2010, available at 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), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301838.html (last visited Aug. 24, 2010). On another day of the
minimalism is gone, and the court has entered an assertive and sometimes unpredictable phase.”
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.”
From striking down programs promoting racial diversity, to restricting local governments’ ability to regulate guns, to giving corporations the right to speak with their money in political election campaigns, 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. To remedy this problem, 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. 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. Although the Florida


7 See infra notes 18–19 and accompanying text.

8 See infra notes 42–44, 52–64 and accompanying text.

9 See infra notes 92–94 and accompanying text.
Supreme Court upheld the legislation against their claims, 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.\(^{10}\)

The judicial takings doctrine embodies the belief 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.\(^{11}\) The concept is not entirely foreign to American law, but until the Roberts Court it had largely remained the subject of scholarly articles.\(^{12}\) Although some dicta in case law as far back as the late nineteenth century had suggested the notion,\(^{13}\) the cases were always decided on other grounds,\(^{14}\) and the idea languished in the courts. But in 2010 the U.S. Supreme Court confronted the judicial takings doctrine and nearly endorsed it. In a case involving Florida beaches, the Court could not agree on what exactly a judicial taking would look like, if indeed it occurred, and some Justices thought the Court should not have spoken on the issue altogether.\(^{15}\) 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-future ramifications. Part II describes the precarious situation of Florida’s beaches and explains the state’s response to beach erosion. Part III examines the litigation in the lower courts that led the Supreme Court to grant

\(^{10}\) See infra notes 222–24 and accompanying text.

\(^{11}\) See infra notes 302–305 and accompanying text.

\(^{12}\) See infra notes 169, 183 and accompanying text.

\(^{13}\) See infra notes 148–50 and accompanying text.

\(^{14}\) See, e.g., Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (upholding a jury award of just compensation to the railroad for its loss of a right of way over its tracks).

\(^{15}\) See infra notes 292–95 and accompanying text.
certiorari. Part IV 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 V discusses the Court’s Florida beach decision, including the plurality and concurring opinions. Part VI 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, if eventually adopted by the Court, 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.

II. 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, have highlighted the vulnerability of coastal ecosystems, Florida’s beaches have long experienced changing fortunes. This section explains the vulnerability of Florida’s beaches in some detail and the state’s response to that vulnerability.

A. Coastal Restoration in Florida

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Before examining Florida’s beach restoration scheme, some background on beach restoration is in order. This foundation will supply an understanding of the evolution of Florida’s legislation, and 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. Occasionally, however, major events like tropical storms and hurricanes alter the shoreline drastically. Of course, gradual, natural erosion occurs in places as well. But 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.\(^{18}\) In all, as much as one-fourth of the coast may be eroding.\(^{19}\) In response, governments undertake beach restoration, an arguably effective, but unquestionably temporary solution to the continual battle against coastal erosion.

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. The water then drains away, leaving the sand behind.\(^{20}\) 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.\(^{21}\) Not only do critics worry about the beach, they also question the effects of the dredging process on the ocean

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21 See Dean, supra note 20, at A11.
Moreover, by their very nature, beaches erode, so any restoration project will have to be continually replenished, sometimes earlier than engineering estimates predict. Over the course of a decade, maintaining a beach may cost up to $6 million dollars a mile. 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.

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. Although acknowledging short-term detriment to some organisms, the Corps believes that “sound management practices” can alleviate these adverse effects. Additionally, when the federal government funds a renourishment project, the new land becomes public land and subject to the Corps’ public access policies. The federal shore protection program, authorized initially under the Rivers and Harbors Act and currently

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22 See id.
23 Id.; BEATLEY, ET AL., supra note 18, 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 . . .).”). For example, a 1982 project in Ocean City, New Jersey, costing $5.2 million, lasted 2.5 months. Id. at 118.
24 BEATLEY, ET AL., supra note 18, at 74.
27 Id.
funded through the Water Resources Development Act,\textsuperscript{30} has cost the government around $100 million a year as recently as 2001.\textsuperscript{31}

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.\textsuperscript{32} Even some Great Lakes states have restored portions of their beaches.\textsuperscript{33} 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.\textsuperscript{34} 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).\textsuperscript{35} 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.\textsuperscript{36} Beach nourishment has thus become a popular middle ground between building

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\textsuperscript{30} 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 that beach erosion costs could be included as appropriate. ROBINSON ET AL., supra note 26, at 10–11; 33 U.S.C. § 2213(c)–(d).

\textsuperscript{31} ROBINSON ET AL., supra note 26, at 16.


\textsuperscript{33} Trembanis, et al., supra note 32, at 330. All told, at least 23 states have undertaken, or are in the planning or construction phases of, 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, http://www.wcu.edu/1038.asp (last visited Aug. 7, 2010); 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.

\textsuperscript{34} BEATLEY, ET AL., supra note 18, at 73.

\textsuperscript{35} Trembanis, et al., supra note 32, at 332 tbl.1.

\textsuperscript{36} Dixon, supra note 20.
physical structures to keep erosion at bay and succumbing to coastal retreat.\textsuperscript{37} With climate change promising rising sea levels,\textsuperscript{38} 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\textsuperscript{39}—some 825 miles.\textsuperscript{40} Its coastline features predominantly sandy beaches, which are major tourist attractions, but these beaches are also prone to erosion.\textsuperscript{41} 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”),\textsuperscript{42} declaring a “necessary governmental responsibility” to 1) protect such beaches from erosion and 2) restore those beaches already eroded.\textsuperscript{43} The BSPA gave the Florida Department of Environmental Protection (“DEP”) responsibility to administrate the program, but the statute also made county commissioners the “beach and shore preservation authority” within each county.\textsuperscript{44}

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.\textsuperscript{45} By June 2010, the amount of critically eroded beaches rose steadily to 398.6 miles, despite

\begin{itemize}
\item \textsuperscript{37} BEATLEY, ET AL., supra note 18, at 72.
\item \textsuperscript{38} Indeed, the U.S. Environmental Protection Agency acknowledges the particular danger that the confluence of climate-induced sea level rise and storm damage poses to Florida. U.S. Envtl. Protection Agc’y, Saving Florida’s Vanishing Shores, \textit{available at} http://www.epa.gov/climatechange/effects/coastal/saving_FL.pdf.
\item \textsuperscript{39} FLA. DEP’T OF ENVTL. PROTECTION, 1994 FLORIDA SEDIMENT QUALITY ASSESSMENT GUIDELINES 6, \textit{available at} http://www.dep.state.fl.us/waste/quick_topics/publications/documents/sediment/volume1/chapter2.pdf.
\item \textsuperscript{40} FLA. DEP’T OF ENVTL. PROTECTION, \textit{STRATEGIC BEACH MANAGEMENT PLAN MAY 2008–INTRODUCTION I}, \textit{available at} http://www.dep.state.fl.us/beaches/publications/pdf/SBMP/Cover%20and%20Introduction.pdf [hereinafter “MAY 2008 SBMP”].
\item \textsuperscript{41} FLA. STAT. ANN. § 161.088 (West 2010).
\item \textsuperscript{42} Id. §§ 161.011–.45.
\item \textsuperscript{43} Id. § 161.088.
\item \textsuperscript{44} Id. § 161.25.
\item \textsuperscript{45} FLA. DEP’T OF ENVTL. PROTECTION, CRITICALLY ERODED BEACHES IN FLORIDA 1, \textit{available at} http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt07-10.pdf [hereinafter “CRITICALLY ERODED BEACHES IN FLORIDA”].
\end{itemize}
renourishment of several areas. Over 485 miles of the state’s beaches—59 percent in 2010—are experiencing some type of erosion. Once the DEP lists a beach as critically eroded, the beach becomes eligible to receive state funding for beach management. In 2008, 197.8 of those critically eroded miles were under “active management,” which includes restoration, nourishment, and other mitigation efforts. Since its enactment, Florida’s beach erosion control program has helped restore over 200 miles of the state’s beaches. Through fiscal year 2006, the state legislature allocated over $582 million for beach restoration and hurricane recovery.

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. 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. The Board is the ultimate authority with respect to the setting of tidal property lines.

The Board first attempts to define the pre-erosion mean high water line (“MHWL”), a shifting boundary that has traditionally served as the demarcation between private and public property in Florida. Second, using the MHWL as a guide, the Board establishes a permanent “Erosion Control Line” (“ECL”) to prospectively divide public and private property. After

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46 Id. at 3.
47 Florida Dep’t of Envtl. Protection, Beach Erosion Control Program, [http://www.dep.state.fl.us/beaches/programs/bcherosn.htm](http://www.dep.state.fl.us/beaches/programs/bcherosn.htm) (last visited July 12, 2010).
48 MAY 2008 SBMP, supra note 40, at 2.
49 Id.
50 Id.
51 Florida Dep’t of Envtl. Protection, supra note 47.
52 FLA. STAT. ANN. § 161.141.
53 Id. § 253.12.
54 Id. §§ 161.141, .161(5).
55 Bd. of Tr. of the Internal Improvement Trust Fund v. Sand Key Assoc., 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).
56 FLA. STAT. ANN. § 161.161(5).
setting the ECL, all seaward land belongs to the state. Because the public owns land seaward of the ECL, upland owners may no longer have constant contact with the water, losing the right to future accretions as a result. But in exchange landowners obtain the protection of the state against future beach erosion.

If the ECL does not accurately reflect the pre-erosion MHWL, but instead encroaches upon riparian land, condemnation proceedings must occur to properly compensate riparian owners. Ordinarily, the regulations applicable to the Board of Trustees require governmental entities to show “sufficient upland interest” to conduct projects on sovereign submerged lands. 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.” Finally, once the beach has been restored, if the entity responsible for the project fails to maintain the ECL, the upland owner’s rights revert to the pre-project status quo.

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

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57 Id. § 161.191(1).
58 According to 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 called “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/Mathew Bender, 3d ed. 2009).
60 Id. § 161.141.
61 Fla. Admin. Code Ann. r. 18-21.004(3) (2010). The regulations define “satisfactory evidence of sufficient upland interest” as requiring documentary proof of a property interest in the riparian land, for example, an easement or a lease. Id. r. 18-21.005(60).
62 Id.
63 Although beach restoration can take several forms, the DEP prefers nourishment. Fla. Dep’t of Envtl. Protection, Beach Erosion Control Program, http://www.dep.state.fl.us/beaches/programs/bcherosn.htm (last visited June 12, 2010). Another benefit of this method, according to the DEP, is a quick restoration of habitat for shorebirds and marine turtles. Id.
depend on beaches . . . demand shore protection or beach renourishment."65 From 1961 to 2003, no one challenged the validity of the BSPA as it applied to these projects.66 For example, Delray Beach, in Palm Beach County on Florida’s Atlantic coast, has been renourished consistently since the 1970s.67

**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.”68 Between the late 1970s, when Destin was still a town of just 2,000 permanent residents, and today, an influx of beachgoers and developers descended, transforming the fishing village into a tourist mecca.69 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.70 The skeptics were right: In 1995, Hurricane Opal ravaged Destin’s beaches, destroying dunes and changing tidal patterns,

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66 Searches for citing references to the BSPA in both Westlaw and LexisNexis reveal several cases that apply the BSPA to specific circumstances, but none that actually assess its validity until the current dispute. For more on the popular acceptance of beach restoration, see supra note 37 and accompanying text.

67 DEAN, supra note 32, at 99.


69 Id.

70 Id.
beginning a decade of further erosion.\textsuperscript{71} To remedy the situation, the city turned to the state
government and its erosion control program.\textsuperscript{72} Ordinarily, the renourishment program is a
popular way to protect both the state’s tourism industry and the coastal ecosystem.\textsuperscript{73} But Destin
proved to be different.\textsuperscript{74}

Destin beachfront property owners and tourists have long been at odds, the property
owners fighting to keep tourists from leaving the wet sand between the high and low tides, which
belongs to the public as part of Florida’s public trust, and encroaching on their dry sand.\textsuperscript{75} For
their part, the tourists and beachgoers claimed an inherent right to enjoy the beach.\textsuperscript{76} The
property owners’ attempt to settle the dispute once and for all coincided with the city’s initiation
of its beach restoration project. Some 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.\textsuperscript{77} The property owners formed an organization, Save Our
Beaches (“SOB”), to challenge the project in court.\textsuperscript{78}

Further down the coast, beachfront landowners who had experienced erosion to a greater
extent than Destin and 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.\textsuperscript{79} Nevertheless, SOB proceeded with its lawsuit.

III. The Destin Beach Case

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Virginia Smith, \textit{Sand & Dollars, Daytona Beach News-Journal}, Nov. 14, 2004, \url{http://www.news-
journalonline.com/special/beacherosion/111404.htm} (last visited Aug. 25, 2010) (describing the economic success
of the Miami Beach nourishment project and other cities’ subsequent rush to imitate it).
\textsuperscript{74} Rice, \textit{supra} note 68, at MM66.
\textsuperscript{75} Id. at MM67.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Eventually, the group grew to about 150 members. \textit{See} Save Our Beaches, Inc., et al. \textit{v.} Fla. Dep’t of Envtl.
Protection (“SOB I”), Case Nos. 04-2960, 04-3261, Recommended Order 13 (June 30, 2005), \url{http://www.dep.state.fl.us/legal/Final_Orders/2005/DEP05-0791.pdf}.
\textsuperscript{79} Rice, \textit{supra} note 68, at MM79.
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. The case that eventually reached the United States Supreme Court in 2009 hardly resembled the relatively simple permit challenge that began in 2004. 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 Issues a 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 beach and to conduct dune restoration. Nearly a year later, on July 15, 2004, the DEP issued a notice of intent to issue a permit, a draft final permit, and a final notice to inform the public of the permit’s issuance and the availability of an administrative appeal. The DEP described the purpose of the project as a response to severe erosion to recreational beaches caused by Hurricanes Erin, Opal, and Georges, and Tropical


81 Notice of Intent, supra note 80, at 1.


Storm Isidore. In the notice of intent 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. Nevertheless, the DEP did not expect the project to significantly adversely affect water quality, nesting sea turtles, the quality of the beach, or the public use of the beach (except during construction), and also determined the project to be in the public interest.

The DEP also made the necessary finding that the project would not interfere with the riparian rights of those who owned property adjacent to the project. In the notice of intent, the DEP noted that the current boundary was already surveyed to be at the MHWL, indicating that the draft final 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. Until the ECL was recorded no work could proceed. 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. The DEP proved prescient in its prediction.

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. STBR also challenged the erosion

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84 Notice of Intent, supra note 80, at 2.
85 Id. at 3.
86 Id. at 3, 4.
87 Id. at 4.
88 Id. On the survey, see infra notes 102-03 and accompanying text.
89 Draft Final Permit, supra note 82, at 4. For more about setting the ECL, see supra notes 55–64 and accompanying text.
90 Draft Final Permit, supra note 82, at 5.
91 Notice of Intent, supra note 80, at 5.
control line (ECL) that the Board of Trustees’ established, a challenge SOB subsequently joined. 93 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. 94 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 the statutes as written. 95

SOB and STBR challenged DEP’s findings regarding turbidity and mixing zones, 96 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). 97 But the ALJ decided that the DEP sufficiently supported its finding that the project would not violate water quality standards. 98

Importantly for SOB, the ALJ determined that although sixty-two of its 150 members had shorefront property, because only one landowner testified to owning four properties in the area that the beach nourishment project would actually affect, 99 SOB lacked the required associational standing under Florida law. 100 However, the ALJ decided that all of STBR’s six members sufficiently proved an interest in the land and the project’s potential effects to satisfy the

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93 Id. at 3.
94 Id. A docket search of “Stop the Beach Renourishment” and “Save Our Beaches” reveals a Leon County circuit court case named Tammy N. Alford, et al. v. Craig Barker, et al., filed August 27, 2004, which includes the groups as plaintiffs. The case is currently still open, cross motions for summary judgment having been denied in July of 2005. As of February, 2010, a notice of failure to prosecute was filed and plaintiffs responded.
96 SOB I, Case Nos. 04-2960, 04-3261, at 8, 9.
97 See id. at 6.
98 Id. at 19.
99 Id. at 13. That landowner was one of the landowners featured in Andrew Rice’s New York Times article, supra notes 77–78 and accompanying text.
100 Id. at 16–17 (citing Fla. Home Builders Ass’n v. Dep’t of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982)).
standing requirements, because they all owned land adjacent to the sovereign submerged lands in question.101

Concerning riparian rights, the ALJ noted that the ECL was set at the MHWL, based on a survey conducted in September of 2003, and that construction would take place both landward and seaward of that line.102 However, according to the survey, the post-construction MHWL would be located seaward of the ECL.103 SOB and STBR asserted that this meant that the project would affect the landowners’ right to accretion, but, presuming constitutionality of the statute upon which the ECL allocation was based, the ALJ concluded that no unreasonable infringement existed.104 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.105 Ultimately, even if the project did infringe upon riparian rights, the ALJ concluded that the two groups failed to show that the infringement was unreasonable, the only way the groups could defeat such a project.106 In light of these conclusions, on June 30, 2005, the ALJ recommended that the DEP issue the permit.107 A month later, the Secretary of the DEP issued a final order, reiterating and adopting the ALJ’s recommendations.108

C. The Florida Court of Appeal’s Decision

SOB and STRB appealed to Florida’s First District Court of Appeal,109 SOB and STBR challenging the Secretary of the DEP’s final order and alleging that, as applied to this particular

101 Id. at 17.
102 Id. at 11.
103 Id.
104 Id. at 24.
105 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 of access, not the right to accretions. See infra note 133 and accompanying text.
106 Id. at 24. See also FLA. ADMIN. CODE ANN. r. 18-21.004(3) (2010); supra notes 61–62 and accompanying text.
107 SOB I, Case Nos. 04-2960, 04-3261, at 28.
project, the BSPA unconstitutionally deprived the landowners of their riparian rights without just compensation.\textsuperscript{110} As a initial matter, 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,\textsuperscript{111} but ruling that STBR, on the other hand, did have standing, because all of its members, though they numbered only six, owned land in the proposed project area.\textsuperscript{112} 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.\textsuperscript{113}

Important to the court’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 boundary in the form of the ECL.\textsuperscript{114} The court ruled that by establishing a fixed ECL that no longer guaranteed that landowners’ property lines would be at the MHWL,\textsuperscript{115} the BSPA deprived the landowners of their right to accretions and relictions.\textsuperscript{116} The court also

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\textsuperscript{110} \textit{Id.} at 50. The court of appeal does not mention under which constitution, Florida’s or that of the United States, the taking was alleged to have occurred.

\textsuperscript{111} \textit{Id.} at 55. The court reiterated and adopted, without explanation or elaboration, the ALJ’s findings of fact on the matter. \textit{Id.} at 55–56.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} at 58.

\textsuperscript{114} \textit{Id.} at 59.

\textsuperscript{115} The court acknowledged that none of STBR’s members’ deeds were in the record to firmly establish exactly how far their property lines extended had the ECL not been set, but the court considered sufficient testimony regarding the property boundaries’ extension to the high water mark. \textit{Id.}

\textsuperscript{116} \textit{Id.} For more on the distinction between accretions and relictions, see supra note 58 and accompanying text. 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 Envtl. Protection, 560 U.S. ----, 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 Envtl. Protection, 560 U.S. ----, 130 S.Ct. 2592, slip op. at 3 (2010), from this point on, the Article will refer to both accretions and relictions as simply “accretions.”
disagreed with the ALJ’s determination that the right to contact the water was one and the same with the right to accretions, and determined that the BSPA eliminated that right as well.\footnote{SOB III, 27 So. 3d at 59.}

Because the appeals court decided 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.\footnote{Id. at 60. Although the court concluded that the BSPA infringed upon the landowners’ riparian rights, it did not make a finding as to the infringement’s unreasonableness, in keeping with the Board of Trustees’ rules. Presumably, ruling the infringement unconstitutional amounted to a finding of unreasonableness.} Thus, in accordance with the statutory scheme, the Board would need to determine whether Destin and Walton County could show “satisfactory evidence of sufficient upland interest” to conduct the project.\footnote{Id.; see also supra notes 61–62 and accompanying text.} The court therefore remanded to the Board to determine whether such interest existed.\footnote{SOB III, 27 So. 3d at 60.} If Destin and Walton County could not acquire, or show that they had already acquired, the necessary property interests, eminent domain proceedings would then be necessary.\footnote{Id.; see also supra notes 61–62 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.} But 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.\footnote{Id. The full question was: 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.}

D. The Florida Supreme Court Decision

The Florida Supreme Court began its examination of the certified question by admonishing the court below for hearing the case, because a facial challenge was already
pending in the circuit court. Additionally, the court concluded that although the court of appeal phrased the question as an as applied challenge, it had actually decided a facial challenge, and the supreme court rephrased the question accordingly. The court proceeded to determine that the BSPA was constitutional on its face, but limited the scope of its ruling to cases like the one in question, where the BSPA was being used to restore critically eroded beaches.

Addressing the rights of the state and the upland owners, the Florida Supreme Court first acknowledged that state courts had yet to determine how those rights interrelate. After explaining relevant portions of the BSPA, the court examined the state’s common law and constitutional duties and powers over land below the MHWL under the public trust doctrine. According to the 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. 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

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123 Walton County, et al. v. Stop the Beach Renourishment, Inc., et al., 998 So. 2d 1102, 1105 n.1 (Fla. 2008). See supra note 95 and accompanying text. Additionally, the Florida Supreme Court does not specify under which constitution the statute passes muster, but rather cites to other Florida cases for the proposition that the state cannot take littoral rights without just compensation. Walton County, 998 So. 2d at 1111.

124 Id. at 1105.

125 Id. at 1105, 1121. Professor Donna Christie expressed concern with the limited nature of the court’s holding in this case. See Donna R. Christie, Of Beaches, Boundaries, and SOBs, 25 J. LAND USE & ENVTL. L. 19, 58–59 (2009). Professor Christie interpreted the Florida Supreme Court’s decision to be limited to when the state reclaims land lost by an avulsive event, leaving the court open to numerous future challenges based on different factual scenarios. Id. However, a broader reading is at least arguable. While the court stated that “[i]n light of the 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 the court uses the phrase “restoring critically eroded beaches under the Beach and Shore Preservation Act” to define the circumstances to which it is limiting its holding, not specifically limiting it to post-avulsive restoration, id. at 1105, 1121. The court may have understood the state’s to be more limited than it really was, believing that avulsion was the only thing that critically erodes beaches. It is also possible the court simply did not concern itself with other factual scenarios which might result in critical erosion, since when deciding a facial challenge the court only had to find one circumstance in which the statute was constitutional. Cf. id. at 1109 (citation omitted). Thus, while Professor Christie may be correct that future litigation will occur to more precisely interpret the court’s holding in Walton County, other Florida courts could reasonably decide that the Florida Supreme Court did not intend to limit its holding to post-avulsive restoration.

126 Walton County, 998 So. 2d at 1109.

127 Id. at 1107–09.

128 Id. at 1109.

129 Id. at 1110 (citing FLA. CONST. art. II § 7(a)).
virtue of their ownership of riparian land they also have rights of access, reasonable use, accretion and reliction, and view. This explanation of rights differed little from that of the court of appeal.

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.” 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. 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.

Whereas under common law principles littoral owners reaped the benefits of accretions but also faced the risk of erosion, under the BSPA the state assumed responsibility for maintaining the upland owner’s property line and preventing further erosion. Because the BSPA both protects the upland owners’ property lines and guarantees the landowners’ other common law rights, the court decided that the act effected “no material or substantial impairment

130 Id. at 1111.
132 Walton County, 998 So. 2d at 1119.
133 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 125, at 71; see also supra note 55.
134 Walton County, 998 So. 2d at 1112.
135 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 Sand Key, 512 So. 2d 934, 936 (Fla. 1987)).
136 Walton County, 998 So. 2d at 1118.
of these littoral rights.”

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. 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. 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, bolstered by support from an influential libertarian property group, the landowners attempted to transform their regulatory takings claim in the Florida courts into a judicial takings claim in the Supreme Court.

IV. 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 Amendment. In the Florida beach case, the landowners in their certiorari petition redirected attention from the state renourishment project to the Florida Supreme Court’s interpretation of the effect of the project. They maintained that this

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137 Id. at 1115.
138 Id. at 1117. Professor Christie pointed out that it may seem that the state did not have any “land” to reclaim, since the state’s trust land was already submerged. However, she argued that because under the doctrine of avulsion the boundary between the landowners’ parcels does not change, without filling in some of the newly-submerged land to restore the shore to where the MHWL was, the public would have no way to access what is rightfully theirs. Christie, supra note 125, at 49. As will be discussed, this use of the doctrine of avulsion differed from the way the Supreme Court would apply the doctrine in deciding the case. See infra note 249 and accompanying text.
139 Id. at 1115.
140 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. Supreme Court of the United States, The Justices’ Caseload, http://www.supremecourt.gov/about/justicecaseload.aspx (last visited Aug. 24, 2010).
141 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 1, Stop the Beach Renourishment, et al., v. Fla. Dep’t of Envtl. Protection, 560 U.S. ----, 130 S.Ct. 2592 (2010) (No. 08-1151), See infra note 222 and accompanying text. Subsequent to the Supreme Court’s grant of certiorari, however, many more like-minded groups joined the fray. See infra note 226 and accompanying text.
allegedly unprecedented interpretation radically and unexpectedly changed Florida property law and, in the process, unconstitutionally took their property. Four members of the Supreme Court thought this idea was powerful enough to warrant hearing the case, and a four-member plurality enthusiastically endorsed the concept, despite a lack of precedent in American law. 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

In 1880, the Chicago city council passed an ordinance to widen a street. Consistent with state statutes, in 1890 the city filed a petition with the Cook County Circuit Court to condemn, among other parcels, a right of way belonging to the Chicago, Burlington and Quincy Railroad, to be used as a street crossing. The jury, statutorily charged with deciding the proper amount of compensation, returned a verdict of one dollar for the railroad. The railroad moved for a new trial, but was denied, and the Illinois Supreme Court upheld the verdict. The railroad argued before the U. S. Supreme Court that the judgment of one dollar deprived it of due process of law under the Fourteenth Amendment and claimed it was entitled to receive the full value of the property interest condemned.

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142 166 U.S. 226 (1897).
143 Id. at 230.
144 Id.
145 Id.
146 Id. Although the city asserted that the Court lacked jurisdiction, since 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.
147 Id. at 232–33.
Deciding that it was not enough for the lower court to merely follow a statutory procedure created to condemn property if the compensation awarded would violate due process, the Court stated that it had the ability to review the state’s highest court’s judgment for compliance with the U.S. Constitution. 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.’” 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, since all the railroad was “losing” was the exclusivity of its right of way where the city proposed a street crossing, a parcel that “was used, and was always likely to be used, for railroad tracks.” For all its strongly worded statements regarding applying due process of law to the state’s highest courts, the Court affirmed the Illinois Supreme Court based on the trial court’s jury instructions, not on the issue of whether the Illinois Supreme Court took the railroad’s property.

B. Justice Stewart’s Concurrence in Hughes v. Washington

148 Chicago Burlington, 166 U.S. at 234–35, 236.  
149 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.  
150 Id. at 234 (citing Scott v. McNeal, 154 U.S. 34, 45 (1894) (declaring as a deprivation of property without due process the selling of a parcel of land made available through a probate court order whose owner was actually still alive, because the owner was never notified of the sale)). Chicago Burlington is the case credited with incorporating 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) (suggesting that the Supreme Court’s holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), provided a rationale for applying the Takings Clause of the Constitution to state courts if they make state law offensive to it).  
151 Id. at 258.  
152 Id. at 256.  
153 Justice Brewer, in dissent, 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 259 (Brewer, J., dissenting).  
During the next seven decades, the Court gave little attention to its statement in *Chicago Burlington*, apparently recognizing that state courts had the authority to shape state law free from federal judicial intervention. 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. 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 oceanfront property, a right the landowners had enjoyed prior to statehood. The Supreme Court decided that federal law governed the landowner’s parcel, not state law, 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.

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. 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. Although agreeing with the notion that states may “develop and administer” property law, he asserted that in this case “state and federal questions are inextricably intertwined,” because the Washington court’s decision may have implicated federal constitutional property protections.

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155 *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”).

156 *Hughes*, 389 U.S. at 294 (Stewart, J., concurring).

157 *Id.* at 291 (majority opinion).

158 *Id.*

159 *Id.* at 294–95 (Stewart, J., concurring).

160 *Id.* at 295.

161 *Id.*

162 *Id.* at 296.
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.” looking at the case law on which the Washington court relied to decide that its ruling was “not startling,” Stewart disagreed. He found the state court’s decision to be “unforeseeable,” “effecting a retroactive transformation of private into public property—without paying for the privilege of doing so.” 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. Although not the majority opinion, Justice Stewart’s ideas have proved quite influential, at least in the legal academy.

C. Professor Thompson’s “Judicial Takings”

In 1990, Buzz published an article that would become an oft-cited source for the judicial takings movement. 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 constitutional history in fact supported the premise, given the Framers’ concern over cabining both executive and judicial powers. Thompson discussed Chicago Burlington, maintaining

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163 Id.
164 Id. at 297 (citing Hughes v. State, 410 P.2d 20, 28 (Wash. 1966)).
165 Id. at 297.
166 Id. at 298.
167 Id.
169 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 150, at 1494–95 (referring to Thompson’s article as “seminal,” but also noting that a majority of other works rejects his theories). A Westlaw search reveals over 100 items, including journals, law reviews, treatises, and briefs, referencing Thompson’s article.
170 Thompson, supra note 168, at 1458–63. Justice Scalia does not agree with this view of the 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
that the Supreme Court recognized that the “takings protections” of the Fourteenth Amendment applied to state courts through the Due Process Clause at least since 1897.\footnote{Id. at 1463.} Although he recognized that the Court did not discuss whether a state court’s changing the law could effect a taking, Thompson characterized the decision as resolving whether “the fourteenth amendment prohibited the Illinois judiciary from awarding one dollar in compensation for a right clearly worth far more.”\footnote{Id.; see also Sarratt, supra note 150, 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”).} He did not mention that the Court affirmed that the right-of-way was worth exactly that.\footnote{See supra note 151 and accompanying text.}

Professor Thompson also characterized the Court’s 1980 decision in \textit{PruneYard Shopping Center v. Robins} \footnote{447 U.S. 74 (1980).} as a “judicial takings” case,\footnote{Thompson, supra note 168, at 1469–70.} although he acknowledged that the Supreme Court did not address the issue.\footnote{Id. at 1470.} Despite citing these cases and a few others to support his judicial takings theory,\footnote{Id. at 1468 (citing Hughes, 389 U.S. 290 (1967)); id. at 1469 n.85 (citing Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)).} 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: 1) “the decision to change current property rules in a way that would constitute a taking,” and 2) “the decision to require compensation.”\footnote{Id. at 1515.} Although he was vague about the former,\footnote{Id. at 1513.} he suggested

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\textit{Beach Renourishment}, 560 U.S. ----, 130 S.Ct. 2592, slip op. at 17 (2010) (plurality opinion). Nevertheless, adopting a textualist approach, Justice Scalia maintained that “what counts is not what they envisioned but what they wrote.”
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\textit{Id.}
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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 overrides the decision, or 3) rule that the change in the law would only take effect if the legislature authorized compensation within a prescribed period of time.\(^{180}\) 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.”\(^ {181}\) 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,”\(^{182}\) 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,\(^ {183}\) until the Florida case only a few lower courts had entertained the notion of a judicial taking.\(^ {184}\)

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\(^{180}\) See supra note 169 and accompanying text.
\(^{181}\) Id. at 1513.
\(^{182}\) Id. at 1544.
\(^{183}\) See supra note 168, at 1469 n.84.
\(^{184}\) 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 168, at 1469 n.84. See also Sarratt, supra note 150, 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 the STBR case, 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 Renourishment, 560 U.S. ----, 130 S.Ct. 2592 (2010) (concurring op. of Kennedy, J., at 7), 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 it the article.
D. Justice Scalia’s Dissent from Denial of Certiorari in *Stevens v. City of Cannon Beach*: Resurrecting Judicial Takings

Eschewing at least one chance to take up the idea of judicial takings, 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*, a case challenging an earlier decision of the Oregon Supreme Court, in *State ex rel. Thornton v. Hay*. Given Justice Scalia’s strong opinions on the matter, 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. While the landowners conceded that the state owned the wet-sand area, or the area between the high and low tides, as an alleged “state recreation area,” 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 within their property. 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.

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

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187 462 P.2d 671 (Or. 1969).
188 Id. at 673.
189 Id. at 672–73 (citing OR. REV. STAT. § 390.720). 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).
190 Id. The Hays were owners of a resort who wanted to provide exclusivity to their guests. Id. at 674.
191 Id. at 672 (citing OR. REV. STAT. § 390.640 (allowing the state to regulate shoreline improvements and requiring permits for such activities)).
implied dedication and prescription. But the court decided that those alternatives were either unsupported by the factual record (in the case of implied dedication) or insufficient to prevent future litigation (in the case of prescription). Instead, the court affirmed that the public’s use rights to the dry-sand area adjacent to the ocean within the state were justified under the doctrine of custom. The court reasoned that the public’s use of the Oregon ocean beaches satisfied custom’s requirements of 1) usage from antiquity, 2) lack of interruption, 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. Further, the Hays conceded that they knew when they bought the land that the public regularly used the dry-sand area, a concession that was consistent with the existence of customary rights. 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.

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. The city denied the permit, prompting an inverse condemnation action. The landowners attempted to rely on McDonald v. Halvorson, 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 that was not adjacent to the ocean, to similarly distinguish their case. 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 in hering in the landowners’ title; thus, the landowners could not interfere with the public’s rights to the dry-sand area of all ocean beaches. The Supreme Court denied certiorari, over a strenuous objection by Justice Scalia, joined by Justice O’Connor.

Justice Scalia criticized the *Thornton* ruling, which the Supreme Court did not review, for its “questionable constitutionality,” suggesting that the decision may have ratified a “landgrab” that “may run the entire length of the Oregon coast.” Criticizing the Oregon court’s application of the doctrine of custom to the beaches at issue, he maintained that the court misunderstood the doctrine. 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*, and then use that doctrine to “‘assert[] retroactively that the property it has taken never existed at all.’” Although conceding that the factual record in *Stevens* was insufficient to support the Court’s deciding whether a taking had occurred, since the trial court dismissed the claim without factual development, 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 their land. Notwithstanding his acknowledgement that the Court could not decide whether a taking had occurred, Justice Scalia endorsed the concept of judicial

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202 This 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. 505 U.S. 1003, 1029 (1992).
204 *Stevens II*, 510 U.S 1207, 114 S.Ct. 1332, 1335.
205 *Id.*, 114 S.Ct. at 1335.
206 *Id.*, 114 S.Ct. at 1335 n.5.
207 *Id.*, 114 S.Ct. at 1334 (citing *Lucas*, 505 U.S. at 1031).
208 *Id.*, 114 S.Ct. at 1334 (quoting *Hughes*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring)).
209 *Id.*, 114 S.Ct. at 1335.
takings, declaring: “No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation.”

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, the trial court decided the case on the basis of prescription, and the supreme court could have upheld the ruling on that basis alone. Although in *Stevens* the landowners attempted to distinguish their case, their beach was in the same city as the Hays, hardly creating a distinct factual scenario.

Justice Scalia also failed to discuss the peculiar facts involving the Oregon beach in *Stevens*. In contrast with Florida’s beaches, the beaches in Oregon were unsuited for development. 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 and accretion. 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

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210 *Id.*, 114 S.Ct. at 1334 (citing Webb’s Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 164 (1980)).
211 See *Thornton*, 462 P.2d 671, 676–77 (Or. 1969) (citing 1 William Blackstone, Commentaries *75–78*).
212 *Id.* at 673, 676 (discussing the trial court’s ruling that the public acquired an easement over the dry-sand area).
214 But Justice Scalia was not the only one to overlook this fact. Oregonians in Action (“OIA”), a nonprofit 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” was partially to blame (without acknowledging its own status as just such a group). Brief Amicus Curiae of Oregonians in Action Legal Center in Support of Petitioner 16–17, *Stop the Beach Renourishment*, Inc. v. Fla. Dep’t of Envtl. Protection, 560 U.S. ----, 130 S.Ct. 2592 (2010) (No. 08-1151). OIA did not, however, recognize the possibility that the landowners in both *Thornton* and *Stevens* would likely have lost their cases on grounds other than custom.
215 See, e.g., supra notes 68–70 and accompanying text.
216 *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”).
217 *Id.*
areas were open to all.\textsuperscript{218} Not until many decades later did upland landowners begin to attempt to exploit the development potential of the Oregon beaches.\textsuperscript{219} As a result, the 1967 Oregon legislature declared the preservation of the public’s rights in the beaches to be state policy.\textsuperscript{220} Thus, the real novelty in \textit{Thornton} was the prospect of allowing unprecedented development on Oregon’s beaches, not affirming of the public’s customary rights to use them.

V. The Supreme Court’s Florida Beach Decision

Some fifteen years after Justice Scalia’s dissent in \textit{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. 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.

A. STBR Files for Certiorari, with Property Rights Advocates In Tow

STBR first unsuccessfully attempted to persuade the Florida Supreme Court to rehear the case.\textsuperscript{221} The group then filed a petition for a writ of certiorari on March 13, 2009, supported by a brief from the Pacific Legal Foundation.\textsuperscript{222} Instead of claiming that the statute was unconstitutional as applied to its case, STBR now argued that the Florida Supreme Court’s opinion, by approving the BSPA, took their property.\textsuperscript{223} They claimed that the state court had

\textsuperscript{218} \textit{Id.} at 673 (noting the public use of the beaches for such activities as clam-digging, building fires for cooking, and general recreation).

\textsuperscript{219} \textit{See id.} at 674 (describing the recognition of a lack of potential building locations on the Oregon beach as having “recently . . . attracted substantial private investments in resort facilities”).

\textsuperscript{220} \textit{Id.} at 674 (citing \textit{Or. REV. STAT.} § 390.610 (1967)).

\textsuperscript{221} \textit{Walton County}, 998 So. 2d 1102 (Fla. 2008), \textit{reh’g denied} Dec. 18, 2008.

\textsuperscript{222} Petition for Writ of Certiorari, \textit{supra} note 116; Motion for Leave to File and Brief Amicus Curiae of Pacific Legal Fdn., \textit{supra} note 141.

\textsuperscript{223} Petition for Writ of Certiorari, \textit{supra} note 116, at (i).
unconstitutionally upheld legislation that both eliminated littoral rights and replaced them with inadequate statutory rights, while allowing an agency to “unilaterally modify a private landowner’s property boundary without a judicial hearing or payment of just compensation.”

Although the petitioners had not raised any such “judicial takings” claim in the proceedings below, and there were no conflicting decisions in the lower courts, the Supreme Court granted certiorari June 15, 2009.

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

224 Id.
225 Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Protection, 129 S.Ct. 2792 (2009). That the Supreme Court would take a case raising entirely new arguments without any grounding in existing law reflects the activism of the Court.
226 In all, seventeen groups, either jointly or alone, filed amici briefs in support of STBR, including the Owners’ Council 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 Oregonians in Action.
227 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, the Coastal States Organization, and Brevard County.
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. 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.”

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

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.\textsuperscript{234} 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.\textsuperscript{235} The arguments eventually digressed into conjecture concerning hot dog stands on the beach,\textsuperscript{236} spring break beach parties,\textsuperscript{237} and “port-a-johns,”\textsuperscript{238} as the Justices grappled with Florida property law and the lack of definitive precedent on point. Due to the scattered arguments raising hypothetical factual issues and rarely-discussed doctrines of Florida law, the argument concluded without providing much of a hint as to how the Court would decide the case.

\textbf{B. Justice Scalia Obtains a Plurality}

The Supreme Court issued its opinion towards the end of its Term, on June 17, 2010. 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.\textsuperscript{239} Considerably more comment on the issue. \textit{Id.} For his part, Chief Justice Roberts owns waterfront property in Maine. Nina Totenberg, \textit{High Court Weighs Florida Beach Case}, NATIONAL PUBLIC RADIO, Dec. 2, 2009, http://www.npr.org/templates/story/story.php?storyId=121030772 (last visited Aug. 25, 2010).\textsuperscript{234} Transcript of Oral Argument at 4, Stop the Beach Renourishment, et al., v. Fla. Dep’t of Envtl. Protection, 560 U.S. ----, 130 S.Ct. 2592 (2010).\textsuperscript{235} \textit{Id.} at 6. Justice Scalia went on to say that he thought two avulsions actually occurred in this case: the first, when the hurricane eroded the shoreline, and the second when the state replenished it. \textit{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, \textit{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 prior precedent. \textit{Stop the Beach Renourishment}, 560 U.S. ----, 130 S.Ct. 2592, slip op. at 27–28 (2010) (majority opinion).\textsuperscript{236} Transcript of Oral Argument, \textit{supra} note 234, at 9.\textsuperscript{237} \textit{Id.} at 39.\textsuperscript{238} \textit{Id.} at 46.\textsuperscript{239} 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. \textit{Stop the Beach Renourishment}, 560 U.S. ----, 130 S.Ct. 2592, slip op. at 1 (2010). 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.
contentious was the question of whether the question of a judicial taking should be reached in a case that involved no taking. Nonetheless, Justice Scalia’s plurality opinion addressed the issue in detail at the outset and gave the concept a ringing endorsement, perhaps predictable given his longstanding interest in the issue.\textsuperscript{240} Justice Scalia undertook a lengthy exposition of why the Takings Clause should apply to courts,\textsuperscript{241} 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, thus leaving the issue very much in play.

1. 8-0: Under Florida Law, an Avulsive Event Is Not a Taking

Ironically, with respect to the element of the case most important to the petitioners themselves—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. Although the Florida Supreme Court had focused on the BSPA and its effects on private property rights,\textsuperscript{242} 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 that trust land, provided the fill does not interfere with the rights of littoral property owners or the rights of the public.\textsuperscript{243} Equally important, according to the Court, was the principle that the owner of the submerged land, in this case the state, takes title to any land exposed by an avulsive event.\textsuperscript{244}

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

\begin{footnotes}
\item[240] See supra notes 204–10 and accompanying text; see also Lucas v. S.C. Coastal Coun., 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)).
\item[241] See infra notes 257–89 and accompanying text.
\item[242] See supra notes 134–39 and accompanying text.
\item[243] Stop the Beach Renourishment, 560 U.S. ----, 130 S.Ct. 2592, slip op. at 25 (2010) (majority opinion).
\item[244] Id. at 26 (citing Bryant v. Peppe, 238 So. 2d 836, 837, 838–39 (Fla. 1970)).
\end{footnotes}
water. 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,” which the Court found too high a bar to overcome.

First, 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.” Interestingly, although the state court considered the avulsive event in question to be a hurricane’s washing away dry land, and ruled that the state had the right to restore the land the avulsion destroyed, the Supreme Court considered the state’s creating dry land through beach nourishment as the kind of rapid change that also constituted an avulsion. 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.”

Citing different Florida authority than the Florida Supreme 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

246 Stop the Beach Renourishment, 560 U.S., slip op. at 25 (majority opinion).
247 Id. at 27.
248 See supra note 138 and accompanying text.
249 Stop the Beach Renourishment, 560 U.S., slip op. at 26 (majority opinion).
250 Id. at 26, 28. While 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 of littoral landowners,” id. at 25, 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 indicates the opposite. Id. at 27. 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 from structures, rights not necessarily preserved under Florida common law avulsions. See Christie, supra note 125, at 62. The Court did note, though, 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, 560 U.S., slip op. at 29, n.12 (majority opinion).
avulsion. 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.

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 was sufficient to overcome the state’s superior rights under the law of avulsion. 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. Because the Court concluded that the state supreme court’s interpretations were “consistent with [ ] background principles of state property law,” it could not rule that a taking had occurred.

2. Judicial Takings: The Latest Activism from a “Restrained” Court

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”—hypothetical because, although ratifying the concept, Scalia was unable to supply a concrete example of what he envisioned a judicial taking might be. This absence of detail did not prevent Scalia from accusing Justice Breyer’s concurrence of dealing in hypotheticals because Breyer believed deciding the issue was unnecessary.\textsuperscript{257} Still, Justice Scalia devoted substantial effort to describing what the Court would do had it decided the Florida Supreme Court’s opinion effected a taking.\textsuperscript{258} Consequently most of the plurality opinion resembled an academic exercise in which 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.\textsuperscript{259}

First, the plurality stated that the Takings Clause “is not addressed to the action of a specific branch or branches,”\textsuperscript{260} citing \textit{PruneYard Shopping Center v. Robins}\textsuperscript{261} as a case “arguably suggest[ing] that the same [takings] analysis applicable to taking by constitutional provision would apply” to judicial action.\textsuperscript{262} But nowhere in \textit{PruneYard} did the Court attempt to apply the takings analysis to judicial decisions. Its sole sentence mentioning “judicial reconstruction of a State’s laws of property” was a reference to the appellants’ contentions, not the Court’s own understanding of the case.\textsuperscript{263} Further, although Justice Scalia characterized the \textit{PruneYard} Court as “treat[ing] the California Supreme Court’s application of the constitutional

\textsuperscript{257} See infra note 294 and accompanying text.
\textsuperscript{258} \textit{Stop the Beach Renourishment}, 560 U.S., slip op. at 18 (plurality opinion).
\textsuperscript{259} Although Justice Scalia cited \textit{Chicago Burlington} for the proposition that “the Due Process Clause of the Fourteenth Amendment prohibits uncompensated takings,” see \textit{id.} at 12, he did not refer to that case to support his theory of judicial takings. This approach contrasts that of Professor Thompson, who argued that \textit{Chicago Burlington} was the foundation of the judicial takings doctrine, see supra notes 171–72 and accompanying text. A key distinction may be that Professor Thompson saw the Takings Clause as applying through the Due Process Clause, see \textit{id.}, whereas Justice Scalia interpreted them as two distinct entities. See \textit{Stop the Beach Renourishment}, 560 U.S., slip op. at 14–16 (plurality opinion).
\textsuperscript{260} \textit{Id.} at 8.
\textsuperscript{261} 447 U.S. 74 (1980).
\textsuperscript{262} \textit{Stop the Beach Renourishment}, 560 U.S., slip op. at 9 (plurality opinion).
\textsuperscript{263} \textit{PruneYard}, 447 U.S. at 79.
provisions as a regulation,” what the Court actually did was analogize the California Constitution’s free speech provision to a statute solely for the purpose of obtaining jurisdiction under the U.S. Code. Justice Scalia acknowledged that the *PruneYard* Court 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.”

Second, Scalia relied on *Webb’s Fabulous Pharmacies, Inc. v. Beckwith* as a case allegedly “even closer in point.” 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. The U.S. Supreme Court described its task as deciding “whether the second exaction by Seminole County amounted to a ‘taking,’” 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. However, read in context, the Court was referring to the state statute’s effect, not to the Florida Supreme Court’s decision.

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264 *Stop the Beach Renourishment*, 560 U.S., slip op. at 9 (plurality opinion).
265 *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 being repugnant to the Constitution.” 28 U.S.C. § 1257(a) (2006).
266 *Stop the Beach Renourishment*, 560 U.S., slip op. at 9 (plurality opinion).
268 *Stop the Beach Renourishment*, 560 U.S., slip op. at 9 (plurality opinion).
269 *Webb’s*, 449 U.S. at 159–60.
270 *Id.* at 160.
271 *Id.* at 163.
272 *Id.* at 164.
273 See *id.*
These two cases, then, while not explicitly rejecting the notion that a court decision could effect a taking in contravention of the Constitution, 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,” 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. 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.

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. 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 to be essentially the same as whether the state court eliminated an “established property right.” 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,” the latter not necessarily

\[274\] Stop the Beach Renourishment, 560 U.S., slip op. at 18 (plurality opinion); Stop the Beach Renourishment, 560 U.S., (concurring op. of Kennedy, J. at 7–8); see also infra notes 308–310 and accompanying text.

\[275\] Stop the Beach Renourishment, 560 U.S., slip op. at 23 (plurality opinion).

\[276\] Id.

\[277\] Id. at 20–21; see also Brief for Respondents Walton County and City of Destin 30–31, Stop the Beach Renourishment, et al., v. Fla. Dep’t of Envtl. Protection, 560 U.S. ----, 130 S.Ct. 2592 (2010) (No. 08-1151) (presuming that “fair support” was the correct standard of review) (citations omitted).

\[278\] Stop the Beach Renourishment, 560 U.S., slip op. at 21 (plurality opinion).

\[279\] Id. at 22. Indeed, the Florida Supreme Court undertook just such a clarification in the case below. See Walton County, 998 So. 2d 1102, 1109, 1111 (Fla. 2008) (noting the lack of detail and explanation in prior Florida law concerning riparian rights).
rising to the level of unconstitutionality. The plurality also criticized the state’s argument that federal courts “lack the knowledge of state law required to decide” whether a judicial taking occurred.\textsuperscript{280} 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,\textsuperscript{281} a statement that may fuel the fire of advocates wishing to have federal courts become the final arbiters of state property law.\textsuperscript{282}

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 \textit{Hughes v. Washington},\textsuperscript{283} because the plurality considered a decision’s predictability to have little bearing on its constitutionality.\textsuperscript{284} Instead, the plurality again turned to whether an “established property right[]” had been eliminated.\textsuperscript{285} Under this test, to determine 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 “eliminated” that right.\textsuperscript{286} This focus on the elimination of an established property right, rather than Justice Stewart’s emphasis on unforeseeable changes,\textsuperscript{287} 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, with respect to remedies the plurality seemed to tacitly

\textsuperscript{280} \textit{Stop the Beach Renourishment}, 560 U.S., slip op. at 21–22 (plurality opinion).
\textsuperscript{281} \textit{Id.} at 22. 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.” \textit{Id.}
\textsuperscript{282} Perhaps because the plurality opinion does not have the force of law, \textit{see infra} notes 314–17 and accompanying text, Justice Scalia felt entitled to paint with a broad brush. However, this lack of precision is certain to provide fodder for future federal/state property law disputes.
\textsuperscript{283} \textit{See supra} notes 163–67 and accompanying text.
\textsuperscript{284} \textit{Stop the Beach Renourishment}, 560 U.S., slip op. at 23–24 (plurality opinion).
\textsuperscript{285} \textit{Id.} at 24.
\textsuperscript{286} \textit{Id.} at 24, 25.
\textsuperscript{287} \textit{See supra} note 165 and accompanying text.
adopt Professor Thompson’s idea of remanding the invalidated law to the legislature, which would then either have to compensate the private property owner or acknowledge the invalidity of the state court’s application of the law.

Although Justice Scalia convinced three other Justices to join him in recognizing a sweeping new doctrine resting on scant judicial precedent, he could not construct a majority without a fifth vote. Further, by adopting neither of the parties’ tests for a judicial taking nor endorsing Justice Stewart’s language in Hughes concerning “sudden” or “unpredictable” changes in state law, 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, a startling authorization for federal courts to reshape federal-state juridicial 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 he questioned the need to address the question of judicial takings. 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

\[288\] See supra note 180 and accompanying text.
\[289\] Stop the Beach Renourishment, 560 U.S., slip op. at 19 (plurality opinion) (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”).
\[290\] 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 15.
\[291\] See supra notes 163–67 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 150, at 1530. Focusing on whether the state court upset reasonable expectations, Professor 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.
\[292\] Stop the Beach Renourishment, 560 U.S., (concurring op. of Breyer, J., at 1) (“[T]he plurality unnecessarily addresses questions of constitutional law that are better left for another day.”).
state property law. Although not expressly disavowing the idea of judicial takings, Breyer thought that addressing the issue was wholly unnecessary to decide the case.

In contrast, Justice Kennedy, somewhat surprisingly joined by Justice Sotomayor, although concurring that no taking occurred and agreeing with Justice Breyer that the Court need not reach the issue of a judicial taking, suggested a different vehicle to hold a state court accountable for its decisions concerning private property—invoking the Due Process Clause. Justice Kennedy interpreted the Takings Clause as properly limited to the executive and legislative branches, the “political” branches that are accountable for the way in which they manage the public fisc.

A major problem Justice Kennedy saw with applying the Takings Clause to judicial decisions was the idea that, so long as the court compensates the private landowner, 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. 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. But the Due Process Clause, according to Kennedy, provides an

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293 Id. at 2. 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.
294 Id. at 3.
295 Stop the Beach Renourishment, 560 U.S., (concurring op. of Kennedy, J., at 1, 5).
297 Stop the Beach Renourishment, 560 U.S., (concurring op. of Kennedy, J., at 2).
298 Id. at 3–4 (“[I]f 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)).
299 Id. at 4.
established way to constrain judicial overreach,\textsuperscript{300} as it allows higher courts to review lower court rulings without having to address thorny issues of compensation and proper procedure.\textsuperscript{301}

Moreover, 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.\textsuperscript{302} 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.\textsuperscript{303} Although he recognized that the Court had expanded the application of the Takings Clause beyond what the Framers likely intended,\textsuperscript{304} he cautioned the Court to take care not to adopt a doctrine that could be “inconsistent with historical practice.”\textsuperscript{305}

Procedural and remedial questions also troubled Justice Kennedy.\textsuperscript{306} Thus, he argued that the Court should take up the question of judicial takings in the future only if absolutely necessary.\textsuperscript{307} The plurality’s cursory explanation of how a judicial takings claim could be raised did not convince Kennedy. He suggested that, in contrast with what the plurality described,\textsuperscript{308} 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, that second lawsuit not being barred by res judicata, since the issue had not been raised below.\textsuperscript{309} In such a two-case model,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{300} Id. at 3 (calling the Due Process Clause “a central limitation upon the exercise of judicial power”).
\item\textsuperscript{301} Id. at 7–8.
\item\textsuperscript{302} Id. at 7.
\item\textsuperscript{303} Id. at 4, 7.
\item\textsuperscript{304} Justice Kennedy indicated that the Framers’ most likely intended Takings Clause to apply “only to physical appropriation pursuant to the power of eminent domain.” Id. at 7 (citing \textit{Lucas}, 505 U.S. 1003, 1028 n.15 (1992)). He also noted that the legislature was the traditional branch making the appropriations decisions. Id.
\item\textsuperscript{305} Id. at 7.
\item\textsuperscript{306} Id. at 7–8.
\item\textsuperscript{307} Id. at 10 (“If and when future cases show that he 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.”).
\item\textsuperscript{308} See supra notes 275–76 and accompanying text.
\item\textsuperscript{309} Id. at 7–8. Although Justice Kennedy expressed doubt that “parties would raise a judicial takings claim on appeal, or in a petition for a writ of certiorari,” in the first case, since the issue was not previously litigated, id. at 8, that is exactly what happened in the Florida beach case.
\end{enumerate}
\end{footnotesize}
Justice Kennedy worried that a court would be able to order only just compensation, without the option of invalidating the previous decision.\textsuperscript{310} Even if only one case decided all the issues, and the highest court reversed the taking, the court effecting the taking would still be liable for a temporary taking, according to Kennedy.\textsuperscript{311} Given the difficulties of these questions and presented with a factual scenario that made addressing them completely unnecessary, 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.\textsuperscript{312}

VI. The Legacy

Like \textit{Rapanos v. United States},\textsuperscript{313} \textit{Stop the Beach Renourishment} is a case without a majority opinion. The only part of the case to obtain a majority of votes was the part that ruled that no taking occurred.\textsuperscript{314} Thus, the decision will have binding effect only on the parties to the suit\textsuperscript{315}—further reason to question why the Court heard the case. Unlike the opinions in \textit{Rapanos},\textsuperscript{316} 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.”\textsuperscript{317} 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—leaving the question

\textsuperscript{310} \textit{Id.} at 9.
\textsuperscript{311} \textit{Id.}
\textsuperscript{312} \textit{Id.} at 10.
\textsuperscript{313} 547 U.S. 715 (2006) (garnering a majority of votes concerning whether to vacate and remand to consider whether certain wetlands were navigable waters, but not arriving at a majority as to which navigability test to apply).
\textsuperscript{314} \textit{See supra} notes 242–56 and accompanying text.
\textsuperscript{315} One court has already noted the lack of precedential weight the plurality opinion carries. \textit{See Sagarin v. City of Bloomington, No. 53A01-0909-CV-454, 2010 WL 3291583, at *3 n.2 (Ind. Ct. App. Aug. 20, 2010)} (rejecting appellant’s argument that, under \textit{Stop the Beach Renourishment}, other remedies exist for inverse condemnation besides compensation, because, according to the court, the plurality opinion is “without precedential authority”).
\textsuperscript{316} \textit{See} \textit{Rapanos}, 547 U.S. at 758 (Roberts, C.J., concurring) (suggesting that Justice Kennedy’s concurrence supplied the rule of decision); \textit{id.} at 810 n.14 (Stevens, J., concurring) (noting the likelihood that “Kennedy’s approach will be controlling in most cases”).
of judicial takings for another case. Nonetheless, some lower federal courts may rely on to Justice Scalia’s opinion and declare state court opinions to have effected takings.

A. Beach Nourishment Projects May Proceed, 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 permits for beach restoration, setting ECLs and filling trust lands. Other states with beach restoration programs may similarly proceed in their efforts to reclaim property lost to the waves.\(^{318}\) Whether this development 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 important, and possibly more challenging, is the notion that state courts must find ways of using existing principles of state property law to justify such programs, and may be forced to apply the law quite narrowly, or risk a landowner challenge in federal court.\(^{319}\)

Even had STBR prevailed in the case, though, its members would have gained very little. After the Florida District Court of Appeal decided Save Our Beaches,\(^{320}\) the Florida legislature amended the BSPA, stipulating that if any claimant alleged a taking in response to a beach nourishment 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.\(^{321}\) In this case, any “damage” done to the STBR members’ remaining upland

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\(^{318}\) 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 125, at 27 n.48.

\(^{319}\) See supra text accompanying note 276.

\(^{320}\) See supra notes 118–21 and accompanying text.

\(^{321}\) FLA. STAT. ANN. § 161.141 (West 2010); see also Christie, supra note 125, at 57–58.
property would almost certainly be offset by the increase in value a new beach provides.\textsuperscript{322}

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.\textsuperscript{323} Given the generally uncontroversial nature of beach restoration programs\textsuperscript{324} until this challenge, with no split among the state courts or the federal circuits on the issue, and 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.

B. The Federal–State Relationship Disrupted

One of the longer lasting and potentially most devastating 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.”\textsuperscript{325} The current Court has not demonstrated the deference to the principles of federalism as did the Rehnquist Court,\textsuperscript{326} having recently begun to accelerate the pace at which it

\textsuperscript{322}Smith, supra note 73 (quoting a Florida Atlantic University economist as saying “[w]hen you nourish, 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. \textit{Id.}

\textsuperscript{323}\textit{Sand Key,} 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.”). \textit{Cf.} Brief for Respondents Walton County and City of Destin, \textit{supra} note 277, 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 only sell trust land, or authorize private use, and only when consistent with the public interest. FLA. CONST. art. 10, § 11. The Florida Constitution does not contemplate giving land away.

\textsuperscript{324}See supra notes 65-66 and accompanying text.

\textsuperscript{325}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. \textit{Id.} at 303. \textit{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 \textit{Robinson v. Ariyoshi} suggested, could “completely reorder our system of federalism”).

\textsuperscript{326}Liptak, supra note 2 (“Federalism has less salience with this court than it did with the Rehnquist court.” (quoting Sri Srinivasan)).
allows the federal government to increasingly encroach into state territory—for example, the recent decision incorporating the Second Amendment against the states.\footnote{McDonald v. City of Chicago, 561 U.S. ----, 130 S.Ct. 3020 (2010). Justice Stevens alluded to the growing federal involvement in state law in his \textit{McDonald} dissent, quoting Justice Scalia’s statement in \textit{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. \textit{Id.}, 130 S.Ct. at 3109 (Stevens, J., dissenting) (quoting \textit{Stop the Beach Renourishment}, 560 U.S. ----, 130 S.Ct. 2592, 2597 (2010) (opinion of Scalia, J.)). This criticism of increasing federal oversight indicates just how pivotal Justice Stevens’ could have been in defeating the idea of judicial takings.

By asserting that federal courts have the power to decide what state property law is, Justice Scalia and the plurality would effectively abrogate the right of the highest state courts to determine their own state’s law, reversing historical practice.\footnote{See, e.g., \textit{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 \textit{Cohen v. Virginia}, 19 U.S. 264 (1821), for the proposition that the Supreme Court has no jurisdiction to “correct any supposed errors of the state courts in determination of the state law”). The \textit{Sauer} Court decided, in particular, that the New York Supreme Court, not the United States Supreme Court, had the right to determine what easements existed appurtenant to a piece of property under New York law. \textit{Id.} at 548; \textit{see also supra} note 229 and accompanying text.} Federal courts would therefore not only have the power to decide state property law, but they would also have to become fluent in the law of each state for which they would hear a case.\footnote{At oral argument, Justice Kennedy did not seem pleased with the prospect of the Court “having] to become real experts in Florida law.” Transcript of Oral Argument, \textit{supra} note 234, at 24.} Further, 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\footnote{\textit{Stop the Beach Renourishment}, 560 U.S., slip op. at 23 (plurality opinion). The plurality’s assertion that adopting the judicial takings doctrine would not violate the \textit{Rooker-Feldman} doctrine, \textit{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 \textit{Rooker-Feldman} doctrine stands for the proposition that only the Supreme Court can review final state court judgments. \textit{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, by allowing collateral attacks, lower federal courts should likewise prepare for a deluge of judicial takings litigation.}—the plurality may have opened the floodgates to scores of takings claims based on judicial decisions clarifying state property law and adapting it to new circumstances and social needs.
Take the doctrine of customary rights governing Oregon beaches, for example. Given Justice Scalia’s vigorous dissent from the denial of certiorari in Stevens, 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. At least in the case of Thornton, however, 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. Hence, 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. As Justice Scalia

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331 See supra notes 204–10 and accompanying text.
332 Indeed, one of the amicus briefs supporting the petitioners seemed more focused on the Oregon case than the Florida case. See Brief Amicus Curiae of Oregonians in Action Legal Center in Support of Petitioner, supra note 214, at 1 (expressing in its statement of interest the group’s belief that “its experience with takings jurisprudence in Oregon 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 JOURNAL OF COMMERCE, July 9, 2010, http://djcoregon.com/news/2010/07/09/florida-homeowners-cannot-stop-the-beach-renourishment/ (last visited Aug. 30, 2010) (“With Stop the Beach, there may now be an avenue to have federal courts look at this issue anew”).
333 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 163–67 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.
334 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, --- P.3d ----, 2010 WL 3261137, at *7 (Wash. Aug. 19, 2010). 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. Four justices dissented, and the dissenting opinion characterized the majority opinion as a “judicial taking,” id. at *9 (Sanders, J., dissenting), and as an exercise in “judicial eminent domain,” id. at *14, perhaps signaling the Supreme Court to take up the case. Although the attorney for the losing landowner said she might file a petition for reconsideration, whether a petition for certiorari is forthcoming is unknown. See Stephanie Rice, Supreme Court Sides with Couple in Property Dispute, THE COLUMBIAN, Aug. 20, 2010, available at http://www.columbian.com/news/2010/aug/20/supreme-court-sides-with-couple-in-property-dispute/. According to Justice Scalia’s reasoning, if the landowner decides not to pursue an appeal, another landowner could attempt to invalidate the court’s ruling in an action in federal court. Questions 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
acknowledged in his *Stevens* dissent, the lack of a factual record is troubling.\(^{335}\) Further, as Justice Kennedy noted, what remedy could a later court provide?\(^{336}\) Would the reviewing court be able to invalidate the earlier decision, or would it simply have to order compensation?\(^{337}\) 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. Thus, Justice Scalia’s opinion need not be the only authority a federal court could rely on to justify its interpreting state property law.\(^{338}\) With six Justices apparently on board, the continuing validity of state common law may become quite uncertain.

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.\(^{339}\) Justice Scalia similarly acknowledged a lack of original intent to subject regulations to scrutiny under

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\(^{135}\) (6th ed. 2006) (noting the drift away from a “rather harsh” rule requiring “innocent improvers” 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).


\(^{336}\) Stop the Beach Renourishment, 560 U.S., (concurring op. of Kennedy, J., at 8).

\(^{337}\) *Id.*

\(^{338}\) 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]”).

\(^{339}\) Stop the Beach Renourishment, 560 U.S., (concurring op. of Kennedy, J., at 7) (referring to the application of the Takings Clause to “regulations that are not physical appropriations”).
the Takings Clause.  

340 See Lucas, 505 U.S. 1003, 1028 n.15 (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”).

341 See Stop the Beach Renourishment, 560 U.S., (concurring op. of Kennedy, J., at 7). Professor John Echeverria, who wrote The American Planning Association’s amicus brief in support of the government, supra note 228, 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. (forthcoming 2010).

342 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 (1984–85) (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”).

343 Justice Sotomayor’s joining Justice Kennedy in this regard may be a signal of future emphasis on the Due Process Clause, although it is too soon to tell.


345 See Brief Amicus Curiae of the Am. Planning Assoc., supra note 228, 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).
could have adopted the test for judicial takings that Justice Stewart advanced in *Hughes*.\(^{346}\) That test, by attempting to discern whether a decision effected a “sudden” or “unpredictable” change in state law, seems to be more respectful of state court decisionmaking than the test the plurality endorsed. Judged under that test, the Florida Supreme Court’s decision would likely not have risen to the level of an unconstitutional taking.\(^{347}\) Instead, the mechanism the Court adopted could equip federal courts with far-reaching authority to investigate and redirect state property law. Since several remedies already exist for addressing judicial overreach at the state level,\(^{348}\) the plurality’s rush to adopt the judicial takings doctrine in the Florida beach case is baffling.

VII. Conclusion

The effect of the Court’s recognition of judicial takings may well be a stifling of the evolution of common law property, an evolution that has been taking place for centuries, and which has helped property law to reflect contemporary values.\(^{349}\) Although Justice Kennedy, who is so often determinative,\(^{350}\) did not rule out the possibility of adopting a judicial takings doctrine in the future, he also has expressed the concern that states should be able to respond to changing conditions with new regulations, and that a “static body of state property law” is not

\(^{346}\) See supra notes 163–67 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 160 and accompanying text.

\(^{347}\) See generally Brief for the United States as Amicus Curiae Supporting Respondents, supra note 230, 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 277, 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, 560 U.S. ----, 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.”).

\(^{348}\) See, e.g., supra notes 300–01 and accompanying text.

\(^{349}\) Cf. Michael C. Blumm & Lucus Ritchie, Lucas’s Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses, 29 HARV. ENVT'L 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”).

\(^{350}\) See Blumm & Bosse, supra note 296, at 667 (noting that advocates before the Supreme Court often tailor their arguments to Justice Kennedy, since his vote can be pivotal).
necessary to satisfy the Takings Clause. In fact, he made this argument in the unique context of coastal property. 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.” 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.

One thing seems evident: a substantial segment of the Roberts Court is willing to venture into uncharted waters like judicial takings, 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. Although Justice Scalia’s plurality came up one vote short of a majority in the Florida beach case, and although the newest member of the Court, Justice Elena Kagan, signed the federal brief in support of the state, 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

352 Id.
353 Id. at 1031 (majority opinion). Cf. Stop the Beach Renourishment, 560 U.S., slip op. at 22 (plurality opinion) (recognizing that courts “clarify and elaborate property entitlements that were previously unclear”); Brief Amicus Curiae of the Am. Planning Assoc., supra note 228, 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).
354 Brief for the United States as Amicus Curiae Supporting Respondents, supra note 230, at 12 (urging the Court to be cautious before taking the “extraordinary step” of ruling that a state supreme court can effect a taking); Brief for Respondents Walton County and City of Destin, supra note 277, 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 228, 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”).
355 See Brief for the United States as Amicus Curiae, supra note 230, 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).
Chief Justice Roberts, state property law may become no more stable than the Florida beaches themselves.

356 See Liptak, supra note 3 (noting that Chief Justice Roberts is only 55 years old).