When Giving Almost Becomes a Taking: An Analysis of Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection

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When Giving Almost Becomes a Taking:

An Analysis of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*

Peter Spencer*

I. INTRODUCTION

In June of 2009, the United States Supreme Court granted certiorari to review a unique takings claim involving beachfront property.1 *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*2 ("STBR") began in 2004 when beachfront property owners opposed a state decision to restore approximately seven miles of white sandy beaches.3 This beach restoration project essentially expanded an eroded beach by creating a strip of publicly-owned beach situated between the

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2. 130 S. Ct. 2592, 2613 (2010), aff'g Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 (Fla. 2008).
3. *Walton Cnty.*, 998 So. 2d at 1106.
private beachfront property and the Gulf of Mexico. After the issue made its way through the lower state courts, the Florida Supreme Court determined that the legislative statute that permitted and directed this state action did not violate the Takings Clause. It was this decision that was appealed to the United States Supreme Court and was later granted certiorari.

Legal scholars anticipated that the Court's ultimate decision would likely do one of two things: (1) reinforce the tenet that individual states are the sole reservoir of authority to define laws of real property within their respective states, or (2) create a new and unprecedented category within takings jurisprudence known colloquially as a "judicial taking." While the judicial taking theory has been discussed for years in both academia as well as Supreme Court dicta, the establishment of this theory as a legal doctrine has never been effectuated. The ripple effects of this decision could be felt by every coastal community in our country.

Indicative of the widespread impact the decision will have is the number of amicus briefs submitted to the Supreme Court for the case—which includes over half of the nation's state attorneys general, the United States Solicitor General, and two dozen interest groups. On June 17, 2010, nearly a year to the day

5. See Walton Cnty., 998 So.2d at 1121.
after granting cert, the United States Supreme Court handed down its decision on this novel and closely-watched case. While the Justices were unanimous in upholding the Florida Supreme Court’s decision that no taking of private property occurred, the larger, more impactful decision regarding the existence of a “judicial takings” doctrine divisively split the Court four to four.

Meanwhile, universal acceptance, concern, and alarm regarding the various consequences of climate change and an increased demand for offshore energy resources has been taking hold throughout the world’s political, scientific, and societal spheres. Consequences of climate change include rising sea levels, an increase in the intensity and frequency of extreme weather, such as hurricanes, and loss of suitable fish habitat. Additionally, the recent BP oil spill in the Gulf of Mexico is representative of the impact of the increased need for offshore energy sources. The costly impacts of these dramatic changes to our environment will be most keenly felt by our coastline communities. As these significant impacts continue to intensify, the citizens of coastal states will inevitably look to their respective local and state governments for leadership in safeguarding their coastline from environmental contamination and encroachment by ocean waters due to sea level rise. Indeed, states have been playing this crucial role of protecting their coastlines for over a century.

Part II of this note briefly traces the history of the Takings Clause jurisprudence, introduces the judicial taking theory, examines how states have been commissioned to develop their
own common law for property, and discusses the U.S. Supreme Court's prior precedents and other academic commentary regarding judicial takings that existed prior to STBR. Part III sets forth the facts and legal issues of STBR, analyzes the Florida Supreme Court's decision and provides some critiques of the court's reasoning. Part IV analyzes the final U.S. Supreme Court's holding, considers the various viewpoints represented in the different opinions, and suggests additional public policy reasons to support the Court's decision. Finally, Part V explores what the future holds for the judicial takings theory.

II. TAKINGS GENERALLY AND JUDICIAL TAKINGS SPECIFICALLY

A. Brief History of Takings Jurisprudence

The Takings Clause of the United States Constitution, inserted in the Fifth Amendment of the Bill of Rights, states simply, "nor shall private property be taken for public use, without just compensation."\footnote{19} In the latter half of the twentieth century, this Clause has taken a very active role in Constitutional jurisprudence, especially as courts have tried to grapple with increased government regulation of private property.\footnote{20} One commentator described this grappling by the Supreme Court as producing jurisprudence "as disheveled as a ragpicker's coat."\footnote{21} The Supreme Court's apparent difficulty in establishing a cohesive jurisprudence in this area of law results from the central issue of all takings cases—the proper role of government regulation of private property in an increasingly populated and changing America.\footnote{22} As such, this central issue of balancing private rights with government regulation presents "one of the most difficult jurisprudential issues of the modern era."\footnote{23}

Originally, the Fifth Amendment applied only to the Federal

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\begin{itemize}
  \item \text{19. U.S. Const. amend. V.}
  \item \text{20. Edward J. Sullivan, A Brief History of the Takings Clause, WASH. UNIV. IN ST. LOUIS SCH. OF LAW, http://law.wustl.edu/landuselaw/Articles/Brief_Hx_Taking.htm (last visited Aug. 2, 2011).}
  \item \text{21. William B. Stoebuck, Police Power, Takings and Due Process, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980).}
  \item \text{22. Walston, supra note 8, at 380.}
  \item \text{23. DONNA R. CHRISTIE & RICHARD G. HILDRETH, COASTAL AND OCEAN MANAGEMENT LAW 115 (3d ed. 2007); Walston, supra note 8, at 380.}
\end{itemize}
Government.\textsuperscript{24} It was not until the Reconstruction period, and specifically the Fourteenth Amendment, that the Fifth Amendment became applicable to the states, thus allowing the federal Constitution to limit the powers of state and local government in how states treated private property.\textsuperscript{25}

In 1922, the United States Supreme Court decided \textit{Pennsylvania Coal Co. v. Mahon}, which articulated the "genesis of modern takings analysis,"\textsuperscript{26} and announced for the first time that a government \textit{regulation} of property can sometimes affect a taking that requires payment of compensation.\textsuperscript{27} Prior to this case, traditional justification for a taking required direct government appropriation or physical invasion of private property that would result in the functional equivalent of an ouster.\textsuperscript{28} The regulation in question in \textit{Pennsylvania Coal} was a Pennsylvania law that prohibited the mining of coal under streets, houses, and places of public assembly.\textsuperscript{29} As a coal company, Pennsylvania Coal held mineral rights to many properties in Pennsylvania but had sold the surface rights to others.\textsuperscript{30} The coal company argued that the legislation prohibiting the mining constituted a taking because it was no longer able to mine the coal.\textsuperscript{31} The Court's majority opinion, written by Justice Oliver Wendell Holmes, agreed by saying that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{32} Hence began the doctrine of regulatory takings—where "government regulation of private property may, in some instances, be so onerous that . . . such [a taking] may be compensable under the Fifth Amendment."\textsuperscript{33}

The second major type of takings follows the more traditional

\begin{footnotes}
\item[24.] Sullivan, supra note 20; see also Barron v. Mayor of Baltimore, 32 U.S. 243, 250-51 (1833).
\item[25.] Sullivan, supra note 20; see also Chi. Burlington and Quincy R.R. v. City of Chicago, 166 U.S. 226, 228 (1897).
\item[26.] CHRISTIE & HILDRETH, supra note 23, at 115.
\item[27.] 260 U.S. 393, 415 (1922).
\item[29.] 260 U.S. at 412-13.
\item[30.] \textit{Id.} at 412.
\item[31.] \textit{Id.}
\item[32.] \textit{Id.} at 412, 415.
\item[33.] Wooster, supra note 28, at § 5.
\end{footnotes}
justification and involves a literal physical invasion of property, as is illustrated by *Loretto v. Teleprompter Manhattan CATV Corp.*\(^{34}\) In this case, a New York law required landlords to allow the installation of cable television facilities on the roofs of their apartment buildings.\(^{35}\) The Court, through Justice Thurgood Marshall, ruled that the government must compensate a property owner whenever there is an actual physical invasion of his or her property—regardless of how minimal.\(^{36}\) In *Loretto*, the Court clarified that this second, and more traditional type of "physical invasion" of property always occurs when the government attempts to exercise a permanent physical occupation of property.\(^{37}\)

These two cases represent the two general doctrines of takings jurisprudence where governmental actions require compensation to the property owner: a regulatory taking or an actual physical invasion. Nearly all the takings cases decided by the Supreme Court have been centered on whether a legislative statute itself is unconstitutional as drafted or whether the executive enforcement of a constitutional statute is applied unconstitutionally.\(^{38}\) However, there exists a principle, albeit only in theory thus far, that the third branch of government—the judicial branch—may also have the ability to affect a takings claim. This issue is at the heart of *STBR*. The next portion of this note will explore this innovative and novel constitutional issue.

**B. The Judicial Taking Theory**

At the outset, it would almost appear that the term judicial taking is an oxymoron. As mentioned above, it is more evident that a physical invasion of property or an onerous regulation of property by either the legislative or executive branches would constitute an unconstitutional taking, but how could a court, whose very nature is "to say what the law is and what it has always been," \(^{39}\) cause a property right to be unconstitutionally

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34. 458 U.S. 417, 421 (1982).
35. *Id.*
36. *Id.* at 421, 438-39; *see also* Walston, *supra* note 8, at 406.
38. *See* Sarratt, *supra* note 8, at 1494.
39. *See id.;* Sarratt, *supra* note 8 at 1490; *see also* Marbury v. Madison 5 U.S. (1 Cranch) 137, 177 (1803) (As Chief Justice Marshall put it, "[i]t is
taken? Under Chief Justice Marshall's traditional theory in Marbury, "judges were thought to be like oracles, possessing special training and ability to decipher and discover the law, but not human lawmakers (that is, casual agents in the creation of law)." For centuries, courts have had the power to determine the contours of property law in areas unaddressed by statutes, and this judge-made law has continuously evolved over time, as background principles are applied to new socio-economic circumstances. Again, legal scholars have asked, "[a]re these 'refinements' [to the common law] capable of being dramatic enough to constitute takings?" To find answers to these questions, it is first necessary to investigate how the federal courts and Constitution apply to an area of law that has been "reserved to the states as independent sovereigns."

I. Property Law Is State-Made Law

The Takings Clause of the Fifth Amendment "protects rather than creates property interests." If the Constitution only protects, but does not define property, which sovereign authority gets to decide what really constitutes property rights in our country? The Supreme Court has held that generally the state is the source of property law in our legal system. The Court reasoned in City of Milwaukee v. Illinois that because property is defined under the common law, and federal courts, unlike state

emphatically the province and duty of the judicial department to say what the law is.").

40. See Sarratt, supra note 8, at 1490, n.18.
41. See Sarratt, supra note 8, at 1491.
42. Id.
44. Wooster, supra note 28, at § 4 (emphasis added); see also Phillips v. Wash. Legal Found., 542 U.S. 156, 164 (1998) (noting that "the Constitution protects rather than creates property interests"); Bd. of Regents of State Colls. v. Roth 408 U.S. 564, 577 (1972) (where the Court held that "[p]roperty interest, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").
courts, are not common law courts, that the property rights will be determined by state law. While the Constitution, under the Supremacy Clause, "shall be the supreme Law of the Land, [which therefore binds] the Judges in every State," "[a] State's highest court is unquestionably 'the ultimate exposito[r] of state law,'" and "the prerogative of [a state court] to say what [state] law is merits respect in federal forums." Indeed, the Supreme Court has repeatedly declared that it is "unquestionably" within the state's sphere of authority, acting as "independent sovereigns," to define and develop the basic tenets of real property law. Thus, leading from the clearly established precedent that real property law is developed and interpreted by state authority and not federal authority, state courts regularly make judicial interpretations and determinations regarding their respective state's property laws. This development of a state's common law is "a process which is not stagnant but fluctuates." If the "nature and scope of the property at issue has been defined by a state court under state common law," does the Supreme Court have any power to directly review the state court's ruling? The property owners in STBR explicitly tailored their appeal by encouraging the Supreme Court "to answer one of the great open questions in takings law," that is, whether a state judicial decision can constitute a taking of property in violation of the Fifth Amendment. The Supreme Court has never squarely addressed the judicial takings issue per se, but the Court has touched upon this subject in previous concurring and dissenting opinions. The following sections will analyze what had been said on the subject of judicial takings by the Supreme Court as well as by the academic legal community up to the time the Court heard STBR.

50. See Brief for American Planning Ass'n, supra note 43, at 4.
51. See Barros, supra note 7; see also Brief for Petitioner for Writ of Certiorari at 33, Stop the Beach Renourishment, Inc., v. Fla. Dep't. of Env'tl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151).
52. See Barros, supra note 7.
2. Supreme Court Commentary

The concept that a state court may unconstitutionally take private property has been a legal principle that has been consistently, albeit sporadically, mentioned in Supreme Court jurisprudence for over one hundred years. One of the first instances where the Court discussed the potential of a judicial taking by a state court took place in *Muhlker v. New York and Harlem Railroad Co.*\(^5^3\) The claim in *Muhlker* was that a government-authorized construction of an elevated railway track above a public street resulted in a taking of the abutting property owners' easement of light and air.\(^5^4\) A New York state court rejected the takings claim by determining that the property right claimed by the owner did not exist and, therefore, could not be taken.\(^5^5\) On appeal, the Supreme Court’s plurality opinion overturned the New York state court's decision of New York property law by adopting a position, primarily through contract law analysis, that the prior state court’s holding (that the property right never existed) constituted a taking in violation of the Fifth Amendment.\(^5^6\) Thus, the Supreme Court laid the foundational underpinnings that a state court's decision of property rights could, in fact, be the basis of a violation of the Takings Clause.

Important to note, however, is the dissent by Justice Holmes, where he wrote:

> I cannot believe that . . . we are free to go behind the local decisions on a matter of land law, and . . . declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. I cannot

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\(^{53}\) 197 U.S. 544, 570 (1905). This principle was first penned by Justice Harlan as far back as 1897:

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the high court of the state is a denial by that state of a right secured to the owner by that instrument.


\(^{54}\) *Id.* at 563; Brief for American Planning Ass'n, *supra* note 43, at 8.

\(^{55}\) See *Muhlker*, 197 U.S. at 560.

\(^{56}\) *Id.* at 570-71.
believe that we are at liberty to create rights over the
streets of Massachusetts, for instance, that never have
been recognized there. If we properly may do that, then I
am wrong in my assumption that, if the New York courts
originally had declared that the laying out of a public way
confferred no private rights, we should have had nothing
to say. But if I am right, if we are bound by local
decisions as to local rights in real estate, then we equally
are bound by the distinctions and the limitations of those
rights declared by the local courts.57

Justice Holmes’ strong dissent became the basis of a decision by
the Supreme Court just two years later when the Court reversed
its own stance on the judicial takings theory in Sauer v. City of
New York.58 In this case, a property owner claimed that the city’s
construction of an elevated viaduct59 above the street and
abutting his property caused a taking of an easement of access,
light, and air above his property.60 The Court embraced the
opinion (previously expressed in Holmes’ dissent) that because
state courts are the final expositors of the meaning of state law,
there is no foundation for seeking federal appellate review under
the Takings Clause of a state court ruling on the nature and scope
of a state property interest.61 Specifically, the Sauer Court ruled:

Surely such questions [of state law] must be for final
determination of the state court . . . this court has neither
the right nor the duty . . . to reduce the law of the various
states to a uniform rule which it shall announce and
impose. Upon the ground, then, that under the law of
New York, as determined by its highest court, the
plaintiff never owned the easements which he claimed,
and that therefore there was no property taken, we hold
that no violation of the 14th Amendment is shown.62

For over half a century, it seems that the Sauer decision, which

57. Id. at 575-76 (Holmes, J., dissenting).
59. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1765 (3d ed. 1986)
(defining “viaduct” as “a bridge . . . carrying a road or railroad over a valley,
river, road or other low-lying obstruction”).
60. Sauer, at 541-42.
61. Id. at 549.
62. Id. at 548.
incorporated Justice Holmes' *Muhlker* dissent from two years prior, ruled the day in regards to judicial takings within the Supreme Court by indicating that state courts' decisions could not constitute a taking.63

A later pivotal case, *Hughes v. Washington*, was decided by the Supreme Court in 1967.64 This case involved a dispute between a property owner and the state of Washington over ownership and title to accretions on oceanfront property.65 The Washington Supreme Court ruled that the ownership of the property is governed by state law and that under Washington State law, accretions were owned by the state.66 Before the United States Supreme Court, the property owner alleged that "the Washington Supreme Court[] constru[ed] the state constitution[] [by] chang[ing] state property laws regarding ownership of oceanfront accretions."67 The United States Supreme Court reversed the state court's ruling and "avoid[ing] the constitutional question arising from the change of state property law[] [by] ruling simply that the oceanfront property owner's rights were granted by federal patents, which are governed by federal law," thus granting the property owner ownership of the accretions.68

However, Justice Potter Stewart did not allow this opportunity to speak to a pressing constitutional matter slip by without comment.69 In his concurrence to the opinion, he insisted "the case should have been decided under Washington law, rather than federal law, and, more importantly, that the Washington courts were subject to constitutional limits in their definition of property rights."70 Specifically, he stated:

To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in

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63. *See id.*
64. 389 U.S. 290, 290 (1967).
65. *Id.* at 291.
66. *Id.*
68. *Id.*
70. *Id.*
state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.71

Thus in his concurrence, Justice Stewart acknowledged the very real possibility of a judicial taking occurring when a state court’s decision takes away an established state property right in a “sudden” and “unpredictable” way.72 In STBR, the petitioners repeatedly relied on these statements by Justice Stewart to argue both the United States Supreme Court’s prior recognition of a judicial taking as well as justification for how the Florida Supreme Court’s decision was an unconstitutional taking.73 Since 1994, the Supreme Court has been petitioned no less than fifteen times to grant writs of certiorari for cases that assert a judicial taking.74 Indeed, some commentators have declared that “the Supreme Court has studiously ‘declined all offers to revisit the issue.’”75 In a 1994 dissent to the Supreme Court’s denial of the petition for writ of certiorari in an Oregon takings case, Justice Scalia, joined by Justice O’Connor, voiced his discontent in this continual skirting of the judicial taking theory by stating, “just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law.”76 Justice Scalia further stated, “[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.”77 Thus, as can be seen by the sporadic but reoccurring dialogue, the judicial takings theory will continue to be a topic of discussion by the Supreme Court until the issue is addressed head on and either

71. Id.
72. See id.
73. See Brief for Petitioner for Writ of Certiorari, supra note 51, at 25-26, 40.
74. Id. at 31.
75. Bederman, supra note 8, at 1437 (citation omitted).
77. Id.
adopted or discarded.

3. Previous Commentary Regarding Judicial Takings

In addition to the sporadic Supreme Court dicta, the judicial takings theory has been discussed at length in academic legal commentary. While a good portion of the scholarly debate regarding this theory does endorse its existence, the majority of the literature denounces it as a fallacy. This note does not attempt to be a comprehensive summary of all the learned arguments for both sides of the issue. Rather, the following portion of this note will briefly summarize some of the primary arguments surrounding this legal theory.

a. Advocating Recognition of Judicial Takings

In what has been termed “the seminal article on the judicial takings problem,” Professor Barton Thompson argues that state courts should be subject to the Takings Clause, just as the legislative and executive powers already are, because in fact, all three branches of government “suffer . . . from many of the same political imperfections.” For example, Thompson posits that courts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections—and pressure is mounting for courts to use these tools. Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests. Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion.

78. See Sarratt, supra note 8, at 1491; Thompson, supra note 8, at 1451.
79. See Sarratt, supra note 8, at 1494-95 & n.33; Bederman, supra note 8, at 1454; Thompson, supra note 8, at 1453 nn.15-16.
80. Sarratt, supra note 8, at 1494.
81. Thompson, supra note 8, at 1541.
82. Id. at 1451 (footnotes omitted).
In his article, Thompson acknowledges that even if this theory were validated, it is “unlikely” that the Supreme Court will find an unconstitutional taking occurred from a lower state court because “courts must view themselves as radically different from the other branches of government in order to justify and validate judicial action.”

Likewise, a 2004 Virginia Law Review article justifies a judicial takings theory by arguing that the holding in the landmark case *Erie Railroad Co. v. Thompkins* “requires that the takings protections of the Federal Constitution apply to state judge-made law as well as state statutes and administrative regulations.” The article purports that if a state truly intends “the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision,” then “the states must accept the bitter consequences of this [holding] with the sweet.” Specifically, the author argues that *Erie* “imposes the obligation to treat state law created by the judiciary as real state law” and, as such, is capable of affecting a taking. The author further advocates that courts are more apt than state legislatures to circumvent constitutionally-mandated compensation to private property owners by “announcing that under their background principles of state law, the property owner never had the property right she claims has been taken.”

Other commentary has envisioned two scenarios in which the judicial takings issue can present itself. First, a state legislature will pass a statute that appears to take property rights, and upon reviewing the statue during a takings challenge, the state court subsequently holds that the claimed property right did not exist. This is the type of judicial takings claim at issue in *STBR*. Second, a state court might make a major change to the state’s existing property law. This allegation was the focus of

83. *Id.* at 1541.
84. 304 U.S. 64, 77-78 (1938).
85. Sarratt, *supra* note 8, at 1488.
86. *Erie*, 304 U.S. at 78.
88. *Id.*
89. *Id.* at 1490.
91. *Id.*
92. *Id.*
the well-known takings case *Matthews v. Bay Head Improvement Association*, which was not granted cert by the Supreme Court.93 In *Matthews*, the New Jersey Supreme Court held that the public must be granted reasonable access to—and reasonable use of—dry sand area of private property.94 There, the highest state court in New Jersey unilaterally modified the common law in the state by requiring public access to private beach.95 The U.S. Supreme Court denied certiorari without commentary.96

b. Advocating for Judicial-Restraint of Judicial Over-Reaching

Much of the scholarly criticism of the judicial takings theory has focused on two central arguments. First, the text and historical backdrop of the Takings Clause makes a judicial taking "anomalous."97 Such commentary posits that the constitutional text does not define "property" or confer any property interests; instead, property interests are defined by some independent source of law, usually state law.98 This argument rests on the premise that because state courts are the "expositors of state law," it would be inconsistent to hold that a state court decision that has interpreted state law regarding property concurrently "takes" that very property.99 Furthermore, historical evidence suggests that the Founding Fathers understood the Takings Clause as confined to the government's physical appropriation of private property for public use by eminent domain.100 Modern day evidence suggests that the drafters' goal was to codify the general practice of government payments for private lands and to protect private citizens' concerns during the Revolutionary War of the military seizing personal property.101

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94. See id. at 365.
95. See id.
The second argument academics put forth against judicial takings involves federalism concerns. Because the states are "the ultimate expositor[] of state law,"102 the judicial takings theory involves an impermissible federal intrusion into an arena where the Supreme Court ordinarily "defer[s] to the decisions of state courts."103 This federal intrusion would potentially "skew or chill state courts in their exposition of property law,"104 and fly "in the face of the Court's landmark decision in Erie."105 The line of reasoning that "state common law definitions of property are beyond the direct control of the federal government" results in respective states' property law varying over time.106 This diversity in property law "is not to be lamented but rather celebrated" as the intended result of our nation's federalist legal regime.107

III. CASE IN POINT: STBR

The remainder of this note will focus on the recently decided US Supreme Court case: Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.108 This case, rising through the Florida state courts and ultimately adjudicated by the Florida Supreme Court in favor of the State, was appealed by the local property owners to the United States Supreme Court.109 The Supreme Court heard oral arguments on December 2, 2009, and the Court's decision was handed down toward the end of the Court's term, in June 2010.110

While the first official petition by aggrieved property owners to review the state's plan to renourish the coastline did not occur until 2004, the seeds for this appeal to the US Supreme Court were planted in 1965, when the Florida Legislature enacted Chapter 161, Florida Statutes, titled the Beach and Shore

106. _Id._ at 19.
107. _Id._
109. _Id._ at 2600-01.
110. _See id._ at 2592.
Preservation Act (the “Act”).

A. Beach and Shore Preservation Act

In recognizing the volatility and susceptibility of Florida’s beaches, the legislature determined that “beach erosion is a serious menace to the economy and general welfare of the people of [Florida] and has advanced to emergency proportions.” The legislature further “declar[ed] that such beach restoration and nourishment projects . . . are in the public interest,” and it is “a necessary governmental responsibility to properly manage and protect Florida beaches . . . from erosion.”

Pursuant to this responsibility, this Act provided a way for both private and public entities to receive state permits to conduct coastline preservation projects. Under this statute, any additions or accretion to the uplands caused by such projects remained the property of the State.

Historically, and as is typical in most states, the common law in Florida established the Mean High Water Line ("MHWL") as the extent landward that the state could claim as public land. In other words, all submerged land as well as the beach that was periodically covered by water due to the fluctuations of the tide, up to the average high tide mark over a nineteen-year period, were public lands held in trust for all the citizens of Florida.

Any land existing inland from the MHWL was privately owned by the waterfront property owner. Because the MHWL could gradually shift inland or seaward, over many years, as the sea level rises or falls, the actual boundary between public and private land would gradually shift with the fluctuations of the water level. In 1970, the Act was amended to provide for the establishment of an Erosion Control Line ("ECL"). In areas

112. Id. § 161.088.
113. Id.
114. Id. § 161.051.
115. Id.
118. See id. § 177.28.
120. See id. at 4-5 & n.8.
proposed for a state beach renourishment permit, a completed
survey would depict where the beach restoration would occur as
well as the location of the ECL. 121 This ECL would then replace
the MHWL as the boundary between public and private land. 122

The Act was very clear to preserve any owners’ property
rights to access, use, and view as well as to boat, bathe, and fish
on water adjacent to newly created public beach. 123 The Act
protected beachfront owners’ right to view and access the water by
prohibiting the state from erecting structures on the new publicly-
owned beach, except those necessary to prevent erosion. 124
Additionally, the Act provided for the cancellation of the ECL if
the state beach renourishment plan is postponed, stalled, or not
maintained. 125 Finally, the Act recognized and provided that, if a
beach renourishment project or an ECL cannot be reasonably
accomplished without taking private property, the taking must be
made by the requesting authority through eminent domain
proceedings. 126

B. Background to STBR

Beginning in 1995, the white sandy beaches of the City of
Destin and Walton County, Florida were repeatedly decimated by
Hurricanes Opal (1995), George (1998), and Ivan (2004), and
Tropical Storm Isidore (2002). 127 Accordingly, the Florida
Department of Environmental Protection (“DEP”) placed these
Florida panhandle beaches on its list of critically eroded beaches,
and the city and county began a lengthy beach restoration process,
which included extensive studies and construction designs for
approximately seven miles of these beaches. 128 This preparation
work culminated in July of 2003 when the DEP petitioned for a
permit, through the Act, to begin physical renourishment of the

121. See id. at 7-8.
122. See FLA. STAT. ANN. § 161.191 (West 2007).
123. Id. § 161.201.
124. Id.
125. Id. § 161.211.
126. Id. § 161.141.
127. See Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d
1102, 1106 & n.4.
128. Florida Property Owners Must Allow Beach Nourishment,
ENVIRONMENT NEWS SERVICE (Sept. 30, 2008), http://www.ens-newswire.com/
ens/sep2008/2008-09-30-094.asp [hereinafter Florida Property Owners].
beaches in Destin and Walton County. A new MHWL was surveyed and in September of 2003 an ECL was officially recorded, which corresponded with the newly surveyed MHWL pursuant to the Act. Within six months, adjacent beachfront property owners, upset with the possibility of having a publicly-owned beach created between their property and the ocean, formed two non-profit groups which filed petitions for formal administrative hearings challenging the DEP’s notice of intent to issue a permit. The petitions by the two groups, Save Our Beaches and Stop the Beach Renourishment Inc., were subsequently consolidated and the groups will be referred to collectively in this note as “the property owners.” Following an administrative hearing, the administrative law judge rejected the property owners’ claims and recommended that the DEP enter its final order to issue the permit. Finding that the permit was properly issued according to the existing statutes and rules, the DEP entered its final order to issue the permit to begin the renourishment of the beach in July of 2005.

The property owners then challenged the DEP’s final order before the First District Court of Florida, claiming that the order was unconstitutional because it applied the statute in an unconstitutional manner. Specifically, the property owners claimed that the state, by establishing the new shoreline boundary at the ECL, divested oceanfront property owners of their common law littoral rights. According to the property owners, an unconstitutional taking occurred when the state became the owner of the newly-created beach resulting from the restoration efforts because the new state property (and no longer

129. Walton Cnty., 998 So. 2d at 1106.
130. Id.; FLA. STAT. ANN. § 161.191(1) (West 2007).
131. See Florida Property Owners, supra note 128.
132. Id.
133. Stop the Beach Renourishment, Inc., 998 So. 2d at 1106.
134. Id. at 1006-07.
136. BLACK’s LAW DICTIONARY 1018 (9th ed. 2009) (defining “littoral” as “relating to the coast or shore of an ocean, sea, or lake”). While the Florida District Court and Florida statutes use “riparian” broadly to describe all waterfront issues, this article will use the more precise term “littoral.”
137. Walton Cnty., 998 So. 2d at 1105-07.
the private beachfront property owner) now has (1) the rights to any future beach accretions138 and (2) direct contact with the water.139 The First District Court agreed, finding for the property owners and reversing the DEP’s final order approving the permit.140 The Court remanded the case, holding that the DEP must take the property through eminent domain proceedings if the project could not be accomplished without the taking of private property.141 In its decision, however, the First District Court certified to the Florida Supreme Court the question of whether the Act has been unconstitutionally applied.142

C. The Florida Supreme Court’s Decision

On appeal from the District Court, the Florida Supreme Court observed that while the District Court “phrased its certified question in terms of an applied challenge, the First District actually addressed a facial challenge” in its decision.143 Therefore, the Florida Supreme Court rephrased the question presented: “[o]n its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”144

Because the property owners originally claimed that their littoral property rights were unconstitutionally violated, the Florida Supreme Court began its de novo review of the case by exploring what littoral rights a beachfront property owner possesses by virtue of living adjacent to the water.145 Applying existing law, the Florida Supreme Court declared that beach front property owners “hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion...;
and (4) the right to the unobstructed view of the water."\textsuperscript{146} The Florida Supreme Court established a baseline from which to work from by acknowledging that it was established Florida law that these littoral rights are private property that cannot be taken without just compensation.\textsuperscript{147} However, the Florida Supreme Court qualified that declaration by stating that "the exact nature of these rights rarely has been described in detail."\textsuperscript{148}

1. Right to Accretions

The first of the property owners' constitutional challenges focused on the taking of the littoral right to accretions.\textsuperscript{149} The Florida Supreme Court distinguished the littoral right to accretion from the other, more established, littoral rights to access, use, and view by categorizing the right to accretions as a "contingent, future interest that only becomes a possessory interest if and when land is added to the \{private beach\} by accretion."\textsuperscript{150} While the Court did not reference any previous case law that categorizes the right to accretion as any different from any other littoral right, the Court did cite four justifications as to why the doctrine of accretion dictates that abutting landowners gain title to any accretions that do occur over time.\textsuperscript{151} These include the following: (1) the law does not concern itself with trifles; (2) he who bears the risk of erosion should also gain the benefit of accretion; (3) all property must have an owner, and in the interest of convenience, the abutting landowner should be the one to receive; and (4) to preserve the littoral right of access to the water.\textsuperscript{152} With these four reasons in mind, the Court found that the right to accretion is a "contingent right" that arises from a "rule of convenience intended to balance public and private interest by automatically allocating small amounts of gradually accreted lands to the

\textsuperscript{146} Id. (citing Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So. 2d 934, 936 (Fla. 1987); Belvedere Dev. Corp. v. Dep't of Transp. 476 So.2d 649, 651 (Fla. 1985); Brickell v. Trammell, 82 So. 221, 227 (Fla. 1919); Broward v. Mabry, 50 So. 826, 830 (Fla. 1909)).

\textsuperscript{147} Id.

\textsuperscript{148} Id. (citing Webb v. Giddens, 82 So. 2d 743, 744 (Fla. 1955) (noting that these rights "have been broadly and inexacty stated").

\textsuperscript{149} Id. at 1107.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 1114.

\textsuperscript{152} Id.
[beachfront] owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water."\textsuperscript{153}

Indeed, the Florida Supreme Court declared that the Act sufficiently nullifies the above-mentioned four bases for why abutting landowners should be given title to accretions in the first place. First, any beach restoration project approved by the Act will result in a significant addition of beach—something not trifling enough for the court to overlook.\textsuperscript{154} Second, the Act explicitly clarifies that the state gains ownership and the resultant liability of erosion and losses caused by the water, thus entitling the state to the benefits that may occur through accretions.\textsuperscript{155} Third, all property has a clear and designated owner according to the recorded ECL.\textsuperscript{156} Fourth, the beachfront owners' fundamental littoral right of access is explicitly preserved under the Act.\textsuperscript{157} The Court concluded that the Act did not unconstitutionally take any littoral right to accretions because "the common law rule of accretion, which is intended to balance private and public interests, is not implicated in the context of this Act."\textsuperscript{158}

2. Right to Contact With Water

The second of \textit{STBR}'s constitutional challenges focused on the taking of the littoral right to have the property owners' property maintain contact with the water.\textsuperscript{159} As mentioned above, the Florida Supreme Court acknowledged that \textit{access} to the water was a "core littoral right" to beachfront property owners.\textsuperscript{160} Although somewhat related to this fundamental littoral property right of access, the Florida Supreme Court declared that "under Florida common law, there is no independent right of \textit{contact} with the water."\textsuperscript{161} Instead, the Court continued, contact with the water is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 1118.
\item \textsuperscript{154} \textit{Walton Cnty.}, 998 So. 2d at 1118.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} Fla. Stat. § 161.201 (2007).
\item \textsuperscript{158} \textit{Walton Cnty.}, 998 So. 2d at 1119.
\item \textsuperscript{159} Save Our Beaches, Inc. v. Fla. Dep't. of Envtl. Prot., 27 So. 3d 48, 58 (Fla. Dist. Ct. App. 2006).
\item \textsuperscript{160} \textit{Walton Cnty.}, 998 So. 2d at 1119.
\item \textsuperscript{161} \textit{Id.} (emphasis added).
\end{itemize}
\end{footnotesize}
only “ancillary to the littoral right of access to the water” that exists to preserve the beachfront owner’s ability and right to access the water.\textsuperscript{162} The Florida Supreme Court cited numerous cases where a taking occurred because sovereign lands were used in a way that deprived water-front landowner’s ability to access the water, but acknowledged that Florida had never directly addressed whether eliminating the beachfront property owner’s contact with the water constituted a taking.\textsuperscript{163}

The Florida Supreme Court used two lines of reasoning to advocate its stance on this littoral issue. First, it again appealed to language within the Act that explicitly protected the right of the beachfront property owner to access the water, “which is the sole justification for the subsidiary right of contact.”\textsuperscript{164} The Florida Supreme Court then looked to where the Act preserves the right of ingress and egress and prevents the State from erecting any structures upon the beach seaward of the ECL except to prevent erosion.\textsuperscript{165} It concluded by reasoning that “the rationale for the ancillary right to contact is satisfied” by the Act.\textsuperscript{166}

Second, the Florida Supreme Court appealed to the practical effect of the existing and non-contended common law surrounding the traditional MHWL. The Court pointed out that the foreshore (the wet sand between the MHWL and the actual water) technically separates the private property from the water’s edge at various times during the tidal cycle.\textsuperscript{167} While this technically is the case on a daily basis, it has never been considered to infringe upon the beachfront property owner’s littoral right of access or right to contact the water.\textsuperscript{168} Before concluding its point in this matter, the Court does acknowledge that the State is not free to “unreasonably” distance the oceanfront private property from the water by “creating as much dry land between [the private]
property and the water as it pleases." Rather, there is "a point" where such a separation would materially impair the adjacent property owner's ability to access the water, thus resulting in an unconstitutional taking of a fundamental littoral right of access, not contact. The Court chose not to articulate further on what this "point" is that would effectuate a taking, leaving that matter for future cases.

Concluding by reaffirming that its holding was strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act, the Florida Supreme Court held that, on its face, the Act does not unconstitutionally deprive oceanfront property owners of littoral rights without just compensation. Similar to the common law, the Act reasonably balances "between public and private interests in the shore." Both by maintaining the beachfront property owner's ability to access the water and by nullifying the underlying reasons for rights to accretions, the Act properly and constitutionally effectuates the State's duty to protect Florida's beaches and protect private property.

D. Critique of the Florida Supreme Court's Decision

Because the Florida Supreme Court's decision was a four to two vote, there exist two dissenting opinions. The major dissenting opinion, drafted by Justice Lewis, was "substantially" agreed to by the other dissenting judge, Justice Wells. The vigorous dissent claimed that the majority "butchered" Florida property law and used "tortured logic" to create "dangerous precedent." By focusing mainly on the issue of contact with the water, the dissent points out that the Florida law defines littoral property as property that "is contiguous to, abuts, borders, adjoins, or touches water." The dissent maintains that this definition captures "the legal essence of littoral or riparian land"
and that “the land must touch the water as a condition precedent to all other riparian or littoral rights.” The dissent argues that littoral property rights consist of actual property and quotes prior precedent of the Florida Supreme Court as “littoral property rights . . . include the following vested rights: (1) the right to access to the water, including the right to have the property’s contact with the water remain intact.”

By emphatically focusing on the technical definition of how littoral property is defined and trying to emphasize that contact with the water is just as fundamental as the right to access, the dissent is guilty of focusing on the letter of the common law, while the majority chooses to focus its reasoning more on the spirit of the common law. Also, while the dissent tries to establish each littoral right as mutually exclusive, substantively isolated, and supported by past precedent, the majority chooses to take a more nuanced approach to what it believes is the varying status of an evolving corner of property right in Florida. The dissent sees contiguity with the sea as an inherent and essential nature of privately held littoral property. The dissent also contends that the Act can and should be applied by the state in a constitutional manner. Specifically, rather than creating an artificial boundary by recording the ECL, the dissent sees the better way to apply the Act would be simply to continue to use the MHWL as the boundary between private land and public domain. The dissent’s application of the statute in this manner is problematic, however, in that the state would be using public funds to restore and create additional property that will eventually be a windfall for the adjacent private property owner.

In addition to the dissent’s disapproval, there are other areas in the STBR opinion where the majority is subject to criticism. First, in its attempt to explain away the reasons why the doctrine of accretion does not apply when the Act is followed, the Court gives short shrift to some of the burdens and risks imposed upon beachfront property owners. The Court is correct in noting that

177. Id. (emphasis in original).
178. Id. at 1123 (quoting Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So. 2d 934, 936 (Fla. 1987)).
179. Id. at 1126.
180. Id. at 1127.
181. Id.
the risk of erosion is eliminated from the private property owner when the State takes ownership of the newly restored beach—but erosion is only a part of the bundle of risks beachfront property owners face. Other risks besides erosion that the landowners bear include property damage to any built structures due to flooding or severe weather due to direct exposure to the ocean. While the state will own the beach, the oceanfront property owner still has to bear these separate risks of storm surge damage to existing development.

Second, the majority posits that “the sole justification for the subsidiary right of contact” is the right to access the water.\textsuperscript{182} This shortsighted conclusion by the majority does not acknowledge other, less tangible justifications for the right to contact the water. For example, maintaining contact with the water might also inhibit an increase in the general public utilizing the beach area between private property and the water. Additionally, there may be somewhat of a subconscious ideal of having one’s property touch the water without anything in between—an ideal that is represented in the price someone is willing to pay for the property. To a lesser degree, this ideal is represented when a purchaser of property is willing to pay a premium for the lot that abuts a national forest or national park as opposed to abutting a public recreational trail.

Third, the majority finds comfort that free access to the water by the beachfront property owners will not be molested because the Act itself prevents the State from erecting structures. However, the Act includes an exception to the structure-prohibition, “except as required to prevent erosion.”\textsuperscript{183} Although this narrow exception sounds innocuous enough, there very well might be a time in the future where the State grows weary of continually expending finite financial resources to fulfill its statutory duty of continually maintaining the beach with expensive renourishing projects.\textsuperscript{184} The State may look for other, more cost-effective, ways to keep the encroaching waters at bay. In this event, the state may look to erosion-control structures that, while allowed under the statute, may inhibit to some degree the

\textsuperscript{182} Id. at 1119.
\textsuperscript{183} FLA. STAT. ANN. § 161.201 (West 2007).
\textsuperscript{184} See id. § 161.211.
accessibility the abutting beachfront property owner has to the water. Contrarily, under the traditional MHWL regime, the state may not own or control sufficient land area between the MHWL and the water to build similar erosion-control features. But then again, the state always controls any submerged land and could probably construct similar erosion-control measures regardless of how much dry land area it owns.

Finally, the majority rests much of its holding on the fact that the Act sufficiently codifies beachfront property owners’ littoral rights while the previous status quo held that “the exact nature” of these littoral rights “rarely ha[d] been described in detail.” While the exact nature of these littoral rights was still undefined, the prior common law arguably gave these littoral rights constitutional protection. Although the Florida Supreme Court never consented that these littoral rights were constitutionally protected by Florida law, the Court did feel comfortable that the Act maintained these rights by statute. This is the decision that was alleged by the property owners, in their appeal to the U.S. Supreme Court, as unconstitutionally taking their private property.

IV. THE UNITED STATES SUPREME COURT’S CONFLICTED DECISION

“After six months of undoubtedly contentious debate,” the U.S. Supreme Court’s highly anticipated final decision successfully resolved the issue presented, but failed to end the larger constitutional debate. While the participating U.S. Supreme Court Justices unanimously held that the Florida

185. See Walton Cnty., 998 So. 2d at 1111.
186. Brief of Petitioner, supra note 31, at 52.
187. The question which arises here is whether a statute-based right is sufficient to preclude the state from taking an alleged constitutionally protected common law right. I am satisfied to leave the answer to this question for another day.
188. See John D. Echeverria, Stop the Beach Renourishment: Why the Judiciary is Different, 35 VT. L. REV. 475, 475 (2010).
189. See Tony Mauro, Behind Justice Stevens’ Recusal in Florida Case, BLOG OF LEGALTIMES (Dec. 4, 2009), http://legaltimes.typepad.com/blt/2009/12/behind-justice-stevens-recusal-in-florida-case.html (As an owner of a beachfront condo in Ft. Lauderdale that was included in a beach renourishment zone similar to the one involved in the case before the Court, Justice Stevens recused himself from the case).
Supreme Court's decision did not constitute a violation of the Takings Clause, and thus rejected the alleged takings claim at issue in the case, the Supreme Court was split four to four on the more fundamental question of whether a judicial ruling can constitute a taking, thus leaving that question undecided.\textsuperscript{190}

A. The Florida Court's Decision Affirmed: No Takings Clause Violation

The Justices were unanimous in their decision that the Florida Supreme Court's decision "did not contravene the established [private] property rights," and therefore the state did not violate the Takings Clause of the Fifth Amendment.\textsuperscript{191} The Court declined to recognize that any property right was unconstitutionally taken from the beachfront property owners.\textsuperscript{192}

1. No Right to Future Accretions Taken

In coming to its conclusion that the State's decision did not unconstitutionally take any property right in future accretions, the Court first established and explained two essential processes that occur over time within Florida property law: accretion and avulsion.\textsuperscript{193} Florida property law defines accretion as any addition to dry land that "occurred gradually and imperceptibly."\textsuperscript{194} Avulsion, in contrast, occurs when "there is a 'sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.'"\textsuperscript{195} The Court noted how under Florida property law, "the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State)."\textsuperscript{196} Consequently, when a new strip of land is added to a shoreline by avulsion, the littoral

\textsuperscript{190.} Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 130 S. Ct. 2592, 2597 (2010).
\textsuperscript{191.} \textit{Id.} at 2613.
\textsuperscript{192.} \textit{Id.}
\textsuperscript{193.} \textit{Id.} at 2598.
\textsuperscript{194.} \textit{Id.}
\textsuperscript{195.} \textit{Id.} (quoting Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So. 2d 934, 936 (Fla. 1987)).
\textsuperscript{196.} \textit{Id.} at 2598 (citing \textit{Sand Key}, 512 So. 2d at 937).
property owner no longer has any rights to those accretions that may form along the newly-exposed strip of land.

The Court classified the state's renourishment project as an avulsion.197 Thus, the accretions occurring after the renourishment of the beach “no longer add to [the landowner's] property, since the property abutting the water belongs not to him but to the State.”198

The real issue in this matter, then, was whether there is an exception to this rule when State action actually causes the avulsion.199 The Court then deferred to a 1927 Florida Supreme Court case that held that even when the State causes an avulsion, any accretions forming on the newly-exposed State-owned lakebed continues to be State land.200 The Court concluded that Florida state property law clearly established that “the right to accretions [is] [] subordinate to the State's right to fill,”201 and that the Florida Supreme Court's decision was “consistent with these background principles of state property law.”202 In sum, the Court concluded that the Florida Supreme Court decision could not have “taken” this right because this right—ownership of future accretions forming on state-owned land resulting from state-caused avulsion—did not exist.203

Interestingly, the U.S. Supreme Court provided some anecdotal commentary that in regards to the property right to accretion, perhaps state-created avulsions should be treated differently from other (naturally-caused) avulsions.204 However, the Court concluded that the Takings Clause “only protects property rights as they are established under state law, not as

197. Id. at 2599.
198. Id.
199. See id. at 2611.
200. Id. (citing Martin v. Busch, 112 So. 274, 287 (Fla. 1927); Bryant v. Peppe, 238 So. 2d 836, 837-39 (Fla. 1970). In Martin, the Florida Supreme Court held that when the State of Florida drained water from a lakebed belonging to the State, thus causing land that was formerly below the mean high-water line to become dry land, that newly formed dry land continued to belong to the State. 112 So. at 287. In Bryant, the narrow strip of land that suddenly emerged from below water after a hurricane belonged to the State of Florida as well. 238 So. 2d at 837-39.
201. Id. at 2611.
202. Id. at 2611-12.
203. See id. at 2612.
204. Id.
they might have been established or ought to have been established.”

2. No Right to Maintain Contact with the Water Existed

The Court also unanimously rejected the petitioner’s claim that the State took the landowners’ littoral right to have their property continually maintain contact with the water. Contrary to the property owners’ argument, which was based on dicta in an earlier Florida decision, the Court held, as the Florida Supreme Court had held in its opinion, that this purported right was subsumed under the property owners’ continuing right of access to the water. The property owners’ ability to access the water was never taken, and the purported right to maintain contact with the water is not founded in Florida property law.

Even assuming that the property owners are correct in their argument that the Florida Supreme Court significantly changed settled state law concerning rights to accretions and contact with the water, the government taking these two littoral rights from the expansive bundle of rights a property owner possesses does not effectuate a taking under the United States Supreme Court’s precedents. Indeed, the decision by the Florida Court fails to constitute a per se taking from physical occupation of property, or by denying “all economically beneficial or productive use of [the] land.” Furthermore, even under the “ad hoc, factual” analysis that follows an alleged

205. Id.
206. Id. at 2612-13.
207. Walton Cnty., 998 So. 2d at 1112, 1119-20.
208. Stop the Beach Renourishment, Inc., 130 S. Ct. at 2612-13; see also Michael Allan Wolf, Michael Allan Wolf on Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 2010 LEXISNEXIS EMERGING ISSUES ANALYSIS 5148, at 2-3 (2010).
209. Walton Cnty., 998 So. 2d at 1119 (noting that “there is no independent right of contact with the water,” but that it “exists to preserve the upland owner's core littoral right of access to the water.”).
“interference with property rights ‘aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good,’” there exists insufficient facts to indicate sufficient harm to the property owners.\footnote{Id. at 324-25 (quoting Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).} For example, while the “beach restoration project here provides important benefits to [beachfront] owners,” the property owners have “made no attempt to demonstrate that the project would reduce the value” of their property.\footnote{See Brief for the United States, supra note 97, at 32.} Any ad hoc evaluation of what monetary value has been “taken” from these property owners would present the Court with an insufficient amount of evidence to proffer that the property “as a whole” is so burdened that the Takings Clause applies.\footnote{See Tahoe-Sierra, 535 U.S. at 327; Brief for the United States, supra note 97, at 32.}

B. The Judicial Takings Issue: The (Vigorous) Debate Continues

While Justice Scalia spoke for a unanimous Court in affirming the Florida Supreme Court’s decision that no taking had occurred, “the Court was deeply divided over the [broader] question of whether a court decision could ever effect a Fifth Amendment ‘judicial takings.’”\footnote{Wolf, supra note 208, at 4.} This disagreement resulted in a splintered decision consisting of a plurality decision of four Justices, and two concurrences consisting of two Justices each.\footnote{Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592, 2597, 2613, 2618 (2010).}

1. Opening the Door for Judicial Takings: Justice Scalia’s Plurality Opinion

Justice Scalia’s plurality opinion (joined by Chief Justice Roberts, and Justices Alito and Thomas) advocated both for declaring once and for all that a judicial decision can violate the Takings Clause and going so far as suggesting the test for when such a judicial taking occurs.\footnote{Id. at 2602; see also The Supreme Court, 2009 Term – Leading Cases, 124 Harv. L. Rev. 179, 300 (2010).} The plurality opinion reasoned that the Takings Clause “is not addressed to the action of a
specific branch or branches [of government]."221 Rather, "[i]t is concerned simply with the act [of government reclassifying what was once private property as now public property], and not with the governmental actor."222 The plurality opinion's argument continues that "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."223 Justice Scalia then cites to his own dissenting opinion in a prior case, asserting that it is "absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."224

The plurality opinion went so far as to articulate the proper test to be used when determining whether a court's decision violates the Takings Clause. It first rejected the petitioner's proposed "unpredictability test," which was derived from Justice Potter Stewart's concurring opinion in Hughes v. Washington.225 Justice Scalia declared that such an "unpredictability test" would be both too broad and too narrow.226

Rather, the plurality viewed an accurate test for a judicial taking to be "whether the property right allegedly taken was [previously] established."227 In other words, for a judicial taking to occur, "[t]here must be a shift in the law, and there must be a confiscation or taking of an established private property right

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221. Stop the Beach Renourishment, Inc., 130 S. Ct. at 2601.
222. Id. (emphasis added).
223. Id.
224. Id. (citing Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting to a denial of cert.).
225. See id. at 2610; 389 U.S. 290, 296-97 (1967).
226. Stop the Beach Renourishment, Inc., 130 S. Ct. at 2610. Justice Scalia explains this "unpredictability test" is too broad because a judicial property decision may not necessarily need not be predictable to be proper. Id. An example given is a decision that clarifies property entitlements (or lack thereof) might be difficult to predict, but that does not necessarily eliminate established property rights. Id. On the other hand, this test is too narrow because a judicial decision that eliminates established property rights, even though it was foreshadowed by dicta may nonetheless still be a taking. Id. An example in this regard is if a state court held in one case that no property owner may own more than 100 acres. Id. Then, in a second case, the state court applied that principle to hold that a complainant's 101st acre to be public property. Here, the state has taken private property, even though it might have been predictable. Id.
227. Id. at 2610.
occasioned by the shift.”228 The focus of the plurality’s proposed test for a judicial taking is not on whether the outcome is predictable, but whether there is an “established right” of private property.229 The plurality’s new iteration of a test for judicial takings, while providing additional dicta for the legal community to consider in takings cases, does attempt to advance a clearer test of when a court goes too far in modifying property law. The question remains, however, of what sufficiently qualifies a property right as “established?” Certainly, if the right was statutorily prescribed, one would be confident that such a property right would be deemed “established.” However, what about prior case law or everyday practice or custom?

2. A Restrained Approach: Justice Breyer’s Concurrence

Justice Breyer’s concurrence (joined by Justice Ginsburg) agreed with the plurality in the limited holding that the Florida Supreme Court’s decision in STBR did not constitute a Fifth Amendment violation.230 However, anchoring his concurrence in a plea for judicial restraint,231 Justice Breyer declined to engage in the judicial taking debate, content rather with classifying the debate as “questions of constitutional law [] better left for another day.”232 While he neither agreed nor disagreed with the plurality’s conclusions,233 Justice Breyer clearly expressed a cautionary approach on the issue, expressing his wariness to “invite a host of federal takings claims . . . in matters that are primarily the subject of state law.”234 This in turn, he suggests, would open the door for “the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.”235

228. Wolf, supra note 208, at 6.
229. Barros, supra note 7 (citation omitted).
230. Stop the Beach Renourishment, Inc., 2592 S. Ct. at 2618 (Breyer, J., concurring).
232. Stop the Beach Renourishment, Inc., 2592 S. Ct. at 2618 (Breyer, J., concurring).
233. Id. (“I do not claim that all of these conclusions are unsound. I do not know.”).
234. Id. at 2618-19.
235. Id. at 2619.
3. The Due Process Possibility: Justice Kennedy’s Concurrence

Justice Kennedy’s concurrence (joined by Justice Sotomayor) also agreed with the plurality in deciding that no Fifth Amendment violation occurred. Then, after agreeing with Justice Breyer’s concurrence that this case did not require the Court to go so far as to determine whether a judicial taking can exist, Justice Kennedy went ahead and offered a series of arguments debunking the judicial takings theory. He concluded by purporting a separate, distinct, (and perhaps more appropriate) Constitutional argument in which an aggrieved property owner may seek to invalidate a court’s decision—the Due Process Clause.

Justice Kennedy’s main objection to the idea of a judicial taking is that the taking power is vested “for the political branches—the legislature and the executive—not the courts.” He argued that these political branches of government are unique in their exercising of the power of eminent domain. The executive and legislative branches specifically have the responsibility of “select[ing] what property to condemn,” and determining whether a “taking makes financial sense” for the community. Justice Kennedy also undercuts the judicial taking theory by suggesting that the original drafters of the Takings Clause did not envision judicial takings.

While it is arguable that the Founders did not foresee the expansion of the Takings Clause to include judicial takings, that same historical argument could have been made to curb the well-established doctrine of regulatory takings occurring through legislative statute or executive implementation. Obviously, this historical restriction did not impede the Supreme Court from properly interpreting the text of the Constitution to cover the ever-changing circumstances and society in which we now live.

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236. Id. at 2613 (Kennedy, J., concurring).
237. Id.
238. See id. at 2614.
239. Id.
240. Id.
241. Id.
242. Id. at 2616.
Furthermore, Justice Kennedy explained that the Takings Clause "implicitly recognizes a governmental power while placing limits upon that power."244 Therefore, if the Court were to find that judicial takings exist, "it would presuppose that a judicial decision eliminating established property rights is otherwise constitutional so long as the State compensates the aggrieved property owners."245 His concurrence asserted that there is no clear precedent for this possibility.246 Finally, Justice Kennedy puts forth the theory that establishing the judicial takings theory may have the unintended consequence of encouraging lower courts to make more sweeping property rulings.247 In other words, Justice Kennedy postulates that establishing a judicial takings doctrine in order to constrain judges, would actually empower them with the assurance that any changes they make in property rights can be deemed as fair and proper essentially because just compensation will be paid.248

Justice Kennedy also asserts that the Due Process Clause, in both its substantive and procedural aspects, is already a "central limitation" on the judicial power generally.249 Therefore, it is "natural" to use the Due Process Clause, rather than the Takings Clause, as a limit on state court property rulings.250 Furthermore, he suggests that the "Court would be on strong footing" if it ruled that a judicial decision that changes legitimate and established property rights is "arbitrary or irrational," and thus unconstitutional, under the Due Process Clause.251

C. Additional Public Policy Reasons to Affirm

While the U.S. Supreme Court's analysis was narrowly focused on how the two property rights allegedly taken by the Florida court's decision never actually existed as independent

244. Stop the Beach Renourishment, Inc., 130 S. Ct. at 2614 (Kennedy, J., concurring).
245. Id.
246. Id.
247. Id. at 2616.
248. Id.
249. Id. at 2614.
250. Id.
251. Id. at 2615 (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005)).
property rights, other, more policy-oriented justifications exist as to why the Supreme Court's decision was both correct and essential. These two additional policy justifications include the public trust doctrine and the respective state's duty to protect it citizenry from coastal hazards.

1. Public Trust Doctrine

The public trust doctrine is a centuries-old body of common law that holds that the sovereign state owns the shore as well as land below navigable waterways in a special capacity for the use and benefit of society generally.\textsuperscript{252} Tracing this doctrine's history to Roman law, the Institutes of Justinian provided that "by the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea."\textsuperscript{253} The United States adopted the public trust doctrine as part of the English common law.\textsuperscript{254} With the United States Supreme Court's approval,\textsuperscript{255} many state courts have evolved the doctrine to reflect the public's concern for recreation, environmental, and ecological protection, and the preservation of scenic beauty.\textsuperscript{256} Notably, this doctrine has been specifically safeguarded in article ten, section eleven of the Florida Constitution.\textsuperscript{257} Therefore, Florida has constitutionally recognized the rights and interests of both the beachfront property owners as well as the public in general in regards to littoral property law.\textsuperscript{258} If the state of Florida was denied the ability to engage in beach restoration, not only will the

\begin{itemize}
\item \textsuperscript{252} Christie & Hildreth, supra note 23, at 19.
\item \textsuperscript{253} Id. (quoting J. Inst. 2.1.pr).
\item \textsuperscript{254} See Shively v. Bowly, 152 U.S. 1, 57-58 (1894).
\item \textsuperscript{255} Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988).
\item \textsuperscript{257} Fla. Const. art. X, § 11 ("The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.").
\item \textsuperscript{258} Brief of Amicus Curiae the Florida Shore and Beach Preservation Ass'n, the Florida Ass'n of Counties, and the Florida League of Cities in Support of Respondents at 22, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2529 (2009) (No. 08-1151).
\end{itemize}
beachfront property owners' interests be hurt through increased property damage, but the citizens of Florida "will invariably lose rights guaranteed them under the public trust . . . doctrine[] as the beach continues to erode."259

2. State's Duty and Interest to Protect the Coastline and Coastline Development

The State of Florida has a constitutional duty "to conserve and protect its natural resources and scenic beauty."260 The Florida Constitution declares that "[a]dequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."261 For the simple reason that a reversal of the state court's decision will stifle the state's attempt to follow through with its constitutional mandate to protect its citizenry, the U.S. Supreme Court's decision to affirm was correct. The following policy reasons may be the most obvious—but also may be the most persuasive as well.

It is within the best interest for the State of Florida, like every other coastal state, to do all that it can to protect and preserve the environmental, economic, and societal benefits that are derived by the coast. Specifically along the Florida shore, the sea level is rising one inch every eleven to fourteen years.262 Over 320 miles of sandy beaches—about forty percent of Florida beaches—are eroding enough to threaten existing developments and recreation areas.263 In 2006, Florida's coastal economy generated almost $562 billion, or eighty-six percent of the state gross domestic product.264 Tourism is essential to the overall economy in Florida: in 2005, nearly eighty-six million tourists visited Florida, "making it one of the most popular travel destinations in the world."265 Clearly, Florida's 825 miles of

259. Id.
260. FLA. CONST. art. II § 7(a).
261. Id.
263. Id.
265. Id. at 15.
fragile, sandy white beaches are one of the major contributors to the state's overall economy and well-being. If the State is thwarted in taking prudent and equitable steps in modifying its own property law regarding coastline management, the State will be severely handicapped in its sovereign Constitutional duty to protect and provide for the general health and welfare of its citizens.

Finally, this decision by the U.S. Supreme Court will have lasting effects, not just on Florida but, on all coastal states' affirmative attempts to protect themselves from the potentially disastrous effects of climate change and the sea level rise. The Federal Environmental Protection Agency has noted that nationwide, about 5,000 square miles of dry land are within two feet of high tide. As such, a two-foot rise in sea level would eliminate approximately 10,000 square miles of land—an area equal to the combined size of Massachusetts and Delaware. The coasts serve as home to over half of our nation's population, as fifty-three percent of Americans live in coastal counties. Economically, coastal counties produce more than forty percent of our nation's economic output and coastal activities contributed over $1 trillion, or one-tenth, of the nation's GDP in the year 2000.

Thus, if coastal states are so severely limited in their efforts to systematically address these environmental coastal problems due to the inability to establish necessary and practical property laws, then these coastal states will fail in their duty to protect their citizenry and our nation's most vibrant resources. This is precisely why our Founders established the federalist legal regime we have today—to allow for states to determine for themselves what laws will uniquely benefit their citizens and contribute to the well-being and strength of our country as a whole.

267. Id.
268. Brief of Coastal States Organization, supra note 14, at 5.
269. Id. at 6.
270. Id. at 7.
V. THE FUTURE OF THE JUDICIAL TAKINGS JURISPRUDENCE

STBR apparently did not contain the specific facts necessary to compel the U.S. Supreme Court to directly address whether the judicial takings theory is anything more than just that: a theory. Perhaps some future case will present the issue more directly and thus demand from the Court a decision determining this theory's existence in our modern legal landscape. That being the case, six of the nine Justices on the Court indicated that state judicial decisions regarding property rights were suspect of judicial overreaching of some sort, whether under the Takings Clause or the Due Process Clause. In this way, four justices plus two justices might add up to an effective strategy for a narrow class of property owners who can properly demonstrate how their established property rights were taken by the judicial branch.271

A. An Invitation for Future Litigation

While the big question of whether there can ever be a judicial taking is still left open, STBR can also been seen as an open invitation to other aggrieved litigants to pursue what they see as a judicial taking claim. For example, the plurality suggests that a litigant who loses before a state supreme court can raise a judicial takings challenge only through a certiorari petition to the U.S. Supreme Court.272 However, the plurality goes on to suggest that property owners who were not a party to the original litigation may challenge the state supreme court's decision as a judicial taking in lower federal courts.273 These hypotheticals posed by the majority certainly seem to invite aggrieved property owners to either bring certiorari petitions to the U.S. Supreme Court or a lower federal court, depending on their circumstances. While not binding, the invitation by the plurality opinion, combined with the lack of any clear guidance on any of these issues from the Court, suggests that there may be an increase of appellate litigation regarding the judicial takings issue.274

For example, since STBR's June 2010 decision, there have

271. Wolf, supra note 208, at 6-7.
273. Id.
been at least two other similarly-situated cases that have been filed for certiorari with the U.S. Supreme Court. The first is a case from Hawaii where the state appellate court held that a state statute constituted a taking in the year it was enacted but was not a taking of "future accretions."\textsuperscript{275} In the other case, the Montana State Supreme Court held that riverbeds, thought to be in private ownership or owned by the federal government, are actually owned by the state.\textsuperscript{276} As the Court reviews these petitions, it will need to look at the reasonableness of the state court decisions and the state court's interpretation of its own state law. For any judicial taking certiorari petition to be granted in the future, it likely will need to be a case that contains the ingredients of a clear departure from "established" state law, adverse consequences for the property owner, and an inequitable result.

B. The Essentiality of Continued Deference to State Law

While the Justices of the U.S. Supreme Court disagreed vehemently amongst themselves regarding the reality of a judicial taking doctrine, the Court's decision on that matter is not as important as is the holding that the states are "the ultimate expositors of state law" and that they have the authority to interpret state law in a way that will allow them to address the changing circumstances of their respective states.\textsuperscript{277} This being the case, it is imperative that the vast majority of state court decisions will and should be treated with the proper respect and deference as currently exists in our legal structure.\textsuperscript{278} That the


\textsuperscript{276} PPL Montana, LLC v. Montana, 229 P.3d 421, 449 (Mont. 2010). On August 12, 2010, the cert petition to the U.S. Supreme Court was filed. On November 1, 2010, the U.S. Supreme Court invited the Office of Solicitor General to provide an Amicus Brief regarding the controversy. PPL Montana, LLC v. Montana, 131 S. Ct. 552, 552 (2010).


\textsuperscript{278} Stop the Beach Renourishment, Inc., 130 S. Ct. at 2619 (Breyer, J., Concurring) (where Justice Breyer warned against the possibility that "federal judges would play a major role in the shaping of ... state property law"). \textit{See also id.}, 130 S. Ct. at 2609-10 n.9 (where Justice Scalia assures Justice Breyer that the plurality's decision guards against that possibility: "[t]he test we have adopted ... contains within itself a considerable degree of
Court's decision upholds this principle\textsuperscript{279} is illustrated by the fact that the second sentence of the entire opinion upholds the states' ability to manage their coastlines according to their respective laws: "[g]enerally speaking, state law defines property interests, including property rights in navigable water and the lands underneath them."\textsuperscript{280}

Over a decade ago, Justice Kennedy explained that our legal system preserves the independent sovereign status of the states by "reserv[ing] to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."\textsuperscript{281} As has been mentioned, the ability for state courts to interpret and evolve their own property common law is essential in our federalist society.

In addition to Justice Kennedy's Due Process proposal in \textit{STBR}, the United States Supreme Court has previously embraced a theory that would allow the Court to review aggrieved property owners without having to adopt a judicial takings theory. In \textit{Howlett v. Rose}, the Court acknowledged that it has "long held . . . an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground [that has] 'fair or substantial support' in state

deference to state courts. A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court."\textsuperscript{282}

\textsuperscript{279.} See Dwight Merriam, \textit{Beach Decision Draws No New Line in Sand}, \textsc{Conn. Law Trib.}, June 28, 2010, http://www.ctlawtribune.com/getarticle.aspx?id=37566 ("The winners here include the states because the Court has shown deference to the common law of Florida."). \textsuperscript{280.} See also Julia B. Wyman, \textit{In States We Trust: The Importance of the Preservation of the Public Trust Doctrine in the Wake of Climate Change}, 35 \textsc{Vt. L. Rev.} 507, 514 (2010) ("[T]his decision is a step towards ensuring that each coastal state, commonwealth, and territory will be able to meet its longstanding responsibility to its citizens and the nation as a whole.").

\textsuperscript{281.} \textit{Stop the Beach Renourishment, Inc.}, 130 S. Ct. at 2597 (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).

\textsuperscript{282.} \textit{Alden v. Maine}, 527 U.S. 706, 714 (1999) (quoting \textsc{The Federalist} No. 39, at 245 (James Madison) (C. Rossiter ed., 1961)).
law.”282 The key inquiry in this “fair and substantial test” is whether, considering all the relevant facts, the decision of the state court was purposely “designed to ‘evade’ or ‘subvert’ a federal constitutional right.”283 This test addresses the basic concern the property owners raise in this case and allows the Court to use a properly “highly deferential review” that is “consistent with the principles that the state courts have the final word on state law.”284

While the Court in deciding this case did not specifically promulgate a rule articulating that state court rulings on property issues would be reviewed with deference, it strongly suggested this would be the case.285 In examining the alleged property rights of future accretions and direct contact with the water, the Court based its decision on technical readings and analysis of the existing common law, not on the sympathetic view of the reasonable expectation of landowners. In this way, the Court evidenced that state action would be treated deferentially while the reasonable expectations of landowners would not.286

However, some commentators conclude that the Court’s holding in STBR may actually undermine this well-established authority of state courts to determine the scope of their own State’s property laws. The argument is as follows: if a judicial takings doctrine is established, it would encourage any dissatisfied litigants to appeal and argue that the state court unconstitutionally took private property anytime a state court issues a decision that could in any way be seen as departing from prior holdings. It is argued that this would subject a wide range of state court holdings to unwarranted and unwanted federal review, thus providing for “unprecedented interference with state court authority.”287

That being said, a pivotal statement, agreed to by all eight Justices, weighs heavily on the side of continued deference to state

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283. Brief for the American Planning Ass’n, supra note 43, at 33 (quoting Fox River Paper Co. v. R.R. Comm’n of Wis., 274 U.S. 651, 655 (1927)).
284. Id.
286. Id. at 502.
courts: "[the Takings Clause only protects rights as they are established under state law, not as they might have been established or ought to have been established." 288 This sentence acknowledges the pivotal role state law still holds in property rights.

C. Judicial Takings Unlikely to Be Recognized in the Near Future

Reading the opinions of the various justices, it is fair to deduce that when the Court received the petition for writ of certiorari, the justices in the plurality saw this case as an opportunity to at least expand on the judicial takings theory, if not establish this theory as doctrine.289 In fact, one legal commentator suggested that Justice Scalia "has been itching for a judicial takings claim since the Court denied certiorari in Stevens v. Cannon Beach."290 In order for a petition for writ to be granted, the traditional "rule of four" practice allows four of the nine justices to grant a writ of certiorari, thus preventing a majority of the Court from controlling the Court's docket.291 While this practice is not required by the Constitution, any law, or even the Supreme Court's own published rules, it has been the custom since the Court was given discretion over which appeals to hear by the Judiciary Act of 1925.292 Thus, it can be deduced that at least the four justices in the plurality voted to grant the petition for writ, with the hope that they could convince at least one of their colleagues of the validity of their viewpoint.

However, in the twelve months following the writ being granted, the plurality was unable to obtain a fifth vote for their side, most likely a vote from Justice Kennedy.293 This perception is supported by the selection of Justice Scalia to write the Court's opinion, his "vilification" of Justice Kennedy and Justice

288. Wyman, supra note 279, at 514.
290. Merriam, supra note 279.
291. Henry T. Scott, Burkean Minimalism and the Roberts Court's Docket, 6 GEO. J.L. & PUB. POL'Y 753, 769 (2008) ("Unshackled from a caseload dominated by mandatory Appeals, the Act established the so-called 'Rule of Four' for granting certiorari.").
292. Id.
293. Oldehoff, supra note 290, at 19.
Kennedy's explanation for not joining the opinion. While Justice Scalia recruited a popular tongue-twister and a classic children's novel to pass judgment on Justice Breyer's concurrence, his sharpest criticism was reserved for Justice Kennedy. Justice Scalia not only characterized that Justice Kennedy's concurrence as "Orwellian," he also listed where he believed Justice Kennedy's previous decisions were in conflict with his present concurrence in STBR—thus accusing him of "Lochner-izing." As none of these statements were particularly gentle, one gets the sense that the discussions in chambers over this decision were conducted with considerable discord. In light of the criticism leveled at their colleagues, and the tenor of the opinion, it is very likely the Justices in the plurality saw as unlikely the Court recognizing judicial takings anytime in the

294. Id.
295. In his response to Justice Breyer's argument that there was no need to address the underlying judicial takings issue, Justice Scalia worked in a well-known tongue twister into the plurality opinion (the author of which probably never thought it a U.S. in Supreme Court opinion): "Justice Breyer must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the "unnecessary" constitutional question whether there is such a thing as a judicial taking." Stop the Beach Renourishment Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2603 (2009).
296. Justice Scalia describes Justice Breyer's approach to deciding this case as a "Queen-of-Hearts approach" that "simply advocates resolving this case without establishing the precise standard under which a party wins or loses." Id. at 2604 (emphasis and internal quotations omitted). This reference is a play on the Queen of Hearts character portrayed in the 1865 children's novel Alice in Wonderland, "who was guided more by whim than by anything else." Fasano, supra note 285, at 501.
297. Justice Scalia suggested that Justice Kennedy's concurrence provided an aggrieved property owner "the Orwellian explanation: 'The court did not take your property. Because it is neither politically accountable nor competent to make such a decision, it cannot take property.'" Stop the Beach Renourishment, Inc., 130 S. Ct. at 2605.
298. Oldehoff, supra note 290, at 21 n.62 ("The term 'Lochner-izing' derives its name from Lochner v. New York, 198 U.S. 45 (1905), when the U.S. Supreme Court struck down a maximum hour law of the State of New York. The court's decision has been characterized by subsequent constitutional scholars as the poster child for judicial activism under the guise of the Due Process Clause.").
299. Fasano, supra note 285, at 501.
nearly future.300 In any event, the significant divisiveness existing regarding the issue indicates it is unlikely to be resolved in the near future by the current makeup of the Court.301

VI. CONCLUSION

If nothing else, the U. S. Supreme Court’s attempt at addressing the unique and complex issue of Constitutional law moved the conversation on judicial takings to a new level. This issue of judicial takings will grow only more pressing as coastal states try to address climate change and the inherent coastal environmental and economic impacts that come with it. Perhaps the Supreme Court recognized the opportunity to provide some needed clarity and predictability on the judicial takings issue. Whether or not this clarity or predictability was accomplished with a plurality opinion and two concurrences, none of which agreed, will be seen by subsequent judicial takings litigation.

This case before the U.S. Supreme Court involved a very few number of beachfront property owners who protested the state from spending tax dollars in restoring and improving the eroded beach adjacent to their property. They claimed that by doing this, the state unconstitutionally took what they believed was their right to receive future accretions to their property and their right to have their property be bordered by the water. While all the other littoral and property rights pertaining to their property are being strictly preserved, they wanted to stop the state from protecting the citizens generally from the many dangers associated with climate change—including sea level rise and increased ferocity and number of hurricanes.302 Fundamentally, no public policy should infringe upon any fundamental constitutional right, regardless of how pressing the policy may seem. However, the argument that property was unconstitutionally taken in this case amounts to nothing more than a futile legal exercise that is grasping at straws in its attempt to fabricate a showing that a taking occurred. The U.S. Supreme Court here, therefore, had the opportunity to “preserve and uphold one of the most basic rights and responsibilities of

300. Oldehoff, supra note 290, at 20.
301. Fasano, supra note 285, at 501.
sovereign states: to protect their citizens, public welfare, and sovereign resources they manage." As such, it did well in affirming the Florida Supreme Court's holding in *STBR* and by so doing preserved states' ability to protect their citizenry individually, and our nation as a whole.

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303. *Id.* at 38.