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Stop the Beach Renourishment: Why Judicial Takings May Have Meant Taking a Little Too Much

*Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*¹

I. INTRODUCTION

Stop the Beach Renourishment started as a seemingly innocent petition by Destin, Florida and Walton County, Florida requesting the state repair eroded and damaged beaches along the shorelines of Destin and Walton County in accordance with Florida's Beach and Shore Preservation Act. However, private property owners in Destin and Walton County saw those petitions as a threat to their property rights; specifically, a way for the government to turn their private beaches into public sands and their beachfront property into beach-adjacent property. The Florida Supreme Court held the Act was not in violation of the Takings Clause because the rights the property owners asserted never actually existed. In their appeal to the U.S. Supreme Court, the property owners claimed that the Florida Supreme Court had effected a judicial taking. The concept of judicial takings had been a hotly debated issue even before *Stop the Beach Renourishment*, and with the Court's split decision as to the need for the doctrine, the debate still rages on.

II. FACTS AND HOLDING

Hurricane Opal wreaked havoc on the Gulf of Mexico in 1995, causing severe damage to many Florida beaches. As a result of that damage, many of the beaches were placed on the Florida Department of Environmental Protection's ("FDEP") critically-eroded beaches list.² The shoreline was further damaged by three hurricanes from 1998 through

¹ 130 S. Ct. 2592 (2010).

² Melanie King, *Florida's Beach Renourishment Act Upheld*, 7:4 SANDBAR 6, 6 (2009), available at <http://nsglc.olemiss.edu/SandBar%20PDF/sandbar7.4.pdf>.

2004.³ In order to repair damage to the 6.9 miles of the hurricane-damaged beach within their jurisdiction, the city of Destin and Walton County filed an “Application for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands on July 30, 2003”⁴ with the FDEP to deposit approximately seventy-five feet of dredged sand along the damaged area that had been hit by the hurricanes in accordance with Florida’s Beach and Shore Preservation Act (“Act”).⁵ The permit application recommended the project sand be dredged from an “ebb shoal⁶ borrow area south of East Pass in . . . Okaloosa County”⁷ using one of two proposed methods: a cutter head dredge⁸ or a hopper dredge.⁹ The sand would be placed on the damaged beachfront, as per specific design plans set forth by Destin and Walton County, and the beachfront would be repaired “usually at a pace of about 300 to 500 feet a day.”¹⁰ Repairs made at that pace would put the project on track for completion in three months if the restoration work were performed every day.¹¹ The seventy-five feet of sand would become an erosion control line and would be

³ Hurricane Georges (1998), Tropical Storm Isidore (2002), and Hurricane Ivan (2004) further eroded the Destin and Walton County shoreline after Hurricane Opal’s destruction landed the beaches on the FDEP’s list of critically-eroded beaches. Walton County v. Stop Beach Renourishment, Inc., 998 So. 2d 1102, 1106 n.4 (Fla. 2008).

⁴ *Walton County*, 998 So. 2d at 1106.

⁵ *Stop the Beach Renourishment v. Fla. Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2599–600 (2010) (citing *Walton County*, 998 So. 2d at 1106).

⁶ Ebb shoals “characteristically contain large volumes of beach quality sand, which in the absence of [tidal currents] would have been deposited on the adjacent beaches [naturally].” NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION COASTAL SERVICES CENTER, BEACH NOURISHMENT: A GUIDE FOR LOCAL GOVERNMENT OFFICIALS, <http://www.csc.noaa.gov/beachnourishment/html/geo/channels.htm> (last visited Aug. 26, 2011).

⁷ *Walton County*, 998 So. 2d at 1106.

⁸ A cutter head dredge “disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area.” *Id.*

⁹ A hopper dredge “fills itself [with sand from the borrow area] and is moved to the project site.” *Id.*

¹⁰ *Id.*

¹¹ If the work were performed at a pace of 400 feet per day over a stretch of 6.9 miles (36,432 feet), the restoration would take approximately ninety-one days to complete.

placed “seaward of the mean high-water line.”¹² The new boundary between privately owned beach and publicly owned beach would be the newly constructed erosion control line, cutting off the private landowners’ rights to future accretions¹³ and relictions¹⁴ of the beach where the land abuts the water because that land would then be public property. The right to receive accretions and relictions (collectively “accretions”) are specific common law property rights held by beachfront property owners in Florida, separate from those rights to Florida beaches enjoyed by the public.¹⁵

The petitioner in this case was Stop the Beach Renourishment, Inc. (“Members”), a nonprofit organization made up of six littoral¹⁶ property owners whose land abutted the project area.¹⁷ The Members filed two petitions for formal administrative hearings, challenging the proposed project based on the issuance of the permit and raising constitutionality issues regarding the Act.¹⁸ The Members’ administrative challenges were broken into two separate proceedings.¹⁹ The administrative hearing discussed the permit challenge, and the constitutional claims were deferred for state court determination.²⁰ After the administrative hearing on the permit challenge, the administrative judge recommended the permits be issued,²¹ and the FDEP approved Destin’s and Walton County’s permits.²²

¹² Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot., 130 S. Ct. 2592, 2600 (2010).

¹³ Accretions are the addition of deposits of sand, sediment or other natural material to waterfront land. *Id.* at 2598.

¹⁴ Relictions are areas where the water recedes to uncover previously submerged land, making it part of the dry beach. *Id.*

¹⁵ *Id.* (citing Thiesen v. Gulf, Fla. & Ala. Ry. Co., 75 Fla. 28, 58–59 (1918)).

¹⁶ “‘Littoral’ means abutting an ocean, sea, or lake.” *Id.* at n.1.

¹⁷ Walton County v. Stop Beach Renourishment, Inc., 998 So.2d 1102, 1106 n.5 (Fla. 2008).

¹⁸ *Id.* at 1106.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Stop the Beach Renourishment Inc. v. Fla. Dep’t of Env’tl. Prot., 130 S. Ct. 2592, 2600 (2010).

The Members then challenged the approval of the restoration permits in state court based on their constitutional claims.²³ The Members asserted the permits were issued pursuant to an unconstitutional statute²⁴ that places the shoreline boundary at the erosion control line.²⁵ The Members claimed that fixing the new boundary at the erosion control line stripped Members of their rights to future accretions.²⁶ The District Court of Appeals of Florida, First District found the approval of the permits “eliminated two of the Members’ littoral rights: (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact.”²⁷

The First District Court of Appeals held this to be an unconstitutional taking that unreasonably infringed upon riparian rights, specifically the property owners’ common law property rights to accretions and rights to contact with the water.²⁸ The infringement required a showing by the local governments that the local governments owned or had a “property interest in the upland property adjacent to the project site” in order to comply with the Act.²⁹ The court set aside the FDEP’s approval of the project permits and remanded in order for the local governments to show that they either owned or had a property interest in the upland property as required by the Florida Administrative Code.³⁰ Then the court certified to the Florida Supreme Court the following question: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”³¹

The Florida Supreme Court answered that question in the negative, quashing the First District’s remand and concluding that the doctrine of

²³ *Id.*

²⁴ King, *supra* note 2, at 6 (citing FLA. STAT. § 161.191(1)).

²⁵ King, *supra* note 2, at 6.

²⁶ *Stop the Beach Renourishment*, 130 S. Ct. at 2600.

²⁷ *Id.* (citing *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 57 (Fla. Dist. Ct. App. 2006)).

²⁸ King, *supra* note 2, at 7.

²⁹ *Id.* (citing FLA. ADMIN. CODE r. 18-21.004(3)(b) (2009)).

³⁰ *Stop the Beach Renourishment*, 130 S. Ct. at 2600 (citing *Save Our Beaches*, 27 So. 3d at 60).

³¹ *Id.* (citing *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008)).

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avulsion³² “permitted the State to reclaim the restored beach on behalf of the public.”³³ The court found that Hurricane Opal and the subsequent storms were avulsive events.³⁴ The State was allowed to restore the storm-damaged beach under the Act because under established Florida common law, the State is permitted to repair tidelands owned by the State below the mean high water line removed by hurricanes.³⁵

The Florida Supreme Court also deemed the right to accretions as a future contingent interest and held that littoral property owners do not have a right of contact with water “independent of the littoral right of access, which the Act does not infringe” because all littoral rights are preserved by the Act except for the rights to accretions.³⁶ The Members sought rehearing based upon the assertion that the Florida Supreme Court’s decision itself resulted in an unconstitutional taking of the Members’ littoral rights, and the request for rehearing was denied.³⁷ According to the Florida Supreme Court, the littoral property right to accretions “was . . . subordinate to the State’s right to fill” and repair the eroded beaches, and therefore there was no taking.³⁸

III. LEGAL BACKGROUND

A. *Florida Common Law*

Under Florida state property law, “the State owns, in trust for the public, the land permanently submerged beneath navigable waters and . . . the land between the low-tide line and the mean high-water

³² Avulsion is a sudden or perceptible loss of or addition to land by the action of the water. *Bd. of Tr. of the Internal Improvement Trust Fund v. Sand Key Assoc.*, 512 So. 2d 934, 936 (Fla. 1987).

³³ *Stop the Beach Renourishment*, 130 S. Ct. at 2600. (citing *Walton County*, 998 So. 2d at 1116–18).

³⁴ *King*, *supra* note 2, at 7–8.

³⁵ *Id.*

³⁶ *Stop the Beach Renourishment*, 130 S. Ct. at 2600 (citing *Walton County*, 998 So. 2d at 1112, 1119–20).

³⁷ *Id.* at 2600–01.

³⁸ *Id.* at 2611.

line.”³⁹ Therefore, the high-water line is the boundary between private littoral⁴⁰ property and public land.⁴¹ The State has a duty to protect publicly held land under the public trust doctrine.⁴² The littoral property owners have property rights distinct from those of the public, including “the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions⁴³ of the littoral property.”⁴⁴

In order to be deemed an accretion, an addition to littoral property (which would be dry beachfront) must occur so slowly that it is unnoticeable to the naked eye.⁴⁵ However, 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,” the change is called an avulsion.⁴⁶ The difference between accretion and avulsion is the length of time in which the addition to or retraction of land occurs. Florida common law delineates that the beachfront property “owner automatically takes title to dry land added to his property by accretion,” but has no claim to land that has been added through avulsion; the newly-dry land “continues to belong to the owner of the seabed (usually the State).”⁴⁷ No matter the effect of the avulsion (an addition to the beachfront, or an addition to the seabed), the property boundary between privately-owned beachfront and state-owned public land continues to be the mean high-water line, which was in place before the avulsion

³⁹ *Id.* at 2598. The mean high-water line is “the average reach of high tide over the preceding 19 years.” *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2598.

⁴² King, *supra* note 2, at 6.

⁴³ *Stop the Beach Renourishment*, 130 S. Ct. at 2598. The right to accretions and relictions are pivotal issues in the present case. “Accretions are additions of [sand, sediment, or other deposits] to waterfront land; relictions are lands once covered by water that become dry when the water recedes.” *Id.* For purposes of this case, the Court refers to accretions and relictions collectively as “accretions.” *Id.*

⁴⁴ *Id.* (citing *Thiesen v. Gulf, Fla. & Al. Ry. Co.*, 75 Fla. 28, 58–59 (1918)).

⁴⁵ *Id.* (citing *Bd. of Tr. of the Internal Improvement Trust Fund v. Sand Key Assoc.*, 512 So. 2d 934, 936 (Fla. 1987)).

⁴⁶ *Id.* (citing *Sand Key*, 512 So. 2d at 936).

⁴⁷ *Id.*

occurred.⁴⁸ Therefore, when previously submerged land becomes dry and is added to the beachfront through avulsion, the State continues to own that land as if it were still the seabed, and all future accretions to the newly exposed land belong to the state, the owner of the land that now abuts the water.⁴⁹

B. *The Florida Beach and Shore Preservation Act*

Florida's Beach and Shore Preservation Act,⁵⁰ passed in 1961, establishes procedures for projects designed to repair and maintain the restoration of eroded beaches in Florida by depositing once-submerged sand dredged seaward from the eroded and damaged beachfronts onto those damaged beachfronts.⁵¹ The Act declares restoration and protection of Florida beaches touching the Atlantic Ocean, Gulf of Mexico and Straits of Florida a "necessary governmental responsibility . . . because beach erosion is a serious menace to the economy and general welfare of the people of [Florida] and has advanced to emergency proportions."⁵²

In order to receive the funds and permits necessary to repair their beaches, local governments have to apply to the FDEP.⁵³ The Board of Trustees of the Internal Improvement Trust Fund owns Florida's submerged lands, so if a restoration project undertakes to place a fill on any areas under water, the Board must specifically authorize those plans in order for the restoration to be carried out.⁵⁴ If dredging the submerged land to repair the eroded beaches would "unreasonably infringe on riparian rights," the permits will not be issued unless the local government owns or has some property interest in the upland property directly next to the restoration site.⁵⁵

⁴⁸ *Id.* at 2599.

⁴⁹ *Id.*

⁵⁰ FLA. STAT. §§ 161.011-.45 (2007).

⁵¹ *See id.*

⁵² FLA. STAT. § 161.088 (2007).

⁵³ *Stop the Beach Renourishment*, 130 S. Ct. at 2599 (citing FLA. STAT. §§ 161.101(1), 161.041(1) (2007)).

⁵⁴ FLA. STAT. §§ 253.12(1), 253.77(1) (2007).

⁵⁵ *Stop the Beach Renourishment*, 130 S. Ct. at 2599–600 (citing FLA. ADMIN. CODE r. 18-21.004(3)(b)–(c) (2009)).

“[When] a local government applies to the FDEP for [a restoration permit and] funding for beach restoration, a shoreline survey is conducted to determine the [mean high-water line] for the [restoration] area.”⁵⁶ The mean high water line is the original boundary between public and private land before the restoration project begins.⁵⁷ “The location of the [erosion control line] is based on the [mean high water line], the amount of erosion or avulsion, and protection of ownership of upland property.”⁵⁸

After a beach restoration plan is approved, the Board sets the erosion control line.⁵⁹ The erosion control line then becomes the boundary between privately owned littoral property and state property (replacing the mean high-water line), and once recorded, the erosion control line is unaffected “by accretion or erosion or by any other natural or artificial process.”⁶⁰

Nevertheless, the Act “expressly preserves upland owners’ littoral rights, including, but not limited to, rights of ingress, egress, view . . . and prevents the State from erecting structures on the beach seaward of the [erosion control line] except as required to prevent erosion.”⁶¹ The State does not intend to claim land it does not own prior to the restoration project or to deprive any private landowner of “legitimate and constitutional use and enjoyment of his or her property.”⁶² In order to further protect littoral property holders, if any authorized beach restoration or repair project cannot be accomplished without taking private property from private landowners, the project may continue only through eminent domain proceedings.⁶³ “The [erosion control line setting the new

⁵⁶ King, *supra* note 2, at 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Stop the Beach Renourishment*, 130 S. Ct. at 2598 (citing FLA. STAT. § 161.161(3)–(5) (2007)).

⁶⁰ FLA. STAT. §§ 161.191(1)–(2) (2007).

⁶¹ *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1108 (Fla. 2008) (citing FLA. STAT. § 161.201 (2007)).

⁶² FLA. STAT. § 161.141 (2007).

⁶³ *Id.*

boundary] is canceled if the project does not begin within a two-year period, is halted for six months, or the restored beach is not maintained.”⁶⁴

C. Judicial Takings

The Takings Clause of the Constitution protects any person from the deprivation of his or her own real property without due process of law and just compensation for the property taken.⁶⁵ Under current property law, the government may take the property of an individual either through a regulatory taking⁶⁶ or through the right of eminent domain.⁶⁷ Although the legislative and executive branches may be required to pay compensation for property taken under the Takings Clause of the Fifth Amendment, currently the judiciary is not partially due to the fact that the Supreme Court has never decided the fate of the doctrine in a majority opinion.⁶⁸

Two types of regulatory takings are “*per se* takings:” permanent physical invasions of private property by the government and “inverse condemnations.”⁶⁹ Under a *per se* taking, if the government permanently infringes upon a private property owner’s right to exclusive possession or the owner’s right to exclude persons from his or her private property, no matter how small the invasion, the invasion constitutes a taking and the property owner is entitled to just compensation.⁷⁰ In an important case involving a *per se* taking, a New York statute required landlords to permit the installation of television cables on their rental properties.⁷¹ Loretto, a New York landlord, sued claiming that the cable company’s installation of

⁶⁴ King, *supra* note 2, at 6.

⁶⁵ U.S. CONST. amend. V. This federal Constitutional amendment has been incorporated to state and local governments since 1897. See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 263 (1897).

⁶⁶ Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that property may be regulated, but if property is too heavily regulated it will be recognized as a taking).

⁶⁷ The government, through eminent domain, has the power to take private property for public use if the property owner is given just compensation. U.S. CONST. amend. V.

⁶⁸ Steven Geoffrey Gieseler & Nicholas M. Gieseler, *The Supreme Court and the Judicial Takings Doctrine*, ENGAGE, Oct. 2009, Vol. 10, Issue 3 at 54.

⁶⁹ Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

⁷⁰ *Id.*

⁷¹ Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

cables to the outside of his rental building effected a constitutionally compensable taking.⁷² The Court, in an opinion written by Justice Marshall, found that the permanent presence of the cables, even though a small intrusion on Loretto's rental property, was a constitutionally compensable taking.⁷³

Under inverse condemnation, the government may create regulations that are so severe that they render private property economically useless and effectively take the property.⁷⁴ The courts treat this economic devaluation of private property as a *per se* taking, which then entitles the property owner to just compensation.⁷⁵ A seminal case regarding inverse condemnation is *Lucas v. South Carolina Coastal Council*.⁷⁶ In that case, Lucas purchased two beachfront residential lots on the Isle of Palms in South Carolina for nearly \$1 million in 1986.⁷⁷ In 1988, South Carolina enacted legislation that effectively barred Lucas from building any permanent homes on the lots, rendering the lots "valueless," according to the trial court.⁷⁸ The Court found that when a regulation goes so far as to declare "'off-limits' all economically productive or beneficial use of land" compensation must be paid to recompense the landowner.⁷⁹

The Constitution grants special ability to the government through eminent domain, which is the power of the government to take private property for "just compensation."⁸⁰ If the government takes private land for public use but pays the property owner just compensation, the taking is constitutional under the right of eminent domain. Some of the most significant litigation challenging takings under eminent domain turns on the issue of public use,⁸¹ which has been defined very broadly to show

⁷² *Id.* at 424.

⁷³ *Id.* at 441-42.

⁷⁴ *Lingle*, 544 U.S. at 538.

⁷⁵ *Id.*

⁷⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1006-07.

⁷⁹ *Id.* at 1030.

⁸⁰ "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

⁸¹ See *Kelo v. City of New London*, 545 U.S. 469 (2005) (discussing whether the use of eminent domain to take private property and give that property to private companies for

deference to legislative decisions regarding takings of property through eminent domain.⁸² The Court will also not deem unconstitutional a decision to take property through eminent domain for a legitimate public use solely on the basis that the land will be given to a private entity after it is taken.⁸³

The most influential question *Stop the Beach Renourishment* asks is whether the Takings Clause in the Fifth and Fourteenth Amendments regulating the actions of the political branches also applies to decisions made by the judiciary. A judicial taking is when the judiciary makes a decision about property law that effectively takes property rights from property holders and gives those rights to the government.⁸⁴ Although the Supreme Court had never held judicial takings to exist, the question of judicial takings had been presented to the Court several times in the past.⁸⁵ Justice Potter Stewart, in his concurrence in *Hughes v. Washington*, proposed a test that would declare a judicial decision as a taking when that decision creates “a sudden change in state law, unpredictable in terms of precedents.”⁸⁶ “A State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law,” by simply retroactively asserting the property rights acquired through a judicial decision never actually existed in the first place.⁸⁷

Scalia’s dissent from the denial of certiorari in *Stevens v. City of Cannon Beach*, joined by Justice O’Connor, introduced the doctrine of judicial takings to the judiciary and laid a firm foundation for the possibility that a future case with stronger facts could support that a

development served a public purpose); *Berman v. Parker*, 348 U.S. 26, 31 (1954) (evaluating whether takings for the creation of a “better balanced, more attractive community” was a valid public use).

⁸² *Kelo*, 545 U.S. at 480.

⁸³ “[I]t is only the taking’s purpose, and not its mechanics” that matters in determining public use. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

⁸⁴ *Stop the Beach Renourishment Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

⁸⁵ *See Hughes v. Washington*, 389 U.S. 290, 294–98 (1967) (Stewart, J., concurring); *see also Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

⁸⁶ *Hughes*, 389 U.S. at 297.

⁸⁷ *Id.* at 296–97.

judicial taking had occurred.⁸⁸ “The petitioners in *Stevens* alleged that the Oregon Supreme Court’s application of the doctrine of customary use effected a taking of their private property, without just compensation, in violation of the Fifth and Fourteenth Amendments.”⁸⁹ Scalia highlighted the Court’s past recognition that some private property rights are so fundamental they require just payment if taken by state action,⁹⁰ pointing to the Court’s decision in *Lucas v. South Carolina Coastal Council*.⁹¹ Scalia wrote that, “[s]ince opening private property to public use constitutes a taking . . . if it cannot fairly be said that an Oregon doctrine of customary use deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking,”⁹² basically reinforcing his view that the judiciary, just as any other branch of the government, could effect a taking.

IV. INSTANT DECISION

In order to determine if there had been a judicial taking of the Members’ property rights, a four-justice plurality adopted a test examining whether there was actually an established property right and whether the Act took that property right from the Members.⁹³ First, the Court had to decide whether the state court’s decision rested on a “‘fair and substantial basis’ [that would lead it to believe] that the Members did not have a property right to future accretions which the Act would take away.”⁹⁴ This “fair and substantial basis” review was used because the Supreme Court was deciding a claim addressing the Takings Clause. When the Supreme Court is reviewing a federal question, the “nonfederal ground of decision [must] have ‘fair support.’”⁹⁵ Weighing the “fair and substantial

⁸⁸ *Stevens*, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting from denial of certiorari).

⁸⁹ Gieseler, *supra* note 68, at 54.

⁹⁰ *Stevens*, 114 S. Ct. at 1334.

⁹¹ 505 U.S. 1003 (1992).

⁹² *Stevens*, 114 S. Ct. at 1334.

⁹³ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2608 (2010) (plurality opinion).

⁹⁴ *Id.*

⁹⁵ *Id.* (citing *Broad River Power Co. v. S.C. ex rel. Daniel*, 281 U.S. 537, 540 (1930)).

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basis” of the state court’s decision maintains the authority of the state court to decide matters of state law—in this case, if there was doubt as to whether there was an established state law about the property rights in question, the Court would “not make [its] own assessment but accept the determination of the state court.”⁹⁶

The Members claimed that the Florida Supreme Court effected a taking of two of the Members’ essential property rights as beachfront property owners.⁹⁷ According to the Members, the right to accretions and the right to have littoral property touch the water were two rights taken by the court when it declared that those rights never actually existed.⁹⁸ However, the Court stated the Members’ claim of judicial taking will not prevail unless the Members can show that their rights to accretions and to have littoral property touch the water are superior to the State’s rights to repair the damaged and eroded beaches.⁹⁹

The Court explored two distinct areas of Florida law in order to determine whether there were established property rights given to the Members and whether the Act took those rights. According to Florida law the State owns all submerged land that may touch littoral (or privately owned) property, and as the owner the State has the right to fill and repair that land so long as it does not encroach upon the rights of the public and private beachfront landowners.¹⁰⁰ If an avulsion adds dry beach to an area that had been submerged then that land belongs to the state, “*even if it interrupts the littoral owner’s contact with the water.*”¹⁰¹ The issue then became whether there was an exception to this law if the State, instead of other natural occurrences, was the cause of the avulsion.¹⁰²

The Court decided there was no exception, citing established Florida law that allowed Florida to fill in its own seabed, leaving the resulting exposed land property of the State, ultimately treating it as an

⁹⁶ *Stop the Beach Renourishment*, 130 S. Ct. at 2608 n.9.

⁹⁷ *Id.* at 2610 (majority opinion).

⁹⁸ *Id.*

⁹⁹ *Id.* at 2611.

¹⁰⁰ *Id.* (citing *Hayes v. Bowman*, 91 So. 2d 795, 799–800 (Fla. 1957) (right to fill conveyed by State to private party)).

¹⁰¹ *Stop the Beach Renourishment*, 130 S. Ct. at 2611 (emphasis added).

¹⁰² *Id.*

avulsion.¹⁰³ To the Court, this left only one outcome: the littoral property owner's right to accretions was effectively subordinate to Florida's right to fill its submerged land.¹⁰⁴ The court held that the Florida Supreme Court decision "did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied."¹⁰⁵

V. COMMENT

A. *Judicial Takings v. Common Law Evolution*

Stop the Beach Renourishment has sparked a lot of commentary in the legal community, and with good reason as the potential effect of instituting judicial takings would be vast. As property law stands now, almost all state property rules are set forth from the common law and have been in place since the United States was founded.¹⁰⁶ Property law is not the same as it was in the 1800s because the state judiciary has had the opportunity to facilitate the evolution of state property law through changing the common law in court decisions as needed. Public policy and modern viewpoints have helped to frame these changes in property law, which is desirable because it has allowed laws to adapt over time. However, the concept of judicial takings threatens the way common law property directives have long been created.

When the judiciary transfers property rights from the property holders to the government, these property holders have no recourse. As of right now, there is no such thing as a judicial taking in American jurisprudence. Consequently, there is no avenue for affected property holders to seek any redress for their injury. If the property holders' land had been taken through a regulatory taking or through eminent domain, they would have been given just compensation; however, since the judiciary took their property, they are afforded no compensation or retaliatory claim.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2612.

¹⁰⁶ *Id.* at 2597 (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

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The judiciary can effect a taking in two different ways. First, a state legislature may pass a law that seems to take rights from property holders, which is then challenged in court.¹⁰⁷ “In deciding a takings challenge to the statute, a state court might hold that the claimed property rights did not exist, and reject the takings challenge because there was nothing to take.”¹⁰⁸ The second form of judicial takings can arise from private civil litigation. “In a case brought by private litigants, a state court might make a major change to the state’s existing property law.”¹⁰⁹ In either situation, the outcome is that the court changes the law or affirms a change in the law that takes property rights from property holders, and these property holders are left with less property rights and no compensation for the loss of those rights.

If judicial takings were to be recognized, courts would no longer be able to change common property law as they saw fit. When the judiciary made a ruling that would change property law in a way that took rights from property holders, those holders would have a right of action, through the doctrine of judicial takings, against the court seeking just compensation for the property taken by judiciary. In effect, the judiciary would never be able to change property law in a way that would infringe upon existing property law rights, even if the rights taken were not in sync with more modern property law viewpoints, or collided with modernistic ways property was being exchanged or handled.¹¹⁰

One argument promoting the doctrine of judicial takings is that the judiciary should not be able to change property law on a whim, and this doctrine would keep the judiciary from modifying established property law. Supporting this proposition is the notion that the primary function of the judicial system is to interpret and apply the laws made by the

¹⁰⁷ Posting of D. Benjamin Barros to PropertyProf Blog, *What’s At Stake in Stop the Beach Renourishment*, <http://lawprofessors.typepad.com/property/2009/07/whats-at-stake-in-stop-the-beach-renourishment.html> (July 1, 2009).

¹⁰⁸ *Id.* This is the kind of judicial taking presented by *Stop the Beach Renourishment*.

¹⁰⁹ *Id.* (citing, e.g., *Matthews v. Bay Head Improvement Assoc.*, 471 A.2d 355 (N.J. 1984)).

¹¹⁰ See generally *Rogers v. Tennessee*, 532 U.S. 451, 464 (2001) (explaining how courts have the power to modify rules over time).

legislative body, who are elected by citizens.¹¹¹ The legislature is said to be more in-tune with public opinion than the judiciary, because the legislature is elected by constituents who are directly affected by the laws made by the legislature. Mainly, the legislature is accountable to the taxpayers, whose funds are spent to acquire property rights of private property holders, and only the political branches are able to make tradeoffs between what will most likely be expensive property takings and other necessary programs fed through public funding.¹¹² The judicial body is largely unaffected by public opinion through the operation of election since most judges are appointed to serve,¹¹³ and therefore, they should not be able to take property rights from property holders at the expense of taxpayers to whom the judiciary is not directly responsible through election.

B. *Effects of Judicial Takings on Court Rulings*

Courts would undoubtedly be affected by the recognition of the judicial takings concept in modern jurisprudence in the United States. It would cause the judiciary to make property law decisions that tiptoe around the possibility of having to pay property owners money. Do we really want our judicial system to make their decisions based on the fact that the state may have to pay property owners large amounts of money? What would happen if a change was required in common property law to account for new floodplain zoning and ultimately take property from a large amount of property owners who own land adjacent to major flooding areas of a large river? Thousands of property owners could have a cause of action against the judiciary, even if the judiciary made the decision to

¹¹¹ See John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary is Different*, 35 VT. L. REV. 475, 485–93 (2010).

¹¹² *Id.*

¹¹³ See LARRY C. BERKSON, JUDICIAL SELECTION IN THE UNITED STATES, A SPECIAL REPORT 3 (Rachel Caufield & Malia Reddick eds., 2010), http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf. Although most states use a mixture of elections and appointments in choosing judges, only eight states elect all of their judges in partisan elections, while “[33] states and the District of Columbia use nominating commissions to help the governor select state judges, and [23] and the District of Columbia use the commission plan to make initial appointments to most or all of their courts.” *Id.*

protect these property owners, preserve the floodplain environment and benefit the public as a whole. It would not be favorable for courts to be swayed from making a beneficial decision for our citizens and the environment merely because the state coffers would suffer substantially from private litigation.¹¹⁴ The judiciary needs to be free of as much unnecessary influence as possible to make these tough decisions that are beneficial to its constituents.

Justice Kennedy saw the effect of judicial takings a bit differently, and stated that there was a possibility that the new restraint of judicial takings would have the exact opposite effect on the judiciary.¹¹⁵ Kennedy saw a possibility for a broad change in property law after the adoption of judicial takings because the property owners whose rights would be taken would be compensated for the loss of those rights.¹¹⁶ Essentially, judicial takings would be a way to free the conscience of the judiciary when it effected a taking of property rights, because the government would then recompense those property holders for the loss of their rights.

Justice Scalia offered some help in this area, suggesting that courts could be liable for compensatory relief, but the remedy for a judicial taking should not be limited to financial compensation.¹¹⁷ He asserted that the high courts would be able to reverse the order that caused the judicial taking, and remand for further proceedings keeping those petitioning property holders' rights intact.¹¹⁸ Although this seems like a just solution, citizens would again be left with the same result; the common law would never adapt with the changing times as it is able to do now. Whenever a judicial taking was effected through changing common law to eliminate property holders' rights, the higher court would reverse and the common law would not evolve.

¹¹⁴ Echeverria, *supra* note 111, at 488.

¹¹⁵ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2616 (2010) (Kennedy, J., concurring).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2607 (plurality opinion).

¹¹⁸ *Id.*

C. *Risks of Not Recognizing Judicial Takings*

As property law stands now, the concept of judicial takings is not applicable to any decision made by the judiciary. Therefore, at least in theory, it would be possible for the judiciary to “take” property rights from property owners who would otherwise be compensated if those same property rights had been taken by the legislature.

The main fear of an absence of the concept of judicial takings would be that the legislature would make a law (or laws) that would eliminate or substantially change established property rights, and then when the legislation were challenged in court, the legislature would argue that the property owners never had the right in the first place. If the court agreed the property owners never had those property rights, the decision would result in a judicial taking of private property, a concept not recognized in American jurisprudence. The property owners whose rights were essentially taken through judicial decision would not be compensated, and the legislature would have a loophole around the Takings Clause and its requirement of just compensation.

A situation such as this speaks in favor of instituting judicial takings, and as Justice Scalia wrote in the plurality opinion of *Stop the Beach Renourishment*, “it would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”¹¹⁹ However, this reasoning is not yet persuasive enough to institute judicial takings.

VI. CONCLUSION

Although there are good arguments on either side of the judicial takings issue, courts are not yet ready to tackle the intricate doctrine as set forth by Justice Scalia. The way our courts operate is to interpret a statute and then fill in the areas the statutes do not address, in a way “[crafting] the contours” of common law and remolding those contours as time goes by to reflect new circumstances as they arise.¹²⁰ Relying on the legislature

¹¹⁹ *Id.* at 2601 (citing *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1332 (1994) (Scalia, J., dissenting from denial of certiorari)).

¹²⁰ W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1491 (2004).

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to create laws that effectively encompass all areas of property law so that when disputes arise, all intricacies of the law brought out through litigation will have a clear and concise answer is an unrealistic ambition. Courts need the unencumbered ability to interpret and apply statutes and common law in a way that reflects public views and current necessity without worrying if their decisions will cost the government money.

Stop the Beach Renourishment set the stage for a new age in property law, but the stage was not strong enough to hold Scalia's call for a decision in favor of instituting judicial takings. With the Court's split decision, the question of judicial takings is still yet to be determined, and there is much debate as to how judicial takings should be handled. Although it could be beneficial to property owners for the courts to be regulated in such a way that would restrict their power from being able to take the rights of property owners abruptly and without compensation, the potential doctrine of judicial takings has a few kinks that definitely need to be worked out before we see it instituted in our courts.

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