STOP THE BEACH RENOURISHMENT, INC. V. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

*Jared Policicchio**

I. INTRODUCTION

After five years of relative quiet, federal property law doctrine is once again the site of renewed controversy. Last Term, the Supreme Court unanimously rejected a Fifth Amendment takings claim alleged to have occurred when Florida took ownership of newly submerged land after a county beach renourishment project.[1] Importantly, the decision marked the Court's entrance into a jurisprudential debate over the existence of judicial takings. In doing so, the Court opened up the possibility of a future decision constitutionalizing judicial takings, an arguably unnecessary addition to Takings Clause jurisprudence and possible detriment to the evolution of environmentally-favorable property law.

The judicial takings issue arose in a case concerning efforts to control beach erosion. Beach erosion is regarded by some local communities and state and local governments as a threat to coastal economies and real property.[2] Concerned governments and management districts utilize an engineering process known as beach renourishment in order to literally reverse erosion and expand a beach's un-submerged surface area.[3] The Florida Legislature, like many states, supported beach renewal by enacting a statute providing, among other incentives, financial assistance to local communities interested in beach renourishment.[4] *Stop the Beach* arose as a takings challenge to this statute by a group of waterfront landowners fighting the loss of certain littoral property rights after a local beach renourishment project.

---

* J.D. Candidate, Harvard Law School, Class of 2011. Special thanks to the Harvard Environmental Law Review editorial staff for their insights, ideas, guidance, and patience. Thanks also to David Brody and Anant Pradhan for their editing prowess.

[1] *See* Stop the Beach Renourishment, Inc. v. Fl. Dep't Envtl. Prot., 130 S. Ct. 2592 (2010).

[2] *See* FLA. DEP'T OF ENVTL. PROT., STATE OF FLORIDA STRATEGIC BEACH MANAGEMENT PLAN: INTRODUCTION 1 (2008), *available at* http://www.dep.state.fl.us/beaches/publications/pdf/SBMP/Cover%20and%20Introduction.pdf; *see also Adequacy of Federal and State Laws for Addressing Beach Erosion Problems*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION COASTAL SERVICES CENTER, http://www.csc.noaa.gov/beachnourishment/html/human/law/fedstate.htm (last visited May 18, 2011) (on file with the Harvard Law School Library).

[3] *See Beach Nourishment*, U.S. ARMY CORPS OF ENGINEERS COASTAL & HYDRAULICS LABORATORY, http://chl.erdc.usace.army.mil/chl.aspx?p=s&a=ARTICLES;192 (last visited May 18, 2011) (on file with the Harvard Law School Library). Many environmentalists oppose beach nourishment as an unnecessary disruption of natural processes. *See, e.g.*, ORRIN H. PILKEY & KATHERINE L. DIXON, THE CORPS AND THE SHORE 75–91 (1996) (cataloging the enormous cost of beach nourishment projects and uneven natural resource benefits).

[4] FLA. STAT. §§ 161.011–161.242 (2010). For the efforts of other states, see, for example, *State of the Beach Report*, SURFRIDER FOUNDATION, http://www.surfrider.org/stateofthebeach/05-sr/state.asp?zone=SE&state=fl&cat=er (last visited Nov. 2, 2010) (on file with the Harvard Law School Library); *California Erosion Response*, SURFRIDER FOUNDATION, http://www.surfrider.org/stateofthebeach/05-sr/state.asp?zone=WC&state=ca&cat=er (last visited Nov. 2, 2010) (on file with the Harvard Law School Library).

Certain Supreme Court observers expressed surprise that the Court had granted certiorari in order to hear the case.[5] Some noted a seeming lack of interest by the Roberts Court in takings cases.[6] In addition, while the interaction between erosion control projects and private property rights is an important issue for coastal states and communities, it is also one that generally turns on nuances in state property law.[7] The three *Stop the Beach* opinions show the justices grappling with whether and how to manage doctrinally a possible intervention into such state property law nuances. But doctrinal disagreement did not prevent a unanimous holding turning aside the property owners' claim. Justice Scalia's plurality opinion[8] and two concurring opinions by Justice Kennedy and Justice Breyer[9] each soundly rejected the constitutional takings claim by upholding the Florida Supreme Court's interpretation of Florida property law.

The United States Supreme Court unanimously agreed with the Florida Supreme Court that, here, no taking was possible as the petitioners no longer possessed certain littoral property rights under properly understood Florida common law.[10] Thus, the Court agreed that petitioners lacked a legal entitlement to the rights they claimed had been illegally disturbed by the state.[11]

This Comment will argue that when a future Court revisits judicial takings, it should be more attuned to the scope of such a doctrine, recognizing

---

[5] *See, e.g.*, Jonathan Adler, *Supreme Court Takes Regulatory Takings Case*, THE VOLOKH CONSPIRACY (June 15, 2009, 10:34 AM), http://volokh.com/posts/1245076497.shtml.

[6] Richard Frank, *The Supreme Court's Love Affair with the Takings Clause — Not Over Just Yet*, LEGAL PLANET: THE ENVIRONMENTAL LAW AND POLICY BLOG (June 15, 2009), http://legalplanet.wordpress.com/2009/06/15/the-supreme-courts-love-affair-with-the-takings-clause-not-over-just-yet/.

[7] It is not at all evident that an overly robust beach reconstruction regime supports sound shoreline management. *See Social and Demographic Trends that Affect the Need for Beach Nourishment*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION COASTAL SERVICES CENTER, http://www.csc.noaa.gov/beachnourishment/html/human/socio/change.htm (last visited Nov. 2, 2010) (on file with the Harvard Law School Library) ("Owners of coastal property generally do not support the 'do nothing' or the strategic retreat strategies."). Given these policy concerns, the environmental advocate is likely to express ambivalence regarding even *Stop the Beach*'s holding, affirming beach nourishment projects, in addition to its judicial takings analysis. *See* Michael C. Blumm & Elizabeth Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. (forthcoming 2011) (manuscript at 48) (on file with the Harvard Law School Library).

[8] Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 130 S. Ct. 2592, 2597 (2010). Justice Scalia wrote for the Court in denying the takings claim. Parts II and III of his opinion, finding it possible to effect a "judicial taking," were joined by only Chief Justice Roberts, Justice Thomas, and Justice Alito. *Id.* at 2597.

[9] Justice Ginsburg joined Justice Breyer's opinion. *Id.* at 2618.

[10] Only one of the three Questions Presented in petitioners' brief concerned judicial takings. The other two questions presented were generally ignored by the Court. Brief for Petitioner at i, Stop the Beach Renourishment, 130 S. Ct. 2592 (2010) (No. 08-1151), 2009 WL 2509219, at *i ("The Florida Supreme Court invoked 'nonexistent rules of state substantive law' to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a 'judicial taking' proscribed by the Fifth and Fourteenth Amendments to the U.S. Constitution?").

[11] *Id.* at 2611 ("Though some may think the question close, in our view the showing cannot be made.").

its implications are different in different categories of cases. In a broad swath of cases involving legislative or executive action, including *Stop the Beach*, judicial takings doctrine does little to alter the merits of a regulatory takings claim, when compared against existing forms of Court review. However, in a different category of cases where only the judiciary is acting to interpret state property law, judicial takings would offer a new claim for relief possibly fraught with doctrinal complexities, such as hindering valuable clarifications in state property law and unbalancing a property law scheme of state primacy with federal constitutional oversight.

II. TAKINGS JURISPRUDENCE: BACKGROUND AND THE TAKINGS CLAIM IN *STOP THE BEACH*

A. Takings Jurisprudence Background

An unconstitutional taking of private property without just compensation occurs not only when the government physically confiscates land but may also occur through regulatory activity having an analogous effect.[12] While takings jurisprudence is far from routinized or monolithic, the most widely followed regulatory takings analysis remains the *Penn Central* balancing test, which weighs regulatory actions against the property holder's expectations for the use of their rights.[13] *Penn Central*'s boundaries and mechanics have never been entirely certain.[14] However, in recent decades, and especially during the Rehnquist Court,[15] the Court has attempted to set down more sharp-edged rules to further develop the parameters of a successful takings claim.[16]

The Court has thus had much to say about *what* represents a taking. It has had much less to say about *who* effects a taking. The paradigmatic takings case has always consisted of a state or local regulatory or legislative body enforcing positive law. Still, occasional academic rumblings and dissenting Court opinions have argued for an elaboration of the "who" question by recognizing that courts could effect a taking by improperly changing background state property law.[17] With *Stop the Beach*, these rumblings have grown louder. Yet, in certain cases, an elaborated judicial takings doctrine

---

[12] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[13] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[14] *See* John D. Echevarria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 172 (2005).

[15] Frank, *supra* note 6.

[16] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

[17] For a leading academic argument for judicial takings, see Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). *See also* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207–14 (1994) (Scalia, J., dissenting from denial of certiorari).

would conflict with a conception of property law as a common law domain that evolves over time through elaboration by the state courts.[18]

B. Case Background

Florida, where beach tourism makes up a significant portion of the state economy, enacted the Beach and Shore Preservation Act ("BSPA") in 1961.[19] The BSPA authorizes state funds to local governments for beach renourishment and erosion control projects.[20] The BSPA sets out a number of statutory guidelines that the Florida Department of Environmental Protection ("FDEP") must follow in administering and allocating BSPA funds.[21] One provision mandates the use of an Erosion Control Line ("ECL") to fix a boundary line separating upland private property from submerged shoreline held by the state in public trust.[22] This line assumes critical importance because successful beach nourishment projects deposit "new" land seaward of the ECL. Any filled land seaward of the ECL becomes state property; private landowners no longer hold property up to the water's edge.[23] The result is an enhanced, wider beach but also a tangle of questions concerning the impact on upland private property holders' common law littoral rights.[24]

Beaches in Destin, a city in Walton County, suffered significant erosion as the result of hurricane impacts in the early 1990s.[25] After a lengthy planning process, Destin and Walton County applied for both funding and a permit in order to conduct beach renourishment along a particular stretch of shoreline. The project affected shoreline property owned by individuals who eventually formed the citizens group Stop the Beach Renourishment, Inc. ("SBR"). FDEP granted a joint permit to the two municipalities in July 2004.[26]

In approving a renourishment permit, FDEP disturbs then-existing property rights and boundaries by utilizing statutory authority granted to it by the BSPA.[27] Under Florida property law, land submerged under shoreline water is held in public trust. Shoreline property holders generally own shore

---

[18] For an example of property law evolution affecting environmental concerns, see National Audubon Soc'y v. Superior Court of Alpine Cnty., 33 Cal. 3d 419 (1983) (clarifying water rights to the Mono Lake by applying the public trust doctrine of property law).

[19] 1961 Fla. Laws ch. 61-246; FLA. STAT. §§ 161.011–161.45 (2003).

[20] FLA. ADMIN. CODE ANN. r. 62B–36.007 (2010).

[21] FLA. STAT. §§ 161.091 (2003).

[22] FLA. STAT. § 161.141 (2010).

[23] *Id.*

[24] *See* Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1109 (Fla. 2008) ("[T]here has been a relative paucity of opinions from this Court that describe the nature of the relationship at common law between the public and upland owners in regard to Florida's beaches."). "Littoral rights" refers to the "rights of owners of land abutting surface waters of a lake or sea." 78 AM. JUR. 2D WATERS § 30 (2010).

[25] MARK E. LEADON ET AL., FLA. DEP'T OF ENVTL. PROT., HURRICANE OPAL: BEACH AND DUNE EROSION AND STRUCTURAL DAMAGE ALONG THE PANHANDLE COAST OF FLORIDA 0–7, (1998), *available at* http://bcs.dep.state.fl.us/reports/opal-rpt.pdf.

[26] *Walton Cnty.*, 998 So. 2d at 1106.

[27] *See id.* at 1108.

land not submerged under water.[28] Thus both significant erosion or, conversely, sand accretions result in periodic adjustments to the property boundaries and the extent of the beachfront property.[29] Beachfront property holders have also enjoyed certain other littoral rights attached to their location. These include the right to access the water, the right to reasonably use the water, and the right to accretion[30] and reliction,[31] among others.[32]

In *Stop the Beach Renourishment*, petitioners argued that their common law right to accretion and reliction was taken without just compensation through the aforementioned permitting process.[33] FDEP establishes an ECL, a fixed line, quite literally in the sand, that will not change regardless of any erosion or accretion that might adjust the observable high water line. Private property holders continue to own everything upland from this line but the state, under the terms of the BSPA, assumes ownership of all present and future accretions of land, whether submerged or not, seaward of the ECL.[34] The private property holder loses his previous right to accretion.[35] The BSPA does contain provisions creating certain statutory property entitlements for private owners following a beach renourishment project. SBR petitioners, though, found these statutory rights to be inadequate in the face of losing the right to accretion and the arguable loss of the right to direct contact with the water. After administrative proceedings sustained the Destin permit, SBR appealed to Florida's First District Court of Appeals. There it successfully raised a federal constitutional takings claim, arguing for compensation against the loss of common law littoral rights wrought by the BSPA beach renourishment scheme.[36]

The Florida Supreme Court reversed the First District, holding that the BSPA's beach renourishment process infringed on no common law property rights of the SBR owners.[37] Significantly, the court conducted an exhaustive review of Florida shoreline property law to conclude that no property rights had been abridged, obviating the need for any takings analysis.

The Florida Supreme Court's decision turns principally on two interpretations of shoreline property law. First, it found that the common law right

---

[28] *Id.* at 1109 ("Under both the Florida Constitution and the common law, the State holds the lands seaward of the MHWL.").

[29] *Id.* at 1114.

[30] Florida property law generally defines accretion as "the increase of riparian [bordering on water] land by the gradual deposit by water of solid materials, such as mud, sand, or sediment." 42 FLA. JUR. PUBLIC LANDS § 72 (2010).

[31] Reliction is defined as an "increase of the land by a gradual and imperceptible withdrawal of any body of water." 56 FLA. JUR. WATER § 183 (2010).

[32] *Walton Cnty.*, 998 So. 2d at 1111.

[33] Brief for Petitioner, *supra* note 10, at 12-15.

[34] FLA. STAT. § 161.191(1) (2010).

[35] FLA. STAT. § 161.191(2) (stating that common law property rules no longer function to "increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process.").

[36] Save Our Beaches v. Fla. Dep't of Envtl. Prot., 27 So. 3d 48, 59 (Fla. Dist. Ct. App. 2006) ("These deprivations of riparian rights are an unconstitutional taking of STBR's members' riparian rights.").

[37] *Walton Cnty.*, 998 So. 2d at 1117-18.

of accretion is superceded by the state sovereign's so-called right of avulsion.[38] Florida property law defines avulsion as the "sudden or violent action of the elements."[39] Thus, a private property owner normally gains ownership of land that accretes seaward of the present high water line (and property boundary). However, this presumption is reversed when an avulsive event, in this case a hurricane, alters the shoreline. The Florida Supreme Court found the sovereign holds a common law right to restore the shoreline to its pre-avulsive state.[40] Crucially, if restoration occurs, the state sovereign assumes ownership of any future seaward accretions on the sovereign's side of the mean high water line.[41] The United States Supreme Court granted certiorari in order to hear STB's appeal of the Florida Supreme Court decision.[42]

III. THE SUPREME COURT'S *STOP THE BEACH RENOURISHMENT* OPINIONS

The Supreme Court, by a vote of 8-0,[43] ruled that the FDEP did not effect a "taking" under correctly interpreted Florida property law. However, the three opinions diverge on the propriety of introducing judicial takings as an available doctrinal concept.

Writing for the majority in part and plurality in part, Justice Scalia was joined by all voting members of the Court in Parts I, IV, and V of his opinion. These parts of his opinion reject STB's takings claim by finding no common law property right to accretion in cases of avulsion accomplished through deliberate state action.[44] In Part IV, Justice Scalia reviews Florida property law precedent, as well as property law treatises, to conclude that state-caused avulsive events are not an exception to the general rule that land newly exposed after an avulsive event is public land held in trust.[45] Interestingly, this evaluation of Florida property law appears before any review of the Florida Supreme Court's analysis of its own common law precedents.[46] Perhaps even more intriguing is his choice of language and emphasis when he does finally consider the Florida Supreme Court's decision; Justice Scalia's analysis is set up so that the Court first determines the best understanding of the particular common law precedent and *then* places this next to

---

[38] *Id.* ("Thus, because the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event, the Act is facially constitutional.").

[39] 1 FL. JUR. ADJOINING LANDOWNERS § 31 (2010).

[40] *Walton Cnty.*, 998 S. 2d at 1117.

[41] The mean high water line is the boundary of ordinary high tides, averaged over a nineteen year period. *See* 1 FL. JUR. ADJOINING LANDOWNERS § 27 (2010).

[42] 129 S. Ct. 2792 (2009).

[43] Justice Stevens did not participate in the case.

[44] *See supra* Part II.

[45] Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 130 S. Ct. 2592, 2610-12 (2010).

[46] Justice Scalia discusses the Florida Supreme Court's analysis only *after* his full review of precedent and authority on the particular common law issue. *Id.* at 2611–12.

the Florida court's decision for comparison.[47] This may be a troubling analytical structure given the Court's traditional deference to state court judgments.[48]

A look at those cases relied on most heavily for their precedential value by the Court and the Florida court pointedly shows Justice Scalia's less deferential approach to the common law question. Justice Scalia's opinion relies most heavily on *Martin v. Busch*,[49] a case that Justice Scalia notes was not even cited by the Florida court.[50] Likewise, the Florida court's analysis puts weight on two decisions, *Bryant v. Peppe*[51] and *State v. Florida National Properties, Inc.*,[52] neither of which is mentioned at all in Justice Scalia's opinion. Such a contrast could be significant, however, given the plurality's suggestions in Part III that, since a judicial takings analysis looks at whether the state court *itself* unconstitutionally took private property, lesser deference is owed to that state court.[53]

Writing for a four-justice plurality, Justice Scalia focused on the phrasing of the petitioner's Questions Presented in elaborating on an argument for a doctrine of judicial takings in Parts II and III. He argued that a textual reading of the Takings Clause plainly shows its application to all three branches of government.[54] Nothing suggests, in his view, any reason to exempt the judicial branch from the Clause's demands. He also relies on language in *Webb's Fabulous Pharmacies* suggesting the Court can find a valid takings claim regardless of whether the mischievous regulation occurs through statutory enactment or judicial interpretation and elaboration.[55]

In Part III, before considering the particulars of the case, Justice Scalia insisted on the necessity of setting out a judicial takings standard, posed as a question of whether the Florida Supreme Court "contravene[d] the established property rights" of the takings claimant.[56] Applying this standard to

---

[47] *Id.* at 2611 ("The Florida Supreme Court decision before us is *consistent* with these background principles of state property law.") (emphasis added).

[48] Given Justice Scalia's nearly de novo analysis of Florida property law, it is unclear how he would react if the Florida Supreme Court's decision was in some respects inconsistent with his interpretation of state property law, yet still arguably a "fair and substantial" interpretation. *Cf.* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) ("[I]f there is no evasion of the constitutional issue . . . and the nonfederal ground of decision has fair support . . . this Court will not inquire whether the rule applied by the state court is right or wrong.").

[49] 112 So. 274 (Fla. 1927).

[50] *Stop the Beach Renourishment*, 130 S. Ct. at 2612 ("Although the opinion does not cite Martin and is not always clear on this point, it suffices that its characterization of the littoral right to accretion is consistent with Martin. . . .").

[51] 238 So. 2d 836 (Fla. 1970).

[52] 338 So. 2d 13 (Fla. 1976).

[53] *Stop the Beach Renourishment*, 130 S. Ct. at 2609 ("A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.").

[54] *Stop the Beach Renourishment*, 130 S. Ct. at 2601.

[55] *Id.* at 2602 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-65 (1980)).

[56] *Id.* at 2602-04, 2613.

SBR's claims, Justice Scalia found no "established" property rights, no right to accretion, and no right to direct contact with the water. Thus, he wrote for a plurality of justices, this particular takings claim failed to meet his newly-minted judicial takings standard.[57]

In Parts II and III, Scalia minimized a series of prudential and pragmatic concerns, raised in Justice Kennedy's concurrence and in Florida's respondent brief, such as possible difficulties in administering "just compensation" and in burdening lower federal courts with new claims of "judicial takings."[58] He also strongly disfavored Justice Kennedy's invocation of the Due Process Clause as an alternative constitutional protection against state court intrusion on expected property rights.[59] His lengthy response critiques Justice Kennedy's suggested substitution of the Due Process Clause, "in both its substantive and procedural aspects,"[60] for a judicial takings doctrine. Justice Scalia invoked the specter of *Lochner*-era substantive due process overreach and detailed his principled objection to any expansion of substantive due process.[61] He further argues, albeit more by invocation of broad political principles than with precedents, that procedural due process is fundamentally concerned with individual rights and thus not doctrinally appropriate as a separation of powers restraint on a state's ability to judicially expropriate property.[62]

In a concurring opinion, Justice Kennedy[63] acknowledged the danger of judicial overreach in interpreting private property rights. He refused, however, to accept a new judicial takings doctrine as the best bulwark against such possible excesses. Instead, he proposed shining a spotlight on preexisting doctrines capable of handling the task: substantive and procedural due process. Justice Kennedy raised a series of prudential, pragmatic, and federalism concerns pointing toward a preference for what he considered already operational constitutional doctrines as a guard against judicial expropriation of property.[64] In other words, due process doctrine would be a more modest, and thus more desirable, intervention in state property law while still providing a constitutional floor on state courts' alteration of property rights.[65]

---

[57] *Id.* at 2612-13.

[58] *Id.* at 2607 ("These, and all the other 'difficulties,'. . . that Justice Kennedy worries *may perhaps* stand in the way of recognizing a judicial taking, are either nonexistent or insignificant.").

[59] *Id.* at 2605-08.

[60] *Id.* at 2614 (Kennedy, J., concurring).

[61] *Id.* at 2606.

[62] *Id.* at 2605.

[63] *Id.* at 2613 (Kennedy, J., concurring).

[64] *Id.* at 2616 ("If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented.").

[65] There may need to be more suspicion as to Justice Kennedy's motives in pushing due process as a substitute for judicial takings. Given his strong support for property rights, some speculate that he envisions using due process doctrine as as a means of more muscular property rights protection. *See* Sarah B. Nelson, Comment, Lingle v. Chevron USA, Inc., 30

Under this assumption, Justice Kennedy's concerns focused on a possibly over-broad judicial takings doctrine as well as the mechanics of unleashing such a doctrine on state and federal courts.

Justice Breyer also concurred,[66] writing separately that he would not rule in or out a judicial takings doctrine.[67] Relying on the Court's unanimous interpretation of established state shoreline property rights in Part IV,[68] Justice Breyer argued that whatever else this case might be, it could not be a *successful* judicial takings claim. Thus, Justice Breyer asserted that since, under the Florida Supreme Court's interpretation, no existing property right has been altered, no question of judicial takings needed to be addressed. Whether or not a judicial takings doctrine might exist, this instance would not satisfy any range of possible doctrinal constructions.[69]

IV. THE FUTURE OF JUDICIAL TAKINGS DOCTRINE

Stop the Beach Renourishment is unlikely to be the last word on judicial takings doctrine. Purely as a matter of vote counting, the case leaves no resolution. Given the uncertainty, the Court is likely to find additional petitioners pushing judicial takings claims. Both concurrences are at pains to leave open the judicial takings door. Thus, there are five potential swing votes ready to be courted by Justice Scalia and the other three members of the plurality.

Moving beyond trackside predictions, the Court and commentators would find their time well spent in considering both the implications of a new "judicial takings" concept and the concept's scope should it receive five votes in the future. Such introspection is especially necessary before any significant modifications to Fifth Amendment takings jurisprudence, already quite complex and murky.

After an initial analysis, three conclusions become apparent. First, potential judicial takings cases fall into certain broad categories, which will be discussed below. Second, an elaborated judicial takings doctrine would have the effect of doctrinal redundancy for cases in two of the categories, and more negative collateral effects if applied to the third category. Third, while the effects of judicial takings would not be uniform across categories, an overall summary is as follows: judicial takings doctrine would increase

---

HARV. ENVTL. L. REV. 281, 288 (2006); Richard Lazarus, *Private Property and the Future of Government Regulation: Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1108–09 (1997).

[66] *Stop the Beach Renourishment*, 130 S.Ct. at 2618 (Breyer, J., concurring in part and concurring in the judgment).

[67] *Id.* at 2618.

[68] Interestingly, Justice Breyer provides no discussion in his concurrence as to his views on the *method* Justice Scalia's Part IV utilizes to evaluate Florida property law littoral rights. For a discussion of the method's minimization of the Florida Supreme Court's own analysis and the questions that raises, see text accompanying notes 45–53.

[69] *Id.* at 2619.

federal constitutional oversight of state property law and open up a new avenue for property owners to reverse or delay state regulation of property, including property law elaborations related to environmental protection.

Most judicial actions that could conceivably be labeled judicial takings, in the sense that a state court would be considered the government entity having taken private property without just compensation, fall into three broad categories.[70]

The first category contains judicial decisions ruling against a private property holder who has filed a claim asserting that a statute, regulation, or executive action resulted in a taking of her private property rights, as those rights are defined by common law or statute, without just compensation. *Stop the Beach* itself was just such a case. From the outset, SBR pursued a constitutional takings case against FDEP, arguing its permitting process abridged property rights of the owners.[71] The Second District found that the FDEP had taken private property from SBR members,[72] whereas the Florida Supreme Court found that the FDEP had not taken from SBR members. The appeal before the Florida Supreme Court was a claim against the FDEP and not the judicial body. Likewise, SBR framed two of its three Questions Presented before the Court as constitutional claims against the FDEP's permitting system, a system based on an unconstitutional statute (the BCPA) and an unconstitutional system as applied by FDEP.[73] Justice Scalia gave no statement indicating that current regulatory takings doctrine could not reach the case. Instead, he simply began elaboration of a judicial takings theory.

It is unclear why the existing "fair and substantial basis" doctrine governing federal review of state court judgments could not successfully vindicate all legitimate takings claims in this category. A regulatory taking occurs when a state executive action or legislative enactment deprives a property holder of an established right under background principles of state common law.[74] Such a regulatory takings claim would reach the Court if a state high court rejected a takings claim because the property holder lacked the requisite established property right (i.e., no right existed such that it could be "taken"). The Court would review the state court's property law decision for "fair and substantial support" in state precedent.[75] If that sup-

---

[70] These categories do not represent the types of cases where judicial takings *should* be utilized but rather where they *could* be utilized without verging on the nonsensical. For example, in American jurisprudence, it would be nonsensical, even with a judicial takings doctrine, to raise such a claim on appeal of a state criminal conviction.

[71] The beachfront property-holders wrote in their brief to the Court, "This application and interpretation of the [BSPA] required STBR to challenge the constitutionality of the Act as applied by the executive branch." Brief for Petitioner, *supra* note 14, at 9.

[72] Save Our Beaches v. Fla. Dep't of Envtl. Prot., 27 So. 3d 48, 60 (Fla. Dist. Ct. App. 2006).

[73] Brief for Petitioner, *supra* note 10, at 1.

[74] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[75] *See* Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930) ("But, if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or

port was found lacking, the Court could overturn the state court's property law decision and then remand or directly consider whether a taking had occurred, drawing on the full array of its existing regulatory takings doctrine. In this way, the Court's review would be sensibly split in a manner that corresponds to the actors involved in such disputes: it is state legislatures and executives who can physically expropriate property through regulation or eminent domain, and it is state courts who can interpret and clarify state law characterizing the nature of that property. Such a form of review would vindicate legitimate takings claims in all cases coming out of the first category and make a judicial takings doctrine for that category redundant.

A second category of judicial decisions would be closely related factually to the first category. Here, however, the state court would rule against a private property holder who has filed a claim asserting that a *previous* judicial decision interpreting state property law resulted in a *subsequent* taking by the government of this new owner's property.[76] The facts of *Stop the Beach* offer a ready example. Imagine another group, Our Beach and Not Yours ("OBNY"), whose members' beachfront property has been renourished by FDEP or may be renourished by FDEP in the future. Suppose that the Florida Supreme Court issued the *Stop the Beach* decision but no takings claim was raised in the litigation (the case instead turned on the court construing the BCPA and how the BCPA interacts with preexisting common law littoral rights). At first, any takings claim OBNY files would seem to be against the state court's judicial decision rather than a state legislative or executive action.

Putting aside any questions of standing and procedure, however, its claim is still analytically similar to the first category with regard to judicial takings. OBNY's harm is a pending or future FDEP permit changing their property interests, and nothing logically suggests that FDEP's action cannot be judged on the merits using regulatory takings jurisprudence. The key question remains: could a plaintiff bring such a suit without any operative judicial takings doctrine? Current regulatory takings doctrine suggests the plaintiff could bring suit.

A very different final category contains judicial decisions resolving a dispute between two private property holders turning on an interpretation of the state's property law. In this final conception, the court might hypothetically take private property without just compensation by acting to adjust property law as against an owner's reasonable expectations and in favor of another private property holder.[77] No other state actor, legislative or execu-

---

substitute its own view of what should be deemed the better rule for that of the state court.") (citations omitted).

[76] *See* D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 908–09 (2011).

[77] An open question in this category of cases concerns the requirement that takings for private use must have a public benefit or purpose. *See* Kelo v. City of New London, 545 U.S. 469 (2005). A Court seeking an all-encompassing judicial takings doctrine would need to conceive of a way to understand disputes between two private owners as having a public

tive, is in the picture. The Court's regulatory takings jurisprudence has never recognized a taking in this situation,[78] and thus elaborating a judicial takings doctrine would newly allow a constitutional claim in this category to proceed.

Certain conclusions flow from the above categorization of possible judicial actions. First, introducing judicial takings doctrine as a source of review of judicial action in the first two categories above will most affect property rights cases through a subtle expansion of the scope of federal review of the state court property law decision. "Fair and substantial basis" review may be replaced with a much less deferential — close to de novo — canvassing of state property law precedent and principles. The Court will justify such review, despite a tradition of deference toward state court interpretations of state property laws, by shifting the blame.[79] Instead of a state legislature's statutory enactment or a state executive's action constituting a taking, now the state court will have performed the taking through its review and interpretation of the statute or executive action. In other words, scrub all mention of judicial takings from the Court's opinions, past, present, and future, and the private property holder would still have a day in court with his takings claim. It would, however, be brought against a different branch of government and be afforded less opportunity for federal definition of the state property right.

Whether a taking occurred, however, will remain based on the Court's overall regulatory takings jurisprudence, as it continues to evolve.[80] To reiterate, the real issue in these two categories of cases is two-fold. A property holder with a meritorious takings claim could have her rights vindicated without resorting to judicial takings, suggesting that a jurisprudential version of Occam's Razor may be appropriate (introduce new doctrines only if necessary to vindicate meritorious claims).[81] But a doctrine of judicial takings

---

purpose. It would likely do so by focusing on whether the state court adjusts established property law in adjudicating the dispute between the private owners.

[78] *See* Barton Thompson, Symposium, *Judicial Takings Redux*: Stop the Beach Renourishment v. Florida Department of Environmental Protection, THE 13TH ANNUAL CONFERENCE ON LITIGATING REGULATORY TAKINGS CHALLENGES TO LAND USE AND ENVIRONMENTAL REGULATION (Nov. 5, 2010), *available at* http://www.vermontlaw.edu/documents/2010TakingsConference/20101104-Thompson.pdf.

[79] Labeling the court as the "taker" could affect how the taking is remedied, depending on how a judicial takings doctrine is structured. An analysis of this issue is beyond the scope of this Comment.

[80] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 130 S. Ct. 2592, 2609–10 (2010) (citing *Lucas* in setting a standard for judicial takings of whether the property right was established). The constitutional takings protection's purpose as a form of distributive justice (often cited by the Court as one of its main aims) also seems unaffected regardless of whether judicial takings doctrine is applied to the first two categories of cases. For a discussion of the Takings Clause's distributive justice function, *see* Jeffrey Gaba, *Taking Justice and Fairness Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 593–4 (2007).

[81] *See* John P. Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 768 (1955); Jonathan R. Siegel, *Political Questions and Political Remedies* 5 (GW Law School Public Law Research Paper No. 94, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_

would not be *entirely* redundant, even for these two categories, as it would possibly expand the scope of federal review beyond the generally deferential "fair and substantial basis" test.[82]

Finally, introducing judicial takings as a review of the third category above (state property law interpretation in a dispute between two private parties) is a significant doctrinal innovation with numerous complexities and debatable value. In this third scenario, there would be no overlap between judicial takings and already-available regulatory takings analysis. Here blame, if any, could only be laid at the feet of the judicial decision-maker. Perhaps, however, this is a worthy innovation, protecting against outsized judicial re-framing of existing private property rights.[83] Even still, certain likely complications caution against introducing judicial takings into this third category.

First, significant complexities and possibly harmful side effects are likely to accompany a judicial takings doctrine. Some of these issues included difficult matters of federalism and Supreme Court review of state court judgments similar to those present in the first two categories above.[84] Likewise, there will be interpretive difficulties inherent in trying to construct a takings standard that protects the necessary evolution of state common law doctrines. As noted earlier, judicial takings would allow the Court to conduct much more probing review into a much wider swath of state property law, especially if that review extended into this third category, which is entirely removed from any state executive or legislative expropriation.[85] If the Court begins conducting de novo judicial taking analyses (as it seemingly did in this case) of state property law, it might also be forced to again begin confronting whether a property interest is created by the Constitution or whether the Constitution instead only protects state property law-created interests[86] in the context of varying property law doctrines across the country.[87]

---

id=527264 ("Moreover, the principle of Occam's razor, applied to legal thinking, would warn us to avoid multiplying doctrines needlessly.").

[82] *See* Barros, *supra* note 76, at 934–35.

[83] *See* Thompson, *supra* note 78, at 6–7.

[84] For an argument that the "public use" phrase in the Clause would create problems in both interpreting judicial takings cases and in remedying them, especially when arising in this third category of cases, *see* Comment, *Takings Clause — Judicial Takings*: Stop the Beach Renourishment, Inc., v. Fl. Dep't Envtl. Prot., 124 HARV. L. REV. 299, 306–07 (2010).

[85] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that Supreme Court review of state court decisions is important for ensuring the uniformity of *federal* law); Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1050–56 (1977).

[86] *See* Webb's Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155,164 (holding that a private property interest existed even where state property law indicated the contrary). *Cf.* Ingraham v. Wright, 430 U.S. 651 (1977) (recognizing a federal constitutional dimension to "liberty" interests, independent of state law).

[87] Water rights are an example of widely varying regimes depending on the particular state. *See* Carol M. Rose, *From H_2O to CO_2: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91 (2008).

These complexities and side effects might not be necessary given that at least one other viable and simpler doctrinal solution, procedural due process, exists for the Court, even if it decides that the third category encompasses a set of possible injuries to private property without adequate protection. In other words, the affliction could still be treated by using a different remedy. Justice Kennedy offered this possibility in his concurrence.[88]

The above discussion demonstrates the importance of using a finer-grained analysis in evaluating the merits of a new judicial takings doctrine. In *Stop the Beach Renourishment*, and the many other cases that fall into the first two categories above, judicial takings doctrine would likely offer a generally redundant avenue for bringing a takings claim but could allow for more searching federal supervision of state property law. Whether or not the taking is labeled "judicial," though, the takings claim will live or die based on its merits as judged against the Court's regulatory takings jurisprudence. There may be persuasive reasons, however, for maintaining more deferential federal review of state property law[89] in these first two categories, including the importance of property law innovation for certain environmental protection doctrines such as the public trust doctrine[90] or public nuisance law.[91] The presence of judicial takings as an available doctrine in the third category of cases would offer a novel means of bringing a takings claim. However, other constitutional tools may be more appropriate forms of constitutional protection.

---

[88] *See also* John Echeverria, Stop the Beach Renourishment: Why the Judiciary is Different 24–25 (Vermont Law School Legal Studies Research Paper Series No. 10-45, 2010), *available at* http://www.vermontlaw.edu/Documents/201018_echeverriaArticle.pdf.

[89] Even if judicial takings ended up being a matter mostly of semantics for cases in the first two categories, opponents of expansive takings law might not want to see the judiciary even labeled as "taking" when it may be called upon to deal with increasingly complicated interactions between statutes addressing environmental challenges and traditional common law property doctrines. For an example of one such possible interaction in the context of climate change adaptation, see, for example, Meg Caldwell & Craig Holt Segall, *No Day At The Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533 (2007). Flipped around, these very worries of expansive takings opponents might be reasons why a private property advocate would support judicial takings regardless of its practical effect in the first two categories of cases. Put simply, any additional layer of doctrine might serve to increase hesitation before the government acts.

[90] *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 699-700 (2006).

[91] *See, e.g.*, Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 349 (2009), *cert granted*, 131 S.Ct. 813 (U.S. Dec. 6, 2010) (No. 10-174).