

## HOLD BACK THE SEA: THE COMMON LAW AND THE CONSTITUTION

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If hard cases make bad law, bizarre cases may make no law at all. The recent Supreme Court decision, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>1</sup> is a case in point. In the Essays that follow, the *Vermont Law Review* has brought together the reflections of seven lawyers, or teams of lawyers, for amici curiae in the case. The authors' challenge was to consider the meaning and future implications of a decision in which no clear rationale emerged from the opinions.

Florida is noted for its fabulous beaches. The Florida coast is noted for its fierce and destructive hurricanes. To provide a restorative remedy to the former for the periodic and devastating damage inflicted by the latter, Florida in 1961 enacted the Beach and Shore Preservation Act, under which a local government may apply for state funds to undertake beach renourishment and restoration of significantly eroded beaches.<sup>2</sup> When a project is approved, the State determines an "erosion control line" (ECL) as a permanent boundary between submerged and tidal lands, held by the State under a constitutional public trust, and privately owned uplands. The statutory ECL is ordinarily placed along the then-existing mean high-water line (MHWL), which the common law recognized as the boundary between public and private lands. At common law, the location of the MHWL could fluctuate to the benefit or detriment of an upland owner through gradual natural additions to (accretions or relictions), or erosion of, the beach. Conversely, a sudden and drastic change in the beach (avulsion) would not change the location of the MHWL. Under the Beach and Shore Preservation Act, renourishment is to occur primarily through the deposit of new sand on the submerged or tidal public trust land seaward of the ECL. If the fixing of the ECL occurs landward of the original MHWL, the property affected must

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† With apologies to King Canute (985–1035), who, it is said, demonstrated the limits of royal authority with his unsuccessful effort to stop the incoming tide on command. See Lord Raglan, *Canute and the Waves*, 60 MAN 7 (1960), for a discussion of the King Canute legend. For a look at a modern-day King Canute, see Barry Blitt, "Pause," NEW YORKER, Aug. 30, 2010, at cover, available at <http://www.newyorker.com/magazine/toc/2010/08/30/toc>. Also, with thanks to Kristin Cisowski, VLS J.D. 2012, for her preliminary review of the Essays discussed herein. This introduction is based in part on the author's unpublished presentation at the Joint McGill–Vermont Law School Workshop on Water, held at VLS on October 24, 2009. See 34 VT. L. REV. 711, 855–973 (2010).

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

2. FLA. STAT. ANN. §§ 161.011–161.76 (West 2010).

be taken by eminent domain. The Act specifically gives the upland owners access to the new beach and the water beyond it.

The beach shared by the City of Destin and Walton County, midway between Panama City and Pensacola, is a wide, white, sandy, sun-drenched paradigm of the Florida Panhandle beach. In 1995, it was severely damaged by Hurricane Opal—harm that was exacerbated by Hurricanes Georges (1998) and Ivan (2004) and Tropical Storm Isidore (2002).<sup>3</sup> After extensive preparation, the City of Destin and Walton County in 2003 applied for a joint project under the Act to restore nearly seven miles of eroded beach. Over the opposition of a group of upland owners, including the six members of Stop the Beach Renourishment, Inc., the Florida Department of Environmental Protection granted the necessary permits. On appeal the District Court of Appeals upheld Petitioners' claim that, under the Florida Constitution, the project was a taking of their littoral rights to receive accretions and to maintain contact with the water at their property lines. That court, however, stayed its order and certified the constitutional question to the Florida Supreme Court.<sup>4</sup>

The Florida Supreme Court, reviewing the esoteric, ancient, and cryptic Florida common law of littoral rights, concluded that the rights to accretion and access did not exist in the form claimed by the owners and thus had not been taken by the renourishment project. Further, the court held that, in any event, the renourishment process was not an accretion but an avulsion that left the MHWL, and hence the ECL, where it was and did not inure to the benefit of the private owners under Florida law even when the avulsion resulted from actions by the State. On motion for rehearing, Petitioners raised for the first time the issue that the Florida Supreme Court's decision itself was a "judicial taking" that violated the Takings Clause of the Fifth Amendment by ignoring 100 years of Florida law. The court dismissed the motion without opinion in December 2008.<sup>5</sup>

Meanwhile, the completed project had resulted in the addition of seventy-five feet of new, dry sand beyond the ECL. The project had the effect of protecting the private owners from further erosion (and certainly in the months since the decision came down has shielded them from tar balls and oil sheens!). Nevertheless, the owners sought and were granted certiorari in the U.S. Supreme Court.<sup>6</sup> They argued, among other things that "In invoking 'nonexistent rules of state substantive law,' the Florida Supreme Court reversed 100 years of uniform holdings that littoral rights

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3. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1106 & n.4 (2008).

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

5. *Walton County*, 998 So. 2d at 1102.

6. *Stop the Beach Renourishment*, 129 S. Ct. 2792.

are constitutionally protected common law property rights, and thus caused a ‘judicial taking’ proscribed by the Fifth and Fourteenth Amendments to the United States Constitution.”<sup>7</sup> The case brought out twenty-one amicus briefs, involving thirty-two organizations and twenty-six states.<sup>8</sup>

The Supreme Court (with Justice Stevens recusing himself, apparently because of his ownership of an interest in Florida littoral real estate) affirmed the Florida decision. All eight Justices agreed with Part IV of Justice Scalia’s plurality opinion, holding that Petitioners had failed to meet their burden of showing that they had rights under pre-existing Florida law to accretions and contact with the water that trumped the State’s interest in restoring its beaches. In fact, according to the Supreme Court, the Florida court’s decision met the *Lucas* test of consistency with “background principles of the State’s law of property” articulated in Florida cases as interpreted by the Florida court.<sup>9</sup> According to the Court, the Florida court could properly hold that Florida common law gives the State a right to fill its submerged and tidal lands, gives it title to the filled lands as an avulsion that did not alter the pre-existing MHWL though the avulsion was state-created, and characterizes the right to contact with the water as merely an incident of the right of access that has been replaced by a statutory right not shown to be inferior to the common-law right.<sup>10</sup>

Despite this display of deference to the state court decision, however, the Court divided on other issues in ways that provide no clear doctrinal basis for the result. Chief Justice Roberts and Justices Alito and Thomas joined Justice Scalia in seeking to formulate and apply a doctrine of judicial takings—a notion that previously had lurked in a concurrence by Justice Stewart,<sup>11</sup> a dissent by Justice Scalia from a denial of certiorari,<sup>12</sup> and a few law review articles.<sup>13</sup> In *Stop the Beach Renourishment*, Justice Scalia based his development of the judicial takings doctrine on the proposition that the Takings Clause does not differentiate among actions declaring that “an

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7. Petition for Certiorari at 15, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 698518 (Mar. 13, 2009) (quoting, first, *Stevens v. City of Cannon Beach*, 854 P.2d. 449 (Or. 1993), *cert denied*, 510 U.S. 1207, 1212–14 (1994) (Scalia, J. dissenting), and, second, Petition for Certiorari, at 24).

8. See Preview of United States Supreme Court Cases, A.B.A., <http://www.abanet.org/publiced/preview/briefs/dec09.shtml> (last visited Sept. 27, 2010), for links to these briefs.

9. *Stop the Beach Renourishment*, 130 S. Ct. at 2609–12 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

10. *Id.* at 2611–13.

11. *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

12. *Stevens*, 854 P.2d. 449, *cert denied*, 510 U.S. 1207, 1212–14 (1994) (Scalia, J. dissenting).

13. The leading article is Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

established right of private property no longer exists,” whether they are actions of the legislative, executive, or judicial branches.<sup>14</sup>

The plurality opinion rejected in strong terms the doubting views expressed by the other members of the Court, as well as several of the Respondents’ arguments. The plurality stated that: Respondents’ proposed “fair or substantial basis” test was unnecessary because it was akin to the burden imposed on Petitioners in the plurality opinion;<sup>15</sup> federal courts of necessity had to be able to decide questions of state property law;<sup>16</sup> the need of common-law courts for “flexibility” extended no further than the power to clarify previously unclear property rights;<sup>17</sup> and the *Rooker–Feldman* prohibition against lower federal court review of final state-court judgments was not violated because finality principles applicable to takings claims required a decision by a state supreme court and then certiorari review in the U.S. Supreme Court.<sup>18</sup> The plurality also rejected Petitioners’ definition of a judicial taking as a decision that makes an unpredictable change in the law as both under- and over-inclusive.<sup>19</sup>

Justice Kennedy, joined by Justice Sotomayor, concurring only in Part IV, suggested that the Takings Clause—with its roots in the eminent domain power and the many practical difficulties in applying it to the judiciary—should apply only to the legislative and executive branches.<sup>20</sup> Echoing some of his prior opinions, Justice Kennedy stated that judicial overreach that impaired property rights should be addressed under the Due Process Clause.<sup>21</sup> He also agreed with Justices Breyer and Ginsburg, who similarly concurred in Part IV but expressed no opinion on the constitutional issues in light of a result that did not require their resolution.<sup>22</sup> Those Justices noted the complex issues of federal–state court relations involved, and the need to develop appropriate standards that should be articulated only in a case in which they were necessary to the result.<sup>23</sup>

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14. *Stop the Beach Renourishment*, 130 S. Ct. at 2602.

15. *Id.* at 2608.

16. *Id.* at 2609.

17. *Id.*

18. *Id.* The *Rooker–Feldman* doctrine prohibits lower U.S. federal courts from directly reviewing state court decisions unless Congress specifically authorizes such review. See Allison B. Jones, *The Rooker–Feldman Doctrine*, 56 DUKE L.J. 643, 644–45; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

19. *Stop the Beach Renourishment*, 130 S. Ct. at 2610.

20. *Id.* at 2613–14 (Kennedy, J., concurring).

21. *Id.* at 2614.

22. *Id.* at 2617–18.

23. *Id.* at 2613–19 (Breyer, J., concurring).

The Essays that follow display the variety of issues and argument raised by amici curiae on both sides of the case. Ilya Shapiro, Senior Fellow at the Cato Institute, was signatory for the Institute on an amicus brief supporting the Petitioners that was joined by the National Federation of Independent Business Legal Center and the Pacific Legal Foundation.<sup>24</sup> Co-author Trevor Burrus is a legal associate at the Cato Institute. The authors contend that *Stop the Beach Renourishment* is a Pyrrhic victory for “violators of property rights” because it narrows a loophole left by the “background principles” formulation of *Lucas* and opens the door to judicial takings claims as a vehicle for challenging property rights violations.<sup>25</sup> Though Justice Scalia is chided for his embrace of substantive due process in *McDonald v. City of Chicago*,<sup>26</sup> the recent Second Amendment decision extending the right to bear arms to the states, the authors are heartened by his solid reliance on the Takings Clause because of the definiteness of its original meaning.<sup>27</sup>

Robert H. Thomas, Mark M. Murakami, directors, and Tred R. Eyerly, an associate, of a Honolulu law firm, were counsel on an amicus brief in support of Petitioners filed in behalf of Owners’ Counsel of America, an organization of property rights attorneys.<sup>28</sup> Their Essay seeks to provide a “roadmap” for successful judicial takings claims based on their analysis of the plurality opinion and the 1980 case of *PruneYard Shopping Center v. Robins*,<sup>29</sup> in which the Court held that an admitted change by the California Supreme Court of its interpretation of the California Constitution’s speech clause did not make the constitutional provision a taking, because the property owner failed to demonstrate that a property interest was invaded.<sup>30</sup> The “roadmap” consists of a two-step process—(1) identification of a property right essential to the use or economic value of the property, and (2) where the right is essential, a determination whether the state court decision has changed the law. Examples to guide that determination in light of *Lucas* are provided by several decisions of the Hawaii courts.<sup>31</sup>

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24. Brief for CATO Institute et al. as Amicus Curiae Supporting Petitioners, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 2588282.

25. Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia’s Shifting Sands*, 35 VT. L. REV. 423, 435 (2010).

26. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

27. Shapiro & Burrus, *supra* note 25, at 431.

28. Brief for Owners’ Counsel of America et al. as Amicus Curiae Supporting Petitioners, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 2896307.

29. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). This case was discussed in the *Stop the Beach Renourishment* plurality opinion. *Stop the Beach Renourishment*, 130 S. Ct. at 2602.

30. See Robert H. Thomas et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, 35 VT. L. REV. 437 (2010).

31. *Id.* at 444–45.

On the Respondents' side, Richard Ruda, Chief Counsel of the State and Local Legal Center in Washington, was Counsel of Record on the amicus brief of the National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, and International Municipal Lawyer Association.<sup>32</sup> Mr. Ruda concludes that Petitioners' claim in *Stop the Beach Renourishment* was not so novel as to require the novel remedy of the judicial takings doctrine.<sup>33</sup> In support of this proposition, he cites a long line of cases overturning state supreme court decisions based on both substantive and procedural provisions of state law when the state court's interpretation did not rest upon "a fair or substantial basis."<sup>34</sup> Justice Scalia had distinguished those cases as concerned with the determination whether a state decision had rested on an independent state ground and thus did not raise a federal question.<sup>35</sup> He also characterized the standard as a less precise version of the requirement that the property owners prove elimination of an established property right.<sup>36</sup> Mr. Ruda demonstrates the application of the fair or substantial analysis in *Stop the Beach Renourishment*, and rejects the Scalia test and the judicial takings doctrine as upsetting the balance of federal–state relations by necessitating too much federal intrusion on state-law determinations.<sup>37</sup>

Daniel L. Siegel, Supervising Deputy Attorney General, California Department of Justice, was Counsel of Record on the amicus brief of California and twenty-five other states in support of Respondents.<sup>38</sup> He argues that the *Stop the Beach Renourishment* decision actually diminishes the likelihood that the Court will adopt the judicial takings doctrine because the "constitutional, doctrinal, and practical problems" that the plurality's concept creates mean that the majority of the Court as now constituted would be unlikely to accept it.<sup>39</sup> Those problems include federal intrusion on state sovereignty as recognized in numerous prior decisions, the impact on the evolution of common law doctrine, and a series of practical impediments, including judicial immunity and the *Rooker–Feldman*

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32. Brief for State & Local Legal Ctr. et al. as Amicus Curiae Supporting Respondents, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3262877.

33. Richard Ruda, *Do We Really Need a Judicial Takings Doctrine?*, 35 VT. L. REV. 451, 451 (2010).

34. *Id.* at 454.

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

36. *Id.*

37. Ruda, *supra* note 33, at 454.

38. Brief for State of California et al. as Amicus Curiae Supporting Respondents, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3199616.

39. Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 472 (2010).

doctrine, problems arising if the Supreme Court itself changes the law, and the burden on the Court of Federal Claims in adjudicating claims involving lower federal court decisions. Mr. Siegel's solution for the extreme case of indefensible state evasion is for the Supreme Court to exercise a highly deferential supervisory role under the Supremacy Clause.<sup>40</sup>

John Echeverria, Professor of Law at Vermont Law School, was Counsel of Record on the amicus brief of the American Planning Association and its Florida Chapter in support of the Respondents.<sup>41</sup> In his Essay, Professor Echeverria first explores the disagreements among the Justices in *Stop the Beach Renourishment* over the purpose and scope of takings law.<sup>42</sup> Characterizing Justice Scalia's proposition that every decision that "eliminates" an established rule of property law is a taking as a "sweeping," even "breathtaking," extension of the concept of *per se* takings,<sup>43</sup> Professor Echeverria speculates that the real agenda may be to extend the mantle of *per se* takings to cover takings heretofore considered under the deferential ad hoc standard of *Penn Central*.<sup>44</sup> He then compares Justice Scalia's assertion that the remedy for a judicial taking need not be just compensation with Justice Kennedy's view that the foundation of the Takings Clause in eminent domain means that compensation is *the* remedy if the taking is for a public use.<sup>45</sup> Otherwise, the action violates the Due Process Clause, not the Takings Clause. Echeverria concludes that the real objection to the judicial takings doctrine is that the judiciary is different from the other branches of government for five reasons: (1) courts cannot exercise and administer the eminent domain power; (2) the counter-majoritarian thrust of the Takings Clause is inapplicable to judicial decision-making; (3) application of a judicial takings doctrine to state-court decisions would disrupt the long-developed comity with which the federal courts view state authority over state law; (4) the institutional quality of state high courts minimizes the threat of inappropriate rulings in comparison to the rest of state government; (5) judicial decisions tend to be general rules, rather than decisions affecting only a few individuals. Finally, he concludes that a due process analysis and the "fair or substantial"

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40. *Id.* at 473–74.

41. Brief for American Planning Ass'n et al. as Amicus Curiae Supporting Respondents, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3199617.

42. John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475 (2010).

43. *Id.*, at 491, 479.

44. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

45. Echeverria, *supra* note 42, at 482.

standard will protect property interests with less intrusion upon the judiciary.<sup>46</sup>

Two of the Essays address *Stop the Beach Renourishment* in the context of the public trust doctrine. Michael J. Fasano, a member of a New Jersey law firm, filed an amicus brief for the New Jersey Land Title Association in support of Petitioners.<sup>47</sup> In his Essay, Mr. Fasano notes initially that retroactive changes in the law of property increase risk and disrupt the mechanism on the basis of which the title insurance industry can provide its critical services effectively and efficiently.<sup>48</sup> His larger concern is the continuing expansion of public access to private littoral property by the New Jersey courts through expansion of the public trust doctrine to include access to an essentially private beach—a development which would presumably be a taking if mandated by legislation.<sup>49</sup> In his view, however, *Stop the Beach Renourishment* does not appear to offer relief for this situation. The lack of consensus in the Court, the tenor of the opinions, the result-oriented deference shown to state law, and the heavy burden cast on the property owner all symbolize the ineffectiveness of the decision in addressing property owners' concerns and the larger national problems of state–federal and public–private conflict.

Julia B. Wyman, Staff Attorney at the Roger Williams School of Law Marine Affairs Institute, was co-author of an amicus brief in support of Respondents filed on behalf of the Coastal States Organization, representing the governors of thirty-five coastal states.<sup>50</sup> In her Essay, Ms. Wyman first outlines the importance of the public trust doctrine as a foundation of the states' authority to protect their all-important coastal lands against the growing threat of climate change.<sup>51</sup> Florida's Beach and Shore Protection Act and the decision of the Florida Supreme Court in *Stop the Beach Renourishment* demonstrated strong state action to protect public trust coastal lands against climate change-induced damage.<sup>52</sup> She views the Supreme Court's decision, recognizing Florida's authority to interpret its own law and upholding the Florida decision, as “a great step forward” in

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46. *Id.* at 493.

47. Brief for New Jersey Land Title Ass'n et al. as Amicus Curiae Supporting Petitioners, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 2597048.

48. Michael J. Fasano, *A Divided Ruling for a Divided Country in Dividing Times*, 35 VT. L. REV. 495 (2010).

49. *Id.* at 497–501.

50. Brief for Coastal States Org. et al. as Amicus Curiae Supporting Respondents, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 6046172.

51. Julia B. Wyman, *In States We Trust: The Importance of the Public Trust Doctrine in the Wake of Climate Change*, 35 VT. L. REV. 507 (2010).

52. *Id.* at 508.



assuring the ability of the states to address the risk of climate change to the vital national resource that is the coast.<sup>53</sup>

As the smoke clears from the last volleys among the amici, a number of significant issues raised in *Stop the Beach Renourishment* and the reflections of the amici remain ripe for fuller development:

(1) Is the decision of the Florida Supreme Court on the nature of the common law rights to access, accretion, and avulsion as elaborated by the U.S. Supreme Court warranted as a proper, perhaps evolutionary, but not revolutionary, interpretation of existing Florida precedents? How will the interpretation apply in other states?

(2) Is the concept of a “judicial taking” a legitimate and appropriate development of Takings Clause jurisprudence in light of its impact on the common law process and the balance of state and federal judicial authority? The common law is meant to be an evolutionary body of doctrine—even within the strict view of the process sometimes attributed to British jurisprudence. Federal deference to state decision-making is a critical element of federalism. Do other sources of federal authority provide a less intrusive safeguard against judicial overreaching?

(3) If a state common law decision can be a taking, what degree of deference is due to the state common law process and by what standards should that deference be measured and applied? Could prospective application of a doctrinal change avoid a takings challenge?

The Editors of the *Vermont Law Review* hope that the Essays that follow will spark others to embark on fuller consideration of these and other issues from a broader and less adversarial perspective.

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53. *Id.* at 514.