

Constitutional Problems with Judicial Takings Doctrine and the Supreme Court's Decision in *Stop the Beach Renourishment*

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I.

INTRODUCTION

The Supreme Court's 2009 term featured a slate of blockbuster cases: for example, the second, special-session re-argument of *Citizens United v. FEC*,¹ review of the criminal conviction of former Enron CEO Ken Skilling in *Skilling v. United States*,² and the question in *McDonald v. City of Chicago*³ of whether an individual right to have a gun for self-defense is constitutionally protected against state infringement. Another potential blockbuster was the first "takings" case to be heard since Chief Justice John

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1. 130 S. Ct. 876 (2010)
 2. 130 S. Ct. 2896 (2010).
 3. 130 S. Ct. 3020 (2010).

Roberts and Justices Samuel Alito and Sonia Sotomayor joined the Court: *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.⁴ Closely watched by property-rights activists, environmental advocates, and state and local governments,⁵ *Stop the Beach* presented the Court with the opportunity to recognize for the first time a doctrine of “judicial takings,”⁶ which would have the potential to significantly limit state courts’ ability to reform state property law and, in this case, to seriously hinder state and local efforts to protect coastal areas and respond to environmental disasters.

Stop the Beach Renourishment involved a beach restoration project on Florida’s Gulf Coast.⁷ Due to sea level rise and increased hurricane activity, beaches around the country are eroding rapidly, and a number of states have invested heavily in programs to maintain their beaches. In particular, Florida’s shorelines have been repeatedly damaged by hurricanes and erosion.⁸ The Beach and Shore Preservation Act of 1965⁹ was enacted to protect Florida’s citizens and environment, in light of the legislature’s view that “beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions.”¹⁰ The Act provides for beach restoration and nourishment projects to shore up beaches threatened by erosion along the state’s 825 miles of sandy beaches.¹¹ In other words, when local governments like Florida’s City of Destin and Walton County apply for the necessary permits under the Act, the state will dredge sand from one area and

4. 130 S. Ct. 2592 (2010).

5. The author, along with the State and Local Legal Center, filed an *amicus curiae* brief on behalf of the National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, and International Municipal Lawyers Association, in support of the respondents. Brief of Nat’l Ass’n of Counties, et al. as Amici Curiae Supporting Respondents, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151), available at http://www.theusconstitution.org/upload/pages/current_1/13_STBR%20v.%20Florida.pdf.

6. Lyle Denniston, *Analysis: An Elusive Constitutional Issue*, SCOTUSBLOG (Dec. 2, 2009, 1:45 PM), <http://www.scotusblog.com/?p=13416>.

7. 130 S. Ct. at 2594.

8. *Hurricane Impacts on the Coastal Environment*, U.S. GEOLOGICAL SURVEY, <http://marine.usgs.gov/fact-sheets/hurricane/hurricane-txt.html> (last visited Apr. 18, 2011).

9. FLA. STAT. § 161.011 *et seq.*

10. FLA. STAT. § 161.088.

11. JULIE HAUSERMAN, *FLORIDA’S COASTAL AND OCEAN FUTURE: A BLUEPRINT FOR ECONOMIC AND ENVIRONMENTAL LEADERSHIP 2* (2007), available at <http://www.nrdc.org/water/oceans/florida/flfuture.pdf>.

dump it on another, expanding the width of the threatened beach.

In most coastal states like Florida where ownership of beachfront property is split between the state and private parties, the traditional rule of beachfront property ownership, stated simply, is that private landowners own the “dry” land and the state owns the seabed.¹² “The dividing line is the mean high water line (MHWL), a dynamic boundary that fluctuates as the beach grows or erodes.”¹³ “Traditionally, the state owns everything seaward of the MHWL.”¹⁴ Florida law, like most states, differentiates between gradual and sudden changes in the coastline.¹⁵ Gradual additions to the shoreline are “accretions;” gradual subtractions are erosion.¹⁶ Under the common law, a beachfront property owner bears both the benefit and burden of these changes: accretion increases the property owners’ land, but erosion will reduce it.¹⁷ Sudden, perceptible changes in the shoreline—as opposed to gradual accretion or erosion—are called “avulsions.”¹⁸ While a sudden change to the shoreline would obviously change the MHWL, under the common law of avulsion in Florida, the legal boundary remained the pre-avulsion MHWL.¹⁹

The Beach and Shore Preservation Act shifts the line between public and private property, modifying the common law of beachfront property ownership.²⁰ Under the Act, the first step in rebuilding a beach is to fix an erosion control line (ECL), which becomes the new, and *permanent*, boundary between the private owners’ land and the state’s land.²¹ The state then adds sand to

12. See Gary K. Oldehoff, *Florida’s Beach Restoration Program Weathers a Storm in the Courts: Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 84 FLA. BAR J. 10 (2010), available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f13012b96736985256aa900624829/80b1e04e426a3a9c852577c9005539ce!OpenDocument>.

13. Anna Christensen, *Will the Court Take on Judicial Takings?*, SCOTUSBLOG (Nov. 19, 2009, 3:27 PM), <http://www.scotusblog.com/2009/11/will-the-court-take-on-judicial-takings/>.

14. *Id.*

15. See Bd. of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 211 (Fla. Dist. Ct. App. 1973).

16. See Bd. of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., 512 So. 2d 934, 936 (Fla. 1987).

17. Christensen, *supra* note 13.

18. Christensen, *supra* note 13.

19. See Bd. of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., 512 So. 2d 934, 936 (Fla. 1987). See *id.* at 936; Bryant v. Peppe, 238 So. 2d 836, 837-39 (Fla. 1970).

20. Christensen, *supra* note 13.

21. *Id.*

shore up the beach, creating an artificial avulsion.²² In many instances, “the ECL is set at the MHWL, so the private owners’ holdings are initially unchanged; however, as the MHWL varies over time,” the line of property ownership “ceases to vary with it.”²³ Thus, “under the common law, owners would have gained land if the sand had ‘accreted’ and the beach had expanded; however, under the statutory scheme, their land stops at the ECL regardless of any accretion.”²⁴ In addition, because of the fixed ECL under the Act, the land added by the state nourishment project, an artificial avulsion, is not added to the private property owner’s land but instead becomes public property.²⁵ The statute does, however, “provide that private owners retain most common-law “littoral” (beachfront) rights, including the right of access to the water.”²⁶

The project at issue in *Stop the Beach* would add about seventy-five feet of dry sand to the beach. This added area would become public beach (whereas if sand had accumulated naturally it would have expanded the private landowners’ property). Accordingly, beachfront property owners in the area would no longer own property to the water’s edge. Six beachfront property owners in Walton County, banding together as “Stop the Beach Renourishment, Inc.,” challenged the beach renourishment project undertaken pursuant to the Act.²⁷ Florida’s district court of appeal agreed with them, concluding that the project would infringe two of the property owners’ “common law riparian rights”: specifically the right to receive accretions on their land, and the right to have their property actually contact the water.²⁸

The Florida Supreme Court, however, disagreed and found that the Beach and Shore Preservation Act does not unconstitutionally deprive the beachfront property owners of any property rights without just compensation.²⁹ As a matter of state law, the Florida Supreme Court held that the doctrine of avulsion—which

22. *Id.*

23. Christensen, *supra* note 13.

24. *Id.*

25. *Id.*

26. *Id.*

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

28. *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl Prot.*, 27 So. 3d 48, 56-60 (Fla. Dist. Ct. App. 2006).

29. *Walton Cty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1120-21 (Fla. 2008).

means a sudden, perceptible loss or addition to land by water—permits the State to reclaim the restored beach on behalf of the public.³⁰ It did not matter that the “avulsion” in this case—that is, the addition of sand to the eroded beach—was in fact created by the state, because the state owns the seabed and has the right to fill in portions of it and claim the resulting dry beach seaward of the ECL.³¹

The property owners sought review from the U.S. Supreme Court on the ground that the Florida Supreme Court’s decision *itself* affected a taking of their property rights by allegedly redefining these rights in a sudden, unpredictable way that was inconsistent with Florida law.³² In other words, the petitioners asked the Supreme Court to recognize, for the first time, that a claim could be brought under the Takings Clause for a *judicial* taking. The Constitution’s Fifth Amendment “takings clause” requires governments to pay “just compensation” when they take private property for public use.³³ This requirement has been applied to acts of the legislative and executive branches, but the Court has never held that a court decision itself can amount to a taking of property.³⁴

Somewhat surprisingly, when the Supreme Court heard oral argument, there was very little discussion about the precise contours of a judicial takings claim or the potential consequences of recognizing that such a claim even exists.³⁵ Instead, the Justices expressed chagrin over the potential for hot dog stands on public beaches in front of homes and the specter of hordes of rowdy spring breakers taking over wide stretches of state-created beaches.³⁶ However, at the same time, most of the Justices did not seem to think that the Florida Supreme Court’s ruling on the Beach Preservation Act’s effects on the scope of petitioners’ property rights was so unreasonable as to constitute a judicial taking. The lawyer for the property owners conceded there wasn’t much case law supporting their view of Florida beachfront

30. *Walton Cty.*, 998 So. 2d at 1116-17.

31. *Id.* at 1117-18.

32. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2597 (2010).

33. U.S. CONST. amend. V

34. Lyle Denniston, *Analysis: An Elusive Constitutional Issue*, SCOTUSBLOG (Dec. 2, 2009, 1:45 PM), <http://www.scotusblog.com/?p=13416>.

35. See generally Transcript of Oral Argument, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1151.pdf.

36. *Id.* at 9.

property rights, and, since the property owners had to show that the Florida court's decision broke with existing state law in a sudden, unpredictable way, Justice Scalia noted, "[i]f there's no case law, it seems to me you've lost your case."³⁷ Justice Kennedy suggested, assuming that it was a "close case" and the Florida Supreme Court could have gone either way, the mere concession that it is a close case could undermine the property owners' claim that the Florida court's decision lacked a fair and substantial basis.³⁸ Or, as Justice Breyer observed, it appeared that the Florida Supreme Court was simply facing "a typical common law situation,"³⁹ in which a state court applies precedent and common law principles to new facts; normal, incremental development in a state's property law surely cannot represent a constitutional violation each time a state court acts in common law capacity.

Thus, it was not terribly surprising to most observers when, writing for the Court, Justice Scalia ultimately concluded that the Florida Supreme Court did not violate the takings clause, after a somewhat dry discussion of water and property rights under Florida law and common law.⁴⁰ The big question, however, was whether such a judicial takings claim could ever exist. Here, Justice Scalia opined that the takings clause "applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land,"⁴¹ arguing that "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."⁴² However, Scalia was not speaking for a majority of the Court, only a plurality of four justices: Chief Justice Roberts, and Justices Alito, Thomas, and himself (only eight Justices participated in the case because Justice Stevens, a Florida property owner, recused himself.)⁴³ Thus, it is only in the plurality portions of the opinion where there is an acceptance of a judicial taking, which does not amount to binding precedent.

Justice Kennedy, joined by Justice Sotomayor, filed a concurring opinion essentially rejecting the judicial takings theory.⁴⁴ He reasoned that 1) "it is unclear whether the Takings Clause

37. Transcript of Oral Argument at 7, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010).

38. *Id.* at 25.

39. *Id.* at 8.

40. *Stop the Beach Renourishment Inc.*, 130 S. Ct. at 2610-13.

41. *Id.* at 2601.

42. *Id.*

43. *Id.* at 2597.

44. *Id.* at 2613-18.

was understood, as a historical matter, to apply to judicial decisions;⁴⁵ 2) the theory would improperly place the *courts* in the position of making the political choice whether to exercise eminent domain power, even though “[t]he judiciary historically has not had the right or responsibility to say what property should or should not be taken;”⁴⁶ and 3) the Due Process Clause already provides the needed protection against arbitrary and irrational rulings on property law questions, noting that “[t]he Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power.”⁴⁷ Justice Breyer, joined by Justice Ginsburg, also declined to join Justice Scalia, arguing that the judicial takings claim in the case at bar so obviously failed on the merits under any test that there was no need to address the merits of the judicial takings theory.⁴⁸ Justice Breyer also sounded a federalism-based cautionary note, explaining that Justice Scalia’s approach to judicial takings “would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.”⁴⁹

State and local governments, environmental advocates, and anyone who cares about an accurate reading of the Constitution dodged a bullet in *Stop the Beach*. With respect to the legal implications of the case, a “judicial takings” theory would require an ahistorical and unjustified reading of the takings clause, while threatening core principles of federalism. With respect to the practical effects of *Stop the Beach*, a contrary ruling by the Court would have tied the hands of state and local governments to respond to the effects of climate change and other coastal problems, such as the oil spill that ravaged the Gulf Coast last summer. If state and local governments were required to compensate private property owners every time the courts applied duly-enacted laws and regulations that modified property law to reflect environmental changes to the coastline, environmental regulation could become prohibitively costly.

This article focuses on some of the issues underlying the *Stop the Beach* case and addresses three primary constitutional

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

46. *Id.*

47. *Id.* at 2614.

48. *Id.* at 2619 (Breyer, J., concurring).

49. *Id.*

problems with a judicial takings doctrine. First, our constitutional history runs contrary to the idea that when state courts apply advancements in state property laws their rulings can amount to unconstitutional judicial takings. Second, judicial takings claims would require a level of federal court intrusion into state development of property law and police power that would violate bedrock principles of federalism. States unquestionably have the authority to define the substance of state property rights; the dynamic interaction between state legislatures, creating statutory law, and state courts, interpreting legislative enactments against the fluid backdrop of state common law, is integral to the development of state substantive property law. Finally, the concept of judicial takings is entirely superfluous as a textual matter, given the presence of the Fourteenth Amendment's Due Process Clause, which protects against the deprivation of property without due process of law and thus limits the exercise of state judicial power. Section II addresses the first "judicial takings" constitutional problem, with the remaining two issues addressed in Sections III and IV, respectively.

II.

CONSTITUTIONAL PROBLEM NUMBER 1: CONSTITUTIONAL HISTORY DOES NOT SUPPORT A JUDICIAL TAKINGS THEORY

Both the Fifth Amendment and the Fourteenth Amendment, through which the Fifth Amendment is applied to the states, were passed against a legal backdrop that included significant legislative and judicial modifications to entrenched, common law property interests. From the very beginnings of the Takings Clause of the Fifth Amendment, which guarantees that "private property" shall not "be taken for public use, without just compensation,"⁵⁰ regulation of property was accepted as compatible with the Amendment's mandate. Property rights were important to the Founding-era Framers, but the Framers also intended the text and meaning of the Takings Clause to be appropriately narrow. The history of the Takings Clause shows a respect for state and local government power to define and regulate property interests, whether through statutory reform of the common law or exercise of reserved police power.⁵¹ To insert federal court re-

50. U.S. CONST. amend. V.

51. See, e.g., *Reinman v. City of Little Rock*, 237 U.S. 171, 177 (1915) (according local government police power regulations "a considerable latitude of discretion"); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992) (noting state authority

view into this process of state lawmaking would be out of step with our constitutional history and disrupt the states' long-established prerogative to gradually develop their statutory and common law to reflect changing conditions.

Beginning at the founding of the United States, property regulation existed in harmony with American ideals: "American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights."⁵² State legislatures engaged in reform of property laws that affected private property interests in order to advance the new nation's emphasis on equality and further the public interest. For example, at the time of the Founding, most states were engaged in reform of traditional inheritance laws.⁵³ Indeed, Thomas Jefferson was the force behind Virginia's statutory revision of inheritance laws, which has been called "[t]he brightest example of the reform process."⁵⁴

Prior to Jefferson's reform efforts, Virginia's inheritance law "largely adhered to the English system;" by 1785, Virginia had changed the law to abolish both entail and primogeniture.⁵⁵ James Madison supported these efforts despite the fact that "Virginia's abolition of entail destroyed valuable reversionary interests in land and slaves that Virginia courts had long protected."⁵⁶ Certainly the abolition of entail modified a significant property interest, but Madison, the person most responsible for the Constitution's Takings Clause,⁵⁷ did not suggest that termination of

to define state common law rules of property); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972))).

52. John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. REV. 1099, 1100 (2000).

53. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 1 (1977).

54. *Id.* at 12.

55. *Id.* at 12, 13.

56. Hart, *supra* note 52, at 1130.

57. The Takings Clause is the only phrase appearing in the Bill of Rights that was not requested by at least two states' amendment-proposing conventions. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985). Its placement in the Constitution is largely attributable to James Madison, who "intended the clause to have narrow legal consequences" but "broad moral implications" as a statement of national commitment to the preservation of property rights." *Id.*

this property interest must be compensated or that statutory modification of this property interest was improper. In fact, the abolition of entail was arguably more closely aligned with American principles than its preservation would have been, and it is thus not surprising that Jefferson, the author of the Declaration of Independence, was its greatest champion. By the end of the eighteenth century, virtually all of the American states had changed their property laws to abolish primogeniture and entail, two concepts which had been heretofore long-established in the common law.⁵⁸ To the extent these reforms were challenged, the Supreme Court upheld the laws.⁵⁹

The adoption of the Fourteenth Amendment, and the application of the Takings Clause to the States, did not change the States' ability to reform state property law in ways consistent with the amended Constitution. In the era of Reconstruction, reform movements sought to change entrenched common-law concepts that had grown incompatible with changing conditions and values.

For example, the centuries-old "common law of coverture gave husbands rights in their wives' property and earnings."⁶⁰ During the nineteenth century, however, states passed legislation modifying or repealing the law of coverture to give wives the capacity to enter into legal transactions and possess rights in their own property and earnings.⁶¹ The law of coverture was reformed in two phases: First, "reform began with the passage of married women's property acts that allowed wives to hold property in their own right."⁶² Second, the reform movement advocated for earnings statutes, which would have "allowed wives to assert property rights in their labor and granted wives various forms of legal agency respecting their separate property, including the capacity

58. See generally Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUMB. L. REV. 24 (1927).

59. See *Van Rensselaer v. Kearney*, 52 U.S. 297 (1850) (upholding New York state court's application of the statute of New York of Feb. 23, 1786, which abolished estates tail).

60. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1994).

61. See, e.g., KATHLEEN S. SULLIVAN, CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH CENTURY AMERICA 69-70 (2007); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1397-98 (1983).

62. Siegel, *supra* note 60, at 2141.

to contract and file suit.”⁶³ From these two phases of reform emerged a “wide-ranging effort to forge a body of family law for the modern era—one that could accommodate social change and do justice to husband and wife, while preserving intact those features of the marital relation that legislators and judges understood to define the institution.”⁶⁴

After the enactment of reform statutes, “[i]t fell to the courts in the late nineteenth century to decide how to square the reform statutes with a common law tradition.”⁶⁵ Prior to coverture reforms, the common law property “bundle of sticks was rather large for men and correspondingly small for married women.”⁶⁶ After the reform of coverture, certain sticks in that property bundle were re-defined so as to belong to married women. Yet, despite this shift in the property “bundle of sticks,” neither the reform acts themselves nor the judicial decisions squaring the statutes with the common law were declared unconstitutional under the Takings Clause—and they were certainly never challenged as “judicial takings.”

Thus, at the time the Takings Clause was added to the Constitution in the eighteenth century, as well as when the Clause was applied to the States in the nineteenth century, states were engaged in prominent reform of common law property interests in response to changed ideals and conditions—much like how states, such as Florida, have modified their coastal property laws to address environmental changes, including beach erosion.

63. *Id.* For example, an 1860 New York statute “expanded a wife’s capacity to contract and sue, improved her rights in child custody and inheritance, and, most significantly, provided that ‘the earnings of any married woman, from her trade, business, labor or other [sic] services, shall be her sole and separate property’” Siegel, *supra* note 25, at 2137 (“An Act concerning the rights and liabilities of husband and wife.” (quoting Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157, 157)). This statute, as well as earnings statutes enacted in Massachusetts and Illinois after the Civil War, were responsive to an increasingly vocal and effective women’s rights movement. They were also responses to changing economic conditions, and reflect the evolution of the common law of marital status in the market economy of mid-nineteenth-century America. Siegel, *supra* note 60, at 2137-39.

64. Siegel, *supra* note 60, at 2140-41.

65. *Id.* at 2148.

66. Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 540 (2006).

III.

CONSTITUTIONAL PROBLEM NUMBER 2: A JUDICIAL TAKINGS THEORY WOULD VIOLATE PRINCIPLES OF FEDERALISM AND COMMON LAW

States' development of property law relies in many ways on the interaction between background common law principles and legislation. The judicial takings theory threatens to violate bedrock principles of federalism and disturb the incremental development of state property law by state and local policy makers and state courts. As Justice Breyer noted in his *Stop the Beach* concurrence, federal court review under a judicial takings theory could "open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases . . . [and] create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law."⁶⁷

The American legal system is a creature of "both statutes and common law."⁶⁸ State common law is necessary "to fill the gaps in legislation, to develop the principles introduced by legislation, and to interpret them."⁶⁹ If common law courts, in response to changed conditions, fill in a legislative gap in a manner sufficiently at odds with the will of the people or the intent of state and local policy makers, elected legislatures can clarify the law to reverse or soften judicial common law decisions.⁷⁰ Under our system of federalism, state law defines property interests;⁷¹ state property law in turn entails a fluid lawmaking partnership between the legislature and the common law courts. Indeed, statutes themselves are often "a source of policy for consistent

67. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2619 (Breyer, J., concurring).

68. Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 548 (2007).

69. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 174 (1921).

70. See M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 562 (1996) ("Where a state's high court has countenanced a new rule, the political process provides for a legislative veto."); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 997 (1982) ("Even in cases to which no statute presently applies, the fact that the legislature is always, or virtually always, in session casts a considerable shadow on innovation in common law growth and development."). Indeed, one of Blackstone's purposes in writing the Commentaries was to "show legislators the problems with the state of the common law so that they might be inclined to exercise their statutory authority in amending it." Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 562 (2006).

71. See, e.g., *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998).

common law development.”⁷² Just as legislatures consider the common law in enacting statutes, state courts consider statutes “as a source of common law policy.”⁷³

Interrupting this dynamic relationship through federal “judicial takings” review would run contrary to established principles of federalism. Within the American system of “cooperative judicial federalism,”⁷⁴ certain responsibilities for administration and development of the law are vested in state courts, including the authority to define and develop state common law rules of property.⁷⁵ Federal court review of state court rulings on matters of state law under the federal Constitution could have a disruptive effect on our system of federalism and on the relationship between the federal and state courts in particular.

In addition, federal judicial takings review could chill important state innovations to the common law. One of the chief benefits of a state common law system is its ability to adapt to change: interpretation of the common law “should be responsive to certain alterations in external conditions, rather than static and inflexible.”⁷⁶ Defenders of the common law in the early states declared “one of its excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times, without losing its original character, its vital principles, its most useful institutions.”⁷⁷ In the words of one state high court, “the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.”⁷⁸

The legal regime at issue in *Stop the Beach* is a perfect example of state property law keeping pace with the changing environment (literally and figuratively). Under the common law, the

72. Peters, *supra* note 70, at 998.

73. *Id.* at 1006. Administrative agencies also enter the flow of statutory interpretation and application, when statutory enforcement is entrusted to such agencies. Administrative regulations rendered pursuant to a statute can prove highly influential by giving greater specificity to often vague or opaque statutory language and by providing illustrative examples. *Id.* at 1000.

74. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

75. *See Lucas*, 505 U.S. at 1032 n.18.

76. Meyler, *supra* note 70, at 558.

77. JOSEPH HOPKINSON, CONSIDERATIONS ON THE ABOLITION OF THE COMMON LAW IN THE UNITED STATES 21-22 (1809).

78. *Harrison v. Montgomery Cnty. Bd. of Educ.*, 456 A.2d 894, 903 (Md. 1983). *Accord Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (noting that the common law “presupposes a measure of evolution”); *Patterson v. Colorado*, 205 U.S. 454, 461 (1907) (“There is no constitutional right to have all general propositions of law once adopted remain unchanged.”).

MHWL set a dynamic boundary that fluctuated according to changes in coastal conditions.⁷⁹ In light of the serious threat of erosion to Florida beaches, the legislature passed the Beach and Shore Preservation Act, modifying or suspending certain aspects of common law to respond to these changing environmental and economic conditions, while expressly preserving all other common law rights.⁸⁰ The Act provides financing and a mechanism for restoring critically eroded beaches through a state-created “avulsion”—i.e., the artificial addition of sand to shore up the beaches and provide a buffer against further damage.⁸¹ This state addition of land changes the boundary from the fluctuating MHWL to a fixed erosion control line (ECL);⁸² this makes sense, given that the state is going to take on the burden of maintaining the dry beach up to that ECL. However, while the property boundary line will shift from the common law MHWL to a fixed ECL, the Act preserves other common law rights of property owners, including: 1) the right to “view or access the water’s edge,”⁸³ 2) the right not to have the reconstructed beach used for any purpose “injurious to the person, business, or property of the upland owner or lessee,”⁸⁴ and 3) the right to restore the common law boundary—the MHWL—if the state fails to maintain the beach restoration.⁸⁵

This statute and the Florida Supreme Court’s efforts to interpret it in accord with established common law principles exemplify the dynamic relationship that state courts and state and local policymakers engage in to develop state common law. Federal courts are not referees for this process.⁸⁶ As the Court explained in *Sauer v. New York*, states have the right to modify and determine complex issues at the intersection of private and public property, even if it is sometimes a messy process:

The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the

79. Christiensen, *supra* note 13.

80. FLA. STAT. § 161.201 (2010).

81. FLA. STAT. § 161.091 (2010).

82. FLA. STAT. § 161.191 (2010).

83. FLA. STAT. § 161.191(2) (2010).

84. FLA. STAT. § 161.201.

85. FLA. STAT. § 161.211(1) (2010).

86. *E.g.*, *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 49 (1944) (Douglas, J. concurring) (explaining that, with respect to a state law property law question on which the state court has the “final say,” “[i]t is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous.”).

decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose.⁸⁷

It is the distinct province of state and local policymakers, as the agents of the government closest to the people, to respond to changing environmental conditions to protect public safety, community welfare, and natural resources. The Court has historically been reluctant to unduly interfere with state and local governments' police powers, even when alleged to effect a deprivation of property, and has accorded police power regulations "considerable latitude of discretion."⁸⁸ As the problems attendant to erosion are likely to continue to vex coastal states,⁸⁹ judicial takings claims should not be able to serve as a backdoor attempt to thwart state and local policy makers' authority to appropriately modify property regimes in order to protect the public interest in the face of environmental change.⁹⁰

87. *Sauer v. City of New York*, 206 U.S. 536, 548 (1907).

88. *Reinman v. City of Little Rock*, 237 U.S. 171, 177 (1915) (upholding city regulation of livery stables against a claim that the regulation amounted to an unconstitutional deprivation of property). *See also* *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591 (1962) (upholding town ordinance regulating dredging and excavation as a valid police regulation); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (explaining that while the police power cannot be exercised arbitrarily, state police power is "one of the most essential powers of government—one that is the least limitable.").

89. *See* 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, 535 (2007) ("Sea level rise is an enormously complex public policy problem.").

90. Soon after the concept of police power was articulated by the Supreme Court, at least one court specifically upheld an anti-erosion regulation as an appropriate use of legislative power to protect natural resources and the public. *Commonwealth v. William Tewksbury*, 52 Mass. 55 (1846) (upholding an anti-erosion statute that criminally forbade the "tak[ing], carry[ing] away or remov[ing], by land or by water, any stones, gravel or sand, from any of the beaches in the town of Chelsea."). *Id.* at 55. The Massachusetts Supreme Court upheld the anti-erosion statute against a constitutional challenge under the state takings clause, interpreting the purpose of the law as follows: "to protect the harbor of Boston, by preserving the integrity of the beaches, and the natural embankments of sand and gravel by which it is bordered." *Id.* at 56. The court explained that:

Such a law is not a taking of the property for public use, within the meaning of the constitution, but is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public.

In the case of Walton County and the City of Destin, for example, the area's beach was critically eroded by Hurricane Opal in 1995, and then again by several hurricanes in 2004, including Hurricane Ivan.⁹¹ As the Court itself acknowledged in *Massachusetts v. EPA*,⁹² scientific experts have reached a strong consensus that global warming will result in sea level rise and increasingly strong hurricanes. The combined effects of sea level rise, storms, and other causes of erosion have led the Federal Emergency Management Agency (FEMA) to estimate that by the year 2060 coastal erosion will threaten nearly 87,000 homes across the country.⁹³ This is a problem beyond merely coastal property, and beyond just Florida. In California, for instance, in addition to the threat to coastal development caused by erosion, vast areas of wetlands and other natural ecosystems adjacent to coastal areas are vulnerable to sea level rise.⁹⁴ An estimated 350,000 acres of wetlands exist along the California coast, valued at approximately \$5,000-\$200,000 per acre,⁹⁵ but truly priceless in terms of ecosystem and habitat. A sea level rise of a mere fifty-five inches would flood approximately 150 square miles of land adjacent to California wetlands.⁹⁶ This same 55-inch sea level rise would also place 480,000 Californians at risk of a 100-year flood event.⁹⁷ A "100-year flood event" in California would threaten basic, critical infrastructure, including nearly 140 schools, 34 police and fire stations, 55 health care facilities, more than 330 EPA-regulated hazardous waste facilities or sites, an estimated 3500 miles of roads and highways, 280 miles of railways, 30 coastal power plants with a combined capacity of more than 10,000 megawatts, 28 wastewater treatment plants, and the San Francisco and Oakland airports.⁹⁸

Id. at 57. In short, the Supreme Court of Massachusetts concluded that a legislative enactment designed to forestall beach erosion was within the legislature's power.

91. Despite the fact that the *Stop the Beach* case did not reach the Supreme Court until its October 2009 term, the restoration projects in Walton County and Destin were completed in 2007.

92. 549 U.S. 497 (2007).

93. GARY B. GRIGGS, COASTAL CLIFF EROSION IN SAN DIEGO COUNTY 1-2 (2002), available at http://www-csgc.ucsd.edu/RESEARCH/PROJPROF_PDF/RCZ157.pdf.

94. CA. CLIMATE CHANGE CTR., THE IMPACTS OF SEA LEVEL RISE ON THE CALIFORNIA COAST 3 (2009).

95. *Id.* at 3, 29.

96. *See id.* at 3.

97. *Id.* at 40.

98. *Id.* at 2-3.

Given these potentially catastrophic threats to coastal states' citizens, environment, infrastructure, and economic well-being, it only makes sense to allow state and local governments to appropriately modify property regimes as necessary to protect against environmental changes. If a private property owner could bring a judicial takings claim every time a court applied common law principles to new property rules, state and local decision makers could hardly afford to take steps necessary to protect against erosion and preserve coastal habitats, homes, and development.

IV.

CONSTITUTIONAL PROBLEM NUMBER 3: THE TEXT OF THE CONSTITUTION ALREADY PROVIDES PROTECTION THROUGH THE DUE PROCESS CLAUSE, RENDERING A JUDICIAL TAKINGS THEORY SUPERFLUOUS

As Justice Kennedy explained in his *Stop the Beach* concurrence, there is no need to fashion a novel theory of judicial takings in order to protect against judicial decisions that arbitrarily or irrationally eliminate established property rights.⁹⁹ In fact, the text of the Constitution explicitly provides protection against unjust state deprivation of property in the Fourteenth Amendment's Due Process Clause. Indeed, the Supreme Court has already addressed, under the Due Process Clause, claims that state courts have interpreted state law to evade federal Takings Clause mandates.¹⁰⁰ These precedents balance the protection of individual constitutional rights with the deference that must be given to state court decisions on issues of state law. To the extent any legitimate federal claims of judicial takings may arise, the Due Process Clause provides an appropriate avenue for redress and a new "judicial takings" doctrine is unnecessary.

Reviewing the text of the Constitution, Justice Kennedy noted in his *Stop the Beach* concurrence that the Due Process Clause protects against deprivation of property without due process of law, concluding that "[i]t is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change es-

99. *Stop the Beach Renourishment Inc.*, 130 S. Ct. at 2614-15.

100. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U. S. 528, 542 (2005); *Goldblatt v. Town of Hempstead*, 369 U. S. 590, 591, 592-593 (1962); *Demorest v. City Bank Farmers Trust Co.*, 321 U. S. 36, 42-43 (1944); *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U. S. 537, 539, 540-541 (1930); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928); *Nectow v. City of Cambridge*, 277 U. S. 183, 188 (1928); *Vill. of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395 (1926).

established property rights.”¹⁰¹ A judicial takings doctrine would not only render this due process language superfluous or duplicative, but the Takings Clause is also less suited to the task of protecting against judicial decisions that unconstitutionally infringe private property rights. As Justice Kennedy’s concurrence observed, the Takings Clause only acts as a *conditional* limitation on government power: the government may take property if it pays the appropriate charge.¹⁰² “Unlike the Due Process Clause, therefore, the Takings Clause implicitly recognizes a governmental power while placing limits upon that power.”¹⁰³ Justice Kennedy concluded that a judicial taking doctrine would thus need to assume that a judicial decision eliminating property rights could be constitutional if just compensation were rendered.¹⁰⁴ This makes little sense, particularly where the text of the Constitution provides such an obvious alternative source of rights protection.

Justice Scalia, of course, did not let Kennedy’s arguments go unchallenged in *Stop the Beach*. Scalia unleashed his scorn for the suggestion that the Due Process Clause, in its procedural and substantive aspects, should protect property rights against judicial abuse instead of the Takings Clause, writing that “[t]he great attraction of Substantive Due Process as a substitute for more specific constitutional guarantees is that it never means never—because it never means anything precise.”¹⁰⁵ (This is a little ironic, given that Scalia embraced substantive due process to incorporate the Second Amendment right to keep and bear arms just a few weeks later in the *McDonald v. City of Chicago* gun-rights case.)

But more importantly, the Due Process Clause, rather than the Takings Clause, appears to be the more restrained approach to claims of “judicial takings,” despite Scalia’s accusations. Supreme Court precedent already exists under the Due Process Clause that suggests it is a better vehicle for protecting individual rights while retaining the appropriate respect for state courts and state laws in our federalist system. For example, in *Sauer v. New York*, the Court addressed a claim that a judicial decision violated the Constitution when the New York state court “in effect

101. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2614 (Kennedy, J., concurring).

102. *See also* *E. Enter. v. Apfel*, 524 U.S. 498, 545 (1998).

103. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2614 (Kennedy, J., concurring).

104. *Id.* at 2617.

105. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2608.

decided that the property alleged to have been injured did not exist.”¹⁰⁶ Sauer complained that he was “denied the due process of law secured to him by the 14th Amendment, in that his property was taken without compensation.”¹⁰⁷ In considering the claim, the Court explained that:

[W]e are not concerned primarily with the correctness of the rule adopted by the court of appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the court of appeals of New York had. It was the duty of that court to ascertain, declare, and apply the law of New York, and its determination of that law is conclusive upon this court. This court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose. The limitation upon the power of this court in the review of the decisions of the courts of the states, though elementary and fundamental, is not infrequently overlooked at the Bar, and unless it is kept steadily in mind much confusion of thought and argument result.¹⁰⁸

Similarly, in *Demorest v. City Bank Farmers Trust Co.*,¹⁰⁹ the Court rejected a claim that a New York court ruling affected a federal taking by overruling prior decisions and modifying certain rights of income and remainder beneficiaries in trust property. Following *Broad River*, the Court stated that:

[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, or substitute its own view of what should be deemed the better rule for that of the state court.¹¹⁰

In sum, the Constitution’s text affirms that there is no need to create a new and separate doctrine of “judicial takings” heretofore unrecognized in constitutional jurisprudence. To expand takings law beyond what it has been for more than two centuries and recognize a judicial takings doctrine would stretch the Takings Clause further than the Constitution’s text and history allow and strain the limits of prudence.

106. *Sauer v. City of New York*, 206 U.S. 536, 542 (1907).

107. *Id.* at 547.

108. *Id.* at 545-46.

109. 321 U.S. 36 (1944).

110. *Id.* at 42 (quoting *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540) (emphasis added).

V.

CONCLUSION

For now, at least, it seems that the theory of judicial takings will continue to be a concept that remains unrecognized as a matter of viable doctrine. While property-rights advocates will surely continue to press the claim, they are unlikely to find much success in the Supreme Court unless there is a dramatic change in the Court's make-up. The *Stop the Beach* petitioners could only muster four conservative votes in favor of judicial takings; with the addition of Justice Elena Kagan to the bench, there appear to be five solid votes against recognizing judicial takings as a new constitutional claim.

The Supreme Court's decision in *Stop the Beach* is not just good news for those interested in guarding against an unwarranted and potentially messy constitutional theory of judicial takings—the decision also supports Florida's efforts to restore eroded beaches and preserves the ability of state and local governments to respond to changing environmental conditions. From rising sea levels to man-made oil spills, it is crucially important that government have the authority to step in to protect our beaches and coastal communities. Particularly when it comes to addressing changes to our coastal areas caused by global warming, state and local governments need a variety of tools at their disposal to maintain and protect important coastal areas. A ruling in favor of the property owners in *Stop the Beach* could have restricted these efforts to protect shorelines and coastal ecosystems wherever they lay along, or within, private property.

State and local governments will undoubtedly continue to face claims under the Takings Clause when they undertake environmental protection projects that affect private property. For the foreseeable future, however, it appears that the Supreme Court is not interested in adding "judicial takings" claims to the legal arsenal of property owners.