Judicial Takings After *Stop the Beach Renourishment v. Florida Department of Environmental Protection*[1]

*By James S. Burling**

I. Background

We know it is possible for the executive and legislative branches of government to take property. It happens all the time. A department of transportation may condemn property for a road, or a local municipality may zone a parcel into inutility, giving rise to liability under an inverse condemnation claim. But what about the judicial branch? Can it take property?

We are also aware of many instances where the United States Supreme Court has taken a state court to task for a ruling that may violate an individual's rights protected under the Federal Constitution.[2] But what we have not seen, to date, is for the Supreme Court to hold that the ruling of a state court has taken private property. But it has come close.

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection ("*STBR*")[3] involved a complaint by beachfront property owners that Florida's program of beach renourishment deprives the owners of an essential riparian right—the right to directly touch the water.

Under a 1961 law, Florida could change the property boundary from the mean high tide line to a new line called the erosion control line (ECL)—which would become a new permanent fixed boundary line between the upland owner and the state. The upland owner would continue to own everything landward of the new line, but the state could add as much sand and beach to the seaward side of the line and any new beach would become property of the state. So, theoretically, after new fill is put down, the former beachfront owner could find hundreds of yards of new public beach between his property and the ocean. Thus, with the ECL line fixed, any sand added by either nature or the state becomes *public* property instead of the property of the littoral owner.

The plaintiffs in *STBR* had no need or desire for new sand. Their beach, they claim, was generally accreting. Any episodic hurricane-related erosive events had proven to be transitory and did not affect the property of the owners. Of course, the main reason why the owners did not want any new sand is because under the ECL regime, where once there was generally nothing between their property and the ocean other than a relatively small strip of public beach when the tides were low, now there would be a new public beach between their homes and the ocean. Where there was once a small strip of public beach with a limited number of public beach goers, there could now be a vast new public beach with throngs of tourists jammed in front of the upland owners' private homes. The difference, the owners allege, between beach*front* property and what they now have—beach *view* property, is considerable, both in terms of fair-market value and the ability to enjoy a relatively uncrowded beach.

There is also a backstory here—the local town has long coveted the private beaches and has wanted to make them public, but it has not been willing to pay for them. Thus with beach renourishment under Florida law, the town had the perfect vehicle: It would dump new sand, here seventy-five feet of it, on the beaches, making them much wider than before, and the town would declare the new beach to be "public" beach.

The problem is that under the common law of Florida, according to the beachfront owners, the owners of littoral property have always had the right to accretions of sand—and have always had the right to actually physically *touch* the water with their land. With the new beach cutting them off from the water, they cried foul, and argued that the state was depriving them of an essential common-law right to have beach*front*, as opposed to beach *view*, property.

The owners sued, figuring that under the Florida statute governing the renourishment program they were entitled to relief—specifically that their right to direct littoral access should be restored or paid for. While they prevailed in the Court of Appeals, ultimately, the Florida Supreme Court ruled against the owners—stating that the littoral owners never, in fact, had a common law right to direct access to the sea. It was only ancillary to their littoral right. Because the legislature now provided the statutory right of access, there was no harm. Judge Lewis dissented, suggesting that

> the logic upon which the entire foundation of the majority opinion is based inherently assumes that contact with the particular body of water has absolutely no protection and is just some ancillary concept that tags along with access to the water and seemingly possesses little or no independent significance. I could not disagree more. By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land *must touch* the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.
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> I agree with former Judge Hersey of the Fourth District Court of Appeal, who urged this Court to take action in *Belvedere Development Corp. v. Division of Administration*, 413 So. 2d 847 (Fla. 4th DCA 1982):
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> To speak of riparian or littoral rights unconnected with ownership of the shore is to speak a *non sequitur*. Hopefully, the Supreme Court will take jurisdiction and extinguish this rather ingenious but *hopelessly illogical hypothesis*.[4]

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Alleging that the Florida Supreme Court had "taken" their property by redefining their well-established littoral rights into oblivion, the owners petitioned the United States Supreme Court arguing a "judicial taking" as well as violations of the Due Process Clause. The Court accepted review but ruled against the landowners.[5]

II. The Doctrine of Judicial Takings

The idea that a *court* can be responsible for a taking is not new. It has been around at least since 1897 in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*,[6] where the Court obliquely referred to a state court being involved in the taking of private property:

> [A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.[7]

But since then, the doctrine of judicial takings has not had much traction—until now. It did get a major boost seventy years later in *Hughes v. State of Washington*,[8] where Justice Stewart, in a concurring opinion, wrote that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[9] *Hughes* dealt with questions about how the State of Washington viewed accretions of riparian property. Justice Stewart continued:

> [t]o the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.[10]
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> Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.[11]

In a 1985 Hawaiian water rights case the Court suggested a redefinition of a water right by the Hawaiian Supreme court might be a judicial taking, but the issue never was decided for procedural reasons.[12]

The idea of a "judicial taking" was rejected outright by the Court of Federal Claims in a 1991 water rights decision, *Fort Mojave Indian Tribe v. United States*.[13]

Various litigants made runs at the Supreme Court over a dozen times since *Hughes*, invoking the doctrine of judicial takings, but all to no avail—until *STBR.* Pitching the judicial takings doctrine in the *STBR* petition was something of a long shot, but perhaps the best shot for the landowners and the doctrine itself for quite some time.

The doctrine, however, raises some tricky questions. First, to what extent should the United States Supreme Court, or any lower federal court, enmesh itself with questions of state property law in order to determine whether there has been a judicial taking? After all, property rights are defined by state law, and under principles of federalism, state courts generally get to decide what state law is. But a countervailing concern is that the Supreme Court has not been terribly deferential to state courts when other rights are at stake; moreover, if the state were to have complete immunity from scrutiny when it abrogates property rights through judicial redefinition, then states would be more likely to act with impunity in destroying private property rights.

Second, what is the appropriate test or tests to identify the existence of a judicial taking? Is it Justice Stewart's concurrence in *Hughes* or something else? If a judicial taking is based on a change in state law, how should the reviewing court deal with ambiguities in the state law or, as in the STBR case, novel factual situations that lack direct precedent?

Third, do judicial takings sound in takings law or due process?

Fourth, what is the appropriate remedy?

Oral argument was heard on December 2, 2009, before eight of the nine Justices.[14] Unfortunately, the decision was badly fractured and provided little in the way of definitive answers to any of these questions, save the first.

III. The Decision

Justice Scalia wrote the main opinion. Part I, in which all eight Justices joined, set out the general principles of riparian and littoral property law, as well as the procedural history of the case. Part II, which commanded a plurality of four Justices: Scalia, Roberts, Thomas, and Alito, explained why the Court should set out the parameters of when a state court decision would constitute a judicial taking. Part III, also joined only by Roberts, Thomas, and Alito, set out the standards for a judicial taking. Part IV, joined by all the Justices, explained why the Florida Supreme Court had not changed state law and had not, therefore, violated the rights of the beachfront owners. Justice Kennedy, joined by Justice Sotomayor, wrote a concurrence suggesting that if the Florida Supreme Court had tried to redefine the owners' property rights, the remedy should lie with the Due Process Clause rather than the Takings Clause. Justice Breyer, joined by Justice Ginsburg, concurred but wrote that it is premature to set out what the standards for a judicial taking might be because there was no such taking in this case. Breyer's concurrence also raised some practical difficulties caused by the doctrine of judicial takings that he argues the Court does not need to resolve in this case. All eight Justices joined in Part V, which affirms the judgment of the Florida Supreme Court.

A. No Change in State Law

Enmeshing itself in questions of state law, in Part IV, eight members of the Court swiftly dispatched the argument

that the Florida Supreme Court had redefined state law when the Florida court held that the littoral owners had no right to actually touch the water: "There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land.[15]" The Court noted two "core" principles relating to littoral property:

> First, the State as owner of the submerged land . . . has the right to fill that land, so long as it does not interfere with the . . . rights of littoral landowners. Second, . . . if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water.[16]

The Court continued to find that there was no exception to the avulsion rule "when the State is the cause of the avulsion."[17] The Court explained:

> Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State's right to fill.[18]

In other words, the state's artificial avulsion should be treated the same as a natural avulsion: an event that does not change the boundary line of littoral property. This may strike some as a remarkable excursion by the high Court into the minutiae of Florida's property law. Before this case, the courts in Florida had never examined the question of whether beach renourishments should be considered accretion, avulsion, or something else. Nor did even the Florida Supreme Court rest its decision on this exact reasoning. And yet here the United States Supreme Court was more than willing to articulate an heretofore unexamined detail of the state's common law.

The Court then continued with an extensive discussion of Florida case law for further support of these propositions. There is nothing particularly remarkable about this discussion—other than the fact that the Court engaged in it in the first place. If the Court had been unwilling to accede to the *possibility* of a judicial taking, then there presumably would have been no need for the Court to examine Florida property law at all. The question, however, of the extent to which the Court needed to engage in a discussion of Florida law is not settled, as seen when the plurality's decision in Part II is contrasted with the concurring opinions.[19]

The Court's determination that the renourishment was akin to an avulsion raises a couple of unanswered questions. One issue that the Court did not address is the possibility that *natural* accretion might occur—and would, under the contested Florida statute, not change the location of the ECL. In other words, an event other than avulsion might change the physical boundaries of the beach, but not the new ECL boundary line. This question will have to await another day to be answered.[20]

Nor does the Court consider whether the state or the landowner had the right after avulsion to restore the property to the status quo ante. In some jurisdictions, if avulsion removes beach, a landowner has the right to replace the sand. If avulsion adds beach, a landowner—theoretically—has the right to remove sand.[21] If the renourishment was an avulsion, would the abutting property owners have the right to remove the sand? Even if this were theoretically true under Florida law, it would be a reckless attorney who advised a client that the landowner had the right to bulldoze the "renourished" avulsion back into the sea. If the landowner does not have this right, at least as a practical matter, is this really an avulsion?

B. Should the Court Have Established a Test for Judicial Taking?

Part II of the four-Justice plurality opinion begins by defending the plurality's holding that there can be a judicial taking. This is in response to the concurring opinions that suggested that the Court does not need to reach that question in order to rule against the property owners and therefore should not reach the constitutional question.

Justice Breyer's concurrence takes the plurality to task for establishing a test for a judicial taking, saying that the plurality "unnecessarily addresses questions of constitutional law that are better left for another day."[22] Later, Justice Breyer notes that "courts frequently find it possible to resolve cases—even those raising constitutional questions—without specifying the precise standard under which a party wins or loses."[23] Likewise, Justice Kennedy adds, "[T]his case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause."[24]

The plurality opinion counters that this is not a case where establishing a constitutional standard can be best left for another day: "Justice Breyer cannot decide that petitioner's claim fails without first deciding what a valid claim would consist of."[25] To decide whether a judicial taking had not occurred "without knowing what standard it has failed to meet" would be "reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?"[26]

Some have argued, however, that there is nothing inherently illogical about deciding that there was no judicial taking here without fully defining what a judicial taking is. Professor Barros, for example, analogizes this to a murder case where the victim is found to be alive.[27] A court need not define the crime of murder in order to dismiss the case. But that is an obvious case as the first test for murder is the absence of a live victim. That other tests for murder exist does not obviate the fact that at least part of the crime must be defined in order to dispose of the case.

Ultimately, the plurality laid out a test for identifying the existence of a judicial taking. Justice Kennedy disagrees with that test, and Justice Breyer notes that there would be practical difficulties in applying it.

C. Can a Court Take Private Property?

Assuming this case is the right vehicle for deciding the question, Justice Scalia continues in Part II with an argument that the judiciary, like any other branch of state government, is capable of taking private property. Noting first that "[s]tates effect a taking if they recharacterize as public property what was previously private property" and 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,"[28] Justice Scalia finds "no support for the proposition that takings effected by the judicial branch are entitled to special treatment."[29]

The plurality finds support in its assertion that there can be a judicial takings doctrine in *PruneYard Shopping Center v. Robins*[30] and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*.[31] *PruneYard*, the plurality notes, *would have been* a judicial taking if there had been a taking found in that case, and the *Pruneyard* Court never suggested otherwise. In *Webb's*, it was the *judicial branch* that had taken property, albeit not with a decision but with its actions (taking of interest on an escrow account).

D. Instead of a Judicial Takings Doctrine, Is This Simply About Due Process?

1. Procedural Due Process

Part II C of the plurality opinion takes on the concurrence by Justices Kennedy and Sotomayor which argues that *if* a state court destroys property by redefining it, that state court would be in violation of the Due Process Clause, not the Takings Clause. Animating the plurality's rejection of the Due Process Clause here is Justice Scalia's antipathy toward all things substantive due process.

The plurality begins its rejection of the application of the Due Process Clause to "judicial takings" by addressing Justice Kennedy's suggestion that the separation-of-powers doctrine mandates relief under *procedural* due process. Justice Kennedy suggests that the decision to take property is essentially a policy decision and that because courts are not policy-making bodies they cannot take property without violating the doctrine of separation of powers: "It is thus natural to read the Due Process Clause as limiting the power of the courts to eliminate or change established property rights."[32]

Justice Scalia's plurality opinion disagrees, noting that the "Court has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States.[33] Moreover, whatever policy rationale that lies behind the separation of powers doctrine "ha[s] nothing whatever to do with the protection of individual rights that is the object of the Due Process Clause."[34] Finally, just in case the foregoing explanation is too subtle, Justice Scalia characterizes Justice Kennedy's argument as an "Orwellian explanation: 'The court did not take your property. Because it is neither politically accountable nor competent to make such a decision, it cannot take property.'"[35]

2. Substantive Due Process

After rejecting the application of procedural due process *cum* separation-of-powers, the plurality turns next to substantive due process. For fans of substantive due process, this portion of the opinion is not pretty. The plurality begins with the nostrum that the more general substantive due process doctrine cannot be applied when there is a more specific constitutional clause, such as the Takings Clause: "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[36]

This statement could be troubling for some. As students of regulatory takings are well aware, for many years courts applied the failure to substantially advance a "legitimate governmental interest" prong from *Agins v. City of Tiburon*.[37] For an equal number of years, debate raged over whether the "substantially advances" test was a Takings Clause test, or a misidentified Due Process Clause test.[38] This mattered, because for many years most courts refused to even *hear* a substantive due process challenge involving a denial of property rights because the "more particular" Takings Clause was available.[39] The "substantially advance" Takings Clause test was ultimately rejected by the Supreme Court in *Lingle v. Chevron U.S.A. Inc*.[40] There the Court put the debate to rest: "The 'substantially advances' formula is not a valid method of identifying compensable regulatory takings. It prescribes an inquiry in the nature of a due process test, which has no proper place in the Court's takings jurisprudence."[41] After *Lingle* the lower courts began to recognize that a due process challenge to governmental actions was a cognizable cause of action independent from the Takings Clause.[42] Now, however, a less-than-careful gloss of Justice Scalia's plurality opinion might lead a lawyer to conclude once again that a substantive due process challenge cannot be mounted against actions by local actors involving property. However, there is, in fact, nothing in the plurality opinion that negates the existence of an independent due process challenge to governmental actions involving property. What *Lingle* said remains true: an allegation that a local governmental action "fails to substantially advance a legitimate governmental interest" is *not* the basis for a Takings Clause challenge.

The plurality next resurrects the old shibboleth that "we have held for many years (logically or not) that the 'liberties' protected by Substantive Due Process do not include economic liberties."[43] To drive home this point, Justice Scalia invokes the ghost of *Lochner* as a coup-de-grace.[44] The notion that economic liberties are somehow less protected by the Constitution than other liberties got its start in the famous (or infamous) footnote 4 in *Carolene Products*.[45] That the Supreme Court today, especially property rights advocates like the plurality Justices in *STBR*, continues to breathe life into this notion, may have more to do with Justice Scalia's overall antipathy toward all things substantive due process than a belief that there is any merit to treating property rights as "poor relations" in constitutional jurisprudence.[46]

One of Justice Kennedy's concerns with utilizing the Takings Clause to correct judicial rewriting of the property rights is the problem of remedy. Specifically, how can a federal court order a state to pay compensation for something done by the judicial branch when that branch has no power to either condemn or pay for property? If judicial overreaching were found to be a violation of the Takings Clause, "a State might find itself obligated to pay a substantial judgment for the judicial ruling. Even if the Legislature were to subsequently rescind the judicial decision by statute, the State would still have to pay just compensation for the temporary taking." Countering the suggestion that the federal court could rescind the taking, Kennedy also notes that "it is unclear what remedy a reviewing court could enter after finding a judicial taking."[47] Because the

Takings Clause does give rise to equitable relief, Kennedy says, courts "may only be able to order just compensation."[48]

The plurality decision dismisses these concerns, saying that if the Court had found a taking, "we would simply reverse the Florida Supreme Court's judgment that the . . . Act can be applied to the property in question."[49]

Justice Scalia then criticizes the Kennedy opinion, suggesting that it "puts forward some extremely vague applications of substantive due process, and does not even say that they (whatever they are) will *for sure* apply."[50] Finally, in trademark Scalian terms, he claims:

> JUSTICE KENNEDY's desire to substitute Substantive Due Process for the Takings Clause suggests, and the rest of what he writes confirms, that what holds him back from giving the Takings Clause its natural meaning is not the *intrusiveness* of applying it to judicial action, but the *definiteness* of doing so; not a concern to preserve the powers of the States' political branches, but a concern to preserve this Court's discretion to say that property may be taken, or may not be taken, as in the Court's view the circumstances suggest.[51]

In other words, Scalia sees the reliance by Justice Kennedy on the Due Process Clause as a power play by the Court—keeping the parameters of the violation of the Constitution vague enough so that the Court may rule as it feels under any particular circumstance.[52]

E. A Test for a Judicial Taking

Assuming that a judicial opinion results in the destruction of an existing property right, and that such a destruction of property law is a violation of the Takings Clause rather than the Due Process Clause, the next question is, "What does a judicial taking actually look like?" The plurality addresses this question in Part III A, essentially suggesting that a judicial taking should look just like any other violation of the Takings Clause, only with a different actor doing the taking. For better or worse, there is little in the way of further elaboration of the principles of regulatory takings.

In Part IV of its opinion, the plurality also takes pains to reject some additional takings criteria put forth by the respondents and petitioners.

The plurality begins by rejecting a judicial takings test advocated by the respondents and petitioners. The respondents suggested that if there were a doctrine of judicial takings, it would, in addition to the usual tests for takings, add a "requirement that the court's decision have no 'fair and substantial basis.'"[53] The plurality dismisses this suggestion, saying it was appropriate for a different inquiry—whether the state court was "evading" federal review by making state court decisions without "fair support."[54] This, the plurality says, has nothing to do with whether there had been a taking.

The respondents also argued that "federal courts lack the knowledge of state law required to decide whether a judicial decision that purports merely to clarify property rights has instead taken them."[55] The plurality rejects this argument as well, noting that federal courts are required to decide whether state property rights exist in nontakings contexts, concluding: "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."[56]

The plurality also rejects the respondent's claim that federal courts could not second-guess state court judgments without rejecting the *Rooker-Feldman* doctrine.[57] The plurality notes simply that a state court judgment, after being appealed to the state supreme court, would go next to a petition for certiorari to the United States Supreme Court. That would not be a *Rooker-Feldman* violation. And, after that, normal principles of res judicata would prevent new litigation in the lower state courts.[58]

The tests propounded by the petitioners are similarly rejected. The petitioners proposed "an unpredictability test" derived from "Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 296 (1967) . . . that a judicial taking consists of a decision that '"constitutes a sudden change in state law, unpredictable in terms of relevant precedents."'"[59] The plurality rejects a "predictability test" out of hand because it would cover

> too much and too little. Too much, because a judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is. A decision that clarifies property entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not eliminate established property rights. And the predictability test covers too little, because a judicial elimination of established private-property rights that is foreshadowed by dicta . . . is nonetheless a taking.[60]

F. Does Justice Scalia Attempt to Create a New Per Se Rule of Judicial Taking

The plurality opinion actually adds very little to an understanding of what a regulatory taking is, and by extension, adds very little to defining what a "judicial taking" is. The most illuminating statement simply says, "[I]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[61]

Professor John H. Echeverria, however, makes the bold claim that the plurality's language suggests a new per se rule. Paraphrasing the language of the opinion, Echeverria asserts that

> Justice Scalia apparently believes that a judicial taking occurs whenever a court ruling changes an "established rule" of property law. He says that every ruling that "eliminates" an established rule constitutes a taking, but since every ruling that changes a rule (as opposed to clarifying it) eliminates the rule as it existed before, Justice Scalia announces what amounts to a single, sweeping rule: every judicial change in the legal status quo is a taking.[62]

Having created this strawman test, which he posits to be a per se test along the lines of physical invasions or total *Lucas*-style takings, Professor Echeverria proceeds to criticize it. However,

the language of the plurality is inadequate to support his argument. In fact, the most that can be read into the plurality's discussion is that if an action by one of the political branches is a taking, so too is an identical action by the judiciary. The plurality had no need to, and does not, create any new definitional test for a taking. The plurality does not create a new per se rule specially applicable to judicial actions. The plurality does not discuss what the threshold of such a taking might be; but surely it does not suggest that every small alteration in the law equates to a judicial taking. In short, the plurality creates no such "single, sweeping rule" that "every judicial change in the legal *status quo* is a taking."

G. Practical Concerns About Judicial Takings

Ultimately, however, lacking a majority opinion and lacking even agreement on what a judicial taking looks like, we are left with a few answers and a few more questions regarding what a judicial taking or judicial due process violation looks like.

First, in analyzing a potential case of judicial overreaching, who has the burden of proving that there was a property right in the first place? In most cases, the landowner claiming a loss will likely have the burden of demonstrating the nature of the property right. In the case of an alleged incursion on riparian or littoral property, the landowner would be well-advised to marshal all manner of facts and legal argument demonstrating the existence of the property right. This would include everything from land title records, to case law, to commentaries on the common law of the state, other states, and, if useful, England. The less on-point case law there is, the more difficult this task may become. *STBR* is a good example of the difficulty in proving the existence of a property right in novel circumstances.

Second, a plaintiff must determine where to file the case.[63] If the judicial abrogation of a property right occurs in state court, appeal to the highest state court would be in order. From that point, the landowner must consider whether the better course of action is to proceed with a petition for a writ of certiorari to the United States Supreme Court or a new action in federal district court. The former is subject to very long odds and is unlikely to be granted. The latter is theoretically possible, but attention must be paid to various abstention doctrines and cases like *San Remo Hotel v. City and County of San Francisco*.[64] In *San Remo* the Court found that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[65] precluded the landowner from filing an action for a regulatory taking in federal court so long as an action could have been filed in state court. Moreover, if an action were to be filed in state court, it would likely be res judicata.[66] However, in a case where the "taking" does not occur until the state court has acted, it is arguable that *Williamson County* should not apply. For that reason, it is plausible that a judicial takings claim could be filed in federal court following the state court taking.

Third, what if it is a federal court that causes the alleged judicial taking? There is nothing in the theory, yet, that says only state courts can engage in a judicial taking. Therefore, if a federal court causes the taking, then presumably the remedy is on appeal—either to the circuit court or the United States Supreme Court.

Fourth, if a court's decision abrogates property rights, should the land owner argue that there has been a judicial taking or a violation of due process? In light of the Supreme Court's opinion in *STBR*, the answer is probably "both." Four Justices ruled that such a scenario would give rise to a judicial taking, while two suggested it might be a violation of due process. If a landowner were to reach the Supreme Court with a more compelling set of facts than the Court found in *STBR*, then at least six of them might find a violation of the Constitution.[67]

H. Whither Williamson County?

When the plurality rejects the respondents' suggestion that the *Rooker-Feldman* doctrine should prevent federal court second-guessing of state court decisions, the plurality opines that such claims, under *Williamson County*,[68] have to begin in state court. While the plurality does not opine on the wisdom of the *Williamson County* doctrine, Justice Kennedy does, albeit obliquely:

> This Court's dicta in *Williamson County*, *supra*, at 194-197 [105 S. Ct. 3108, 87 L. Ed. 2d 126], regarding when regulatory takings claims become ripe, explains why federal courts have not been able to provide much analysis on the issue of judicial takings. See *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. 323, 351 [125 S. Ct. 2491, 162 L. Ed. 2d 315] (2005) (Rehnquist, C. J., concurring in judgment) ("*Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue"). Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts.[69]

Since *San Remo* was decided, there have been at least a half-dozen petitions for writ of certiorari filed by property owners seeking to have *Williamson County* reconsidered.[70] Justice Kennedy's concurrence continues to give some hope to property owners that *Williamson County* might well be reconsidered again someday, opening up the federal courts to alleged victims of overzealous state and federal land use regulators.

CONCLUSION

For a long time the doctrine of judicial takings was considered something of an oddity that lived on primarily in the minds of ever-hopeful property rights advocates.[71] But even the most ardent advocates of property rights had become pessimistic about the odds that this doctrine would ever see any life as the years passed since *Hughes v. State of Washington*. Some of the advocates even suggested that the petition for certiorari in *STBR* was close to an exercise in futility—worth the good fight but not at all likely to succeed.[72] That the Court even accepted the case in the first place was a remarkable vindication of the argument that a state court might itself be in violation of the Constitution if it were to redefine a property right into oblivion.

Ultimately the Court found that there had been no taking. But it also kept the hope alive that there might yet be legs to the doctrine under the right set of circumstances. Four of the Justices, Scalia, Roberts, Thomas, and Alito, would establish

a clear test for finding a judicial taking. Two of the Justices, Kennedy and Sotomayor, would find that such circumstances might give rise to a due process violation. If the Court were again to take up an alleged violation of property rights by a state court, we may well see a result similar to that in *Eastern Enterprises v. Apfel, Comm'r of Social Security*,[73] where four members of the Court found that a retroactive imposition of medical costs for coal miners was a violation of the Takings Clause, four members found it was neither a violation of the Takings Clause nor the Due Process Clause, and Justice Kennedy found there to be a violation of the Due Process Clause. In other words five members of the Court found a constitutional violation, although they could not agree on which provision of the Constitution applied.

In *STBR*, two others, Justices Breyer and Ginsburg would defer such a judgment until it is more clearly presented. Overall, therefore, *none* of the Justices rejected outright the possibility that a federal court remedy might exist if a state court were to go too far and destroy property rights through a definitional sleight-of-hand. Hope abounds.

About all that can be said now with certainty is that there will be more petitions for writ of certiorari alleging "judicial takings."[74]

Endnotes

1 Portions of this paper were previously published as James Burling, *Bacchanalian Beach Parties, Property Rights, and Judicial Takings: Argument in Stop the Beach Renourishment v. Florida Department of Environmental Protection*. That article was published by ALI-ABA as part of its *Annual Course on Eminent Domain and Land Valuation Litigation* held February 4-6, 2010, in Scottsdale, Arizona. Used with permission.

2 For more on this theme, see Steven Geoffrey Gieseler & Nicholas M. Gieseler, *The Supreme Court and the Judicial Takings Doctrine*, Engage, Vol. 10, Issue 3, at 54 (2009), *available at* http://www.fed-soc.org/publications/detail/the-supreme-court-and-the-judicial-takings-doctrine.

3 130 S. Ct. 2592 (2010).

4 Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1122 (Fla. 2008) (Lewis, J., dissenting; footnotes and citations omitted).

5 The questions presented were:

> 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 United States Constitution?
>
> Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?
>
> Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowners's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

6 166 U.S. 226 (1897).

7 *Id*. at 241. The court couched this holding in terms of due process, at a time when the takings and due process doctrines were quite intertwined. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), attempted to untie this confusion, but debate remains as to whether particular actions involving alleged deprivations of property sound in due process or takings doctrine. *See, e.g.*, Eastern Enterprises v. Apfel, Comm'r of Social Security, 524 U.S. 498 (1998) (Court divides over whether retroactive application of monetary liability is a taking or due process violation.). Similarly, as will be discussed below, the disagreement between the *STBR* plurality opinion by Scalia and the concurrence by Kennedy highlights the continuing nature of this disagreement in the context of "judicial takings."

8 389 U.S. 290 (1967).

9 *Id.* at 296-97.

10 *Id*. at 296.

11 *Id*. at 298.

12 Ariyoshi v. Robinson, 477 U.S. 902 (1986).

13 23 Cl. Ct. 417, 427-28 & n.4 (1991) (noting that reserved water rights are protected water rights but that courts are not capable of taking property).

14 Justice Stevens owns a beachfront condo that has benefitted from beach renourishment and did not participate.

15 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection, 130 S. Ct. 2592, 2611 (2010).

16 *Id.* (citation omitted).

17 *Id.*

18 *Id.*

19 *See infra* at Part III B.

20 For discussion of a case recently *not* granted review *see infra* note 67.

21 Or at least sue for a taking, pre-*STBR*. *See* Vaizburd v. United States, 57 Fed. Cl. 221 (2003), where the Corps of Engineers added sand to a beach, creating new land between private property and the sea and opening up property to illegal trespass. The trial court held that this was a taking, but that there was no diminution in value so judgment was for government. On appeal, the Federal Circuit found that "cost for cure" is the correct measure of damages where it "'would have been sound economy, in view of the character and nature of the property, to have made the expenditure.'" 384 F.3d 1278, 1286 (Fed. Cir. 2004) (citation omitted). Query whether any of this result would have been the same after *STBR*'s avulsion rationale.

22 130 S. Ct. at 2618 (Breyer, J., concurring).

23 *Id.* at 2619.

24 *Id.* at 2613 (Kennedy, J., concurring).

25 *Id.* at 2604 (plurality opinion).

26 *Id.* at 2603.

27 Benjamin Barros, *The Complexities of Judicial Takings*, Widener Law School Legal Studies Research Paper Series no. 10-32 (Oct. 28, 2010), *available at* http://ssrn.com/abstract=1699355.

28 130 S. Ct. at 2601.

29 *Id.*

30 447 U.S. 74 (1980).

31 449 U.S. 155, 163-65 (1980).

32 130 S. Ct. at 2607 (Kennedy, J., concurring).

33 *Id.* at 2605 (plurality opinion). *See* Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902).

34 *Id.*

35 *Id.*

36 *Id.* at 2606 (citations omitted).

37 447 U.S. 255, 260 (1980).

38 *See, e.g.*, R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L.J. 353 (2004).

39 *See, e.g.*, Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir. 1996).

40 544 U.S. 528 (2005).

41 *Id.*

42 *See, e.g.*, Crown Point Dev. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007).

43 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection, 130 S. Ct. 2592, 2606 (2010).

44 *Id.*

45 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

46 *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (Property rights are not "poor relation[s].").

47 130 S. Ct. at 2617 (Kennedy, J., concurring).

48 *Id.*

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

50 *Id.*

51 *Id.* at 2608.

52 The petition for certiorari raised the potential of a due process violation in the questions presented. *See supra* note 5. However, the plurality rejected considering this question because "[p]etitioner did not raise this challenge before the Florida Supreme Court, and only obliquely raised [it] in the petition for certiorari." 130 S. Ct. at 2610 n.11.

53 *Id.* at 2608.

54 *Id.*

55 *Id.* at 2609.

56 *Id.*

57 *Id.* at 2609-10.

58 *Id.* at 2609.

59 *Id.* at 2610.

60 *Id.*

61 *Id.* at 2602.

62 John H. Echeverria, *Stop the Beach Renourishment: Essay Reflections from Amici Curiae: Stop the Beach Renourishment: Why the Judiciary is Different*, 35 Vt. L. Rev. 475, 476-77 (2010).

63 For a more comprehensive treatment of these issues, *see* Barros, *supra* note 27.

64 545 U.S. 323 (2005).

65 473 U.S. 172 (1985).

66 *Williamson County* is discussed in more detail in Part H, *infra.*

67 This was the result in *Eastern Enterprises v. Apfel, Commissioner of Social Security*, 524 U.S. 498 (1998).

68 Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). *Williamson County* held that for a regulatory takings claim to be ripe for review by a federal court, the property owner must first have obtained a final decision from the relevant land use authority and, secondly, have utilized available state compensation remedies. *Id.* at 186.

69 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection, 130 S. Ct. 2592, 2618 (2010) (Kennedy, J., concurring).

70 Many of these unsuccessful petitions have been filed by attorneys for Pacific Legal Foundation.

71 Including the author's.

72 The author made this mistake.

73 E. Enters. v. Apfel, Comm'r of Soc. Sec., 524 U.S. 498 (1998).

74 *See, e.g.*, Maunalua Bay Beach Ohana 28 v. State, 222 P.3d 441 (Haw. Ct. App. 2009) (finding no taking when Hawaiian legislature changed the common law by declaring all future accretions the property of the state. The court's decision that the common law could be so malleable is, arguably, a judicial taking. Unlike *STBR*, this case deals with accretions, not avulsions.). The Hawaiian Supreme Court denied review on June 9, 2010. 2010 Haw. LEXIS 119 (2010). The United States Supreme Court denied certiorari on November 1, 2010. 131 S. Ct. 129 (2010).