The Supreme Court and the Judicial Takings Doctrine

By Steven Geoffrey Gieseler and Nicholas M. Gieseler**

This Fall, the United States Supreme Court will hear arguments in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.[1] Those with an interest in property rights jurisprudence will pay particular attention, as the case will be the Supreme Court's first dealing with the Takings Clause since the Court decided three such cases in 2005.[2] But *Stop the Beach Renourishment* is even more notable, perhaps, in that it holds the potential for the Supreme Court to furnish, for the first time, a majority opinion dealing with the doctrine known as "judicial takings."

As its name indicates, the judicial takings doctrine posits that the judiciary, just like the executive and legislative branches, may be held responsible for violations of constitutionally-protected property rights. Specifically, *Stop the Beach Renourishment* presents the question of whether a state court decision can so radically depart from settled background principles of state property law that it constitutes a taking, or violates due process guarantees, under the Federal Constitution.[3] Despite occasional language on the matter in concurrences and dissents, no majority opinion of the Supreme Court has formally addressed this judicial takings question. The Court has sanctioned, and applied, a similar approach in a variety of other contexts, holding that state court decisions, just like actions of the other two branches, can violate persons' constitutional rights. With the grant of certiorari in *Stop the Beach Renourishment*, the judicial takings doctrine is primed, finally, to have its day in court.

Stop the Beach Renourishment involves a Florida statute aimed at stemming beach erosion.[4] The Florida Legislature enacted the Beach and Shore Preservation Act to restore beaches eroded by a series of hurricanes that hit the state.[5] The Act carried out its objective by authorizing government officials to place large quantities of sand on the eroded beach, both landward and seaward of the line dividing privately-owned property from publicly-owned beach. Problems arose not just because the law authorized the government to physically occupy, via the sand placement, private property, but also because the Act granted the title to the new strip of beach to the State of Florida.[6]

This provision has profound implications. For over a century, under Florida common law, owners of littoral property—land lying directly adjacent to the water—have possessed rights unique to the littoral context. For instance, these owners maintained the exclusive right to directly access the water from their property, the right to new land formed by accretion, and the right to an unobstructed view of the water.[7] But because the Florida renourishment law severs direct contact with the water, these common law rights vanish.

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Recognizing the effects this scheme would have on their property values, as well as the constitutional issues involved, affected landowners brought suit challenging the validity of the Act as applied to their property. After a series of administrative actions, a Florida appeals court held that the Act resulted in an uncompensated taking of property, in the form of the vanquished littoral rights.[8] But the Florida Supreme Court reversed this decision, writing that because "the exact nature of [littoral] rights has rarely been described in detail," it was within the court's ambit to redefine them.[9] Some might argue that the court did so by overlooking over one hundred years of Florida common law to declare that "there is no independent right of contact with the water."[10]

This tactic elicited a heated dissent from Justice Fred Lewis, who described the majority opinion as having "butchered" Florida law to create a "dangerous precedent… based upon infirm, tortured logic and a rescission from existing precedent."[11] The crux of Judge Lewis's dissent was that the court's holding "simply erased" settled fundamental principles of Florida property law, and with them the entirety of the beachfront owners' littoral rights.[12] Though not explicitly identified as such, Judge Lewis's dissent reflects the very foundations of the judicial takings doctrine.

I. Judicial Takings in the Supreme Court

A. Of Concurrence and Dissent

The Fourteenth Amendment to the United States Constitution, incorporating the Fifth Amendment's protections, forbids states from taking private property for public use without just compensation.[13] The most obvious of these prohibited takings occurs when a government entity physically confiscates, occupies, invades, or takes title to private property.[14] So too must government pay just compensation when it regulates property to the extent that it is taken for constitutional purposes.[15]

While these takings of private property typically arise from legislative or administrative acts, the question remains whether actions of state courts can give rise to similar government liability. This question of judicial takings—so named though such scenarios implicate both the Takings Clause and guarantees of due process—has been asked of the Supreme Court long before *Stop the Beach Renourishment*. Fifteen years ago, in *Stevens v. City of Cannon Beach*, the Court denied a petition for writ of certiorari filed by the owners of beachfront property in Oregon.[16] The petitioners in *Stevens* alleged that the Oregon Supreme Court's application of the doctrine of customary use effected a taking of their private property, without just compensation, in violation of the Fifth and Fourteenth Amendments.

In dissenting from the Supreme Court's denial, Justice Scalia, joined by Justice O'Connor, invoked the Court's opinion in *Lucas v. South Carolina Coastal Council* for the proposition that certain principles inherent in the right to security in private property are so fundamental as to require payment when they are abrogated by state action.[17] In Justice Scalia's

reading, this holds true whether the state actor applying such restrictions is the executive, the legislature, or the judiciary: "No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation."[18]

Justice Scalia's dissent recognized the general rule that "the Constitution leaves the law of real property to the States."[19] However, "just as a State may not deny rights under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law."[20] Justice Scalia concluded that he would grant the petition to determine whether the lower court's ruling violated the property owners' due process rights.[21] He also wrote that he would apply this theory of constitutional protection to takings claims in general.[22]

There are other Supreme Court decisions that mirror Justice Scalia's view of the validity of the judicial takings doctrine. The clearest and most influential opinion of the kind is Justice Stewart's concurrence in *Hughes v. Washington*.[23] In *Hughes*, an owner of upland property sought a determination of the ownership of accretions that had gradually formed along her beachfront property.[24] The land was conveyed to the landowner prior to the formation of what became the State of Washington.[25] At the time of the conveyance, the common law rule was that an owner of property bordering the ocean had the right to include within his title any accretion gradually built up by the movement of the tides.[26]

The Supreme Court considered the issue of who owned the accreted land—the state or the upland private owner—and held that the upland owner was to remain the sole owner of the property.[27] In his concurrence, Justice Stewart emphasized that property owners have valid claims under the Takings Clause where state courts suddenly depart from settled property law to the detriment of private owners:

> To 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. For 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.[28]

Justice Lewis, dissenting from the Florida Supreme Court's opinion in *Stop the Beach Renourishment*, shared many of the concerns identified by Justice Stewart in his concurrence in *Hughes*. Justice Lewis wrote that the majority's decision summarily altered the definition of littoral property that had governed in Florida for nearly a century: "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."[29] Justice Lewis recognized that it was the Florida Supreme Court's novel interpretation of the state statute in question, and not necessarily the statute itself, that violated the well-established constitutional rights of the beachfront property owners. Citing these owners' fundamental right to have their property maintain contact with the water, Justice Lewis wrote that "[t]he majority now avoids this inconvenient principle of law—and firmly recognized and protected property right[s]" by ignoring decades of settled state law on the matter.[30]

B. State Courts and Federal Rights

Justice Stewart's concurrence in *Hughes* finds analogues in other Supreme Court decisions holding that sudden judicial departures from settled state law violate citizens' rights as guaranteed by the Federal Constitution. For example, in *Webb's Fabulous Pharmacies v. Beckwith*,[31] the Court considered a Florida Supreme Court decision upholding as constitutional a state statute permitting counties to seize the interest accruing on an interpleader fund paid into by private citizens and maintained by county courts.[32] As with the dissent in the *Stop the Beach Renourishment* case, the Court's analysis focused not as much on the relevant Florida statute as on the Florida Supreme Court's opinion interpreting that statute. The U.S. Supreme Court found that the Florida court's holding was unconstitutional, and that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court."[33] The Court concluded with a statement precisely on point for the property owners in *Stop the Beach Renourishment*: "a State, by *ipse dixit*, may not transform private property into public property without compensation...."[34]

Similarly, in *Bouie v. City of Columbia*, the Supreme Court was faced with a constitutional challenge to a state court decision that departed significantly from established jurisprudence governing a basic right.[35] In *Bouie*, the South Carolina Supreme Court applied an entirely new construction of a criminal trespass statute in order to uphold the convictions of two alleged trespassers.[36] This interpretation was such a departure from settled state law that the Supreme Court held it amounted to the imposition of an ex post facto law in violation of the petitioners' due process rights.[37] In the *Bouie* Court's view, a state may not avoid constitutional restrictions on its power merely by delegating the restriction to the courts instead of having them instituted by the elected branches: "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[38]

These are but two examples of Supreme Court decisions that extend constitutional protections, and prohibitions, to judicial actions. There are perhaps scores of similar opinions. In numerous civil rights cases of the late 1950s and early 1960s, the Court found state court actions to violate rights guaranteed by the Federal Constitution. For example, in *NAACP v. Ala. ex rel. Flowers*, the Supreme Court found injunctions against NAACP operations, as issued by Alabama courts, to violate the Due Process Clause.[39] In *NAACP v. Ala. ex rel. Robinson*, the Court reached a similar decision, writing that "[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of

state power which we are asked to scrutinize."[40] The Supreme Court's First Amendment jurisprudence is particularly notable for holding state judiciaries accountable for constitutional violations, where state courts "assert[ ] retroactively" that private actors had no right to exercise their First Amendment liberties.[41] Thus, if sometime in 2010 the Supreme Court issues an opinion recognizing and validating the judicial takings doctrine in *Stop the Beach Renourishment*, the decision will not be an outlier, but rather one comporting with the body of the Court's jurisprudence.

II. The Theoretical Basis for the Judicial Takings Doctrine

In the first opinion to incorporate the federal Takings Clause against the states, the Supreme Court made explicit that incorporation applies to state courts as well as state legislatures and executives.[42] In *Chicago Burlington & Quincy Railroad*, a just compensation case, the Court held that a state court decision "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 or authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States...."[43] As Roderick Walston writes in the Utah Law Review, the *Chicago Burlington* opinion, aside from its more famous incorporation holding, also "held that the state must pay compensation even when the alleged 'taking' is the result of judicial rather than legislative action.... [T]he final judgment of a state court is the act of the state for due process and takings purposes."[44] In property rights cases, then, the idea that state courts can violate due process guarantees, and take private property, is as old as the incorporation doctrine itself.

With regard to sudden changes in substantive law, the Supreme Court captured the modern theoretical basis for the judicial takings doctrine in its opinion in *Lucas*. In that case, the Court recognized that certain basic principles of property ownership are so fundamental as to be beyond the reach of the state, unless the state is willing to pay the owner for his property.[45] The *Lucas* Court arrived at that holding in part by way of negative examples; that is, by pointing to certain uses of property that, historically, *never* were lawful (and thus, the regulation of which could not require just compensation), the Court distinguished those incidents of ownership that *always* were lawful.[46]

Despite this distinction, the Court's *Lucas* opinion does not establish which aspects of property fit into which category. According to W. David Sarratt, writing in the Virginia Law Review, "[t]his ambiguity has provided states with a loophole in the *Lucas* rule large enough to circumvent the rule entirely, provided that state courts are willing to be rather creative in defining background legal principles."[47] Sarratt continues, observing that even post-*Lucas*, "[s]tates may thus attempt to avoid compensation altogether by announcing that under their background principles of state law, the property owner never had the property right she claims has been taken. Of course, state courts can pull off this ploy better than state legislatures."[48]

It is this reality that makes the theory of judicial takings so crucial to protecting property rights. As Sarratt notes, the job of defining what constitutes a *Lucas* background principle, existing perhaps for centuries, is more appropriate for the judiciary. This is because "legislatures are presumed to act prospectively, saying what the law shall be, while courts are presumed to decide questions retrospectively, saying what the law is and has been."[49] But this dexterity, uncabined by federal review, is not without peril. Sarratt writes:

> [W]hen state courts are understood to wield the power not only to declare the law, but also to make it, the *Lucas* rule's background-principles exception invites state courts to reshuffle property rights in ways that state legislatures cannot, potentially allowing the state to avoid paying compensation for takings of property.[50]

Premising his conclusion in part on the Supreme Court's holding in *Erie R.R. Co. v. Tompkins* ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."),[51] Sarratt views federal application of the judicial takings doctrine as necessary.[52] Since *Erie* stands for the proposition that state courts are permitted to "make real law on behalf of the state,"[53] a state court's departure from established law must be treated by federal courts "as wielding real lawmaking power–including the ability to take property."[54]

Justice Scalia recognized in his *Stevens* dissent the real potential for state courts to overstep their bounds in their roles as "definers" of background principles. "Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate background law–regardless of whether it is really such–could eliminate property rights."[55] The only answer to this conundrum–state courts have the authority and particular ability to define background principles, but in doing so they can eviscerate private property with nothing more than the metaphorical stroke of a pen–is for federal courts, including the Supreme Court, to review these definitions by way of the judicial takings doctrine.

As Professor David J. Bederman has written, the judiciary's ability to wield its power to make law is pronounced in property rights cases involving beach property, where judge-made law of custom governs.[56] Citing "custom as an end-run around *Lucas*,"[57] Bederman writes of examples of state supreme courts having "obliterated constitutional requirement[s] (whether articulated in a takings or due process idiom)"[58] relating to property rights by invoking common law principles of custom that the courts themselves have developed.[59] The danger in beach cases like *Stevens* and *Stop the Beach Renourishment*, generally, is that in the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries.

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored what is widely recognized as the "seminal article on the judicial takings problem."[60] Thompson's article identifies the rationales federal courts might use to apply the judicial takings doctrine, focusing specifically on the importance of legal determinacy. He notes that sudden changes from established precedent often are a signal that state courts have abdicated their roles as the "generally less political" branch of government: "Justice Stewart's suggestion that judicial

changes in property law are takings only when 'sudden' and quite unpredictable may have been designed partially to ferret out the more questionable judicial changes."[61] Thompson observes that while slow, gradual changes in the common law assure property owners that legal considerations, not political ones, dictated a ruling, "[n]o such assurances accompany a sudden and quite startling judicial shift in property rights."[62]

Thompson's article is among the earliest, if not the first, to address scholarly opposition to the judicial takings doctrine. He writes that the "few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches, but with little illumination as to why."[63] Thompson preemptively rebuts any textualist objection to the effect that the Fifth or Fourteenth Amendments do not apply to state courts, noting that while nothing in the Constitution's language compels such application, the "broad language certainly does not preclude application to judicial changes in property rights."[64] As outlined in Part I above, this textual imprecision has done nothing to preclude the Supreme Court's application of due process guarantees to the state courts, a point Thompson expounds upon in his article.[65]

Thompson further cites opposition to the judicial takings doctrine that asserts the Just Compensation Clause necessarily excludes the judiciary, for the courts have no "fiscal purse" of their own.[66] He parries this argument by writing "it is worth noting that the executive branch also lacks a separate purse and yet there is no doubt that the fifth amendment applies to at least some executive takings."[67]

The main focus of Thompson's seminal article, though, is the "normative pulls and counterpulls that have shaped our takings jurisprudence."[68] To this end, he returns repeatedly to the dangers of allowing state courts, charged with defining themselves what is and isn't property under *Lucas*, also to serve as final arbiter of the validity of these definitions under the Federal Constitution. Thompson argued, two years before *Lucas*, that state courts were too eager, and too able, to take private property without repercussion. Thompson wrote that

> [c]ourts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections–and pressure is mounting for courts to use these tools. Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests. Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion.[69]

In the nearly two decades since Thompson wrote these words, the pressures he identified have only increased. Perversely, the Supreme Court's opinion in *Lucas*, offering greater protections for owners of private property, perhaps has left state courts even more free to effect takings of private property, as they step in where legislatures and executives now are more afraid to tread. By agreeing to hear *Stop the Beach Renourishment*, the Supreme Court appears ready to define these boundaries for such state court action, and to finally and unambiguously answer the question of the validity of the judicial takings doctrine.

CONCLUSION

As Thompson wrote in 1990, "[t]he United States Supreme Court's reluctance to apply the takings protections to courts proved particularly puzzling [ ] when one compares the Court's treatment of other constitutional restrictions that, unlike the takings protections, are essentially noneconomic."[70] "Even where the Court has concluded that a specific noneconomic protection does not directly apply to the judiciary, the Court has sometimes extended the protection to judicial actions, using a more general constitutional provision."[71] In mere months, we should know, going forward, whether the Supreme Court will extend such constitutional protection to owners of property threatened by the actions of state courts.

Endnotes

1 Case No. 08-1151.

2 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); San Remo Hotel, L.P. v. City and County of San Francisco, Cal., 545 U.S. 323 (2005); Kelo v. City of New London, Conn., 545 U.S. 469 (2005).

3 The relevant Question Presented, one of three in the case as accepted by the Court, reads as follows: "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?"

4 Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008).

5 Fla. Stat. ch. 161 (2003).

6 Fla. Stat. § 161.191(1).

7 Bd. Of Trustees v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (beachfront owners "have the exclusive right of access over their own property to the water.").

8 Save Our Beaches, Inc. v. Florida Dep't of Envtl. Prot., 2006 WL 1112700 (July 6, 2006).

9 *Stop the Beach Renourishment*, 998 So. 2d at 1111.

10 *Id.* at 1119.

11 *Id.* at 1121 (Lewis, J., dissenting).

12 *Id.*

13 Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 242-43 (1897).

14 *Kelo*, 545 U.S. 469; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

15 *Lingle*, 544 U.S. 528, 538-541.

16 Stevens v. City of Cannon Beach , 510 U.S. 1207, 114 S. Ct. 1332 (1994).

17 *Stevens*, 114 S. Ct. at 1334 (Scalia, J., dissenting) (citing *Lucas*, 505 U.S. 1003 (1992)).

18 *Id.*

19 *Id.*

20 *Id.* (citation omitted)

21 *Id.* at 1335-36

22 *Id.*

23 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

24 *Id.* at 291.

25 *Id.*

26 *Id.*

27 *Id.* at 294.

28 *Id.* at 296-97 (Stewart, J., concurring).

29 *Stop the Beach Renourishment*, 998 So. 2d at 1122.

30 *Id.* at 1123.

31 449 U.S. 155 (1980).

32 *Id.* at 155-56.

33 *Id.* at 164.

34 *Id.*

35 378 U.S. 347 (1964).

36 *Id.* at 362.

37 *Id.*

38 *Id.* at 353-54.

39 377 U.S. 288, 306-08 (1964).

40 357 U.S. 449, 463 (1958).

41 Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971) (state court injunction forbidding distribution of pamphlet violated First Amendment); *see also* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) (state court injunction against rally violated right to free speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (vacating state court restriction on publication).

42 David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1435 (1996); Roderick E. Walston*, The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 425-26 (2001) (citing *Chicago B & Q R. Co.*, 166 U.S. 226).

43 166 U.S. at 241

44 Walston, *supra* note 42, at 425-26.

45 Lucas, 505 U.S. at 1029-30.

46 *Id.* at 1030-31.

47 W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1489 (2004).

48 *Id.* at 1490.

49 *Id.* at 1491.

50 *Id.*

51 304 U.S. 64, 78 (1938).

52 Sarratt, *supra* note 47, at 1496-97.

53 *Id.* at 1496.

54 *Id.* at 1497.

55 *Stevens*, 114 S. Ct. at 1334 (Scalia, J., and O'Connor, J., dissenting).

56 Bederman, *supra* note 42, at 1438-39.

57 *Id.* at 1442.

58 Whether judicial takings challenges are properly grounded in takings or due process law, or both, is unsettled even among those who are proponents of the general doctrine. Justice Scalia's *Stevens* dissent, for example, contemplates the doctrine applying to both takings and due process under some circumstances. 114 S. Ct. at 1335-36. Others, such as Roderick E. Walston, argue persuasively that the doctrine applies only to due process claims. Walston, *supra* note 42, at 1434-36.

59 Bederman, *supra* note 42, at 1442-43.

60 Sarratt, *supra* note 47, at 1494 (citing Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

61 Thompson, *supra* note 60 at 1496-97.

62 *Id.* at 1497.

63 *Id.* at 1453.

64 *Id.* at 1456.

65 *Id.* at 1456-57.

66 *Id.* at 1456.

67 *Id.* at 1456, n.22.

68 *Id.* at 1453.

69 *Id.* at 1451.

70 *Id.* at 1456.

71 *Id.* at 1457.