

**SEA LEVEL RISE AND GULF BEACHES:
THE SPECTER OF JUDICIAL TAKINGS**

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I. INTRODUCTION

The BP oil spill recently focused the nation’s attention on the importance of beaches to the economies of the states bordering the Gulf of Mexico.¹ These beaches have, however, been under attack for many decades by erosion from storms and other natural forces, as well as construction and maintenance of navigation inlets and rampant coastal development. Texas, which has one of the highest coastal erosion rates in the country, reports that “64 percent of the Texas coast is eroding at an average rate of about 6 feet per year with some locations losing more than 30 feet per year.”² Of the 825 miles of Florida’s sandy beaches, 59% or over 485 miles has experienced erosion, with about 47% experiencing “critical erosion.”³ Sea

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1. See generally Ilan Brat & Jeffery Ball, *The Gulf Oil Spill: Tar Balls Avoid Mississippi—But So Do Tourists*, WALL ST. J., June 14, 2010, at A4; Sara K. Clarke & Kevin Spear, *Florida Panhandle Hotels Hurt by Oil Spill’s Effects; Beachfront Properties Report Year-Over-Year Declines in Revenue During Crucial Months of June, July and August*, L.A. TIMES, Oct. 23, 2010, at B2; Rick Jervis, *Gulf Region Eyes Recovery as Oil Spill Losses Mount; Attention Swings to Long-term Solutions*, USA TODAY, Sept. 20, 2010, at A1, available at http://www.usatoday.com/news/nation/2010-09-19-bp-oil-spill-well-killed_N.htm; Campbell Robertson, *Effects of Spill Spread as Tar Balls Are Found*, N.Y. TIMES, July 7, 2010, at A12, available at <http://www.nytimes.com/2010/07/07/us/07spill.html>.

2. *Coastal Erosion*, TEX. GEN. LAND OFFICE, <http://www.glo.texas.gov/what-we-do/caring-for-the-coast/coastal-erosion/index.html> (last visited May 9, 2011).

3. *Beach Erosion Control Program*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/beaches/programs/bcherosn.htm> (last updated Apr. 11, 2010). “Critically Eroded Shoreline” is defined as “a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost.” FLA. ADMIN. CODE, r. 62B-36.002(4) (2010).

level rise will exacerbate these erosion rates.⁴ In many Gulf of Mexico states, however, the projected rate of beach loss due to sea level rise is overwhelmed by the current background rate of erosion. In Florida, for example, because the erosion rate is already so substantial, beach restoration and nourishment are considered to be economically viable adaptations to sea level rise for the next 50-100 years.⁵ While restoration is arguably not a long-term solution to sea level rise, beach restoration has many benefits over armor-ing of the shoreline where the level and scale of development makes retreat economically unviable. While armor-ing may protect structures, it will inevitably lead to loss of beaches, habitat and tidal public trust lands.⁶

The continued viability of beach restoration as an adaptation strategy presumes that current legal regimes for carrying out these projects can withstand constitutional challenges and that takings challenges and compensation of littoral property owners will not be part of the cost of the projects. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,⁷ Florida withstood a first attack on the Beach and Shore Preservation Act (BSPA or the Act)⁸ as well as a challenge to the Florida Supreme Court's interpretation of the common law principles embodied in the Act. The case provided the opportunity, however, for Justice Scalia to introduce his theory of a new genre of "takings" under the Fifth and Fourteenth amend-ments—judicial takings.⁹

This Article discusses the *Stop the Beach Renourishment* case in both the Florida and U.S. Supreme Courts, and reviews Justice Scalia's theory of judicial takings. It then reviews the continuing challenges to beach restoration as a beach management and sea level rise strategy, both from the perspective of the legal issues that remain unresolved and the chilling effect of the specter of judicial taking.

4. See Stephen P. Leatherman, *Social and Economic Costs of Sea Level Rise*, in SEA LEVEL RISE: HISTORY AND CONSEQUENCES, 181, 189 (Bruce C. Douglas et al. eds., 2001).

5. Nicole Elko, Pinellas Cnty. Dep't of Env'tl. Mgmt., *Planning for Climate Change: Recommendations for Local Beach Communities 13-14* (2009) (unpublished manuscript, on file with the author).

6. Jenifer E. Dugan & David M. Hubbard, *Ecological Responses to Coastal Armoring on Exposed Sandy Beaches*, 74 SHORE & BEACH 10, 10 (2006); See also Jenifer E. Dugan et al., *Ecological Effects of Coastal Armoring on Sandy Beaches*, 29 MARINE ECOLOGY 160 (2008).

7. 130 S. Ct. 2592 (2010).

8. Beach and Shore Preservation Act, FLA. STAT. §§ 161.011-161.45 (2010).

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

II. THE STOP THE BEACH RENOURISHMENT CASE

A. *In the Florida Courts*

Beach restoration under the BSPA requires the state to establish an erosion control line (ECL) based on the Mean High Water Line (MHWL), with discretion to also take into account the engineering requirements for the project, the extent of erosion or avulsion, and the protection of upland property ownership.¹⁰ Once the boundary is adopted by the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees), which holds title to sovereignty lands in Florida, the fixed ECL replaces the ambulatory MHWL as the boundary between state and littoral property.¹¹ Title to all land seaward of the ECL is:

vested in the state by right of its sovereignty, and title to all lands landward of [the ECL] shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.¹²

Common law rights associated with littoral ownership—“including but not limited to rights of ingress, egress, view, boating, bathing, and fishing”¹³—are specifically preserved by the BSPA. The right to accretions, however, is specifically abrogated by the terms of the Act.¹⁴

The permit for the 6.9 mile beach restoration project for Walton County and Destin was upheld in an administrative hearing,¹⁵ but on appeal the Florida First District Court of Appeals (DCA) jeopardized the Florida Beach Erosion Control Program by finding that beachfront property owners had been deprived

10. See FLA. STAT. § 161.161(4)-(5) (2010).

11. See FLA. STAT. § 161.191(1). Littoral property is land bordered by an ocean or a lake. See 78 AM. JUR. 2D *Waters* § 30 (2010).

12. FLA. STAT. § 161.191(1).

13. FLA. STAT. § 161.201. The Act further protects upland owners by providing that “[i]n addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line . . . except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.” *Id.*

14. The boundary will no longer change “either by accretion or erosion or by any other natural or artificial process[.]” FLA. STAT. § 161.191(2).

15. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1106-07 (Fla. 2008).

of constitutionally protected littoral rights, specifically the right to accretions and the right of contact with the water, without just compensation.¹⁶

The Florida Supreme Court framed the challenge to the BSPA as: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”¹⁷ The Act would survive such a facial challenge unless “no set of circumstances exists under which the statute would be valid.”¹⁸ The court analyzed the statute in the context of a situation where the ECL was set at the boundary line between the state-owned lands and the upland, private property owner,¹⁹ and the beach restoration merely reinstated the pre-avulsive *status quo* after a hurricane.²⁰ The court found that private property rights of littoral owners must be balanced against the state’s duty, both under the Florida Constitution and the public trust doctrine, to protect the state’s beaches.²¹ “[J]ust as with the common law,” the court concluded, “the Act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests.”²²

The Florida Supreme Court faulted the DCA for not considering the role of avulsion,²³ and it seems clear that if the beach restoration project were characterized as an avulsive event, no property rights would have been affected under common law principles.²⁴ The upland owner would no longer own property directly bordering the sea and consequently could not claim accretions. But the Florida Supreme Court was not referring to the beach restoration project as the relevant avulsive event.²⁵ Instead, the beach restoration project was characterized as the state acting to recover its property lost to hurricane-induced avulsion.²⁶ The court concluded that the

16. *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 50, 59-60 (Fla. 1st DCA 2006).

17. *Walton Cnty.*, 998 So. 2d at 1105 (footnotes omitted).

18. *Id.* at 1109 (citing *Fla. Dep’t of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)).

19. *Id.* at 1117-18 n.15.

20. *Id.* at 1116.

21. *Id.* at 1110-11 (quoting FLA. CONST., art. X, § 11).

22. *Id.* at 1115.

23. *Id.* at 1116.

24. Avulsion, a sudden and perceptible change in the location of the shoreline, does not alter the boundary between the state and upland owner. *See, e.g.*, *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs.*, 512 So. 2d 934, 945 n.6 (Fla. 1987) (“When ‘new’ land is formed by the process by [sic] avulsion, title remains in its former owner.”) (citations omitted).

25. *Walton Cnty.*, 998 So. 2d at 1116.

26. *Id.* This was an unusual application of the doctrine that a littoral owner has a reasonable amount of time to reclaim land after an avulsive event. The court accorded the state the same right as the upland owner to recover its land after an avulsive event, but the only totally, non-submerged land owned by the state prior to the avulsion was the tideland be-

Act is facially constitutional because it simply reflects the common law principle that allows a littoral owner the right to re-claim land lost to avulsion within a reasonable time.²⁷

Florida courts have consistently stated that littoral rights are vested property rights which require compensation if taken by the state,²⁸ but, the court distinguished the right to accretions from other presently exercised rights associated with the right of access and view.²⁹ The right to accretions was labeled a future, contingent right³⁰ that was not implicated in beach restoration projects.³¹ The asserted right of contact with the water was dismissed as merely ancillary to preservation of the right of access and irrelevant in the context of the BSPA, because the Act preserved access to the water.³²

The Florida Supreme Court's analysis of the rights of accretion and the right of contact with the water formed the basis of a request for rehearing by the property owners' association, Stop the Beach Renourishment (STBR). Upon denial of a hearing,³³ STBR petitioned the U.S. Supreme Court for *certiorari*.³⁴ The case afforded the Supreme Court an opportunity to address directly the issue of whether a court's decision that redefines property rights can be a taking of property without just compensation under the Fifth and Fourteenth amendments—a judicial taking.³⁵

B. In the U.S. Supreme Court

From both a factual and legal standpoint, the *STBR* case provided a weak foundation for Justice Scalia to mount his argument for a theory of judicial takings. Although the Court split on the ba-

tween the MHWL and the low tide line. This land is, however, critical to the public's access to the beach and water. See generally Donna R. Christie, *Of Beaches, Boundaries and SOBs*, 25 J. LAND USE & ENVTL. L. 19, 49 (2009).

27. *Walton Cnty.*, 998 So. 2d at 1117-18.

28. See, e.g., *Sand Key Assocs.*, 512 So. 2d at 936; *Brickell v. Trammel*, 82 So. 221, 227 (Fla. 1919); *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 506-07 (Fla. 1917); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

29. *Walton Cnty.*, 998 So. 2d at 1112 (asserting that "[t]he rights to access, use, and view are rights relating to the present use of the foreshore and water").

30. *Id.* (asserting that "[t]he right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction").

31. *Id.* at 1118-19 (stating that because none of the common law justifications for the doctrine of accretions applied in the circumstances of beach restoration under the BSPA, the doctrine was not relevant).

32. *Id.* at 1119-20.

33. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2600-01 (2010).

34. *Id.* at 2601.

35. *Id.* at 2596, 2610; see also Christie, *supra* note 26, at 64-67 (a general survey of judicial and scholarly views on judicial taking prior to *STBR*).

sis for review, the Justices unanimously affirmed that the Florida Supreme Court's decision did not constitute a taking of property rights³⁶ or even that the case presented a "close" question.³⁷ The Court found that the Florida Supreme Court decision clearly effected no change in state law.³⁸ In the view of Justices Kennedy (joined by Justice Sotomayor) and Breyer (joined by Justice Ginsberg), because no property rights were impaired and no compensable taking could result no matter what kind of test the Court applied, the Court should refrain from introducing a new constitutional takings principle.³⁹ To make the case for the concept of judicial taking, Justice Scalia took the position in his plurality opinion⁴⁰ that the Court could not decide whether the case presented a judicial taking of property without determining whether a judicial taking can exist and, if so, what is the standard for finding such a taking.⁴¹

The Fifth Amendment of the Constitution was originally applied to require compensation when the government directly appropriated property,⁴² but the just compensation requirement has been extended to legislative and regulatory action that "goes too

36. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2613 (plurality opinion), 2613 (Kennedy, J., concurring in part and dissenting in part), 2618 (Breyer, J., concurring in part and dissenting in part), 2613 (Justice Stevens did not participate in the case).

37. *Id.* at 2611.

38. *Id.* at 2611-12. The Court concluded that Florida law recognizes that the state has the right to fill in its submerged land adjacent to littoral property "so long as it does not interfere with the rights of the public and the rights of littoral landowners." The property owners did not meet their burden of demonstrating that they had "rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." Asserting that Florida law treats the filling of state submerged land as avulsion, the Court found that state law recognized no exception to the doctrine when the state causes the exposure of submerged land adjacent to littoral property. Finally, the Court concurred that the right to accretions was not "implicated" in beach restoration "as there can be no accretions to land that no longer abuts the water." *Id.*

39. *Id.* at 2613 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy wrote that the "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 . . ." *Id.* Justice Breyer agreed, seeing "no need" to rule on the issue of judicial takings "now[.]" *Id.* at 2619 (Breyer, J., concurring in part and concurring in the judgment).

40. *Id.* at 2596. Justice Scalia was joined in his opinion by Chief Justice Roberts and Justices Thomas and Alito.

41. *Id.* at 2602-03 (plurality opinion). Justice Scalia criticized Justice Breyer for arguing that it was unnecessary for the Court to decide whether a judicial taking exists or the appropriate standard of review. He stated that

[o]ne cannot know whether a takings claim is invalid without knowing what standard it has failed to meet. Which means that Justice Breyer must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the "unnecessary" constitutional question whether there is such a thing as a judicial taking.

Id.

42. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992).

far” in reducing the beneficial use and value of property—commonly known as a regulatory taking.⁴³ Justice Scalia rejected the argument that the branch of government was relevant in the application of the principle that “the Takings Clause bars *the State* from taking private property without paying for it[.]”⁴⁴ He insisted that the constitutional standard applies to the act and not the actor.⁴⁵ “It would be absurd[.]” Justice Scalia declared, “to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”⁴⁶

In his concurring opinion in *Hughes v. Washington*,⁴⁷ Justice Potter Stewart had earlier suggested the possibility of a judicial taking when a court decision constitutes “a sudden change in state law, unpredictable in terms of the relevant precedents.”⁴⁸ While adopting the concept of judicial taking, Justice Scalia rejected this as the relevant test. He reasoned that the predictability of a court’s decision affecting property entitlements was irrelevant.⁴⁹ Instead, Justice Scalia’s test focuses on the effect on existing property rights: “If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property”⁵⁰ While using absolute terms that seem to suggest a *per se* taking rule,⁵¹ later in the case, he gives a hint of how judicial taking might fit into traditional taking doctrine. He explains that “the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent.”⁵² This statement seems to concede that both the nature and degree of infringement of property rights are as relevant to a judicial impairment of property rights as to a similar impairment of rights by the legislature

43. *Id.*; see also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (finding that a regulation could be the equivalent of an act of eminent domain if it “goes too far” in diminishing the value of the land).

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

45. *Id.*

46. *Id.* at 2601.

47. 389 U.S. 290 (1967) (Stewart, J., concurring).

48. *Id.* at 296-97.

49. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2610 (a decision could be predictable but confiscatory, or unpredictable but merely clarifies property rights that were previously unclear).

50. *Id.* at 2602.

51. See *id.* at 2601. This use of absolutist language is likely related to the specific facts of the case. Justice Scalia notes that it is not necessary to determine whether riparian rights are an easement because they are as fully protected as an estate in land. *Id.* (citing *Yates v. Milwaukee*, 10 Wall. 497, 504 (1871)). Applying this standard, the taking of the right to accretions would be a *per se* taking requiring compensation.

52. *Id.* at 2602.

or an executive agency. That is, a *Penn Central* balancing test⁵³ would normally apply.⁵⁴ This approach would be consistent with Justice Scalia's position that the same standards apply to all branches of government in applying the takings clause.

Justice Kennedy, joined by Justice Sotomayor, did not view the case as requiring the Court to determine "whether, or when" a judicial taking might arise.⁵⁵ He extensively reviewed the "difficulties" that should be taken into account before adopting a theory of judicial takings, including the political nature of property,⁵⁶ the lack of eminent domain power in the judiciary,⁵⁷ the procedural issues involved in how to raise a judicial takings claim,⁵⁸ and the question of what the remedy would be for a judicial taking.⁵⁹ The Due Process Clause, in Justice Kennedy's view, provides an adequate constraint on the judiciary in protecting private property.⁶⁰

If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause.⁶¹

Justice Kennedy deemed it "not wise" to devise a new remedy when it has not been shown that "usual principles, including con-

53. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). The *Penn Central* test weighs the extent that the regulation interferes with the property owner's investment-backed expectations against the character of the government action.

54. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (reviewing and summarizing takings analysis).

55. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2613 (Kennedy, J., concurring in part and dissenting in part) "In the exercise of their duty to protect the fisc, both the legislative and executive branches monitor, or should monitor, the exercise of this substantial power. Those branches are accountable in their political capacity for the proper discharge of this obligation." *Id.*

56. *Id.* at 2613-14.

57. *Id.* at 2614, 2618 ("[T]he Takings Clause implicitly recognizes a governmental power while placing limits upon that power. . . . There is no clear authority for [the] proposition [that courts have eminent domain power]. . . . [T]he substantial power to decide whose property to take and when to take it should be conceived of as a power vested in the political branches and subject to political control.").

58. *Id.* at 2616-17 ("[I]t may be unclear in certain situations how a party should properly raise a judicial takings claim.").

59. *Id.* at 2617 ("It is . . . questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation.").

60. *Id.* at 2615.

61. *Id.* at 2614.

stitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners.”⁶²

The concept of a judicial taking was only adopted by the four justices in the plurality, but it must be observed that although the other four participating justices did not appear inclined to accept the theory, none of the justices in *STBR* expressly rejected it. On this basis, property rights advocates are viewing the case as opening the door for development of a judicial taking doctrine.⁶³

III. JUDICIAL TAKING, SEA LEVEL RISE, AND BEACH RESTORATION

The intersection of land and sea has always been not only a particularly vulnerable and special environment, but has also been subject to a unique legal regime. Over many centuries, the common law has developed to balance public and private rights in the ocean and shore. While concepts like the public trust doctrine have been codified and even incorporated in state constitutions, the increased intensity of use of coastal areas and new developments and pressures on the fragile coastline often present novel questions that will require the courts to fill gaps or clarify the application of the concepts in the context of new circumstances. The courts need the independence necessary to allow common law concepts, such as the public trust doctrine and custom, to evolve to meet the changing needs of society in regard to the use and protection of the shore.

In juxtaposition to the idea that courts should be able to evolve common law principles to address changing circumstances and societal needs, the theory of judicial taking presumes that courts require additional constraints in addressing these issues of state property law.⁶⁴ As noted by Justice Kennedy in *STBR*, the due process clause already provides both procedural and substantive limi-

62. *Id.* at 2607, 2617-18.

63. See generally Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia's Shifting Sands*, 35 VT. L. REV. 423 (2010); Robert H. Thomas et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, 35 VT. L. REV. 437 (2010).

64. Justice Scalia's frustration with state courts may arise from the response of many courts to his opinion in *Lucas*, which held that a regulation that takes all value of land is a categorical taking unless the prohibited use of the property did not inhere in the owner's title based on background principles of state property law. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Justice Scalia has asserted that "*Lucas* . . . 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" and 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." *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari) (quoting *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967)).

tations on state courts that eliminate or substantially change property rights by arbitrary or irrational rulings.⁶⁵ An arbitrary or irrational standard provides state courts some needed flexibility in dealing with gaps in the law or adapting to changing circumstances but may not provide a clear or predictable result. Justice Scalia's discussion of judicial taking did not explain, however, why notoriously complex and unpredictable takings analysis⁶⁶ would provide a more adequate or predictable remedy.⁶⁷

Even though the theory of judicial taking was not adopted by a majority of the Court in *STBR*, the case does send a message to state courts. In fact, six justices agreed (albeit not on the same grounds) that state supreme court decisions that eliminated existing property rights can be found unconstitutional by federal courts, inviting federal review of state property law questions.⁶⁸

This chilling message may have already affected the Texas Supreme Court in the recent *Severance v. Patterson* case.⁶⁹ After several decades of Texas courts recognizing that an established public easement to use a Texas beach moved or "rolled" when the beach moved as a result of erosion or avulsion,⁷⁰ the Texas Supreme Court surprisingly rejected, as a matter of Texas property law, that a public use easement could "roll" or migrate after an avulsive event onto "previously unencumbered beachfront property[.]"⁷¹ The

65. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and dissenting in part). In *Lingle v. Chevron*, the Court recently clarified the dichotomy between due process violations and takings. 554 U.S. 528 (2005). Justice Kennedy's analysis in *STBR* reasonably relates to that dichotomy in the context of the existence of a judicial takings doctrine.

66. See generally Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

67. Of course, a finding of a judicial taking would seem to necessarily provide a remedy of just compensation, but this aspect of judicial taking theory is perhaps the most difficult to rationalize. Justice Kennedy explains the problems associated with a compensation remedy for a judicial taking and why such a remedy may be inappropriate. See *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2616-17 (Kennedy, J., concurring in part, dissenting in part).

68. Justice Breyer noted in his concurring opinion that discussion of judicial taking "invite[s] a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law." *Id.* at 2618-19 (Breyer, J., concurring in part and dissenting in part). Justice Breyer went on to state that

the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference 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.

Id. at 2619.

69. *Severance v. Patterson*, No. 09-0387, 2010 Tex. LEXIS 854, (Tex. Nov. 5, 2010), *reh'g granted*.

70. *Id.* at *50-51.

71. *Id.* at *47. The reasoning for the rejection of the rule is quite unclear. Texas continues to recognize the rule the state has applied that after an avulsive event the boundary

case has led to the cancellation of the largest beach restoration project in the history of the state.⁷²

In another context, *STBR* has provided some support for beach restoration projects. Avulsion is traditionally defined as an addition to littoral land that forms suddenly and perceptibly and does not change the boundary between the state and the landowner.⁷³ However, very few cases have addressed whether beach restoration projects are subject to the common law rule of avulsion in regard to the boundary.⁷⁴ The U.S. Supreme Court in *STBR* found that the Florida court applied the doctrine of avulsion to the beach restoration project,⁷⁵ and that because state law created no exception when the avulsion was caused by the state, the boundary does not move.⁷⁶ Consequently, the state retains ownership of the previously submerged lands.⁷⁷ A New Jersey Supreme Court case, *City of Long Branch v. Jui Yung Liu*,⁷⁸ had seemed to be “on hold” pending the U.S. Supreme Court’s determination of the nature of avulsion. In that case, the question was whether oceanfront property owners had gained title to the created beach that would entitle them to compensation for its condemnation by the city of Long Branch.⁷⁹ The New Jersey Supreme Court extensively cited *STBR*

between state and private upland property is the post-avulsion MHWL. *Id.* at *36-37. It is not necessarily intuitive that property owner’s expectations as “ordinary hazard” of ownership include “losing property to the public trust as it becomes part of the wet beach or submerged under the ocean . . .,” but that they do not expect a public easement on the adjacent land to move with the migrating beach. *Id.* at *38.

72. See Ian White, *Galveston: State Kills West End Beach Restoration Project*, DAILY NEWS, Nov. 16, 2010, available at <http://www.khou.com/news/neighborhood-news/Galveston-State-kills-West-End-beach-restoration-project-108431359.html>.

73. See, e.g., *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2599 (stating “whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event. See *Bryant v. Peppe*, 238 So.2d 836, 838–839 (Fla.1970); J. Gould, *Law of Waters* § 158, p. 290 (1883).”).

74. See *supra*, note 38. The situation could be considered outside the application of the common law rule because the exposure of the land is through the action of the state (often called “artificial avulsion”), rather than caused by natural action of wind and water. A number of cases, however, have addressed other filling of waterfront land and found the action constituted avulsion. See *City of Waukegan v. Nat’l Gypsum Co.*, 587 F. Supp. 2d 997, 1005 (N.D. Ill. 2008) (explaining that “[t]he same rules apply both to natural avulsions (e.g., a sudden storm or flood) and artificial avulsions (e.g., excavation along waterfront property).”); *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (recognizing the filling of submerged land around Ellis Island as an “avulsive” change under the common law); *J.P. Furlong Enters. v. Sun Exploration & Prod. Co.*, 423 N.W.2d 130, 134 (N.D. 1988); *Cinque Bambini P’ship v. State*, 491 So. 2d 508, 520 (Miss. 1986).

75. To be precise, the Florida Supreme Court never stated that beach restoration was an avulsive event, but only that after an avulsive event—in the case of a hurricane, a littoral owner had a reasonable time to reclaim his or her land. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1117 (Fla. 2008).

76. *Id.*

77. *Id.* at 1117-18.

78. 4 A.3d 542 (N.J. 2010).

79. *Id.* at 548.

to support its conclusion that the doctrine of avulsion applied to the beach restoration project and that title to the filled land remained in the state.⁸⁰

The U.S. Supreme Court's upholding of state law that does not make exceptions for "artificial avulsion" like the state restoration of beaches and agreeing that the right to accretions is not implicated in such projects does not necessarily clear the way for beach restoration to continue. The doctrine of avulsion is a two-sided sword in the case of beach restoration. In *Walton County*, the Florida Supreme Court noted that "if the ECL does not represent the pre-hurricane MHWL, the resulting boundary between sovereignty and private property might result in the State laying claim to a portion of land that, under the common law, would typically remain with the private owner."⁸¹ The U.S. Supreme Court in *STBR* also made reference to the fact that the case was decided on the basis that the ECL was being set at the "pre-existing mean high-water line"⁸² and that setting the ECL landward of the pre-existing MHWL would result in a taking.⁸³ These observations lead to the conclusion that if, for example, an ECL is set at the existing MHWL after an avulsive event that scours away 100 feet of beach, the state's claim to the restored beach would be a taking of the littoral owner's property requiring compensation. The additional costs of acquiring ownership of the restored beach would likely lead to the termination of such projects.

In most situations, however, the avulsive event will not be the only cause of the beach migration. In one of the few cases addressing the issue, a Texas appellate court held that for littoral owners to claim that the boundary had not moved prior to the restoration project, the owners had to establish that *all* the loss of the disputed land was due to avulsion.⁸⁴ If states widely adopt this standard,

80. *Id.* at 550-51, 560.

81. *Walton Cnty.* 998 So. 2d at 1117-18 n.15 (explaining that the court would not address this "as-applied" issue in the facial challenge to the case).

82. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2599 n.2 (2010).

83. *Id.* ("Respondents concede that, if the erosion-control line were established landward of that, the State would have taken property.").

84. In *City of Corpus Christi v. Davis*, the court held that [i]t is undisputed that not all the shoreline loss was attributable to sudden and obvious causes, although it is true that hurricanes and northers have been responsible for a substantial part of the total loss of the shoreline. Nevertheless, the evidence is that forces other than hurricanes and northers, such as summertime night winds and quick water action, are at work slowly shifting away the sands of North Beach. Such forces are classically erosive, not avulsive. The Davises failed to overcome the presumption that the State held title to the disputed acreage by proving that the total loss of the shoreline resulted from avulsive action. 622 S.W.2d 640, 646 (Tex. App. 1981). See also *Christie*, *supra* note 26, at 51-63.

there will only be rare, if any, occasions when the littoral owners can carry the burden of proof.

IV. CONCLUSION

Sea level rise resulting from global warming presents one of the greatest challenges to climate change adaptation. The intensity and economic value of coastal development as well as the value of beaches to the coastal economies of Gulf of Mexico states continues to make beach restoration an economically viable option for adaptation to sea level rise—at least in the short term. As a sea level rise strategy, beach restoration may be more in the nature of “stalling” than adapting, but there is little doubt about its importance, even if only as a continuing response to background levels of erosion to protect the tourism economy and upland property.

Of course, beach restoration projects are not something new. Beach nourishment as an erosion strategy began as early as the 1930s,⁸⁵ but as technologies have improved and funding has become more available, these projects have become a primary tool for beach management and erosion mitigation. Florida now manages over 200 miles of restored beach,⁸⁶ and until the *STBR* case, there had been no legal challenges to its programs. Now, however, challenges to beach programs both in Florida and Texas supported by property rights organizations are proliferating. Unfortunately, there are a plethora of unresolved legal issues that can serve to derail the reliance on beach restoration as a sea level rise adaptation strategy. The specter of judicial takings is just one hurdle for states in confronting these issues, and it serves as a signal that Justice Scalia will continue to pursue his aggressive agenda of property rights protection.⁸⁷

85. COMM. ON BEACH NOURISHMENT & PROT., NAT'L RESEARCH COUNCIL, BEACH NOURISHMENT AND PROTECTION 58-60 (1995).

86. See generally *Beach Erosion Control Program*, *supra* note 3.

87. There had been speculation that cases like *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), and *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), represented a retrenchment of Supreme Court's aggressive development of the takings doctrine. *STBR* suggests this conclusion may be unjustified. See, e.g., Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004).

