FINAL THOUGHTS ON A RECENT DEVELOPMENT

STOP THE BEACH RENOURISHMENT v. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION: MUCH ADO ABOUT NOTHING?

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I. INTRODUCTION

Florida's beaches are critical to the State's economy and provide significant protection for upland property, but erosion from natural forces, coastal development, and construction and maintenance of navigation inlets threatens the beaches' ability to provide these vital services. Of the 825 miles of sandy beach in the State, over 485 miles (about fifty-nine percent) is eroding, with 387 miles of beach (about forty-seven percent) experiencing "critical erosion."[1] To protect and manage critically eroding beaches, the Legislature enacted the Beach and Shore Preservation Act (BSPA),[2] specifically directing the State to provide for beach restoration and nourishment projects.[3]

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1. Fla. Dept. of Envtl. Protec., *Beach Erosion Control Program (BECP)*, http://www.dep.state.fl.us/beaches/programs/bcherosn.htm (last updated Aug. 4, 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. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

Fla. Admin. Code Ann. r. 62B–36.002(4) (2010).

2. Fla. Stat. § 161.011–161.45 (2010).

3. *Id.*

The State has spent at least six hundred million dollars on beach erosion control and beach restoration, and the Florida Department of Environmental Protection (DEP) now manages over two hundred miles of restored beaches.[4] In 2006, the Florida First District Court of Appeal (First DCA) put the Florida Beach Erosion Control Program in jeopardy, however, by finding that the BSPA deprived the beachfront property owners of their constitutionally protected riparian rights without just compensation.[5] The case eventually worked its way to the United States Supreme Court.[6]

II. BACKGROUND OF THE CASE

When the City of Destin and Walton County applied for permits to restore 6.9 miles of beach in 2003, groups representing property owners challenged the county's intent to issue the permit in an administrative hearing that consolidated their claims.[7] Deferring constitutional challenges for subsequent court adjudication, the administrative law judge found that the permit applicants met the applicable standards and recommended issuance of the permit.[8] The Florida DEP's final order affirming that the permit was properly issued was appealed to the First DCA on the issue of the constitutionality of the BSPA.[9] The First DCA found that the BSPA deprived the beachfront property owners of constitutionally protected riparian (littoral) rights[10]—the right to accretions and the right of contact with the water—

4. Fla. Dept. of Envtl. Protec., *supra* n. 1.

5. *Save Our Beaches, Inc. v. Fla. Dept. of Envtl. Protec.*, 27 So. 3d 48, 60 (Fla. 1st Dist. App. 2006).

6. *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Protec.*, 130 S. Ct. 2592 (2010) [hereinafter *STBR II*].

7. *See Walton Co. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1106 (Fla. 2008) [hereinafter *STBR I*]. Although restored beaches protect upland properties and their economic value in areas of critically eroded beach, some property owners view beach restoration projects as simply building a public beach in front of their property, creating disturbance of their use and enjoyment by unwelcomed members of the public. *See e.g.* Save Our Beaches, Inc., http://saveourbeaches.net/ (accessed Oct. 12, 2010) (stating, "The only objective of the City of Destin is to make all privately owned Gulf front beach open to the public").

8. *STBR I*, 998 So. 2d at 1106.

9. *Id.* at 1106–1107.

10. Riparian is often used to describe all waterfront property, but technically, land bordered by an ocean or a lake is littoral property. *Wehby v. Turpin*, 710 So. 2d 1243, 1247 n. 2 (Ala. 1998).

without just compensation.[11] The BSPA expressly preserves and even enhances most of the rights that characterize riparian or littoral land but specifically provides that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process . . . ."[12] Further, by providing that the State set an Erosion Control Line (ECL)[13] and that the beach built seaward of that line on state-owned, submerged lands would continue to be state property,[14] the BSPA requires that the property of the upland owners be separated from the water by a publicly owned beach.

The Florida Supreme Court, in accepting the certified question from the First DCA, addressed the issue as a facial challenge to the BSPA[15] and assumed for purposes of the case that the ECL was set at the current boundary line between the state-owned submerged, sovereignty lands and the upland private property owners' land.[16] Noting that a statute is facially constitutional unless "no set of circumstances exists under which the statute would be valid,"[17] the Court analyzed the statute in the context of an avulsive scouring of the beach and state restoration that returned the beach to the pre-avulsive status quo.[18] The Court found that the BSPA effectuated a state's constitutional duty to

11. *STBR I*, 998 So. 2d at 1107.

12. Fla. Stat. § 161.191(2).

13. Before construction of a beach restoration project, the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees), which holds title to sovereignty lands in Florida, must establish the mean high water line (MHWL) and an erosion control line (ECL) for the area to be restored. Fla. Stat. § 161.161(4). The MHWL is the primary reference for the Board of Trustees to establish the ECL for the project, but it may also be adjusted by taking into account the "requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." Fla. Stat. § 161.161(5). The statute fixes the boundary line at the ECL, replacing the ambulatory MHWL as the upland owner's boundary. Fla. Stat. § 161.191(1).

14. 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 are] vested in the riparian upland owners whose lands either abut the [ECL] 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.

Fla. Stat. § 161.191(1).

15. *STBR I*, 998 So. 2d at 1105.

16. *Id.* at 1117 n. 15.

17. *Id.* at 1109 (citing *Fla. Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)).

18. *Id.* at 1116.

protect its beaches, and like the common law, the BSPA "facially achieves a reasonable balance between public and private interests in the shore."[19] Addressing whether the BSPA caused a taking of littoral rights, the Court found that, unlike other vested and presently exercised littoral rights associated with access,[20] the right to accretions under the Florida common law is a future, contingent right,[21] and in the beach restoration context, that right was not implicated.[22] Finally, the Florida Supreme Court determined that the right of contact with the water merely preserves the right of access to the water. It is an ancillary—rather than independent—right and is not relevant because the BSPA preserves access to the water.[23]

The Florida Supreme Court faulted the First DCA for not considering the doctrine of avulsion.[24] Interestingly, the Florida Supreme Court was not referring to the restoration project as the avulsive event disregarded by the First DCA.[25] Instead, the 1995 hurricane contributing to the area's designation as critically eroded coastline was identified as the relevant avulsive event, and the Florida Supreme Court described the State as a property owner entitled to recover property lost to avulsion.[26] The Florida

19. *Id.* at 1120.

20. *Id.* at 1112 (stating, "The rights to access, use, and view are rights relating to the present use of the foreshore and water").

21. *Id.* (explaining, "The 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").

22. *Id.* at 1118–1119. The Florida Supreme Court determined that none of the common law justifications for the doctrine of accretions applied in the circumstances of beach restoration under the BSPA. *Id.*

23. *Id.* at 1119–1120.

24. *Id.* at 1116.

25. *Id.*

26. *Id.* It seems an understatement to say this is an unusual application of the doctrine that a littoral owner has a reasonable time to reclaim his or her beach after an avulsive event.

> The Florida Supreme Court's interpretation seems to create an inverse application of a right to reclaim land after an avulsive event. Because the State's submerged land *is* bounded by the MHWL, however, one might analogize that the State has the same rights to reclaim its land as an upland littoral owner. But since the State's ownership is of land that was already submerged, what *land* does the state have to *reclaim*? While it is not immediately obvious, the state does have crucially important *land* to reclaim between the pre-avulsive low and high water lines. These tidelands are the critical link for the public in their access to beaches. An avulsive event that submerges the MHWL far seaward of the ocean's current reach potentially leaves the public with no guaranteed access to the sea or use of the beaches.

Supreme Court concluded that the BSPA was facially constitutional because the BSPA did no more than what would be allowed under common law.[27]

After the property owner's association Stop the Beach Renourishment (STBR) was denied a rehearing by the state supreme court,[28] STBR petitioned the United States Supreme Court for certiorari.[29] Although the Supreme Court accepted three questions, the primary issue addressed was whether the Florida Supreme Court had taken the property owners' littoral rights without just compensation by redefining the right to accretions and contact with the water.[30] The case provided the Supreme Court with the first opportunity to address directly the issue of a "judicial taking."[31]

III. THE CONCEPT OF A JUDICIAL TAKING

The Fifth Amendment of the United States Constitution prohibits the government from taking property without just compensation.[32] Originally, this precept applied only to the direct appropriation of property or to a situation in which the owner was practically ousted,[33] but since *Pennsylvania Coal Co. v. Mahon*,[34] the requirement of just compensation has been extended to a legislative and regulatory action that "goes too far" in reducing the value of property.[35] Although the concept of judicial takings was first raised in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*,[36] an 1897 case, the doctrine's modern roots stem from the

Donna R. Christie, *Of Beaches, Boundaries and SOBs*, 25 J. Land Use & Envtl. L. 19, 49 (2009) (emphasis in original).

27. *STBR I*, 998 So. 2d at 1117–1118.

28. *STBR II*, 130 S. Ct. at 2600–2601.

29. *Id.* at 2601.

30. *Id.* at 2610.

31. *Id.* at 2601–2603.

32. U.S. Const. amend. V. The Court has held that the Fourteenth Amendment made the Fifth Amendment's Takings and Compensation Clauses applicable to the States. *Chi., Burlington & Quincy R.R. Co. v. Chi.*, 166 U.S. 226, 235–237 (1897).

33. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (discussing the history of the precept).

34. 260 U.S. 393 (1922).

35. *Lucas*, 505 U.S. at 1014 (citing *Penn. Coal Co.*, 260 U.S. at 415). In *Pennsylvania Coal Co.*, Justice Holmes concluded that a regulation that seriously diminished the value of land could be the equivalent of an act of eminent domain, giving birth to the concept of regulatory takings. *Penn. Coal Co.*, 260 U.S. at 415.

36. 166. U.S. 226.

concurring opinion by Justice Stewart in *Hughes v. Washington*.[37] Justice Stewart argued that "[t]o the extent that the decision of the [state court] . . . arguably conforms to reasonable expectations, [it should be accepted] 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."[38]

In the seminal article on judicial takings, Barton Thompson posited that "judicial changes in property law raise the same concerns as legislative and executive takings,"[39] and consequently, courts should be subject to the same constitutional restrictions as other government branches. Most commentators and courts have, however, rejected the concept.[40]

IV. THE UNITED STATES SUPREME COURT, STBR II*, AND JUDICIAL TAKINGS*

Stop the Beach Renourishment v. Department of Environmental Protection (STBR II) resulted in a plurality opinion by Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito,[41] and opinions concurring in part and dissenting in part by Justice Kennedy, joined by Justice Sotomayor,[42] and Justice Breyer, joined by Justice Ginsburg.[43] Without agreeing on the basis for review, the Justices unanimously affirmed that the Florida Supreme Court's decision did not constitute a taking of property rights.[44]

37. 389 U.S. 290, 296 (1967) (Stewart, J., concurring). See also Justice Scalia's scathing dissent from the denial of certiorari in *Stevens v. City of Cannon Beach*, denouncing the state court's invoking "new-found" and "fiction[al]" principles to avoid an unconstitutional taking of property. 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari).

38. *Hughes*, 389 U.S. at 296 (Stewart, J., concurring).

39. Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1544 (1990).

40. *See* Christie, *supra* n. 26, at 64–67 (providing an overview of the views on judicial takings before *STBR II*).

41. *STBR II*, 130 S. Ct. at 2597 (plurality).

42. *Id.* at 2613 (Kennedy & Sotomayor, JJ., concurring in part and dissenting in part).

43. *Id.* at 2618 (Breyer & Ginsburg, JJ., concurring in part and dissenting in part).

44. *Id.* at 2613 (plurality); *id.* (Kennedy & Sotomayor, JJ., concurring in part and dissenting in part); *id.* at 2618 (Breyer & Ginsburg, JJ., concurring in part and dissenting in part). Justice Stevens did not participate in the case. *Id.* at 2613.

A. The Holding of No Taking of Property

It is clear from the amount of time needed to render its decision in *Walton County v. Stop the Beach Renourishment, Inc.*[45] and the unusual reasoning the Court applied, that the Florida Supreme Court struggled with the case and the issue of whether the right to accretions had been taken by the BSPA.[46] The United States Supreme Court, on the other hand, easily concluded that the property owners had not met their burden to show that they had "rights to future accretions and contact with the water superior to the State's right to fill in its submerged land."[47] In fact, Justice Scalia (and apparently all the other participating Justices) did not even find it a "close" question.[48] Concluding 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,"[49] the Supreme Court then addressed the issues the Florida Supreme Court had meticulously avoided: whether the act of beach restoration is an avulsive event,[50] and if so, is there an exception when the avulsion is caused by the state?[51] The Court found that because Florida law permitted the state to fill its submerged land resulting in its "sudden exposure" and had "treated [this action] like an avulsion for purposes of ownership, . . . [t]he right to accretions was therefore subordinate to the State's right to fill."[52] The Court then relied heavily on *Martin v. Busch*,[53] a case not even cited in the Florida opinion,[54] to support its conclu-

45. Oral argument was held April 19, 2007, but the decision was not released until nineteen months later on September 29, 2008. Docket for *STBR I* (No. SC06-1449).

46. *See* Christie, *supra* n. 26, at 45–51 (describing the rationale underlying the Florida Supreme Court's decision).

47. *STBR II*, 130 S. Ct. at 2611 (plurality).

48. *Id.*

49. *Id.*

50. The Court noted: "[W]hen a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions. Those accretions no longer add to *his* property, since the property abutting the water belongs not to him but to the State." *Id.* at 2599 (emphasis in original).

51. *Id.* at 2611.

52. *Id.* at 2611. *See id.* (relying on *Martin v. Busch*, 112 So. 274 (Fla. 1927), and *Thiesen v. Gulf, Florida & Alabama Railway Co.*, 78 So. 491 (Fla. 1918), for prior law that "suggests" this result).

53. 112 So. 274.

54. *STBR II*, 130 S. Ct. at 2612 (plurality). "Although the [Florida Supreme Court] opinion does not cite *Martin* and is not always clear on this point, it suffices that its char-

sion that Florida law made no exception to the doctrine of avulsion when the State was responsible for the exposure of submerged land adjacent to littoral property.[55] The Court found it unsurprising then that the Florida Supreme Court held 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."[56]

The Supreme Court also handily disposed of the petitioner's argument that the Florida Supreme Court's interpretation of the BSPA also took the right to contact with the water. The Court upheld the Florida Supreme Court's determination that the right was ancillary to the right of access to the water. The Court concluded that recognition of contact with the water as an independent right would be inconsistent with the State's law governing avulsion.[57]

V. JUDICIAL TAKINGS

The Court's analysis made it clear that there was simply no change in Florida law by the Florida Supreme Court's decision in *STBR I*.[58] No compensable taking could result no matter what test the Court applied, since no property rights were impaired.[59] The case provided a flimsy vehicle for introducing this test for a judicial taking, but Justice Scalia nevertheless insisted that one could not determine whether the decision *was* a judicial taking without determining whether a judicial taking can exist and, if so, what the standard is for finding such a taking.[60] Emphasizing

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acterization of the littoral right to accretion is consistent with *Martin* and the other relevant principles of Florida law we have discussed." *Id.*

55. *Id.* (stating that "nothing in prior Florida law makes such a distinction [between natural and state-caused avulsion], and *Martin* suggests, if it does not indeed hold, the contrary").

56. *Id.* at 2611–2612.

57. *Id.* at 2612–2613.

58. *STBR II*, 130 S. Ct. at 2612–2613 (plurality).

59. 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.* at 2613 (Kennedy & Sotomayor, JJ., concurring in part and dissenting in part). Justice Breyer agreed, saying there was "no need" to rule on the issue of judicial takings "now[.]" *Id.* at 2619 (Breyer & Ginsburg, JJ., concurring in part and dissenting in part).

60. Justice Scalia chided Justice Breyer for taking the position that the Court need not decide either the question of whether a judicial taking exists or the appropriate standard

that the "Takings Clause bars *the State* from taking private property without paying for it,"[61] Justice Scalia rejected the argument that it mattered which branch of the government was responsible, noting that the Constitution addresses the act and not the actor.[62]

Addressing the applicable standard of review, Justice Scalia rejected the test for a judicial taking suggested by Justice Stewart in *Hughes*.[63] He noted that the predictability of a court's decision affecting property entitlements was irrelevant.[64] Instead, Justice Scalia's test for a judicial taking focused 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 . . . ."[65]

Both the nature of Justice Scalia's judicial takings test and how it fits into traditional takings doctrine are left rather unclear. At one level, he speaks in absolute terms about judicial opinions "effect[ing] a taking if they recharacterize as public property what was previously private property,"[66] suggesting a per se rule.[67] But

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for review. He stated:

> One 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. at 2602–2603 (plurality) (footnotes omitted).

61. *Id.* at 2602 (emphasis in original).

62. *Id.*

63. 389 U.S. at 296–297 (Stewart, J., concurring).

64. *STBR II*, 130 S. Ct. at 2610 (plurality) (explaining that a decision could be predictable but confiscatory, or unpredictable but merely clarifying property rights that were previously unclear); *see supra* nn. 38–40 and accompanying text (discussing this relationship between prediction and confiscation in older sources).

65. *STBR II*, 130 S. Ct. at 2602 (emphasis in original).

66. *Id.* at 2601.

67. The seemingly absolutist language used in the plurality opinion may be tied to the specific facts of the case. Justice Scalia states that riparian rights are as fully protected as an estate in land. *Id.* (citing *Yates v. City of Milwaukee*, 77 U.S. 497 (1871) (requiring compensation for the taking of the right to build and maintain a wharf)). If this is the test, then the taking of the right to accretions would per se require compensation. *See Nollan v. Cal. Coastal Commn.*, 483 U.S. 825, 831 (1987) (stating, "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach . . . there would have been a taking"); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (maintaining that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

he also seems to concede that the nature and degree of the infringement on property rights is relevant. "To be sure," he explains, "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."[68] Interpreting this language as applying the same test to a judicial impairment of property rights as to a similar impairment of rights by the legislature or an executive agency, i.e., a *Penn Central*[69] balancing test,[70] would be more consistent with Justice Scalia's position that, regarding the Takings Clause, the same standards apply to all branches of government.

Justice Kennedy, joined by Justice Sotomayor, sorts out some of the "difficulties" associated with applying the Fifth Amendment to judicial decisions, including the political nature of condemnation of property,[71] the procedural issues involved in how to raise a judicial takings claim,[72] and the question of what would be the remedy for a judicial taking.[73] By applying a due process analysis, rather than a takings analysis, to the situation in which a court's decision eliminates established property rights, these difficult issues are avoided. Justice Kennedy believes the "Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause."[74] Justice Kennedy deems it "not wise" to decide questions and devise a new remedy when it has not been shown that "usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners . . . ."[75]

68. *STBR II*, 130 S. Ct. at 2602 (plurality).

69. *Penn. Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

70. *Penn Central* notes that a takings analysis must weigh the extent by which the regulation interferes with the property owner's investment-backed expectations against the character of the government action. *Id.* at 124–125. Later courts added that the investment-backed expectations must be reasonable. *See e.g. Lucas*, 505 U.S. at 1034 (reciting the reasonableness requirement and citing to a line of case authority).

71. *STBR II*, 130 S. Ct. at 2613–2614 (Kennedy & Sotomayor, JJ., concurring in part and dissenting in part).

72. *Id.* at 2616–2617.

73. *Id.* at 2617.

74. *Id.* at 2615.

75. *Id.* at 2618.

Justice Breyer, joined by Justice Ginsburg, did not discuss the merits of the concept of a judicial taking. Seeing that reaching a novel constitutional issue was unnecessary to the case's disposition, Justice Breyer merely noted the lack of procedural limitations or substantive guidance in the plurality opinion and speculated on the possibility of a flood of federal litigation reviewing complex issues of state law unfamiliar to federal judges.[76]

VI. CONCLUSION

This conclusion must, of necessity, take two parts because the case's ramifications must be considered not only in relation to its effect on Florida's beach management and the BSPA, but also in relation to takings jurisprudence more generally.

A. STBR and Beach Restoration

Of course, the United States Supreme Court settled any question about whether the BSPA unconstitutionally takes the right to accretions or the right of contact with the water.[77] But the State's victory in the Supreme Court does not mean that beach restoration will now proceed unchallenged in the future. Future restoration projects must still deal with the state of the law as the Florida Supreme Court decision left it. That decision was extremely narrow in that it only decided the constitutionality of the BSPA "on its face" in the circumstance of returning the beach to the status quo after an avulsive event.[78] The Florida Supreme Court left the BSPA wide open to "as applied" challenges due largely to its misunderstanding of the causes of critical erosion of Florida's beaches and its unorthodox analysis of the right to reclaim after an avulsive event.[79] The Florida Supreme Court asserted that "when restoring storm-ravaged shoreline, the boundary under the BSPA should remain the pre-avulsive event

76. *Id.* at 2618–2619 (Breyer & Ginsburg, JJ., concurring in part and dissenting in part).

77. *Id.* at 2612–2613 (plurality, joined by Kennedy, Ginsburg, Breyer & Sotomayor, JJ., in parts I, IV, and V).

78. *STBR I*, 998 So. 2d at 1120–1121.

79. *Id.*; *see* Christie, *supra* n. 26, at 51–63 (providing a complete discussion of the problems raised by the decision).

boundary,"[80] ignoring the multitude of causes that lead to the designation of a critically eroded beach.[81] In a footnote, the Florida Supreme Court pointed out that an ECL that was not set at a pre-hurricane MHWL, the pre-avulsion boundary, may present a takings issue.[82] Further, the Florida Supreme Court created major problems in its inverse analysis of the right to reclaim beach taken by avulsion, an issue that has never been fully explained by Florida's common law or statutes.[83] The result is that continued litigation, largely focusing on the ECL and the right of reclamation, is extremely likely.

B. Judicial Takings

The taking mavens are circling. Property rights advocates view the case as far from a complete loss.[84] None of the Justices in *STBR II* categorically denied the existence of the concept of a judicial taking; six Justices agreed that state supreme court decisions that eliminated existing property rights might be unconstitutional.[85] The door is viewed as definitely open for the development of the judicial takings concept in the right case. Had Justice Scalia chosen a more likely candidate to represent an egregious judicial expropriation of established property rights to introduce his conception of a judicial taking, the door might be more than only slightly ajar.

The four-justice plurality in the case may, however, simply remain a four-justice minority on the judicial takings issue. Justice Kennedy has often referred to substantive due process limitations that apply to legislative and executive actions[86] and is not likely to abandon the position that due process is more finely

80. *STBR I*, 998 So. 2d at 1117.

81. *See* Christie, *supra* n. 26, at 52 (pointing to "difficult evidentiary issues" surrounding the many causes of avulsion or erosion).

82. *STBR I*, 998 So. 2d at 1118 n. 15.

83. *See* Christie, *supra* n. 26, at 53–58 (describing the inverse analysis pursued by the Florida Supreme Court).

84. *See generally* Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia's Shifting Sands*, 35 Vt. L. Rev. 423 (2010); Robert H. Thomas, Mark M. Murakami & Tred R. Eyerly, *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches* (working paper Aug. 9, 2010) (available at http://ssrn.com/abstract=1655658).

85. Albeit, not on the same constitutional grounds. *See supra* pt. VI (analyzing each opinion's distinct rationales).

86. *See e.g. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (pointing to due process explicitly as a potential limitation).

attuned to addressing the judicial branch if the circumstances that warrant constraint of the judiciary arise. The Court has recently clarified the dichotomy between due process violations and takings in *Lingle v. Chevron*,[87] and Justice Kennedy's approach in *STBR II* rationally addressed that dichotomy in the context of the existence of a judicial takings doctrine. While Justices Breyer and Ginsberg have not directly addressed the judicial takings concept, they appear to be disinclined to move in that direction. Justice Kagan, of course, has also not addressed the issue, and is key to the concept's future.[88]

Is the case "much ado about nothing?" Perhaps. In the end, the Court sustained the Florida Beach and Shore Preservation Act and no new transcending precept of judicial takings emerged. But because the Florida Supreme Court failed to take the straightforward approach to beach restoration as an avulsive action applied by the United States Supreme Court, the Act remains subject to challenges that affect efficient management of the State's beaches and the State's primary means for adapting to the rise of sea levels.[89] And because Justice Scalia continues to pursue relentlessly his agenda of property rights protection, the perception that the Supreme Court's aggressive application of the takings doctrine ended with *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[90] and *Lingle*[91] may be unjustified.[92]

87. *Id.*

88. The Solicitor General's Office did, however, submit a brief for the State arguing against a creation of a judicial taking concept. *See generally* Br. for the United States as Amicus Curiae in Support of Respt., *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Protec.*, 2009 WL 3183079 (U.S. Oct. 5, 2009).

89. *See* Christie, *supra* n. 26, at 38 (describing the Act's role in Florida's beach management).

90. 535 U.S. 302 (2002).

91. 544 U.S. 528.

92. It also appears that Justice Scalia is attempting to protect his "total taking" analysis in *Lucas* from evisceration by courts discovering new background principles of property law. *See generally Stevens*, 510 U.S. at 1207 (Scalia & O'Connor, JJ., dissenting from denial of certiorari) (defending the *Lucas* analysis).