AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Property/Takings

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Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. __, (2010)

Stop the Beach Renourishment is an organization of private owners of beachfront property in Florida. The organization was formed to prevent the city of Destin from restoring approximately seven miles of city beaches that had been eroded after hurricanes. The project would change the shoreline of local beach property and add a sandbar to which the city claimed ownership. After the city obtained the necessary permits from the state to begin the reconstruction, Stop the Beach Renourishment sued the Florida Department of Environmental Protection. They claimed that the permits took their property because they had rights to any land above the water that resulted from the restoration and rights to have their beachfront property continue to border on the water. A local trial court ruled in favor of the land owners, but that decision was reversed by the Supreme Court of Florida. The land owners appealed to the Supreme Court of the United States. They claimed that the Florida Court decision that they had no property rights was a judicial taking that violated the Fifth and Fourteenth Amendments.

Prominent government officials and interest groups filed numerous amicus briefs. The United States, numerous states, organizations of government officials, the American Planning Association and the Florida Shore and Beach Preservation Association urged the Supreme Court to reject the notion of judicial takings. The brief filed by the Obama administration declared,

> *It would be anomalous to hold that a decision defining state property rights also itself "takes" property. Nor does the historical understanding of what constitutes a taking support a judicial takings theory. And there are numerous jurisprudential and practical problems with recognizing such claims. They could unduly cabin the discretion of state courts to adapt the State's property law to new circumstances, upset the federal-state balance by assessing liability based on judicial decisions rather than on legislative and executive action, and encourage relitigation of property disputes as judicial takings.*

The National Association of Home Buildings, prominent property rights organizations, and conservative interest groups argued in favor of judicial takings. The brief for the CATO Institute stated,

> *There is no textual or theoretical reason for this Court to deny property owners just compensation for a taking solely because the acting branch of government is judicial instead of executive or legislative. In fact, the realities of modern property law, including the authority of state courts to define background principles of property law . . . necessitate that property owners be protected, via the judicial takings doctrine, against state court decisions that abrogate constitutional rights.*

The Supreme Court ruled that no taking took place. The justices unanimously agreed that the property owners had no right to have their property border on the water and no right to the sandbar that resulted after the beach restoration. The justices sharply disputed whether a judicial decision could take property. Chief Justice Roberts, Justice Scalia, Justice Alito and Justice Thomas insisted that the takings clause applied to judicial decisions as well as to legislative decrees. The other five justices did not reach any conclusions on that issue, although their opinions expressed skepticism that judicial rulings could violate the takings clause.

Consider the following questions when reading the opinion. Why did all the justices agree that no taking took place? On what basis did Justice Scalia maintain that judicial decisions may take property? Why was Justice

Kennedy skeptical? Did any significant difference exist between classifying the issue as concerning the takings clause or as raising issues about the proper interpretation of the due process clause of the Fourteenth Amendment?

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court in part and an opinion in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join in part.

. . . Generally speaking, state law defines property interests, . . . including property rights in navigable waters and the lands underneath them. . . . In Florida, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line). . . . Thus, the mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral property, and state-owned land. . . .

Littoral owners have, in addition to the rights of the public, certain "special rights" with regard to the water and the foreshore, . . . rights which Florida considers to be property, generally akin to easements. . . . These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property. . . .

At the center of this case is the right to accretions and relictions. Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes. . . . In order for an addition to dry land to qualify as an accretion, it must have occurred gradually and imperceptibly—that is, so slowly that one could not see the change occurring, though over time the difference became apparent. . . . When, on the other hand, there is a "sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream," the change is called an avulsion.

In Florida, as at common law, the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State). . . . Thus, regardless of 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. It follows from this that, when 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. . . .

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Before coming to the parties' arguments in the present case, we discuss some general principles of our takings jurisprudence. The Takings Clause—"nor shall private property be taken for public use, without just compensation"— applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land. Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. . . . Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking." Thus, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation . . . or deprives him of all economically beneficial use of his property, *Lucas v. South Carolina Coastal Council* (1992). Finally (and here we approach the situation before us), States effect a taking if they recharacterize as public property what was previously private property. . . .

The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ("nor shall private property be taken" [emphasis added]). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would

be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. . . .

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In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, 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. But the particular state actor is irrelevant. 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, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by ipse dixit, may not transform private property into public property without compensation."

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The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" . . . . The second problem is that we have held for many years (logically or not) that the "liberties" protected by Substantive Due Process do not include economic liberties. . . . Justice KENNEDY's language ("If a judicial decision . . . eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law" propels us back to what is referred to (usually deprecatingly) as "the *Lochner* era." That is a step of much greater novelty, and much more unpredictable effect, than merely applying the Takings Clause to judicial action. And the third and last problem with using Substantive Due Process is that either (1) it will not do all that the Takings Clause does, or (2) if it does all that the Takings Clause does, it will encounter the same supposed difficulties that Justice KENNEDY finds troublesome.

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We do not grasp the relevance of Justice KENNEDY's speculation that the Framers did not envision the Takings Clause would apply to judicial action. They doubtless did not, since the Constitution was adopted in an era when courts had no power to "change" the common law. . . . Where the text they adopted is clear, however ("nor shall private property be taken for public use"), what counts is not what they envisioned but what they wrote. Of course even after courts, in the 19th century, did assume the power to change the common law, it is not true that the new "common-law tradition . . . allows for incremental modifications to property law," so that "owners may reasonably expect or anticipate courts to make certain changes in property law." In the only sense in which this could be relevant to what we are discussing, that is an astounding statement. We are talking here about judicial elimination of established private property rights. . . .

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Respondents . . . warn us against depriving common-law judging of needed flexibility. That argument has little appeal when directed against the enforcement of a constitutional guarantee adopted in an era when, as we said supra, courts had no power to "change" the common law. But in any case, courts have no peculiar need of flexibility. It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so. And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right.

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Petitioner argues that the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist: the right to accretions, and the right to have littoral property touch the water (which petitioner distinguishes from the mere right of access to the water). Under petitioner's theory, because no prior Florida decision had said that the State's filling of submerged tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions, the Florida Supreme Court's judgment in the present case abolished those two easements to

which littoral property owners had been entitled. This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land. Though some may think the question close, in our view the showing cannot be made.

Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. . . . Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. . . . The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not. . . .

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

The Florida Supreme Court decision before us is consistent with these background principles of state property law. It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied. . . . The Florida Supreme Court's opinion describes beach restoration as the reclamation by the State of the public's land. . . .

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The result under Florida law may seem counter-intuitive. After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion. Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction. . . . The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established. We cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law.

JUSTICE STEVENS took no part in the decision of this case.

JUSTICE KENNEDY, with whom JUSTICE SOTOMAYOR joins, concurring in part and concurring in the judgment.

. . . This separate opinion notes certain difficulties that should be considered before accepting the theory that a judicial decision that eliminates an "established property right" constitutes a violation of the Takings Clause.

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The right of the property owner is subject, however, to the rule that the government does have power to take property for a public use, provided that it pays just compensation. . . . This is a vast governmental power. And typically, legislative bodies grant substantial discretion to executive officers to decide what property can be taken for authorized projects and uses. As a result, if an authorized executive agency or official decides that Blackacre is the right place for a fire station or Greenacre is the best spot for a freeway interchange, then the weight and authority of the State are used to take the property, even against the wishes of the owner, who must be satisfied with just compensation.

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.

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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. . . .

The Takings Clause also protects property rights, and it "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." . . . Unlike the Due Process Clause, therefore, the Takings Clause implicitly recognizes a governmental power while placing limits upon that power. Thus, if the Court were to hold that a judicial taking exists, it would presuppose that a judicial decision eliminating established property rights is "otherwise constitutional" so long as the State compensates the aggrieved property owners. There is no clear authority for this proposition.

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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. . . . Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat." . . .

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The idea, then, that a judicial takings doctrine would constrain judges might just well have the opposite effect. It would give judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid. The judiciary historically has not had the right or responsibility to say what property should or should not be taken.

Indeed, it is unclear whether the Takings Clause was understood, as a historical matter, to apply to judicial decisions. The Framers most likely viewed this Clause as applying only to physical appropriation pursuant to the power of eminent domain. . . . And it appears these physical appropriations were traditionally made by legislatures. . . .

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. . . If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. In the meantime, it seems appropriate to recognize that the 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.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring in part and concurring in the judgment.

[Justice Breyer and Ginsburg agreed that no taking took place and maintained that the justices should not have determined whether judicial decisions may violate the takings clause.]