Mississippi College Law Review

Volume 31
Issue 1 *Vol. 31 Iss. 1*

Article 7

2013

How Much Land Can a sand Pump Dump: Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.

Justin Ponds

How Much Land Can a Sand Pump Dump: *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*

*Justin Ponds**

"[T]he old man always thought of [the sea] . . . as something that gave or withheld great favours, and if she did wild or wicked things it was because she could not help them."

- Ernest Hemingway,
The Old Man and the Sea.[1]

I. Introduction

Tammy Alford is a retired schoolteacher who bought a house on Sandtrap Road near Destin, Florida.[2] Suzy Spence is a small business owner with her office a few blocks down from Tammy.[3] When the State tried to build a public beach between their property and the oceanfront,[4] the two women and their neighbors fought their case all the way to the United States Supreme Court. This is their story.

It all came down to two issues before the Court: (1) Could a judicial decision "take" private property rights such that the Fifth Amendment required "just compensation," and, if so, (2) did the Florida Supreme Court's decision actually take away any established rights? The Court split four to four on the first issue but unanimously answered no to the second question.[5]

Ultimately, the Court's self-restraint allowed the State to create an artificial public beach and separate the upland owners' backyards from the shoreline.[6] For the locals, it looked like their oceanfront property turned

* B.S., J.D., Mississippi College. I extend my utmost appreciation to the Mississippi College School of Law for embracing our Christian principles that encourage respect and compassion among the faculty, administration, and student body. My most genuine thanks go to Professor Alina Ng for supervising me throughout this Note's preparation and for challenging me to develop a more nuanced view of "property." I dedicate this Note to my loving family for teaching me to be independent in my thoughts and selfless in my actions—and especially to my mom for heel-toeing it with me along Florida's beautiful panhandle to research this case.

1. Ernest Hemingway, The Old Man and the Sea 30 (Scribner 2003) (1952).

2. Mark D. Evans, *Ruling Trips Beach Restoration Plan*, The Destin to 30A Beach Blog (Apr. 29, 2006), http://destinlandconnection.blogspot.com/2006_04_01_archive.html.

3. Sea Dunes Realty, http://www.seadunesrealty.com/ (last visited May 9, 2012).

4. Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot., 27 So. 3d 48, 55 n.4 (Fla. Dist. Ct. App. 2006).

5. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597, 2613 (2010).

6. *Id.* at 2612.

into "oceanview property,"[7] and even the Court believed its holding produced an "arguably odd result."[8] Even so, the majority deferred to the Florida Supreme Court,[9] which quietly admitted *in a footnote*, "There is a point where such a separation would materially and substantially impair the upland owner's access, thereby resulting in an unconstitutional taking . . . ."[10] This Note sets sail to find that point and deliver a sense of resolve to these seaside property owners more so than a mere footnote might provide. Part II describes the facts involved for these beachfront property owners and reveals the case's procedural history. Part III explores the legal history behind oceanfront property entitlements, the legislation involved, and the Takings Clause. Then, Part IV explains the law's application to the facts at hand in the instant case. Part V analyzes the Court's restraint and applies a balancing test under nuisance laws to provide a more practical platform for these competing property interests. Finally, Part VI concludes the Note and encourages oceanfront property owners to watch carefully for the point at which these types of projects may turn into unreasonable interferences.

II. FACTS AND PROCEDURAL HISTORY

Hurricane Opal devastated Florida's panhandle in 1995 and seriously eroded the shorelines along Okaloosa and Walton counties; almost a decade later, Florida's Department of Environmental Protection ("the Department") issued a Notice of Intent to permit a nearly seven-mile reconstruction project.[11] Florida's Beach and Shore Preservation Act ("the Act") required officials to conduct a survey and position an erosion control line ("ECL") to serve as the new boundaries for property owners based upon the pre-erosion mean high-water line ("MHWL").[12] Once established, beachfront property owners' common law littoral rights would cease, and statutory law would concurrently grant those same rights, excepting the right to accretions and relictions.[13] The project planned to use dredging machines to pump submerged sand into the affected areas, and the venture ultimately restored the beaches to a pre-erosion condition but

7. Transcript of Oral Argument at 5, *Stop the Beach Renourishment, Inc.*, 130 S. Ct. 2592 (No. 08-1151).

8. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2612 (majority opinion).

9. *Id.*

10. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1120 n.16 (Fla. 2008). The word "littoral" comes from the Latin word "litus," which means "seashore." *Id.* at 1105 n.3.

11. Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot., 27 So. 3d 48, 50–51 (Fla. Dist. Ct. App. 2006).

12. *Id.* at 53; FLA. STAT. §§ 161.161(3)-(5), 161.191 (2005).

13. *Save our Beaches, Inc.*, 27 So. 3d at 54; FLA. STAT. §§ 161.191, 161.201. Littoral rights in Florida include (1) the right to access the water, (2) the right to reasonably use the water, (3) the right to an unobstructed view of the water, and (4) the right to accretions and relictions. *Walton Cnty.*, 998 So. 2d at 1111. An "accretion" is "the gradual and imperceptible accumulation of land along the shore or bank of a body of water." *Black's Law Dictionary*, 34 (8th ed. 2004). A "reliction" is "an increase of the land by a gradual and imperceptible withdrawal of any body of water." *Id.* at 1455.

added an extra seventy-five feet of sandy beach seaward of the old property boundaries.[14]

In other words, the State drove huge pipes into the ocean floor and pumped sand along the coastline to help prevent more erosions.[15] Instead of putting the beaches back in their previous positions, the State went ahead and pumped additional sand into the damaged areas and set aside the new beach for the public.[16] Essentially, the property owners' ocean-front real estate would no longer touch the water, and twenty-five yards of public beach would sit outside their patio doors.[17]

Shortly after the Department issued its public notice, six beachfront property owners formed an association titled Stop the Beach Renourishment, Inc. ("the Members") to challenge the upcoming permit, the recent survey, and the legislation's constitutionality under state law.[18]

On appeal to the Florida District Court, the Members challenged the Department's order that endorsed the reconstruction project because it would take away both the right to accretions and the right for the upland to maintain contact with the water.[19] The district court reversed the Department's order that issued the permit and remanded the case so the Department could prove its property interest in the abutting land.[20] The appellate court then certified the question to the Florida Supreme Court as to whether the Act was unconstitutionally applied and consequently deprived the upland owners of their littoral property rights without just compensation.[21]

The Florida Supreme Court re-worded the certified issue and questioned the statute on its face, which meant that the statute would only be unconstitutional if "no set of circumstances exist[ed] under which the statute would be valid."[22] The high court reversed the district court's decision and held that the Act was facially constitutional because the common law

14. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2600.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Save Our Beaches, Inc.*, 27 So. 3d at 51. Save Our Beach, Inc. was not permitted to appear before the administrative law judge without more proof that the individuals within the corporation were beachfront property owners who would be directly affected by the judicial hearing. *Id.* at 55. In addition to the Department, Walton County and the City of Destin were active parties. *Id.* at 48. The administrative law judge held the permit and survey were proper under state laws, leaving the constitutional challenges for court proceedings. *Id.* at 51.

19. *Id.* at 50, 57. "If an authorized beach restoration . . . cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." FLA. STAT. § 161.141 (2005).

20. *Save Our Beaches, Inc.*, 27 So. 3d at 60. The law requires "satisfactory evidence of [a] sufficient upland interest" if a beach restoration project "unreasonably infringe[s] on riparian rights." FLA. ADMIN. CODE ANN. r. 18-21.004(3) (2005). "Riparian rights" generally refer to all waterfront property rights, but "littoral rights" more properly defines those interests which abut the ocean. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 n.3 (Fla. 2008).

21. *Save Our Beaches, Inc.*, 27 So. 3d at 60–61.

22. *Walton Cnty.*, 998 So. 2d at 1105, 1109. The certified question became: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation." *Id.*

doctrine of avulsion maintained the property boundary at the pre-hurricane MHWL,[23] and the doctrine permitted the public to regain the land it had lost.[24] The court further held that the right to accretions was a contingent future interest that had not yet vested in the upland owners' possession,[25] and the right for the upland to maintain contact with the water was ancillary to the littoral right to access.[26] One of the dissenting justices felt that the court manipulated the certified question and failed to recognize that the precedent factor in calling the property rights "littoral" rested soundly upon the property contacting the water.[27]

The United States Supreme Court granted certiorari to decide whether the Florida Supreme Court's *decision itself* amounted to a "taking" under the United States Constitution.[28] Justice Scalia and three others concluded that the Fifth Amendment's Takings Clause applies to judicial decisions just like it applies to legislative acts because the Constitution focuses on the government's act of taking without regard to the actor.[29] The plurality determined that the Fifth Amendment applies to littoral rights just like it applies to estates in land, so there was no need to determine whether the right to accretions was an easement appurtenant or a contingent future interest under Florida's common law.[30]

Justices Kennedy, Sotomayor, Breyer, and Ginsburg concluded that it was improper to discuss whether a judicial decision could amount to a governmental taking because the instant case could be resolved without such an inquiry.[31]

In the end, Justice Scalia wrote the majority opinion for a unanimous Court and affirmed the Florida Supreme Court's decision that the State's avulsion doctrine applied, holding the judicial decision was not an unconstitutional taking because the project never implicated the right to accretions.[32] Moreover, the Florida Supreme Court's refusal to expand State

23. *Id.* at 1116. " 'Avulsion' is the sudden or perceptible loss of or addition to the land by the action of the water . . . ." *Id.* The Florida Supreme Court held there was no difference between a natural avulsion and a State-created avulsion. *Id.* at 1115.

24. *Id.* at 1117. "Under both the Florida Constitution and the common law, the State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation." *Id.* at 1109 (citing FLA. CONST., art. X, § 11).

25. *Id.* at 1112. The littoral rights to access and use are treated *like* affirmative easements, and the other littoral right to an unobstructed view is treated *like* a negative easement. *Id.* at 1112 n.10.

26. *Id.* at 1119–20. The court held the project could produce a wider area of sand beyond the pre-hurricane condition so long as the State did not unreasonably distance the upland owner from the water so as to impair her right to access. *Id.* at 1120 n.16.

27. *Id.* at 1121, 1124 (Lewis, J., dissenting).

28. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600–01 (2010). The Department claimed the Members could not bring the suit because the corporation did not own waterfront property itself; moreover, the Department argued the claim was not ripe because the Members did not ask for just compensation. *Id.* at 2610. The Court rejected both contentions and held the claims were not in the Department's previous petition and were consequently not jurisdictional. *Id.*

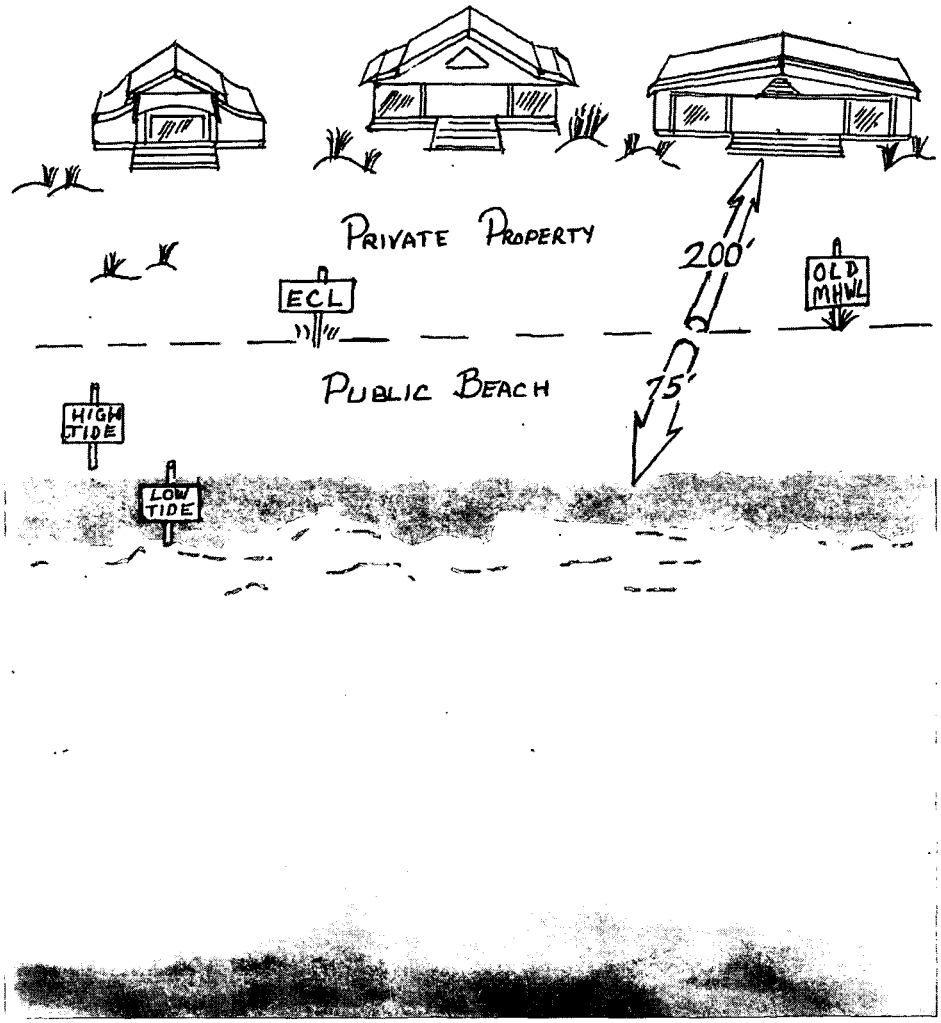
29. *Id.* at 2601. Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia's plurality decision with regards to Parts II and III. *Id.* at 2597.

30. *Id.* at 2601 n.5.

31. *Id.* at 2613, 2618.

32. *Id.* at 2597, 2612–13. Justice Stevens took no part in the Court's decision. *Id.* at 2614.

law to include a littoral right to contact would not amount to a taking since the court plainly upheld the State's established property laws.[33]



34

III. BACKGROUND AND HISTORY OF THE LAW

A. The Public Trust Doctrine

Florida holds its beaches and submerged lands below the MHWL in a trust for the public's use and enjoyment.[35] To be clear, the public has a right to use the water plus the strip of tideland between the high-water

33. *Id.* at 2612–13.

34. I am grateful to my grandparents, best known as Nanna and Granddaddy, for helping me create this pictorial expression and for their loving encouragement and advice throughout all of my endeavors.

35. FLA. CONST. art. X, § 11. The "mean high-water line" is "the average reach of the high tide over the preceding 19 years." *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2598.

mark and the low-water line where the tide ebbs and flows throughout the day.[36] Historically, both common and civil law communities used this arrangement to ensure the whole public could use the shorelines on any navigable body of water.[37] Consequently, the trust prohibits Florida from conveying these lands to private parties unless the State grants only limited rights that do not materially interfere with the public's use.[38]

At English common law, the Crown held the shoreline and tidal waters in this type of trust for the entire citizenry, and the same principles applied throughout the American Colonies.[39] The King or Queen could grant rights to use these lands, but the licenses were always subject to an overriding public interest in using the waters.[40] The justification for such an inherent right was that the ocean and other navigable waterways created "natural highways" for commerce that no one, not even a prince, should interrupt.[41]

After gaining independence, the States held title to these lands in a trust to promote the general welfare for their citizens.[42] After the States ratified the United States Constitution and surrendered some of their rights, these lands remained under State control but also became subject to federal navigation and interstate commerce laws.[43]

Florida's tale involves a slightly different story: After negotiating with Spain, the United States took the Florida territories and held the tidelands in a trust that would benefit the area's respective society.[44] Once Florida became a state in 1845, it expressly agreed to hold these lands in a public trust for its citizens in the same manner as the original states.[45] Today, this trust creates a property boundary at the MHWL that separates the public's lowland from the private owner's upland.[46]

B. Littoral Rights

Speaking of private owners, the common law recognized additional rights for property that abutted navigable water.[47] These rights are called "riparian" or "littoral" rights, and some people use the terms interchangeably; however, the term "riparian" refers to land that borders rivers or streams, while "littoral" refers to land that borders the sea.[48] Littoral rights in Florida include (1) the right to access the water, (2) the right to reasonably use the water, (3) the right to an unobstructed view of the

36. Merrill-Stevens Co. v. Durkee, 57 So. 428, 431 (Fla. 1912).
37. *Id.*
38. *Id.*
39. Brickell v. Trammel, 82 So. 221, 226 (Fla. 1919).
40. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892).
41. *Id.*
42. *Brickell*, 82 So. at 226.
43. *Id.*
44. *Id.* at 227.
45. *Id.* at 226.
46. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1113 (Fla. 2008).
47. *Brickell*, 82 So. at 227.
48. *Walton Cnty.*, 998 So. 2d at 1105 n.3.

water, and (4) the right to accretions and relictions.[49] These exclusive rights apply to lands that extend to the MHWL, and they simply reflect the implied rights necessary for enjoying the oceanfront property.[50] Furthermore, littoral rights are considered property rights that "may not be taken without just compensation and due process of law."[51] Should the State proceed to take the land through eminent domain, the government may not sever the littoral rights from the upland to discount just compensation calculations.[52]

Florida recognizes the first two rights—to access and use the water—as affirmative easements, while the third right—to view the water—exists as a negative easement.[53] Moreover, these rights are incident to owning littoral property, regardless of separate acts of creation, and they inherently run with the land as easements appurtenant.[54] Thus, every littoral property owner has a present, non-possessory right to enter and use the tidelands and water, and no one may interrupt the littoral owner's view of the ocean.[55]

While a previous decision in Florida provided in dictum that the right to access included a right for the land to maintain contact with the water,[56] the Florida Supreme Court recently clarified that Florida's law considers the right to contact ancillary to the right of access.[57] Consequently, the upland cannot become so disconnected from the shoreline that it would materially destroy the owner's right to access.[58] The court vaguely stated, "[t]here is a point where such a separation would . . . [result] in an unconstitutional taking of littoral rights."[59]

The last right—to accretion and reliction—exists in Florida as a contingent future interest that vests in possession once the accretion or reliction occurs.[60] An "accretion" is "the gradual and imperceptible accumulation of land along the shore or bank of a body of water."[61] A

49. *Id.* at 1111.

50. Ferry Pass Inspectors' & Shippers' Ass'n v. Whites River Inspectors' & Shippers' Ass'n, 48 So. 643, 644 (Fla. 1909).

51. *Brickell*, 82 So. at 227.

52. Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649, 653 (Fla. 1985).

53. *Walton Cnty.*, 998 So. 2d at 1112. "An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (2010).

54. *Walton Cnty*, 998 So. 2d at 1112 n.10; Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491, 502 (Fla. 1918); *Belvedere Dev. Corp.*, 476 So. 2d at 651–52. Some case law refers to easements as "incorporeal hereditaments," which simply suggests the servitude is both non-possessory and devisable; it does not mean the interest created is non-physical. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 435–36 (West Group 2000) (1984).

55. *Walton Cnty.*, 998 So. 2d at 1112.

56. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 936 (Fla. 1987).

57. *Walton Cnty*, 998 So. 2d at 1119.

58. *Id.* at 1120 n.16.

59. *Id.*

60. *Id.* at 1119; Brickell v. Trammel, 82 So. 221, 227 (Fla. 1919).

61. BLACK'S LAW DICTIONARY 34 (8th ed. 2004).

"reliction" is "an increase of the land by a gradual and imperceptible withdrawal of any body of water."[62] It is important to note the difference between accumulated and non-accumulated sediment: The Florida Supreme Court held *all* littoral rights were vested property interests, including the right to already-accumulated alluvion that developed by accretions or relictions.[63] A more recent decision clarified the law with regards to the right to future, non-accumulated alluvion, calling that right a contingent interest.[64]

It is well established that State law determines "the nature and extent" of littoral property rights within the respective state.[65] Years ago, the United States Supreme Court wrote in dictum that the right to future, non-accumulated alluvion was a vested property right based on natural justice, calling it "the same with that of the owner of a tree to its fruits."[66] It appears that the Court was merely applying State law to the issue presented,[67] but the doctrine of increase reasoning remains persuasive to some jurists.[68] Since that decision in 1874, some courts have disregarded the language and said, "We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists."[69]

Nonetheless, the point for now is that State law defines its own littoral rights, and if the State recognizes accretion as a vested right, then the United States Supreme Court likewise recognizes it as valuable property that may only be taken pursuant to the Constitution.[70]

Moving forward, Florida justifies the littoral right to accretion and reliction in the following manner:

> There are four reasons for the doctrine of accretion: (1) De minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land

62. *Id.* at 1455.

63. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 936 (Fla. 1987).

64. *Walton Cnty.*, 998 So. 2d at 1112, 1119.

65. Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 655 (1927); Webb v. Giddens, 82 So. 2d 743, 744 (Fla. 1955); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010).

66. Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68–69 (1874). This concept reflects the doctrine of increase in property law based on the idea that "the offspring of our cattle . . . are esteem'd our property, even before possession." THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 165 (Foundation Press 2007) (quoting DAVID HUME, A TREATISE OF HUMAN NATURE 327 (David Fate Norton & Mary J. Norton eds., 2000) (1739)).

67. *Sand Key Assocs.*, 512 So. 2d at 941 (Ehrlich, J., dissenting).

68. *Id.* at 937.

69. Maunalua Bay Beach Ohana v. State, 222 P.3d 441, 460 (Haw. Ct. App. 2009) (citing W. Pac. R.R. Co. v. S. Pac. Co., 151 F. 376, 399 (9th Cir. 1907)).

70. Yates v. Milwaukee, 77 U.S. 497, 504 (1870).

> have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.[71]

Furthermore, alluvion, or additional land, that forms along the shoreline has historically gone to the upland owner if it accumulated gradually.[72] Florida does not distinguish between natural and artificial accretions unless the upland owner caused the accumulation, which would effectively allow a private owner to take public land.[73] For example, the State built a jetty in *Board of Trustees v. Sand Key Associates* that helped increase the amount of natural accretions, and the court held that the upland owner had a vested right to the sediment.[74] Ultimately, the justification for a right to accretion and reliction rests upon natural justice and the quid pro quo that the upland owner gets for taking on the equal risk of losing property if the water creeps inland.[75]

C. *The Doctrine of Avulsion*

Unlike accretions and relictions, an "avulsion is the sudden or perceptible loss of or addition to land by the action of the water."[76] The difference rests upon whether the change in the land is a "sudden or violent action of the elements, perceptible while in progress."[77] Should an avulsion occur, all property boundaries in the affected areas remain the same as they were before the avulsion stirred the lands.[78] Without the doctrine, property owners and title recorders would face serious challenges in documenting the changes to the topography.[79]

After the avulsion, the property owner who lost her land may reclaim it within a reasonable amount of time.[80] For instance, the Florida Supreme Court held it was lawful for riparian owners on a lake to take it upon themselves to lower the water to its pre-avulsion level.[81] Likewise, the State has

71. Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212–13 (Fla. 1973). *De minimis non curat lex* means "trifles with which the law does not concern itself." Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1118 (Fla. 2008). In the case at hand, Florida's Supreme Court held none of these four reasons applied to the Act because the critically eroded beaches were much more than trifles, the reconstruction lowered the upland owner's risk of losing property through future erosions, the ECL provided a clear property boundary, and the Act expressly protects the littoral owner's right to access. *Id.*

72. Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 66–68 (1874). The Court found similar laws in the works of Justinian, Napoleon, English common law, and early American case law. *Id.*

73. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 937–38 (Fla. 1987) (citing *Medeira Beach Nominee, Inc.*, 272 So. 2d at 212).

74. *Id.* at 938.

75. 2 WILLIAM BLACKSTONE, COMMENTARIES *261–62.

76. *Walton Cnty.*, 998 So. 2d at 1113. Hurricanes are expressly recognized as avulsive events. Bryant v. Peppe, 238 So. 2d 836, 837 (Fla. 1970).

77. 7 J. A. SIMPSON & E. S. C. WEINER, THE OXFORD ENGLISH DICTIONARY 173 (Clarendon Press 1989) (citing Schwartzstein v. B.B. Bathing Park, 197 N.Y.S. 490 (N.Y. App. Div. 1922)).

78. *Walton Cnty.*, 998 So. 2d at 1114.

79. *Id.*

80. *Id.* at 1117.

81. Florida v. Fla. Nat'l Props., Inc., 338 So. 2d 13, 17 (Fla. 1976).

a right to reclaim the public's land after an avulsion occurs, even if the land was once submerged but is now exposed.[82]

Furthermore, Florida does not distinguish between artificial and natural avulsions.[83] In *Martin v. Busch*, the Florida Supreme Court determined that the State had no authority to convey title to lands below the mean high-water line on a navigable lake.[84] The plaintiff claimed that he owned the swamplands to a point that extended below Lake Okeechobee's high-water line based on his predecessor's deed of conveyance.[85] The court was unconvinced that the State had authority at the time to grant such a conveyance, and the court held that Florida's resolution to lower the lake in a perceptible manner did not change the fact that the State would still own the land after the water receded.[86] In a later case, the Florida Supreme Court used this reasoning to conclude the drainage project was an artificial avulsion that trumped any littoral right to reliction.[87]

D. The Beach and Shore Preservation Act

In 1961, Florida's legislature passed a law that allowed the State to reconstruct eroded beaches along the coastline because the shores were "vitally important to the economy and the well-being of the people of Florida."[88] In its 1970 amendment, the legislature passed a law without the governor's approval, explaining that the State would need to set an ECL based on the MHWL and the engineers' practical needs to clarify the property boundary.[89]

Today, the statute establishes that Florida's Board of Trustees of the Internal Improvement Trust Fund holds title to the lands below the MHWL on navigable bodies of water in a trust for the public's benefit.[90] The legislature delegated its authority to determine which beaches are critically eroded to the Department of Environmental Protection.[91] If a local municipality determines its beaches have reached a serious point of decay, the governing body applies to the Department for funding.[92] If the Department approves the application for sand deposits and nourishment,[93] the government conducts a survey to find the MHWL,[94] and then the State sets an ECL based on that old boundary, giving due consideration for the project's needs.[95]

82. *Bryant*, 238 So. 2d at 838–39.
83. *Id.* (citing Martin v. Busch, 112 So. 274, 284 (Fla. 1927)).
84. *Martin*, 112 So. at 284.
85. *Id.* at 283.
86. *Id.* at 284.
87. *Bryant*, 238 So. 2d at 838–39.
88. H. B. 1921, 1961 Leg., Reg. Sess. at *437 (Fla. 1961).
89. H. B. 155, 1970 Leg., Reg. Sess. at *873–76 (Fla. 1970).
90. FLA. STAT. § 253.12(1) (2005).
91. *Id.* § 161.088.
92. *Id.* § 161.141.
93. *Id.* § 161.021(3)–(4).
94. *Id.* § 161.141.
95. *Id.* § 161.161(5).

Once the State files the ECL survey with the county records holder, the ECL becomes the new property boundary between the upland and lowland.[96] Thus, the common law right to accretion and reliction ceases to apply,[97] but the Act expressly protects the other littoral rights to access, use, and an unobstructed view.[98]

A few caveats remain for these renourishment projects: First, if the State cannot reasonably perform the reconstruction without impairing the upland owner's littoral rights, the government can only move forward through eminent domain proceedings.[99] Second, the State has two years to finish the project or else the common law rights return, and the ECL terminates.[100] Finally, the State has the right to come back and fix the beach if the erosion continues, but action must be taken within one year.[101]

E. The Takings Clause

The United States Constitution provides: "Nor shall private property be taken for public use, without just compensation."[102] This limitation on the government's eminent domain powers originally applied to the federal government, but the United States Supreme Court incorporated the provision to apply to the states through the Fourteenth Amendment's due process clause.[103]

The Fifth Amendment's Takings Clause has four core parts that deserve separate attention: First, this constitutional provision only applies to "private property."[104] Florida recognizes vested littoral rights as private property rights,[105] and the United States Supreme Court likewise considers the rights valuable property interests that cannot be "capriciously destroyed or impaired."[106]

Second, the government may "take" private property in ways beyond the word's plain meaning: A state may "take" property when the government uses its own property in a manner that seriously damages another's land.[107] In *Pumpelly v. Green Bay*, the defendants received authority to build a dam and raise a lake's water level.[108] As a result, water flooded the plaintiff's nearby land, continually leaving sand deposits and destroying the

96. *Id.* § 161.191(1).

97. *Id.* § 161.191(2).

98. *Id.* § 161.201.

99. *Id.* § 161.141.

100. *Id.* § 161.211(1). The same happens if the State begins the project but takes no action for a six-month period, and the same happens if the State fails to maintain the ECL. *Id.*

101. *Id.* § 161.211(2).

102. U.S. CONST. amend. V.

103. Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 238–39 (1897).

104. U.S. CONST. amend. V.

105. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 936 (Fla. 1987).

106. Yates v. Milwaukee, 77 U.S. 497, 504 (1870).

107. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166, 177–78 (1872).

108. *Id.* at 171.

terrain.[109] The Court held that the destruction amounted to a "taking" because it effectively destroyed the land's usefulness.[110]

Thus far, the Takings Clause in the Fifth Amendment only applies to the executive and legislative branches; only a plurality of Justices in *Stop the Beach Renourishment, Inc.* would impose the limitation on the judiciary.[111] The plurality relied on *Webb's Fabulous Pharmacies, Inc. v. Beckwith* that held Florida took property within the meaning of the Takings Clause when it *recharacterized* private property as public property.[112]

In *Webb's Fabulous Pharmacies, Inc.*, a business agreed to purchase an insolvent corporation, and the parties proceeded through the state court system to properly distribute the funds among creditors who held a "property right to their respective portions."[113] Pursuant to state law, the court's clerk deposited the funds in an interest-bearing account and eventually used the extra income as government revenue.[114] In *Webb's Fabulous Pharmacies, Inc.*, Florida's high court arguably went against precedent and defined the deposited fund as temporary "public money" from which the State "[took] only what it create[d]."[115] The United States Supreme Court unanimously disapproved and held that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' . . . without compensation . . . . [It] is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent."[116]

The third element in the Takings Clause limits the government's power to take private property to situations where the taking is for a "public use."[117] It is well established in American jurisprudence that the government cannot take property from one individual and convey it to another private party.[118] Over the years, the public use requirement has expanded to include economic development plans, even when the land is not open to the entire public's physical use.[119] Moreover, the extent to which the government may take private property rests in the legislative branch's discretion.[120]

Finally, the government must pay "just compensation" for the property it takes.[121] The goal is to put the owner "in as good a position . . . as he would have occupied if his property had not been taken."[122] Moreover, the

109. *Id.* at 167 (syllabus).
110. *Id.* at 181.
111. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010).
112. *Id.* (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–65 (1980)).
113. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 157, 160.
114. *Id.* at 162–63.
115. *Id.* at 163.
116. *Id.* at 164.
117. U.S. CONST. amend. V.
118. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).
119. Kelo v. City of New London, 545 U.S. 469, 478–79 (2005).
120. *Id.* at 475.
121. U.S. CONST. amend. V.
122. United States v. Miller, 317 U.S. 369, 373 (1943).

compensation should be measured at fair market value, which is "what a willing buyer would pay in cash to a willing seller."[123]

IV. THE INSTANT CASE

It seems necessary to repeat what the Fifth Amendment says: "Nor shall private property be taken for public use, without just compensation."[124] Florida recognizes vested littoral rights as private property, so the Court was quick to place this issue within the scope of the Takings Clause.[125] Moreover, the Act itself expressly arranges for the public to physically use any land seaward of the MHWL.[126] So, the Court was only left with two issues: (a) Whether a judicial decision could "take" these property rights such that the Fifth Amendment required "just compensation" for the owners, and, if so, (b) whether the Florida Supreme Court's decision actually took away any of the Members' vested littoral rights.

A. Could a Judicial Decision Amount to a "Taking" Under the Fifth Amendment?

1. Justice Scalia's Plurality[127]

Four Justices concluded that the Takings Clause protects private property from any "governmental actor," including decisions from judicial branches.[128] The plurality reasoned that the Fifth Amendment focuses on the *act* of taking and was unlike other portions of the Constitution where the text specifically mentions *actors*.[129] Perhaps common sense suggests that "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[130]

The plurality explained that the Takings Clause has expanded to prevent activities beyond "the classic taking" to activities that accomplish the same result:[131] The government may not regulate property to the extent it becomes inversely condemned,[132] use property in a way that destroys all of its economic benefits,[133] or even force physical occupations without just compensation.[134]

123. *Id.* at 374.

124. U.S. CONST. amend. V.

125. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2598 (2010).

126. FLA. STAT. § 253.12(1) (2005).

127. Chief Justice Roberts and Justices Alito and Thomas joined Justice Scalia's opinion. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2601 (plurality opinion).

128. *Id.*

129. *Id.* The Court cited U.S. Const. art. I, § 9, cl. 3 and § 10, cl. 1 for examples of where the Constitution focuses on the specific actor. *Id.*

130. *Id.* (citing Stevens v. Cannon Beach, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting)).

131. *Id.* Traditionally, a legislature may transfer property to another party for public use under eminent domain laws so long as the State pays just compensation to the owner. *See id.* at 2613 (Kennedy, J., concurring).

132. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

133. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

134. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

Analogous to the situation at hand, the Court previously held in *Webb's Fabulous Pharmacies, Inc.* that recharacterizing private property as public money likewise constitutes a taking within the meaning of the Fifth Amendment.[135] Here, the test is whether the State, through whatever branch of its government, "declares that what was once an established right of private property no longer exists."[136] Thus, the Members needed to prove that the Florida Supreme Court's decision to uphold the Act effectively took away a property right that previously existed.[137]

The Department argued that federal courts do not have enough knowledge about substantive state laws to effectively handle these situations, proposing that such an expansion to the judiciary would deny state courts the flexibility they need in deciding complex issues.[138] However, the plurality explained that the Fifth Amendment would be useless if the federal courts could not make such state law determinations, and there is nothing to distinguish a court's need for flexibility in overturning prior decisions from a legislature's need for flexibility in revising the common law through statutes.[139]

The Department further contended that a judicial takings theory would force federal courts to act as appellate tribunals and review "final state-court judgments," contravening the district courts' limited authority to hear cases over which they have subject matter jurisdiction.[140] Yet, the plurality explained that the available procedures would not create such a predicament: After a judicial decision in a lower court allegedly took the private property right, the party could then appeal to the State supreme court for review, and afterwards the United States Supreme Court could grant or deny certiorari.[141] If certiorari were denied, the claim would be precluded from being brought in federal court because the issue would be

135. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–65 (1980).

136. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2602 (plurality opinion).

137. *Id.* at 2608.

138. *Id.* at 2609. The Department also argued that the test for whether a judicial decision took private property should depend on whether the decision had "no fair and substantial basis," but Justice Scalia remarked that such a test would yield the same result. *Id.* The Members proposed the test should be for a "sudden change in state law, unpredictable in terms of relevant precedents." *Id.* at 2610. Justice Stewart suggested this approach thirty years ago in a concurring opinion that supported a judicial takings theory. Hughes v. Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). However, Justice Scalia explains that the focus should be on whether the property right was previously *established* and not whether there is precedent for the court's decision. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2610 (plurality opinion). Justice Scalia reasons that one person might seek relief and win under Justice Stewart's test if no precedent supported the decision, but the next person who seeks relief would lose because precedent would have been established after the court ruled on the first's person's claims. *Id.*

139. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2610 (plurality opinion).

140. *Id* at 2609; *see* Rooker v. Fidelity Trust Co., 263 U.S. 413, 415–16 (1923); 28 U.S.C. §§ 1331, 1332 (2006).

141. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2609 (plurality opinion).

res judicata.[142] If a person was not a party to the state court claim, then the individual could challenge the decision in federal court.[143]

2. Justice Kennedy's Concurrence[144]

Justice Kennedy felt that it was unnecessary to develop a judicial takings theory so long as the Fourteenth Amendment's Due Process Clause adequately protects property owners from state court decisions that alter property rights.[145] Moreover, eminent domain exists as a "vast governmental power" that the executive and legislative branches monitor to provide for public policy demands, and it is through these branches' political capacities that they remain directly accountable to the electorate should the government abuse its power.[146] Justice Kennedy also warns that the plurality's theory might indirectly recognize a judicial *power* to take property (so long as the owner receives just compensation), which would contravene the plurality's goal of *limiting* a court's ability.[147]

If the test Justice Scalia proposes asks whether a judicial decision takes away an established property right, instead of asking whether just compensation was paid, then a more proper analysis rests under the Due Process Clause than the Takings Clause.[148] After all, courts allocate property rights on a regular basis when they impose liabilities in nuisance claims, so property owners should always anticipate *some* changes in their rights.[149] If the judiciary goes too far and eliminates a property right, then the owner could appeal the decision on the grounds that she was deprived of property without procedural or substantive due process.[150]

142. *Id.*

143. *Id.* The district court would have authority to hear such a claim based on original subject matter jurisdiction under FED. R. CIV. P. § 1331 because the Fifth Amendment guarantees just compensation if the State takes private property for public use. *See* Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1095 (6th Cir. 1978).

144. Justice Sotomayor joined Justice Kennedy's concurrence. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2613 (Kennedy, J., concurring).

145. *Id.* at 2613, 2618. Justice Kennedy joined parts I, IV, and V, concluding that Florida's decision did not deprive the Members of any private property rights. *Id.* at 2613. The plurality criticized Justice Kennedy's decision because he failed to establish a standard or even recognize that a judicial taking could occur. *Id.* at 2604 (plurality opinion).

146. *Id.* at 2613 (Kennedy, J., concurring). Justice Kennedy admits it is not clear how the Founders understood the Takings Clause as it relates to the judicial branch, but he suggests that the clause applied to classic eminent domain proceedings, where such power was solely vested in the legislative branch. *Id.* at 2616. Justice Scalia agreed that the founders did not envision a judicial takings theory because when the Founders wrote the Constitution, "courts had not power to 'change' the common law"; however, it should not matter "what they envisioned but what they wrote." *Id.* at 2606 (plurality opinion). Because judges now have the power to overturn the common law, it seems imperative to review the decisions that potentially violate citizens' private property rights under the Fifth Amendment. *Id.*

147. *Id.* at 2614–15 (Kennedy, J., concurring). In other words, a jurist might assume the power to take away private property rights and feel more comfortable with the decision if the State would then be required to pay just compensation. *Id.* at 2616. Justice Scalia disagrees and says it is the plurality who would limit the judiciary from taking private property while Justice Kennedy's opinion "insists that judges cannot be so limited." *Id.* at 2605 (plurality opinion).

148. *Id.* at 2614–15 (Kennedy, J., concurring).

149. *Id.* at 2615.

150. *Id.* at 2613.

Justice Kennedy concluded with practical considerations that he warns the plurality should consider before developing a judicial takings theory.[151] The concurrence suggests that a majority of these cases would spring from a property owner's claim against the government for inversely condemning her property.[152] The only remedy would be damages at law (i.e. just compensation) because "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking."[153] If res judicata would not prevent the plaintiff from bringing a new claim against the judicial decision, then the only remedy would be to remand the case to the lower court for it to either rescind its decision or pay just compensation.[154]

However, Justice Scalia explained that a procedural due process analysis in such cases would improperly impose the federal government's separation-of-powers principles on the sovereign states.[155] Chief Justice Roberts illustrated this reasoning during oral arguments when he pointed out that some states elect their judges directly instead of using an appointment process like the federal government.[156] Even more, a judicial candidate could potentially campaign to change a particular law, which would be no different from the political role that legislative and executive branches embrace.[157]

Furthermore, Justice Scalia argues that substantive due process is an improper framework to prevent a judicial taking because "[w]here 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.' "[158] The plurality questions how Justice Kennedy's practical considerations would be any different under a Due Process Clause analysis, suggesting that the proper remedy would simply be for the Court to reverse the state court's holding that the Act can be applied.[159]

---

151. *Id.* at 2616–18.

152. *Id.* at 2617. Justice Kennedy disagrees that res judicata would bar a new claim because the party would not have lost a property right until after the lower court's decision. *Id.*

153. *Id.* (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)).

154. *Id.*

155. *Id.* at 2605 (plurality opinion).

156. Transcript of Oral Argument at 33, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2952 (2010) (No. 08-1151).

157. *Id.*

158. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2606 (plurality opinion) (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994)). Justice Scalia also contends that substantive due process should not be a method for protecting economic liberties. *Id.* The plurality suggests that Justice Kennedy might like to use a substantive due process analysis because it would preserve the Court's open-ended power to decide whether or not property has been taken in future cases: "The great attraction of Substantive Due Process as a substitute for more specific constitutional guarantees is that it *never* means never—because it never means anything precise." *Id.* at 2608.

159. *Id.* at 2607.

3. Justice Breyer's Concurrence[160]

Justice Breyer agreed with Justice Kennedy that it was not appropriate to discuss whether a judicial taking occurred in the case at hand because it was clear that the Florida Supreme Court did not take a private property right.[161] Furthermore, he worried that the plurality's decision would open a floodgate of federal trial courts deciding substantive issues of state law with little deference to state court opinions.[162]

Justice Scalia countered that Justice Breyer's approach seemed impossible because he decided that the state court did not take a private property right without first determining whether a state court *could* take a private property right.[163] Justice Scalia compared the analysis to the infamous question, "How much wood would a woodchuck chuck if a woodchuck could chuck wood?"[164] Furthermore, Justice Scalia explained that the federal courts do not give deference to state court decisions that are appealed on federal constitutional challenges.[165] Instead, the federal courts give high deference to the state court's determination that a property right did not exist before the decision.[166]

In sum, four Justices were willing to expand the Takings Clause to judicial decisions to the extent it already applies to the executive and legislative branches, and four Justices refused to allow such an expansion, leaving the issue open for future determination.[167] It is interesting to note that Justice Kagan, who was then the United States Solicitor General, filed a brief as amicus curiae and strongly opposed the notion that a judicial decision could amount to a "taking."[168]

B. Did the Florida Supreme Court's Decision "Take" Private Property Rights?

Let's get back to the sandy beaches. After all the hustle and bustle over whether a judicial branch could "take" private property, the Court unanimously held that the Florida Supreme Court's decision did not amount to a taking under the Fifth Amendment.[169] Instead, two property rights in Florida simply overlapped and caused some confusion: (a) The

160. *Id.* at 2618 (Breyer, J., concurring). Justice Ginsburg joined Justice Breyer's concurrence. *Id.*

161. *Id.* Justice Breyer suggests the Court should "confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Id.* (quoting Whitehouse v. Ill. Cent. R.R. Co., 349 U.S. 366, 373 (1955)). However, Justice Scalia argues that the Court routinely establishes a test only to find that the issue at hand fails to meet it; moreover, Justice Breyer's examples of instances when the Court refused to give a precise standard arose only when there were competing standards among lower courts. *Id.* at 2602–03 (plurality opinion).

162. *Id.* at 2619 (Breyer, J., concurring).

163. *Id.* at 2602–04 (plurality opinion).

164. *Id.* at 2603.

165. *Id.* at 2608 n.9.

166. *Id.*

167. Justice Stevens did not participate in the opinion. *Id.* at 2613.

168. Brief for the United States as Amicus Curiae Supporting Respondents at 9, *Stop the Beach Renourishment, Inc.*, 130 S. Ct. 2952 (No. 08-1151).

169. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2613, 2618 (majority opinion).

State always has a right to fill its submerged lands so long as the government acts in accordance with the public trust and does not interfere with the upland owners' littoral rights; (b) anytime an avulsion occurs, the property boundaries between the upland owner and the State remain fixed even if the avulsion interrupts the abutting land's contact with the shoreline.[170]

It was clear that the State had a right to reclaim its engulfed lands up to the MHWL after the avulsive hurricanes.[171] The issue became whether Florida's law made an exception when the State *caused an artificial avulsion* by dumping the extra sand that separated the upland from the shoreline.[172] It appeared Florida law did not make an exception after reviewing *Martin* because the State analogously drained a lake in *Martin* and retained title to the uncovered lands, which separated the upland owner from the water line.[173]

Furthermore, the Florida Supreme Court held that there was no independent right for the littoral owner's land to touch the water outside of the right to access, and the United States Supreme Court held that this decision was consistent with Florida law.[174] The Members argued that they had a right for the upland to contact the water based on the holding in *Sand Key Associates*.[175] However, the Court held that the discussion in *Sand Key Associates* existed only as dictum and conflicted with legal precedent in Florida.[176] Just to be clear, the Members did not claim the new ECL was different from the historical MHWL.[177] The Court said that if the new line was upland of the old one, then it would amount to a taking and would require just compensation.[178]

Coupling the State's present right to uncover submerged land with littoral owners' contingent interest in future accretions, it appeared the latter was subordinate.[179] In other words, the Members failed to prove that the upland owners' littoral rights were superior to the public's right-to-fill under the avulsion doctrine.[180] If there was no accreted sediment, then the littoral owner had nothing to claim a right over, regardless of the State's

170. *Id.* at 2611.

171. *Id.* The Members argued that they had a vested property right to future accretions based on precedent in *Sand Key Associates*, but the Court found that *Sand Key Associates* discussed the matter in dictum because the case there involved already-accumulated accretions. *Id.* at 2612. Furthermore, the holding in *Sand Key Associates* refused to apply *Martin* to their circumstances because the drainage project in *Martin* involved an avulsive event, which was notably different from the jetty. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 940–41 (Fla. 1987).

172. *Stop the Beach Renourishment, Inc.* 130 S. Ct. at 2612 (majority opinion).

173. *Id.* at 2611–12.

174. *Id.* at 2612–13.

175. *Id.* at 2612.

176. *Id.*

177. *Id.* at 2600 n.2, 2612.

178. *Id.*

179. *Id.* at 2611.

180. *Id.* at 2610–11. The Court said that the Members' argument positioned the burden on the wrong party; the Members needed to show the Court that the owners' littoral rights were superior to the public's right-to-fill. *Id.*

interference with the boundary lines.[181] Consequently, the Florida Supreme Court's decision did not take away the right to accretion and instead yielded to stare decisis in *Martin*.[182]

In addition to these central arguments, the Members contended that the Act itself replaced owners' littoral rights with inferior statutory versions. But the Members failed to show how littoral owners had anything less under the statute than they did at common law because the avulsion doctrine would apply either way.[183]

Ultimately, the United States Supreme Court held that the Florida court's decision did not take away any private property rights because the State's avulsion doctrine superseded the littoral right to accretion; moreover, the right to contact never independently existed in Florida outside of the right to access,[184] which the Act expressly protected.[185] The Court sympathized that "the Members' property has been deprived of character (and value) as oceanfront property by the State's artificial creation of an avulsion."[186] But no matter how wrong the boundary interference seemed, the Court felt it was not in a position to change Florida's substantive property laws.[187]

V. ANALYSIS

Although the Justices' line-drawing divergence bestows an alluring topic for discussion, what seems more remarkable is the Justices' unanimous pronouncement about the substantive property laws at issue. This analysis tunnels beyond the hypothetical consequences that this case entails for the Takings Clause and engages in a balancing test based on the State's nuisance laws.[188] While this Part draws on Florida's common law, the *reasoning* applies to the other twenty-two states with oceanfront property and virtually any state with property that borders navigable lakes or rivers. Finally, this Part tackles the last littoral right to accretion and attempts to further develop this this peculiar entitlement's status under the law.

The Court restrained itself from making too broad a ruling and observed, "Perhaps state-created avulsions ought to be treated differently . . . [, and] there might be different interpretations of *Martin* and other Florida property-law cases that would prevent this arguably odd result, [but] we are

181. *Id.* at 2612.

182. *Id.* It is worthy to note that the Florida Supreme Court's decision never mentioned *Martin* in its decision. *Id.* Instead, the court relied on other cases to show "that affected property owners can return their property to its pre-hurricane status," which meant that the Act was facially constitutional. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1117 (Fla. 2008).

183. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2612–13 n.12 (majority opinion).

184. *Id.* at 2612–13.

185. FLA. STAT. § 161.201 (2005).

186. *See Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2612

187. *Id.*

188. Professor Timothy Mulvaney noted that an interesting question remains unresolved for this case in the Takings Clause context: How is the cable line in *Loretto* different from the anchoring sand here? Timothy Mulvaney, *Uncertainties Remain for Judicial Takings Theory*, 24:6 ABA PROBATE & PROPERTY 14 (2010).

not free to adopt them."[189] What's more, the Florida Supreme Court cited to binding authority on nuisance laws and admitted, "the State is not free to unreasonably distance the upland property from the water by creating as much dry land between the upland property and the water as it pleases."[190] Coupling the United States Supreme Court's restraint with the Florida Supreme Court's careful admission, this Note suggests that a more tangible analysis for the Members' dilemma rests in the property laws of nuisance.

Across jurisdictions, and probably in Florida as well,[191] the law generally defines a nuisance as a substantial and unreasonable interference "with the plaintiff's use and enjoyment of his land."[192] In cases of intentional interferences, the inquiry turns to whether the substantial harm is unreasonable.[193]

A. The Balancing Test

The test is whether "the gravity of harm" that the littoral owner suffers in losing direct contact with the water "outweighs the utility of the actor's conduct" in protecting the public shoreline from future erosions by artificially creating new beaches.[194] Regrettably, the short answer in this case is probably no, but a time may come when that answer is yes. Nuisance laws use a governance theory to protect people's use and enjoyment of their property from harmful neighboring interferences.[195] Here, the neighbors are very simply the Members and the State; the former has littoral rights and the latter protects the public's rights to the seashore.[196]

189. *Id.* at 2612. One possible distinction between *Martin* and the case at hand is that *Martin* involved a non-tidal lake. Martin v. Busch, 112 So. 274, 283 (Fla. 1927). Here, the oceanfront is clearly tidal and arguably involves much more drastic changes to the MHWL, but this Note leaves that policy discussion for Florida's legislators.

190. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1120 n.16 (Fla. 2008) (citing Game & Fresh Water Comm'n v. Lake Islands, 407 So. 2d 189 (Fla. 1981); Webb v. Giddens, 82 So. 2d 743 (Fla. 1955)). The federal government faces a similar limitation in the context of lawful conduct that allegedly causes a nuisance. Richards v. Wash. Terminal Co., 233 U.S. 546 (1914) ("We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.") (citations omitted).

191. *See* Jones v. Trawick, 70 So. 2d 785, 787 (Fla. 1954) (en banc).

192. STOEBUCK & WHITMAN, *supra* note 54, at 414.

193. RESTATEMENT (SECOND) OF TORTS § 822(a) (1979).

194. Id. § 826(a); *see* Cason v. Fla. Power Co., 76 So. 535, 536 (Fla. 1917).

195. Beckman v. Marshall, 85 So. 2d 552, 554 (Fla. 1956). There is a fundamental difference in the government's ability to regulate public nuisances with the power to take property through eminent domain. Kelo v. City of New London, 545 U.S. 469, 510 (2005) (Thomas, J., dissenting). The former affords a public benefit without compensation because the property use is so injurious to the public, and the latter permits the government to take property from an innocent owner for a public use so long as it provides just compensation. *Id.* The regulation turns into a taking when the State deprives the property of "all economically beneficial use," which depends on whether the "nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). However, the Members were not claiming the artificial avulsions were public nuisances, and the State was not claiming the Members used their property in a manner injurious to the public.

196. Littoral owners may bring claims for public nuisances, from which they incur a special injury, or for private nuisances directly. *Lake Islands*, 407 So. 2d at 192–93.

The first step in this balancing process is to examine the gravity of harm to littoral owners. The second step is to look at the utility of the beach renourishment project. Then, the last step is to balance the two uses to determine if the renourishment project is reasonable under the circumstances.

1. Gravity of Harm to Littoral Owners

The gravity of harm here is relatively low because these rights are limited to particular purposes that remain virtually intact after the renourishment project. Littoral ownership creates a rare breed of property entitlements: These rights make common sense because they arise naturally,[197] but the law grapples with their definition and often struggles with their application.[198] Florida treats the non-possessory littoral rights to access, use, and view like servitudes because that is the closest analogy for natural rights that arise incident to owning oceanfront property, particularly because the public has a neighboring interest in the shoreline. The public land, through the trust, represents the servient tenement that grants an easement appurtenant for those three particular purposes to littoral owners, whose land represents the dominant estate.

Thus, the Members have the right to prevent people from obstructing these irrevocable rights, and the rights impose a correlative duty on the world, including the State, not to interfere.[199] Likewise, the public has a *concurrent* interest in using the shoreline and waters,[200] so this right imposes a reciprocal duty on the world, including littoral owners, not to interfere.

On its face, the gravity of harm here seems nominal because statutory law immediately protects these common law rights once the Department sets an ECL.[201] But this case presents a new situation because the State has added sand and distanced the upland owner from the shoreline. Although the Members still have a right to use the water, their ability to access the water and their unobstructed view has nevertheless changed. Even so, it does not seem very harmful for the Members to walk another twenty-five yards to reach the ocean, and the distance hardly requires binoculars to

197. STOEBUCK & WHITMAN, *supra* note 54, at 440.

198. A great deal of controversy surrounded the additional right for the upland to contact the water; after all, littoral rights exist because the land extends to the MHWL and *borders* a navigable waterway. Ferry Pass Inspectors' & Shippers' Ass'n v. Whites River Inspectors' & Shippers' Ass'n, 48 So. 643, 644 (Fla. 1909). However, a practical look at the situation makes the discussion more palatable: The property deeds for littoral owners in Florida describe the land extending to the MHWL, and without that boundary the property would have no incidental littoral rights. If the State needs to conduct a renourishment project, officials record an ECL survey that attaches to the deed, and positive law immediately protects the three littoral rights to access, use, and view. What's more, the State has two years to finish the project or the ECL terminates, and the common law littoral rights return; if the beach erodes again, the State has one year to fix the problem. FLA. STAT. § 161.211 (2005). It appears crucial here to allow statutory law to protect what the common law, by definition, cannot.

199. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 36–38 (Yale University Press 1919).

200. *Lake Islands*, 407 So. 2d at 192.

201. FLA. STAT. § 161.201.

see the shoreline. As a result, it appears that the gravity of harm to the Members in this case is relatively low.

2. Utility of the Beach Renourishment Project

The State has a constitutional duty to safeguard the aesthetic beaches because they serve a vital role in the economy,[202] and the renourishment project protects the public's interest in using the seashore for its daily enjoyment. So, it seems the utility here is rather high because the project helps protect these beaches from harsh erosion or ultimate depletion. Furthermore, the public trust doctrine sets forth fairly clear property rights for Florida's citizens to communally use and enjoy the tidal waters.[203] Before the renourishment project, the public could only use the stretch of beach between high tide and low tide.[204] From personal experience, people use the shoreline to walk their pets, go for a morning jog, or play around in the waves.

Here, the State is likely spending millions of dollars to fix a nearly seven-mile area to keep these eroded beaches from disappearing. The additional sand is necessary to keep the erosion from reoccurring too soon; even all of the sand here is only projected to last for six years.[205] The Members probably felt that the State was just trying to open more public beaches to promote tourism, but the Department's hidden intent is beyond the scope of this analysis.

Looking only at the State's conduct, it seems that there is a high level of utility in the project's renourishment plans. Local officials cannot sit by and allow hurricane after hurricane to ravish the beaches to a point of no return. Likewise, the State cannot reasonably expect private property owners to be able to afford, much less repeatedly organize, their own beach reconstruction projects. Coupling the State's constitutional duty to protect the shoreline with its well-structured procedure to reconstruct eroded beaches, it appears that the utility of the project is relatively high.

3. Reasonableness

The renourishment project at hand seems like a reasonable use of the property, but future projects could very well become unreasonable if they go too far. Florida precedent holds that "[t]he law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances."[206] Florida courts determine reasonableness based on the Second Restatement

202. FLA. CONST. art. II, § 7(a).

203. White v. Hughes, 190 So. 446, 449 (Fla. 1939).

204. Ferry Pass Inspectors' & Shippers' Ass'n v. Whites River Inspectors' & Shippers' Ass'n, 48 So. 643, 645 (Fla. 1909).

205. Transcript of Oral Argument at 18, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2952 (2010) (No. 08-1151).

206. Beckman v. Marshall, 85 So. 2d 552, 555 (Fla. 1956).

of Torts: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the gravity of the harm outweighs the utility of the actor's conduct . . . ."[207]

For instance, a riparian owner in *Webb v. Giddens* owned property on the arm of a lake where he rented boats.[208] The State replaced an old bridge with a flat road that destroyed the owner's ability to access the large part of the lake via boat.[209] The court found that this filled-in culvert was an unreasonable interference with the riparian owner's use of the lake.[210] For another example, the State passed an ordinance in *Game & Fresh Water Fish Commission v. Lake Islands, Ltd.* to prevent boating over Lake Iamonia during the duck season's hunting hours.[211] The lake was unusually low, and some owners could not reach their property without an airboat,[212] so the court found this ordinance unreasonable as it applied to riparian owners because it interfered with their right to access.[213]

Now, the underlying concern here is probably that this new public beach in the Members' back yard will attract loud parties, smoky campfires, or crowds of people, which in turn will diminish the property's value compared to nearby real estate. The Members' feel like they bargained for a different type of real estate—they paid for property that directly abutted the water—and perhaps their attorney Mr. Safriet put it best when he said that the Florida Supreme Court's decision turned "oceanfront property into oceanview property."[214]

But oceanfront property owners have always faced potential annoyances along the shoreline such as noisy jet skis or even floating hot dog stands as some Justices suggested in oral arguments.[215] The potential problems that this new public beach may bring seem endless, but *their* solution rests in either police enforcement or equitable injunctions if the annoyances become unlawful nuisances. To put the issue into focus for *this* analysis, the Act and the court's decision simply permitted the State to dredge and pump sand; they did not permit a free-for-all for constant interferences with property rights.

Again, the question here is whether "the gravity of harm" that the littoral owner suffers in losing direct contact with the water and the right to accretion "outweighs the utility of the actor's conduct" in protecting the public shoreline from future erosions by artificially creating a seventy-five feet avulsion. Probably not. The Members retain statutory rights to access, use, and view the water, and even though the new beach changes the ability

207. RESTATEMENT (SECOND) OF TORTS § 826(a) (1979); *see* Cason v. Fla. Power Co., 76 So. 535, 536 (Fla. 1917).

208. Webb v. Giddens, 82 So. 2d 743, 744 (Fla. 1955).

209. *Id.*

210. *Id.* at 745.

211. Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd., 407 So. 2d 189, 190 (Fla. 1981).

212. *Id.*

213. *Id.* at 191.

214. Transcript of Oral Argument at 5, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2952 (2010) (No. 08-1151).

215. *Id.* at 9–10.

to access and view the ocean, the effect is minimal. Conversely, the State has a constitutional duty to protect the public's interest in using the seashore and has created a systematic procedure to reconstruct the damaged beaches.

Furthermore, it is hard to imagine a point of unreasonableness for the artificial avulsions because the economic influences tend to negate any minimal effect on the littoral owner. The renourishment projects and artificial beaches are only temporary,[216] and if the erosion continues, the State has one year to replenish the area, or else the ECL terminates and the common law rights return.[217]

That is not to say that renourishment projects and artificial beaches may never reach an excessive point comparable to the road in *Giddens* or the no-boat ordinance in *Lake Islands*. Situations comparable to *Giddens* might include anything that obstructs the littoral owner's ability to walk to the beach, such as high seawalls or lattice fences that help anchor the new sand. Perhaps three hundred feet is too much sand for the average person to comfortably walk across; after all, it can be quite a workout to tread dry sand every day. A mile would probably be unreasonable, but the technology is not advanced enough to dump that amount of sand *yet*. Moreover, situations comparable to *Lake Islands* might include ordinances that prohibit walking over newly created sand dunes or ones that prevent using the water in certain areas. Until those situations arise or courts develop new precedent, the question remains: How much land can a sand pump dump now that a sand pump can dump land?

B. The Last Littoral Right[218]

The public trust doctrine and the first three littoral entitlements involve non-possessory rights for the owners' use and enjoyment, but the last littoral right—the right to accretion and reliction—evades the nuisance balancing test because it implicates the possessory right to exclude. Accordingly, this Note discusses the nature of that property entitlement separately from the reasonableness test above.

The right to accretion and reliction deserves a standing ovation for lasting all of these years while simultaneously befuddling so many lawyers. Some say that the doctrine exists in order to convenience society—others argue that the right is necessary for the littoral owner. Some say that accretions are too trifling for the law—others say it's just the way things *ought* to be. Florida says it's all of the above.[219] Indeed, courts have termed this

216. *Id.* at 18.

217. FLA. STAT. § 161.211 (2005).

218. I am especially thankful to Professor Donald Campbell for his insight here.

219. Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212–13 (Fla. 1973) ("There are four reasons for the doctrine of accretion: (1) de minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.").

curious property interest everything from a contingent future interest[220] to a vested right[221]—one going so far as to call it a natural right.[222] So which is it?

Speaking within the bounds of this Note, the right to accretion and reliction is a vested property interest, despite the Florida Supreme Court's deceivingly clear pronouncement that "[t]he right . . . is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction."[223]

If this were a statement of the upland owner's title, then it would make very little sense in terms of freehold estates: From a purist's standpoint, a "contingent" future interest suggests that the riparian has a remainder, meaning that the State has a finite estate that *must* end.[224] That arrangement controverts the public trust doctrine[225] and simply cannot be the case here.

So what did the court mean when it described the right as a contingent future interest? The court was probably doing just that—describing the future possessory right that a riparian would have over accreted alluvion and using the adjective "contingent" to mean that the present *possessory* right is dependent upon the gradual accumulation of sediment on the upland. The opinion cited authority in *Brickell*, which said, "[Littoral] rights . . . give no title to the land under navigable waters except as may be lawfully acquired by accretion, reliction, and other similar rights."[226] Well, of course they don't give *title* to the tangible sediment until the alluvion accumulates. That's the whole point of the doctrine itself,[227] and the court was likely just using the words "contingent, future interest" as adjectives to describe the riparian's potential interest.

Now, stating the parties' actual title to the physical sand deposits has its own problems: If the riparian has a contingent future interest in the land under the navigable water, then the State, as a trustee for the public, would necessarily have a present possessory interest held in a fee tail, a life estate, or a term of years.[228] But the State cannot have a finite estate without contradicting the public trust doctrine.[229]

---

220. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1112 (Fla. 2008).

221. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 936 (Fla. 1987).

222. Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68–69 (1874).

223. *Walton Cnty.*, 998 So. 2d at 1112.

224. *See* PETER T. WENDEL, A POSSESSORY ESTATES AND FUTURE INTEREST PRIMER 100 (West Group 2007) (1996).

225. *See* Merrill-Stevens Co. v. Durkee, 57 So. 428, 431 (Fla. 1911).

226. *Walton Cnty.*, 998 So. 2d at 1112 (quoting Brickell v. Trammell, 82 So. 221, 227 (Fla. 1919)).

227. *See* Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212–13 (Fla. 1973) ("[H]e who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion.").

228. WENDEL, supra note 224, at 47.

229. *See Merrill-Stevens Co.*, 57 So. at 431.

Hypothetically and with a polite nod to the Rule Against Perpetuities,[230] the State could have initially granted the riparian a "future interest only"[231] conveyance: To riparian *if* the alluvion accumulates. That conveyance leaves the State with a present possessory interest held in an estate known as a fee simple subject to an executory limitation.[232] The riparian would then have a future interest, an executory interest, that would not vest in interest until it vested in possession.[233] But then, the riparian would hold title to the alluvion in fee simple absolute,[234] begging the question: What happens if the water creeps inland again? Would the landowner then lose his fee simple interest?

On another hypothetical note, the State could own the alluvion in fee simple absolute, wait until the alluvion forms, and then grant the riparian a present possessory interest: To riparian *until* the alluvion disappears. That conveyance leaves the riparian with a present possessory interest held in an estate known as a fee simple determinable.[235] The State would then have a future interest, a possibility of a reverter, held in fee simple absolute, that would vest in interest upon creation.[236] So again, what happens if the title reverts, and the alluvion accumulates again? The same would likely occur if the State granted a fee simple subject to a condition subsequent.[237]

The common law recognized these inconsistencies and purposefully developed the doctrine of accretion to resolve the problems that nature herself poses. Although it would soothe the legal soul to state the ever-changing title to accretions and relictions more specifically within the property vernacular, nature has other plans. Sand continually washes along the seashores, and people cannot watch with lidless eyes for the alluvion to form (or wash away), so the best the law can do is (1) recognize that title to the accumulated alluvion is held in fee simple and (2) develop the doctrine of accretion to justify the natural redistribution between neighbors. One scholar made the same argument over 70 years ago:

> If the law of accession is sufficient to explain the gain, as it undoubtedly is, why grope for alien terms in which to designate a loss occurring at the same time, from the same causes, and in the identical transaction? . . . Accretion and reliction normally operate on titles in fee simple . . . .[238]

230. The Rule Against Perpetuities applies to contingent remainders, remainders subject to open, and executory interests. WENDEL, supra note 224, at 173–74. The rule states, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Id.* at 173.

231. *See id.* at 99–100.

232. *See id.* at 100.

233. *See id.*

234. *See id.*

235. *See id.* at 21.

236. *See id.* at 20–21, 26.

237. *See id.*

238. Ross D. Terry, *Waters and Watercourses—Title to Stream Beds and Riparian Lands—Determinable Fees*, 12 Tex. L. Rev. 490, 495 (1934).

But the future interest in owning title to accumulated alluvion is not the only issue in *Stop the Beach Renourishment, Inc.*—a separate issue is the property right to accretion as one of the sticks in the bundle that comes along with littoral ownership. Now, of course, the Members' lawyers probably knew that arguing about the latter would only produce a steeper hill to climb, and the Florida Supreme Court was simply answering the question before it. But for the purposes of setting legal precedent, the two issues cannot merely blur together in infinite harmony.

Separate the right to accretion (the legal *occupation* over accumulated alluvion) from the right to accretion (the legal *expectation* of a doctrine to apply in the occurrence of a happenstance). This severance explains the misleading appearance that the Florida Supreme Court "reverse[d] 100 years of uniform holdings that littoral rights are constitutionally protected."[239] The court did not reverse precedent;[240] instead, it affirmed the holding from a line of cases dating back to 1909.[241]

The court did, on the other hand, confusingly use the term "contingent" a second time—again as an adjective but without the "future interest" language: The court was explaining that it "[did] not find the littoral right to accretion applicable in the context of [the] Act."[242] The court could have stopped there, but it went on to say:

> [T]he right to accretion under Florida common law is a contingent right. It is a right that arises from a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water.[243]

The court continued to explain the four justifications for the accretion doctrine only to say that none of them applied in the context of the beach renourishment or under section 161.191(2) of the Act.[244]

All of this is true so long as future courts do not misconstrue the contingency involved in this discussion. The right to accretion is contingent in the sense that the littoral owner only has a right to claim possession *if* the alluvion accumulates. The argument in this case centered around Florida's

239. Brief of Petitioner at i, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151), 2009 WL 2509219 at *1.

240. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2612 (2010) (plurality opinion) ("The Florida Supreme Court decision before us is consistent with these background principles of state property law.").

241. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934 (Fla. 1987); Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649 (Fla. 1985); Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209 (Fla. 1973); Brickell v. Trammel, 82 So. 221 (Fla. 1919); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491 (Fla. 1918); Ferry Pass Inspectors' & Shippers' Ass'n v. Whites River Inspectors' & Shippers' Ass'n, 48 So. 643 (Fla. 1909).

242. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1118 (Fla. 2008)

243. *Id.*

244. *Id.* at 1118–19.

ability to tinker with that contingency by creating an artificial avulsion,[245] and the State's high court said that so long as the context of that tinkering continued to do what the doctrine of accretion set out to do—balance private and public interests through a rule of convenience—then yes, the State could take away the littoral owner's *ability* to gain alluvion (*if* it ever accreted) by also taking away the littoral owner's *ability* to lose property (*if* the tide moved upland).[246]

It does not necessarily follow that by taking away the ability to gain alluvion that the littoral owner cannot have a vested property interest in the right to accretion. Littoral rights are sticks in the bundle of property interests that vest pursuant to owning littoral land. Look at the language in section 161.191(2) that allegedly "took" the right to accretion:

> Once the erosion control line . . . has been established . . . 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, except as provided in s. 161.211(2) and (3).[247]

Section 161.211(2) explains that "[i]f the state . . . fails to maintain [the protected beach] and as a result thereof the shoreline gradually recedes . . . landward of the erosion control line . . . , the provisions of s. 161.191(2) shall cease to be operative . . . ." Subsection (3) goes on to give the State a chance to fix the protected beach within one year, and if not, "the erosion control line shall be null and void and of no further force or effect."

Now, where in this statute does it say that a littoral owner no longer has a property right to accretion? It says that "the common law shall no longer operate,"[248] and it says that the statute "shall cease to be operative"[249] or will be "of no further force"[250]—but nothing illustrates a legislative act that destroys the right to accretion. If anything, the legislature overtly recognizes the expectation as a vested property interest, or else it would not so adamantly require the State to maintain the renourished beach. Put another way, the legislation reinforces the common law policy that whenever littoral property is subject to losing land, the owner has a vested right to likewise gain land. Temporarily making that contingency impossible (because "there can be no accretions to land that no longer abuts the water")[251] does not equate to destroying the property right to

245. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2611 (plurality opinion).

246. *Walton Cnty.*, 998 So. 2d at 1118–19.

247. FLA. STAT. § 161.191(2) (2005).

248. *Id.*

249. *Id.* § 161.211(2).

250. *Id.* § 161.211(3).

251. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2611 (plurality opinion) (citing Bryant v. Peppe, 238 So. 2d 836, 839 (Fla. 1970) (quoting Martin v. Busch, 112 So. 274, 288 (Fla. 1927))).

accretion—the *expectation* is indeed alive and well under this statutory scheme.

The United States Supreme Court's plurality opinion supports this distinction as well. Justice Scalia quickly dismissed the need to determine whether the Fifth Amendment proscribes the taking of littoral rights because legal precedent dating back to the 1800s made that point very clear—yes.[252] The discussion focused instead on what the petitioners' claimed: that the Florida Supreme Court "took" the Members' property by declaring that the right to accretions did not exist when no prior precedent permitted such denial of the *ability* to gain future accretions.[253] That argument failed because Florida precedent in *Martin*, as clarified in *Bryant*, allowed the State to drain a lake and continue to claim the newly exposed land between the MHWL and the water's edge pursuant to the doctrine of (artificial) avulsion.[254] By necessity, the State action caused the doctrine of accretion to no longer apply (again, because "there can be no accretions to land that no longer abuts the water").[255] *Martin* and *Bryant* never said that the right to accretion did not exist—they said together that the doctrine did not apply by virtue of the State making the contingency impossible.[256]

Remember, the central rationale behind the right to accretion and reliction is that "he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they *may* bring by accretion."[257] If the State temporarily abrogates the ability to gain land in exchange for the inability to lose it, then it seems that the Members get the quid pro quo that the common law doctrine required. For precedent purposes, lawyers and courts should note that the littoral owner's expectation (that the doctrine of accretion will apply if the contingency reemerges) remains a legally vested property interest.

VI. CONCLUSION

A four to four split on the United States Supreme Court presents an expected conundrum: Lawyers find powerful persuasion for future litigation, scholars try to put Humpty Dumpty back together again, jurists are left to sift through the rubble, and the people involved go on with their daily lives in an unsure reality. Indeed, *Stop the Beach Renourishment, Inc.* harmoniously rallied private property advocates, but it stopped short of declaring a victory for the plurality's judicial takings theory.

The Court's plurality concluded that a judicial decision could "take" private property rights for public use such that the Fifth Amendment would

252. *Id.* at 2601 n.5.

253. *Id.* at 2610–11.

254. *Id.* at 2611 (citing *Martin*, 112 So. at 287; *Bryant*, 238 So. 2d at 838–39).

255. *Id.* (citing *Bryant*, 238 So. 2d at 839 (quoting *Martin*, 112 So. at 288 (Brown, J., concurring))).

256. *See Bryant*, 238 So. 2d at 838–39 (citing *Martin*, 112 So. at 285).

257. Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212-13 (Fla. 1973) (emphasis added).

require "just compensation,"[258] but an equal number of justices refused to join the reasoning.[259] Even so, the Court unanimously held that the Florida Supreme Court's decision did not actually take away any established property rights.[260]

Perhaps this case illustrates how "nuisance law literally picks up where trespass leaves off."[261] An answer to the Members' problem could not rest on an exclusion theory, but the conjoined decisions here point towards a governance theory as the more practical arena for these neighboring property interests. Further, the right to accretion and reliction arguably remains alive and well in Florida as a vested property interest, despite the high court's language.

In the end, the gravity of harm that Tammy and Suzy face does not outweigh this renourishment project's value to the public. But this Note encourages oceanfront property owners to watch for the day when projects like this reach a point of unreasonableness—usually, when you give people an inch, they try to take a mile.

258. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010) (plurality opinion).

259. *Id.* at 2597 (majority opinion).

260. *Id.* at 2613.

261. MERRILL, *supra* note 66, at 938.