

## JUDICIAL TAKINGS AND SCALIA’S SHIFTING SANDS

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### INTRODUCTION

There’s an old saying: “It is wise to buy property because God isn’t making any more of it.” Whoever said this had never encountered Florida’s beach renourishment program, which adds sand to privately owned beaches and then claims the newly created beach extensions as state property.

While some property owners have welcomed the addition to their eroding land—even if it meant they no longer have exclusive access to the water—others recoiled at the seeming erosion of their “bundle of sticks,” the various rights attending their property. They sued the state, arguing that it had taken their land without just compensation, and had their case won until the Florida Supreme Court (SCOFLA, if you remember your *Bush v. Gore* trivia) reversed several lower-court determinations and ruled for the state.<sup>1</sup>

At the Cato Institute, we were appalled by that ruling because it effectively turned highly valued oceanfront property into lesser-valued ocean-view property. Because defending property rights is one of the core goals of Cato’s Center for Constitutional Studies, we joined with the Pacific Legal Foundation and the National Federation of Independent Business Legal Center on an amicus brief supporting the petitioning property owners.<sup>2</sup>

In June, over half a year since argument, the Supreme Court finally decided *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.<sup>3</sup> The decision waded through a jumbled mass of arcane waterfront law to reach a very simple and unanimous holding: the Florida Supreme Court did not subvert an existing property right to such an extent that its decision constituted a “judicial taking.”<sup>4</sup> The state won. The property owners lost. SCOFLA was vindicated.

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

2. Brief Amicus Curiae of Cato Institute, NFIB Legal Center, and Pacific Legal Foundation in Support of Petitioner, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151).

3. *Stop the Beach Renourishment*, 130 S. Ct. 2592.

4. *Id.* at 2613.

Still, this was about as good a unanimous ruling against the side an amicus supports as a lawyer could ever desire. While all eight Justices ultimately ruled for the state—Justice John Paul Stevens recused himself because his Florida property is subject to the renourishment program—six accepted the idea that judges can violate the Constitution by reinterpreting pre-existing property rights (albeit under two different theories), and the other two declined to reach the question. Although the *Stop the Beach Renourishment* Court found that SCOFLA had not departed from sufficiently established state property law to constitute a taking, the idea of a judicial taking—whether through the Fifth Amendment’s Takings Clause or the Fourteenth Amendment’s Due Process Clause—is very much alive.

More than 40 years ago in *Hughes v. Washington*, Justice Potter Stewart warned against the dangers of judicial takings: “[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”<sup>5</sup> Paradoxically, even as the particular property owners here are out of luck, Justice Stewart’s judicial takings doctrine has been strengthened.

In this Essay, we examine the background of the judicial takings doctrine, discuss the Supreme Court’s ruling in *Stop the Beach Renourishment*, react to that decision in light of Cato’s amicus brief, and contrast Justice Antonin Scalia’s views of Substantive Due Process as expressed in *Stop the Beach Renourishment* with that in another high-profile case whose plurality opinion he joined, *McDonald v. City of Chicago*,<sup>6</sup> to argue that the judicial takings doctrine is necessary to a robust constitutional protection of property rights.

### I. THE STAKES IN *STOP THE BEACH RENOURISHMENT*

*Stop the Beach Renourishment* challenged an attempt to “renourish” the beach around the Florida panhandle city of Destin. The Beach and Shore Preservation Act of 1961 established procedures for restoring eroded beaches.<sup>7</sup> In 2003, Destin and Walton County applied for the funds and permits necessary to restore approximately seven miles of beach that had been eroded by hurricanes.<sup>8</sup> The plan involved dredging sand to add about 75 feet to the beach.

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5. *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967).

6. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

7. FLA. STAT. §§ 161.011–161.45 (2007).

8. There is some dispute as to whether the beach areas belonging to Petitioners had been eroded, but that factual issue is immaterial to the legal result.

In Florida, land submerged beneath ocean waters belongs to the state and the dry waterfront land to the property owner. In between is the constantly fluctuating water line. Ordinarily, the mean high-water line—defined as the average high-tide water line over the previous 19 years—is the boundary between the private beach land and the public submerged land.<sup>9</sup>

After a beach restoration project, however, the mean high-water line is replaced by a fixed “erosion control line.”<sup>10</sup> Whereas before a littoral property owner would be guaranteed that his property limit would ebb and flow with the mean high-water line, the erosion control line does not move. Thus, when the state adds 75 feet of beach past the fixed erosion control line, the owner no longer has a piece of property that touches the water. In very real layman’s terms, oceanfront property turns into ocean-view property.

In ratifying that conversion, the Florida Supreme Court defied a century of common law and ruled that the right to have littoral property about the water line is equivalent to—or supplanted by—the right to access the water (essentially an easement) over public lands. In short, the new boundary did not take away a right that the landowners had to begin with. The court thus removed from the bundle of littoral property sticks the right to contact the water line—the very essence of “littoral-ness.”

## II. DIGGING DEEPER INTO THE FLORIDA COURT’S DECISION

Before *Stop the Beach Renourishment*, the absence of a federal judicial takings doctrine encouraged state legislatures to restrict property rights—often an unpopular practice—indirectly, by shifting the issue to politically insulated courts. If legislators or their favored interests desired land, they knew what to do: Avoid changing defined property rights in a way that constitutes a taking. Instead, wait for the courts to subtly redefine those rights when a property owner inevitably challenges a particular state action.

In the late 1960s, Oregon’s Supreme Court played into that strategy perfectly. In *State ex rel. Thornton v. Hay*, that court entertained a lawsuit from the owner of private dry-sand beach property who sought to enclose his property.<sup>11</sup> The legislature had passed a bill that was a masterpiece of equivocation: it established a “policy” that the state had the exclusive right,

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9. See *id.* §§ 177.27(14)–(15), 177.28(1) (stating how Florida defines “mean high-water line”). The waterfront land is called “littoral” property, a synonym for “riparian” that is used in Florida law to describe land abutting oceans, seas, and lakes. *Stop the Beach Renourishment*, 130 S. Ct. at 2598 n.1.

10. See FLA. STAT. § 161.161(3)–(5).

11. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 672 (Or. 1969).

through “dedication, prescription, grant or otherwise,” to all “ocean shore” property, regardless of private ownership of upland dry-sand areas.<sup>12</sup> But fear of takings claims kept the legislature from turning its legislation into outright law (if that’s possible). Instead, the statute was considered to be a sort of glorified guideline.

In *Thornton*, the state argued that, because of constitutional protections against uncompensated takings, the statute at issue did not actually divest people of their property. Instead, it merely “codifies a policy favoring the acquisition by prescription of public recreational easement in beach lands” which codification is authority for the court to restrict the private owners’ property rights.<sup>13</sup> In other words, it was a policy that was not quite a law but still should be enforced like a law. The Oregon Supreme Court exploited this legerdemain, construing the “enacted policy”—to coin a phrase—as a law and effectively absolving the legislature of responsibility for its taking. *Thornton* thus showed that, in the absence of a judicial takings doctrine, legislators will use the path of least resistance—the courts—to accomplish policy goals that the Takings Clause would block through other channels.

Decades later, the U.S. Supreme Court decided a case that, when combined with *Thornton*, laid the groundwork for SCOFLA’s decision in *Stop the Beach Renourishment*. In *Lucas v. South Carolina Coastal Council*, the case famous for establishing the “total taking” standard for regulatory takings, the Court discussed how background principles of state law help determine when a taking has occurred.<sup>14</sup> If an owner is barred from using land in such a way that is traditionally proscribed by “existing rules or understandings” then he will have few valid complaints if those uses are taken.<sup>15</sup> But if a well-established, permissive use of land is extinguished, the analysis is different.<sup>16</sup>

Unfortunately, the *Lucas* Court left little guidance as to which background principles are sufficiently established and which are pliable to modern courts. This ambiguity provides state courts with a loophole to interpret relevant background principles in a way that avoids the Takings Clause entirely. After all, that which never existed cannot be taken.

Oregon (again!) exploited the loophole in *Stevens v. City of Cannon Beach*, a case in which beachfront owners sought a permit to erect a seawall

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12. OR. REV. STAT. § 390.610 (2009).

13. *Thornton*, 462 P.2d at 676.

14. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

15. *Id.* at 1030.

16. *Id.*

on their portion of the beach.<sup>17</sup> Using the *Lucas* framework, the Oregon Supreme Court held that the private owners had no property right superior to the public's right of access to the beach.<sup>18</sup> In dissenting from the denial of certiorari, Justice Scalia, joined by Justice Sandra Day O'Connor, recognized that *Lucas* needed to be clarified in order to avoid these judicial slights-of-hand: "Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights."<sup>19</sup>

Cato's brief before the U.S. Supreme Court argued that this is precisely what the Florida Supreme Court had done in *Stop the Beach Renourishment*: SCOFLA's holding departed from long-established state law that protected the rights of beachfront landowners.<sup>20</sup> Justice R. Fred Lewis's scathing dissent captured this sentiment:

The majority now avoids this inconvenient principle of law—and firmly recognized and protected property right—by improperly describing the littoral property and its owner as having "no independent right of contact with the water," and by mischaracterizing the significant right of *contact* as being only "ancillary" to the right of access.<sup>21</sup>

We also pointed out other times in which the Court has held that the judiciary is equally constrained by constitutional limitations. In *Bouie v. City of Columbia*, South Carolina's Supreme Court creatively interpreted a trespassing statute in order to uphold the convictions of two alleged trespassers.<sup>22</sup> The Court held that the interpretation was so novel that it amounted to an ex post facto law: "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."<sup>23</sup> In *NAACP v. Alabama ex rel. Patterson*, the Court vacated as unconstitutional a state court order enjoining NAACP activities because abridgements of constitutional rights "may inevitably follow from varied forms of governmental action."<sup>24</sup>

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17. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994).

18. *Id.* at 456.

19. *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting).

20. Brief for Cato Institute et al., *supra* note 2, at 3–4.

21. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1123 (Fla. 2008) (Lewis, J., dissenting).

22. *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

23. *Id.* at 353–54.

24. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958).

Finally, in *Organization for a Better Austin v. Keefe*, the Court vacated as unconstitutional a state court order that enjoined an advocacy group from distributing pamphlets.<sup>25</sup>

Just as the cases described above enforce other constitutional provisions against state courts, SCOFLA's drastic departure from well-established principles of property law screams out for a Takings Clause analysis. There is no textual or theoretical reason to deny property owners just compensation for a taking because the acting branch of government is judicial rather than executive or legislative, an argument that a four-Justice plurality eventually accepted.

### III. THE SUPREME COURT'S RULING

The Court's opinion in *Stop the Beach* is characterized by a reluctance to tell the Florida Supreme Court that it does not understand its own law. The unanimous sections deal with specific technical aspects of state property law. Much more importantly, the remainder of Justice Scalia's opinion makes clear that judicial takings are just as much a violation of the Fifth Amendment as any other kind. "If a legislature *or a court* declares that what was once an established right of private property no longer exists," Scalia wrote for a four-Justice plurality, "it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."<sup>26</sup> And the test for whether the government—any part of it—has committed a taking turns on "whether the property right allegedly taken was established."<sup>27</sup>

Moreover, because the case turned on a narrow interpretation of Florida law, that the Supreme Court ultimately found no taking here should provide no succor to courts and other state actors who wish to abuse property rights. The case could have easily swung the other way in a non-oceanfront circumstance or under a different state's laws.

Indeed, two Justices, Anthony Kennedy and Sonia Sotomayor, said that federal courts can still police judicial takings by using the Fourteenth Amendment's Due Process Clause.<sup>28</sup> Perhaps they are more amenable than previously thought to the *Lochner*-era idea that *some* protection of property rights can be found in the Due Process Clause.

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25. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971).

26. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 183 S. Ct. 2592, 2602 (2010) (plurality opinion).

27. *Id.* at 2610.

28. *Id.* at 2613 (Kennedy, J., concurring).

The remaining two Justices, Stephen Breyer and Ruth Bader Ginsburg, fearing a floodgate of challenges to state property laws brought into less-qualified federal courts, decided to leave the question for another day.<sup>29</sup> They did not say, however, that a judicial taking was a legal impossibility.

Indeed, no Justice was willing to grant state courts free reign in manipulating established property rights in order to avoid an uncompensated taking. Nobody accepted the idea that courts are immune from review for subverting property rights.

#### IV. JUDICIAL TAKINGS IN BROADER CONTEXT

The debate over Florida's renourishment program and judicial takings generally is but the latest skirmish in the battle over eminent domain abuse. Of course, governmental violations of property rights have received much more attention since the resoundingly condemned Supreme Court decision in *Kelo v. City of New London*, five years ago.<sup>30</sup> In the wake of that case, 43 states passed statutory or constitutional provisions that forbid interpretations of "public use" that are really private use for nebulous and indirect public benefit.<sup>31</sup> Many property rights advocates thus view *Kelo* as a Pyrrhic victory—much as we have implied about *Stop the Beach Renourishment* but in a different way.

*Kelo* contained the Manichean conflict of a morality tale, however, while *Stop the Beach Renourishment* lacked such dramatic contrasts. Susette Kelo's little pink house stood in the way of Pfizer, the corporate baddie entering the scene to an ominous fanfare (and departing this past year after abandoning the land it had induced New London to condemn). Complaints from beachfront property owners—relatively privileged people who were not losing their houses but only their beaches—do not strike the same chord.

But imagine instead that Susette Kelo never had an opportunity to have her claim heard in the first place because the Connecticut Supreme Court eviscerated her rights through a novel interpretation of state property law—that, say, a deed only grants ownership to a particular size and quality of land, not a fixed location. That would have been a judicial taking, one that could be remedied only by a populist groundswell of a more sophisticated—and therefore less likely—sort, if the U.S. Supreme Court refused to act.

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29. *Id.* at 2618 (Breyer, J., concurring).

30. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

31. *50 State Report Card*, CASTLE COALITION, (July 16, 2009), <http://www.castlecoalition.org/about/component/content/57>.

That is, without proper higher court review, judicial redefinitions of property rights could destroy the Takings Clause through the back door. And this redefinition is particularly likely in the context of beaches, where judge-made common law collides with regulations in battles over highly valued property.

In contrast to the relative predictability of landlocked property law, cases involving shifting sands and newly created landmasses may seem like a prescription for a legal fiasco. Blackacre can be reliably delineated by metes and bounds or a surveyor's scope. Beachacre, however, tends to be amorphous at the edges. But humans have not just recently decided to live on beaches. Wherever humans live, a body of property law develops that settles expectations and establishes predictability, even in the face of unpredictable land. The legal fiasco of waterfront property is thus avoided by the common law of waterfront property—if that common law is followed.

As we have seen with *Thornton*, *Stevens*, *Lucas*, and now *Stop the Beach Renourishment*, state courts are often tempted to reenact their own Sherman's march to the sea and raze private rights in beachfront property. Cato's brief highlighted this unfortunate trend in which court-made "custom" becomes the conduit for an "end-run around *Lucas*."<sup>32</sup> In the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries. If property rights amount to whatever a state court declares them to be—and can change overnight, without federal oversight for whether those rulings comport with constitutional guarantees—then they are not worth very much at all. As the Supreme Court has recognized in cases like *Lucas*, property rights—and the law that has developed to protect them—are more than what state courts say they are.

And so, where state courts depart from historically rooted property rights, it is important that federal courts continue hearing claims of "judicial takings"—whether labeled as such or otherwise. That is so especially because the judiciary, unlike the bodies granted the power of eminent domain, is relatively insulated from political pressure. *Stop the Beach Renourishment* at least preserved the possibility that future such challenges may be successful.

In short, while the proud owners of ocean-view property in Destin, Florida are certainly not satisfied with the outcome of *Stop the Beach*

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32. Brief for Cato Institute et al., *supra* note 2, at 8 (citing David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1442–46 (1996)).



*Renourishment*, the case is far from a complete loss for defenders of property rights.

#### V. WOULD JUDICIAL TAKINGS BY ANOTHER NAME SMELL AS SWEET?

As discussed above, *Stop the Beach Renourishment* created a situation whereby future property right violations by courts can be protected by either the Takings Clause or, less certainly, the Due Process Clause. In his plurality opinion, Justice Scalia supported the former method and argued vociferously against Justice Kennedy's invocation of the latter. While Scalia's criticism is in line with his well-voiced disparagement of the substantive due process doctrine—which he has called “babble”<sup>33</sup>—it is at odds with his wholesale acceptance of that doctrine in *McDonald v. City of Chicago*. We prefer the *Stop the Beach Renourishment* Scalia because that is the one who more firmly guarantees the underlying fundamental right, but the *McDonald* Scalia provides a nice foil to our argument.

*McDonald* was last term's landmark case in which the Court held that the Fourteenth Amendment extends the individual right to keep and bear arms to people living in the states (as opposed to federal enclaves like the District Columbia).<sup>34</sup> As important as this holding is, just as striking is that a four-Justice plurality endorsed “incorporating” the Second Amendment via the Due Process Clause—declining to take what most scholars contend is a more constitutionally faithful method.<sup>35</sup> Only Justice Clarence Thomas, the necessary fifth vote against Chicago's gun ban, took the opportunity to resurrect the Privileges or Immunities Clause, which the Court had eviscerated in the *Slaughter-House Cases* a mere five years after the Fourteenth Amendment's ratification.<sup>36</sup>

That is, despite asking the parties to brief which Fourteenth Amendment clause should be used to incorporate the Second Amendment,

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33. Robert Barnes, *Gun Case Presents Quandary for Court*, WASH. POST, Mar. 1, 2010, at A1.

34. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

35. See, e.g., Brief for Constitutional Law Professors as Amici Curiae Supporting Petitioners at 9–21, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 U.S. S. Ct. Briefs LEXIS 1257 (arguing that not only was the Privileges or Immunities Clause intended to protect the substantive liberties in the Bill of Rights and other fundamental rights, but that it is also the most logical clause under which to incorporate the Second Amendment).

36. *McDonald*, 130 S. Ct. at 3058–88 (Thomas, J., concurring) (expressing desire to overturn *Slaughter-House Cases*, 83 U.S. 36 (1873)). Cato's amicus brief in *McDonald*, again joined by the Pacific Legal Foundation, argued that, because the original intent of Privilege or Immunities Clause was to protect certain individual natural rights from state violation, the right to keep and bear arms should be extended to the states via the Privilege or Immunities Clause. Brief Amicus Curiae of Cato Institute and Pacific Legal Foundation in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 U.S. S. Ct. Briefs LEXIS 1218.

the Court at oral argument behaved as if the petitioners had spontaneously decided to postulate absurd constitutional arguments. This hostile reaction was led by none other than Justice Scalia, who accused Petitioners' counsel Alan Gura of "bucking for a place on some law school faculty" and belittled his argument as being nothing more than "the darling of the professoriate."<sup>37</sup> Justice Scalia would later join Justice Samuel Alito's plurality opinion in *McDonald*, holding that the Second Amendment is incorporated to the states via the Due Process Clause.<sup>38</sup> Just as he did in oral arguments, therefore, Justice Scalia went back on his own history of opposing substantive due process.

While a full evaluation of that doctrine is far beyond the scope of this Essay—as is any discussion of the Second Amendment—we provide the above discussion to outline why the Takings Clause is a superior vehicle for remedying judicial violations of property rights. Part of that outline's content came 11 days before *McDonald*, in *Stop the Beach Renourishment* itself, where Justice Scalia argued against Justice Kennedy's somewhat nebulous position: "Justice Kennedy . . . while dismissive of the Takings Clause, places no other constraints on judicial action. He puts forward some extremely vague applications of Substantive Due Process, and does not even say that they (whatever they are) will *for sure* apply."<sup>39</sup> In *McDonald*, however, Scalia not only gave his newfound adherence to substantive due process a curt explanation, but seemed to explain away the "extremely vague applications" of the doctrine: "Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'"<sup>40</sup>

Ironically, *Albright* is the same decision which Scalia quoted in *Stop the Beach Renourishment* as support for why the Due Process Clause is the wrong constitutional provision under which to review judicial takings: "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"<sup>41</sup>

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37. Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 U.S. Trans. LEXIS 20.

38. *McDonald*, 130 S. Ct. at 3050–58.

39. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2607 (2010) (plurality opinion) (emphasis in original).

40. *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

41. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

Why, according to Scalia, is the Takings Clause better? For some of the same reasons offered by “aspiring professor” Alan Gura during oral argument in *McDonald*. Gura was explaining why the Privileges or Immunities Clause is preferable to the Due Process Clause: “We believe that [the Privilege or Immunities Clause is] more limited because that text had a specific understanding and that there are guideposts left behind in texts and history that tell us how to apply it, unlike the due process [clause].”<sup>42</sup> But, as Scalia points out, *Stop the Beach Renourishment* calls for the same reasoning with respect to the Takings Clause, because the Due Process Clause “places no constraints whatever upon *this* Court.”<sup>43</sup> In chastising Justice Kennedy, Justice Scalia offers the best reasons to chastise his own vote in *McDonald*: “Substantive Due Process is such a wonderfully malleable concept, even a firm commitment to apply it would be a firm commitment to nothing in particular.”<sup>44</sup>

Justice Scalia’s antipathy to substantive due process seems to arise when judges use the doctrine either to protect unenumerated rights<sup>45</sup> or, as in *Stop the Beach Renourishment*, to supersede more historically rooted textual provisions. He saw these disfavored uses combined in *Stop the Beach Renourishment*, citing Justice Kennedy’s language in *Lawrence*—“liberty of the person both in its spatial and in its more transcendent dimensions”—as an example of judicial overreaching.<sup>46</sup> Scalia finds such assertions of judicial power not only dangerous but unnecessary when a textual provision provides the appropriate protections while also limiting a judge’s ability to “discover” extra-textual doctrines.<sup>47</sup> This too is persuasive reasoning that is equally applicable to *McDonald*’s Fourteenth Amendment debate.

Indeed, esteemed scholars from across the political spectrum have argued that the clear, original meaning of the Privileges or Immunities Clause was to apply certain natural rights, such as most of those included in the Bill of Rights, against the states.<sup>48</sup> Yale law professor Akhil Reed Amar, for example, has said about the holding of the *Slaughter-House Cases* that

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42. Transcript of Oral Argument at 65, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2010 U.S. Trans. LEXIS 20.

43. *Stop the Beach Renourishment*, 130 S. Ct. at 2608 (plurality opinion) (emphasis in original).

44. *Id.* (citation omitted).

45. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (holding that the Due Process Clause protects the right to engage in homosexual conduct).

46. *Stop the Beach Renourishment*, 130 S. Ct. at 2608 (plurality opinion) (quoting *Lawrence*, 539 U.S. at 562).

47. *Id.*

48. See, e.g., Brief for Constitutional Law Professors, *supra* note 35, at 1257; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509 (2007); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE 12 passim* (1986).

“[v]irtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment.”<sup>49</sup> In addition to historical accuracy and faithfulness to the Constitution’s original meaning—virtues which are the “darling” of Justice Scalia himself—the Privileges or Immunities Clause also has the virtue of being more confined to textual and historical parameters.<sup>50</sup> It is for these same reasons that Justice Scalia rebukes Justice Kennedy’s use of the Due Process Clause as an attempt to avoid the constraints the Constitution places upon the Court:

[W]hat holds him back from giving the Taking Clause its natural meaning is not the *intrusiveness* of applying it to judicial action, but the *definiteness* of doing so; not a concern to preserve the powers of the States’ political branches, but a concern to preserve this Court’s discretion to say that property may be taken, or may not be taken, as in the Court’s view the circumstances suggest.<sup>51</sup>

Scalia thus bucks for bright-line rules when it comes to protecting rights rather than the discretionary standards of judicial supremacy.

And there are good reasons for adhering to the Constitution’s textual provisions—reasons that Chief Justice John Marshall explained in *Marbury v. Madison*: “It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.”<sup>52</sup> This analysis applies to the Takings Clause in *Stop the Beach Renourishment* and the Privileges or Immunities Clause in *McDonald* equally and so it is disconcerting that Justice Scalia’s jurisprudence is fractured on this point. In the end, Scalia’s own biting pen offers the best reasons for using the most applicable clauses—textually and historically—to decide constitutional issues rather than engaging in judicial imperialism: “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.”<sup>53</sup>

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49. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

50. For more on this argument, see Josh Blackman and Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL’Y 1, 69–70 (2010).

51. *Stop the Beach Renourishment*, 130 S. Ct. at 2608 (plurality opinion) (emphasis in original).

52. *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

53. *Stop the Beach Renourishment*, 130 S. Ct. at 2608 (plurality opinion) (emphasis in original).

## CONCLUSION

In recent years, violators of property rights have experienced several Pyrrhic victories—and *Stop the Beach* is another case in which the particular plaintiffs find themselves losing their property even as property rights generally are more secure. Although it remains to be seen what sort of aberrant rulings will produce a successful judicial takings claim, the fact that the door is now open to such claims is a significant silver lining to an ostensibly adverse Supreme Court ruling. State courts and legislatures are now on notice that they violate long-held property rights at their peril—and Justice Scalia has provided less faint-hearted originalists more ammunition with which to protect our constitutional rights.