

Edith Jones, the 5th Circuit Chief Judge who makes wingnuts swoon, is at it again, this time in [Severance v. Patterson](#), a Takings test case brought by the Pacific Legal Foundation. For environmentalists, Severance is also a test case in who is going to have to pay for coastal damage from climate change. Edith Jones answer is that you are, in order to protect landowners along the coast who purchased property knowing of the danger.

Quite literally, the decision contains no legal authority on the key issue in the case, and essentially serves as a mechanism to provide dicta for property rights lawyers. It also serves as Example Number One billion that puts the lie to conservative maundering about judicial restraint.

In 2005, Carol Severance bought a piece of property along the Gulf coast. When she did so, she was on notice that Texas law reserves a "rolling easement" for the public along the coastline, which means that once an easement is established, its boundaries shift in its borders — in this case, between the mean low high tide line and the vegetation line.

Then, Hurricane Rita hit, shifting the vegetation line farther landward, "causing a large segment of Severance's properties, including both homes, to be located on the dry beach." Texas officials, citing the rolling easement, notified her that the rolling easement now extended to the two houses that she had purchased.

Severance knew very well about the rolling easement when she purchased the property, and also knew that hurricanes happen. She had to sign an explicit acknowledgement of the danger of hurricane damage, and she is a licensed real estate agent, so she could hardly say that she didn't understand the forms. That's why this case's facts are less sympathetic than one might think. But more importantly, the law is crystal clear on the matter: *Palazzolo v. Rhode Island* clearly states that in the case of an alleged physical taking, "any award goes to the owner at the time of the taking, and [] the right to compensation is not passed to a subsequent purchaser." Since Texas established the rolling easement nearly a half century ago, Severance clearly was not the owner at the time of the alleged taking, so she didn't have standing.

But Edith Jones has decided that even though she is a federal judge, she would also like to write Texas state law, so she held — literally with NO authority — that because the rolling easement rolled, it thus became a NEW easement, which means that Severance was the affected owner.

With Supreme Court precedent conveniently out of the way, Jones then proceeded to ignore Texas precedent. Three intermediate appellate courts had previously ruled that a rolling

easement does not affect a taking, but because, according to Jones, those cases did not provide a “consistent rationale” for such a holding, the law was “unclear” and marked by “obvious conceptual difficulties.” Thus, the panel decided to certify a very clear question of state law to the Texas Supreme Court.

But that's not all. Because Severance also alleged that the so far nonexistent seizure of her houses violated the Fourth Amendment's prohibition on unreasonable searches and seizures, this sort of physical takings case is also a Fourth Amendment case. Now, it is true that this precise issue has never been decided by the Supreme Court. But the high court has consistently warned against such double dipping, and in fact has held that if, say, a police excessive force claim is cognizable under the Fourth Amendment, it cannot also be cognizable under the Fifth Amendment's substantive due process prong.

It's important to understand the impact of this move. Takings claims, because they are about property, turn on state law determinations about what “property” is in the first place. Under Severance's unique Fourth Amendment argument, however, federal courts can decide that state laws are “unreasonable” regardless of what the states say is property. It thus represents a potentially vast expansion of federal court power.

So here is a judge who: 1) ignores Supreme Court precedent; 2) decides to change state law by ignoring an unbroken line of state cases holding the opposite because she doesn't like the way that they were written; 3) decides to expand private property right in precisely the way that the Court has warned against. NOW who is the activist? The right's hypocrisy on this issue is just overwhelming.

I actually don't mind judicial activism in many circumstances. If you think that private property rights are so critical — the guardian of every other right, as the property activists say — then it makes sense that you would advocate for that. But then we should have that debate.

Ask the question: if someone purchases a piece of property knowing full well what the background law is and about the danger of hurricanes, should the taxpayers be forced to pay because she took a risk and failed?

Ask the question: climate change will cause fiercer and more frequent hurricanes, and we should expect damage like this to occur more often. In such an era, should the public be forced to pay for beachfront access?

Ask the question: in such conditions, whose rights should prevail, relatively wealthy private

landowners, or the public?

Ask the question: in order to force the public to pay for beachfront access, do you want to cede authority over these questions to the federal judiciary?

Finally, ask the question: can we take seriously a judge who would write an opinion like *Severance*, yet [simultaneously criticize](#) the Warren Court for “overruling local authorities” and “foisting its philosophical vision on the United States”?

UPDATE: For those who want the opposing perspective, you can see PLF's writeup of the case [here](#). I agree with my friend and colleague [Eugene Volokh](#) that the dissent contains some quite bizarre ad hominem comments about the fact that this is a test case. I find it just as bizarre that a group of conservative legal scholars (such as inhabit the Volokh Conspiracy) seems so blase about a federal judge trampling over state prerogatives and creating new federal constitutional rights.