

Constitutional Law Committee Newsletter

Vol. 7, No. 1

September 2010

MESSAGE FROM THE CO-CHAIRS

Trish McCubbin and Norman A. Dupont
Constitutional Law Committee

It's an exciting time for constitutional issues in environmental law! In June, the U.S. Supreme Court decided *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 540 U.S. ___, 130 S. Ct. 2592 (2010), exploring the circumstances under which a state court's decision can create a "judicial taking" of private property. All eight of the participating Justices agreed that a Florida Supreme Court ruling on state real property law did not constitute a taking in this particular context involving sudden additions (or deletions) to Florida's sandy shore. The Justices, however, wrote a total of five different opinions, revealing sharp divisions on the underlying issues and even the appropriate clause of the Constitution. Justices Kennedy and Sotomayor suggested that due process might be an adequate constitutional doctrine limiting state courts, a notion that provoked a derisive response from Justice Scalia.

This newsletter presents several outstanding articles giving background on the Court's fascinating decision and discussing its implications for the future. Many thanks to Committee Vice Chair Jim Wedeking for lining up these excellent contributors and to Committee Vice Chair Robin Craig for shepherding the articles to publication. We also thank Vice Chair Lisa Goldman for arranging a superb Quick Teleconference on July 22 on *Stop the Beach Renourishment*. The QT

featured two lawyers who argued the case and two lawyers who authored briefs in the case.

And the constitutional law issues just keep coming! In early August, a petition for certiorari was filed with the U.S. Supreme Court in *American Electric Power Co., Inc. (AEP) v. Connecticut*, the highly publicized Second Circuit decision (582 F3d 309) allowing various state and municipal plaintiffs to bring a nuisance action against major power companies for their greenhouse gas emissions. AEP and the other petitioners are asking the Supreme Court to address three key constitutional questions: (1) whether the plaintiffs have standing; (2) whether the federal common law nuisance claim is displaced by the Clean Air Act; and (3) whether the case presents political questions not suited for judicial resolution. If the Supreme Court takes the case, it could result in a landmark decision.

Constitutional questions will also be discussed at the 18th Section Fall Meeting of the ABA Section of Environment, Energy, and Resources in New Orleans on September 29 through October 2. Co-Chair Trish McCubbin will moderate a panel on greenhouse gas regulation under the Clean Air Act that, among other things, will ask whether challenges to EPA's endangerment finding are ripe and whether the petitioners have standing. We hope to see you at that panel, to be held on Thursday, September 30, at 10:30 a.m., and at the Committee Luncheon on Friday October 1. Vice Chair Andy Jacoby, who graduated from Tulane Law School, has promised some "insider"

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Committee Newsletter
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Robin Kundis Craig, Editor**

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Energy, and Resources.

hints on enjoying New Orleans, available only to those
who join us at the Committee Luncheon. And don't
forget about the public service opportunity on
Wednesday, September 29, when you can help plant
trees in New Orleans as part of SEER's One Million
Trees project. For more information on the 18th
Section Fall Meeting, see [http://www.abanet.org/
environ/fallmeet/2010/home.shtml](http://www.abanet.org/environ/fallmeet/2010/home.shtml).

We hope you enjoy this edition of the newsletter and
all the other activities of your Committee.

**Upcoming Section
Programs—**

For full details, please visit
www.abanet.org/environ/calendar/

Sept. 29 - Oct. 2, 2010
18th Section Fall Meeting
New Orleans

Oct. 12, 2010
**9th Annual Energy Litigation
Conference**
Primary Sponsor The Center for American
and International Law
Houston

Feb. 23-25, 2011
29th Annual Water Law Conference
San Diego

March 17-20, 2011
**40th Annual Conference on
Environmental Law**
Salt Lake City

August 4-9, 2011
ABA Annual Meeting
Toronto

**THE UNITED STATES SUPREME COURT'S
PROTECTION OF PUBLIC ACCESS TO
FLORIDA'S BEACHES BY VALIDATING
STATUTE ON COASTAL RESTORATION
AND BEACH RENOURISHMENT OVER
CONSTITUTIONAL CHALLENGE BY
PRIVATE WATERFRONT LANDOWNERS**

**Bruce J. Berman, David A. Chase,
Jeremy T. Elman, Justin B. Uhlemann,
and Brock Wilson
McDermott, Will & Emery LLP**

**Angela Howe
Surfrider Foundation**

I. Introduction

Along Florida's coast, the outward boundary of a waterfront property owner's land, as determined by Florida law, is the mean high water line (MHWL). A private landowner can own the land landward of the MHWL, but the State of Florida owns, in trust for the public, the land seaward of that line, including both the "foreshore," which is the land between the MHWL and the low tide line, and the outward submerged land beneath the state's navigable waters. *See* FLA. CONST. art. X, § 11. Because tides and coastlines change over time, the property line between private and public coastal land moves as the MHWL and the shape of the beach change, with waterfront landowners gaining property from any accretions (imperceptible accumulation of land over time) and losing it from any erosion.

Given this basic legal framework, what happens when state government intercedes, in an effort to protect the shoreline, and artificially moves the MHWL seaward by filling previously submerged land and raising it above sea level? Is the private landowner the beneficiary of this newly created dry land, or does it belong to the public? And if it belongs to the public, is the former waterfront landowner entitled to any compensation for the fact that his or her property no longer abuts the sea?

These questions gave rise to a recent Supreme Court case, *Stop the Beach Renourishment, Inc. v. Florida*

Department of Environmental Protection, 560 U.S. ___, 130 S. Ct. 2592 (June 17, 2010) (*Stop the Beach Renourishment*), in which an association of waterfront landowners (petitioner) challenged the constitutionality of Florida's Beach and Shore Preservation Act, a statute designed to protect Florida's coastline by providing for the renourishment of its beaches. In 2003, the City of Destin and Walton County, Florida, on the shore of the Gulf of Mexico, had obtained permits under the act to restore approximately seven miles of coastland that had been critically eroded by hurricanes. The effect would be to extend the beach seaward by approximately 75 feet by adding sufficient sand to raise previously submerged land above the water. The petitioner, whose members contended that valuable waterfront property rights were taken from them without compensation, challenged the act as permitting an uncompensated and thus unconstitutional "taking" of their property.

This article reviews the act, the proceedings in the Florida courts, and the Supreme Court's decision upholding the act.

II. Florida's Beach Preservation Program and the Present Dispute

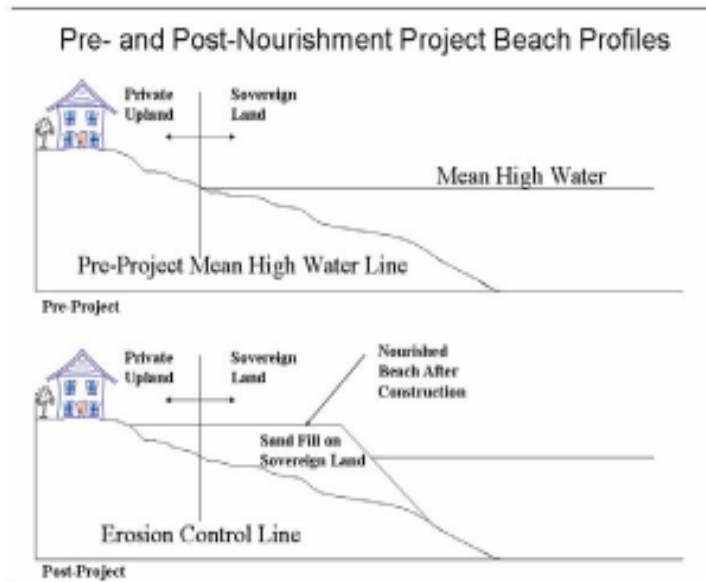
In 1961, the Florida Legislature enacted the act to "manage and protect Florida beaches from . . . erosion." *See* FLA. STAT. § 161.088 (2009). The act provides for the renourishment of the state's eroded beaches by adding land to the shoreline. Because such changes implicate property rights of both waterfront property owners and the public, the act specifically addresses the consequence of beach restoration by defining the dividing line between the privately owned upland property and the previously submerged land, owned by the state in trust for the public.

Before a beach is renourished, the act requires that a survey of the shoreline be conducted to determine the MHWL for the area. Once the MHWL is determined, an Erosion Control Line (ECL) is set based on the MHWL. If a restoration project adds land landward of the ECL, that land becomes the property of the upland owner. All additions of land seaward of the ECL are owned by the state, in trust for the public. As depicted below, a restoration project under the act could lead to

the creation of a sizable public beach between private upland property and the extended shoreline that did not exist at the inception of the restoration project.

This is exactly what happened in the *Stop the Beach Renourishment* situation. Prompted by concerns over

“accretion”; and (4) the right to the unobstructed view of the water. Petitioner asserted that its members’ littoral rights included a fifth right, the right of “contact” with the water, relying upon *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 936 (Fla. 1987)



significant shoreline erosion resulting from a series of hurricanes, the City of Destin and Walton County filed an Application for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands. The project anticipated extending the beach outward by depositing, immediately seaward of the shoreline, sand dredged from farther seaward, thus restoring previously eroded shoreline and thus preventing further erosion of the already receded, pre-restoration shoreline. The Florida Department of Environmental Protection then issued a Notice of Intent to issue the permit, which petitioner unsuccessfully opposed in administrative proceedings.

Petitioner was concerned that landowners in the affected area would lose their common law “littoral” property rights, a bundle of rights that in Florida includes: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction (respectively additional land accumulated gradually and imperceptibly over time by either (i) natural and imperceptible deposits of earth or (ii) withdrawal of the sea), collectively referred to as

(“[T]he term ‘littoral owner’ applies to waterfront owners *abutting* an ocean, sea, or lake.” (emphasis added)).

III. The Florida Court Proceedings

Following an unsuccessful administrative challenge to the issuance of the permit for the renourishment project, petitioner appealed to the Florida First District Court of Appeal. The appellate court reversed, holding that petitioner’s members had been deprived of two of their constitutionally protected littoral rights without just compensation for the property rights taken. *See Save Our Beaches v. Fla. Dep’t of Env’tl. Protection*, 27 So. 3d 48 (Fla. 1st DCA2006). The court’s holding focused exclusively upon:

- (1) the right to “receive accretions and relictions to the property”; and
- (2) the right to “have the property’s contact with the water remain intact.”

Id. at 58. The court held that the petitioner’s members had been deprived of both of these rights through the

provision of the act fixing the private property boundary at the ECL, which was now substantially inland of the new MHWL (thus, the loss of contact) and through the act's express preclusion of future post-restoration rights to accretion to the land seaward of the ECL. The appellate court certified to the Florida Supreme Court, however, as a matter of great public importance, the question whether the act had been unconstitutionally applied.

The Florida Supreme Court reversed, holding that the act achieves a reasonable balance between public and private interests in the shore. *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008). The court held that the act benefits property owners by protecting private property but does not deprive them of littoral rights. As to the asserted right to contact the water, the court concluded that this was only ancillary to the fundamental right of access, which the landowners maintain under the act. However, the landowners do not have the right to exclude the public from the new beach area. The right of access is enjoyed both by the general public and the private property owners. The court found that the doctrine of accretion was not implicated because restoration under the act is the equivalent of an avulsive event. In making this analogy the court recognized and emphasized Florida common law principles that treat an avulsion—a sudden emergence of previously submerged state land—as creating public, not private land, not accretion. As a result, petitioner's members here were not deprived of any littoral rights, and so there was no unconstitutional taking.

The U.S. Supreme Court granted petitioner's petition for a writ of certiorari to review not only the constitutionality of the act, but also whether the Florida Supreme Court's reversal could itself constitute a "judicial taking" prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution and whether eliminating constitutional littoral rights was a violation of constitutional due process.

IV. The U.S. Supreme Court's Decision

In Section I, the unanimous Court rejected petitioner's arguments that their littoral rights were infringed. The

Court held only that littoral owners have "certain 'special rights' with regard to the water and the foreshore," which is an important point because it minimizes the role and rights of the individual property owner versus the state. *Stop the Beach Renourishment*, 130 S. Ct. at 2598. These "special rights" are only akin to easements and hence are not absolute. *Id.*

Most of the text of the plurality and concurring opinions in the Supreme Court focused upon the concept of judicial takings, an issue that clearly engaged the justices and on which their views diverged, as shown in Sections II and III of Justice Scalia's opinion and concurrences by Justices Kennedy and Breyer. *Stop the Beach Renourishment*, 130 S. Ct. at 2601-08, 2608-10, 2613-18 (Kennedy, J., concurring), 2618-19 (Breyer, J., concurring). The pronouncements on this issue, however, are *dicta*; the Supreme Court was unanimous in its judgment regarding the specific issues at stake in this case in Sections I, IV, and V of Justice Scalia's opinion. These unanimous judgments include:

- (1) "[T]he State as owner of the submerged land adjacent to littoral property has the right to fill that land . . ." *Id.* at 2611 (citations omitted).
- (2) When an avulsion exposes previously submerged land seaward of littoral property "the land belongs to the State even if it interrupts the littoral owner's contact with the water," *id.* (citation omitted), a principle to which there is no exception for a state-caused avulsion.
- (3) Therefore, the adjacent waterfront landowners "right to accretions was therefore subordinate to the State's right to fill." *Id.*

Moreover, the Supreme Court recognized that the decision of the Florida Supreme Court, in overturning the ruling of the First District Court of Appeal, did not, as petitioner contended, overturn 100 years of state law, but to the contrary "is consistent with these background principles of state property law" *Id.* at 2612.

While the Court candidly recognized that the effect of the state's beach nourishment project was to deprive

the petitioner’s property “of its character (and value) as oceanfront property by the State’s artificial creation of an avulsion,” *id.*, the Court nonetheless concluded that the Takings Clause was not violated.

The Takings Clause only protects property rights as they are established under state law not as they might have been established or ought to have been established. We cannot say that the Florida Supreme Court’s decision eliminated a right of accretion established under Florida law

Id.

Nor, according to the Supreme Court, was any right of contact with the water eliminated by the decision of Florida’s highest court. To the contrary, the Court characterized the petitioner’s argument as “an expansive interpretation of the dictum in *Sand Key*” that “would cause it to contradict the clear Florida law governing avulsion.” *Id.* at 2612-13. The U.S. Supreme Court referred to that “clear Florida law” by quoting from the Florida Supreme Court’s ruling that “there is no independent right of contact with the water’ but it ‘exists to preserve the upland owner’s core littoral right of access to the water’” *Id.* (internal quotations omitted). Finally, because “the Florida Supreme Court’s decision did not contravene the established property rights of petitioner’s Members,” *id.* at 2613, there was not only no judicial taking, but also no violation of the Fifth and Fourteenth Amendments.

V. Conclusion

The U.S. Supreme Court upheld Florida’s action in *Stop the Beach Renourishment*. The act allows the State of Florida to restore the shoreline of critically eroded beaches such as those in Destin. This decision also reaffirms the position of Surfrider (an amicus

curiae in the case and client/employer of the authors of this article) that the public has a strong interest in preserving the world’s beaches and that judicial decisions upholding public rights are not “judicial takings.” The Supreme Court’s decision should encourage Florida and other states to continue to protect public access to beaches.

The co-authors from McDermott Will & Emery LLP, resident in the firm’s Miami, Florida, and Orange County, California, offices, represented Surfrider Foundation as amicus curiae before the U.S. Supreme Court.

Surfrider Foundation is a grassroots, nonprofit environmental organization dedicated to the protection and enjoyment of the world’s oceans, waves and beaches, for all people. Surfrider Foundation appeared as amicus curiae to file a brief in support of the Florida beach renourishment statute challenged in the U.S. Supreme Court case that is the subject of this article. This was the first time that Surfrider Foundation was represented at the U.S. Supreme Court, and was prompted by the overriding concern of the organization’s members over public access to the nation’s beaches. Surfrider’s amicus brief focused on only the Florida statute at issue in Stop the Beach Renourishment because the Surfrider Foundation has often opposed other types of shoreline management and was involved in a Florida legal action in 2008 against an unhealthy beach renourishment project, Surfrider Foundation v. Town of Palm Beach, OGC Case No. 08-0469, DOAH Case No. 08-1511 (July 15, 2009). In that case, Surfrider succeeded in halting the proposed project that would have deposited poor quality sand on the beach, harmed beach ecology, and increased the turbidity of the ocean water, thus posing harm to environmental and recreational resources.

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**STOP THE BEACH RENOURISHMENT:
A WIN FOR THE STATE, BUT A STEP
FORWARD FOR CONSTITUTIONAL
PROTECTION OF PROPERTY RIGHTS**

**Douglas G. Smith
William H. Burgess**

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010), was a unanimous loss for the property owners seeking redress against the state, as all eight Justices (Justice Stevens recused himself) agreed that the property owners had not suffered an uncompensated “taking” of their property in violation of the Fifth and Fourteenth Amendments. Despite the seemingly obvious propositions that the Fifth Amendment’s Takings Clause is not textually limited to a particular branch of government and that a property owner’s property is no less “taken” when a court defines the owner’s title out of existence than when the executive seizes it, the Supreme Court had not previously recognized such “judicial takings.” While *Stop the Beach* did not produce a majority opinion definitively recognizing the concept of a judicial taking, either, the decision is nonetheless a significant step forward for proponents of the constitutional protection of property rights for two reasons: (1) six Justices agreed that the Constitution imposes some limits on the ability of courts to define property rights out of existence; and (2) Justice Scalia’s opinion on behalf of four Justices is the most comprehensive and prominent exposition yet of how the concept of a judicial taking might work in practice.

***Stop the Beach* was expected to be the case to recognize a theory of “judicial takings.”**

The petition for certiorari in *Stop the Beach* was premised on the idea that the Florida Supreme Court had changed the rules of Florida property law in a way that deprived the petitioners of their property rights. The petitioners were waterfront property owners who argued that a state program to restore eroded beaches violated their constitutional rights by altering their property boundaries and depriving them of their right

to have their property contact the water. The Florida Supreme Court rejected the petitioners’ challenge, holding that they never had the right to have their property contact the water in the first place. Petitioners argued that this ruling was contrary to decades of Florida precedent. Essentially, the Florida Supreme Court deprived the petitioners of their property right to contact with the water by declaring, retroactively that it never existed. This, the petitioners argued, ran afoul of the constitutional guarantee under the Fifth and Fourteenth Amendments that private property shall not “be taken for public use, without just compensation.” Although a court decision is different from a typical exercise of the state’s power of eminent domain, the petitioners asserted that their property rights were no less “taken” because the taking was at the hands of a court, as opposed to the legislature or the executive.

Given the premise of the petition, *Stop the Beach* seemed like a prime opportunity for the Supreme Court to decide whether and under what circumstances a court could commit a “taking.” The notion of a “judicial taking” had never been directly recognized by the Supreme Court, but neither had it been ruled out. Although there was some case law recognizing that the Constitution may be violated where a property owner alleges a taking and a state court holds that no property right existed in the first place, *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42–43 (1944); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930); *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651, 654 (1927), other cases appeared to recognize the ability of state courts to make erroneous decisions in property disputes and to overrule prior precedent without necessarily causing a taking. See, e.g., *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930); *Patterson v. People*, 205 U.S. 454, 461 (1907); *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570–71 (1905).

The concept of a judicial taking was unsettled at best and survived primarily in lower court opinions, scholarly articles, *dicta* in Supreme Court opinions, and two single-Justice opinions. In 1967, Justice Stewart wrote a concurring opinion in which he indicated that states were generally free to make

changes in the rules of property law without running afoul of the Constitution. Where, however, a state court made a “sudden change in state law unpredictable in terms of the relevant precedents,” that dispossessed an owner of property rights, Justice Stewart opined that a taking had occurred *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). In 1994, Justice Scalia likewise wrote a dissent from denial of certiorari, citing Justice Stewart’s opinion and arguing that where a state court makes up fictional rules of property law to dispossess an owner of property, the court has committed a taking *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334–35 (1994) (Scalia, J., dissenting from denial of certiorari). While Justice Stewart’s and Justice Scalia’s opinions contained the beginnings of a theory of judicial takings, they raised as many questions as they answered. For example, does a court commit a taking, implicating the federal Constitution, every time it makes an incorrect decision in a dispute over property? What is the remedy for a judicial taking? When the executive or legislature of a state takes property for public use, it can be required to pay just compensation out of the state treasury; can a court be made to do the same?

Justice Stewart’s and Justice Scalia’s opinions seemed to leave the door open for the Supreme Court to recognize a “judicial taking” and to answer the above questions if the right case came along. And the petitioners in *Stop the Beach* insisted that theirs was such a case, going so far as to include in their appendix a list of fourteen certiorari petitions from 1987 to 2005 that presented the “judicial taking” issue but that the Court had denied. When the Court granted certiorari, it was thus widely anticipated that it would take the opportunity to clarify the status and effect of the “judicial takings” doctrine.

As a result, it was likely a disappointment to property rights advocates when the Court resolved the case on purely state law grounds, denying the premise of the certiorari petition and holding that the Florida Supreme Court’s decision was reasonable and supported by Florida precedent. Nonetheless, despite the fact that the Court decided *Stop the Beach* on this alternative basis and without a majority opinion, the decision is still

a step forward for proponents of the judicial takings theory and for property rights advocates in general.

Justice Scalia’s plurality opinion develops the doctrinal framework for a theory of judicial takings and resolves the most obvious practical concerns.

Justice Scalia’s plurality opinion, joined by three other Justices, provides a powerful foundation for recognition of the theory of judicial takings. Section II of the opinion provides the doctrinal underpinnings of a theory of judicial takings. First, as Justice Scalia observed, the Court’s precedents recognize that a “taking” is not limited to direct transfers of property through eminent domain but includes other types of destruction of private property including regulatory takings. Second, the Takings Clause is not textually limited to any specific branch or instrumentality but instead states in the passive voice, “nor shall private property be taken.” Third, to the extent the Court’s precedents have anything to say about whether takings by the judicial branch should be entitled to special treatment, they suggest the contrary. *See Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 78–79 (1980) (addressing contention that the appellants’ property rights had been taken “by judicial reconstruction of a State’s laws of private property” by applying standard Takings Clause analysis); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (stating in what was arguably dictum 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 property as public).

In response to the concurring opinions of Justices Kennedy and Breyer, Justice Scalia’s plurality opinion also addresses the most obvious practical questions raised by the judicial takings theory: the remedy and the standard. The opinion states that the remedy for a judicial taking presented in the same procedural posture as *Stop the Beach* would be simply to reverse the decision that caused the taking. “The power to effect a *compensated* taking,” the plurality explained, “would then reside, where it has always resided, not in the Florida Supreme Court but in the Florida

Legislature—which could either provide compensation or acquiesce in the invalidity of the offending features of the Act.” *Stop the Beach*, 130 S. Ct. at 2607.

Justice Scalia’s opinion also resolves the proper standard for a judicial taking. The petitioners had cited language from Justice Stewart’s concurring opinion in *Hughes* and argued that the focus should be on whether the decision was “a sudden change in state law, unpredictable in terms of relevant precedents.” *Id.* at 2610. That test was consistent with language in other opinions suggesting that what the Takings Clause protects is an owner’s reasonable investment-backed expectations in his property. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034–35 (1992) (Kennedy, J., concurring) (citing cases). It was also consistent with lower court opinions that had relied on Justice Stewart’s concurring opinion. *See, e.g., Robinson v. Ariyoshi*, 753 F.2d 1468, 1471 (9th Cir. 1985) (“[T]he main question [is: c]an the state, by a judicial decision which creates a major change in property law, divest property interests?”). Deciding whether a lower court’s decision is “predictable,” however, has obvious problems, and the *Stop the Beach* plurality rejected it as being both overinclusive and underinclusive. Instead, Justice Scalia explained, the test should be whether the state court has deprived someone of an *established* property right. “A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.” 130 S. Ct. at 2608 n.9. The state respondents argued that federal courts lack the competence to second-guess a state court’s decision on property law, but the plurality responded that federal courts often decide what state property rights exist in nontakings contexts, and that the test the plurality proposed had some degree of deference built in.

While Justice Scalia’s plurality opinion fell one crucial vote short of commanding a majority it made significant steps forward in developing the theory of judicial takings, and the concurring opinions of Justices Kennedy and Breyer are remarkable for their lack of substantive disagreement with Justice Scalia’s analysis. Aside from a few pragmatic considerations to which

Justice Scalia has a ready answer, Justices Kennedy and Breyer offer no reasons *not* to recognize a judicial taking doctrine.

Justice Kennedy’s concurring opinion agrees that the Constitution places some limits on the ability of courts to deprive people of property, and does not contradict Justice Scalia’s plurality opinion.

Justice Kennedy’s opinion, for himself and Justice Sotomayor, does not contradict the takings analysis in the plurality opinion. And it recognizes, in less forceful terms than the plurality that the Constitution limits the power of courts to deprive owners of their property. The main point of Justice Kennedy’s opinion, however, is that the Due Process Clause is a more natural fit than the Takings Clause. “The Due Process Clause,” Justice Kennedy explained, “is a central limitation upon the exercise of judicial power” *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy J., concurring). And “[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law” *Id.*

Justice Kennedy agreed that “[t]he Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom.” *Id.* at 2613. However, he suggested that there were “certain difficulties” with applying the Takings Clause to the judicial branch and declined to “reach beyond the necessities of the case to recognize a judicial takings doctrine.” *Id.* at 2615.

Justice Breyer’s concurring opinion avoids the debate altogether.

Finally, Justice Breyer’s opinion, in which Justice Ginsburg joined, avoids the constitutional questions altogether, primarily out of concern that recognizing a judicial takings doctrine would invite a flood of claims: “[I]f we were to express our views on these questions, we would invite a host of federal takings claims without the mature consideration of potential procedural or

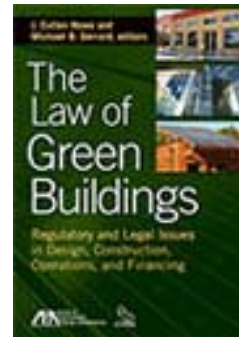
substantive legal principles that might limit federal interference in matters that are primarily the subject of state law.” *Stop the Beach*, 130 S. Ct. at 2618–19 (Breyer, J., concurring). Justice Breyer expressed no opinion at all on the reasoning and conclusions of Justice Scalia’s plurality opinion, and it is unclear why the pragmatic concerns he identified in his separate opinion should prevent a federal court from hearing claims from people who have been deprived of their constitutional rights. *Id.* at 2618 (“I do not claim that all of these conclusions are unsound. I do not know”). After all, such alleged practical concerns cannot override clear textual commands found in the Constitution.

Conclusion

While *Stop the Beach* is surely a disappointment to the petitioners and did not bring property advocates everything it might have, the decision should be regarded as a step forward for constitutional protections of property rights. Six Justices on the current Court agree that the Constitution places limits on the ability of courts to deprive people of their property, though the nature and details of those limits have been left for another day. Moreover, Justice Scalia’s plurality opinion has brought the concept of a judicial taking out of the shadows and into the spotlight without any contradiction from his colleagues, thus opening the door wider than ever before for full recognition of that theory. Property rights advocates should celebrate those gains.

Douglas G. Smith is a partner at Kirkland & Ellis LLP. **William H. Burgess** is an associate at Kirkland & Ellis LLP. The authors filed an amicus brief in *Stop the Beach Renourishment* in support of the petitioners. This article reflects the authors’ views alone and not necessarily those of Kirkland & Ellis LLP or its clients.

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The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing

J. Cullen Howe and Michael B. Gerrard, editors

Buildings and the built environment use vast amounts of energy and other resources in construction, operation, and demolition. In 2009, the residential and commercial building sector was responsible for more than 50 percent of total annual U.S. energy consumption and 74 percent of total U.S. electricity consumption. Beyond that, buildings are responsible for significant amounts of greenhouse gas emissions and air pollutants, while the materials in them can “offgas” and contribute to indoor air pollution. Green buildings use land and energy efficiently, conserve water, improve indoor and outdoor air quality, and increase the use of recycled materials. They can also lead to reduced operating costs, offering a better return on investment and overall building value.

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WHAT DID YOU EXPECT FROM SWAMP SALES, A HAPPY ENDING?

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I. Background

On June 17, 2010, the U.S. Supreme Court issued its opinion in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 540 U.S. —, 130 S. Ct. 2592 (June 17, 2010) (*STBR*). *STBR* reviewed the Florida Supreme Court opinion in *Walton County v. Stop the Beach Renourishment*, 998 So.2d 1102 (Fla. 2008) (*Walton County*). The Florida Supreme Court held that Chapter 161, Florida Statutes, which fixes a waterfront boundary line after a public beach renourishment project to replace the ambulatory mean high water line that normally defines littoral property boundaries along the Gulf of Mexico, did not constitute a facial taking of private Gulf-front property. The new boundary would be set where the eroded beach previously met the water and the new fill would separate the formerly waterfront parcel from the Gulf of Mexico. The majority Florida Supreme Court opinion was made over vehement dissents by Justices Lewis and Wells, who urged that riparian and littoral rights carried rights of contact with the adjacent navigable waters. Both of the dissents are found at 998 So.2d at 1121.

On appeal to the U.S. Supreme Court, *STBR* principally addressed two issues. The first one concerned a significant eminent domain question: Can a court be liable for a taking of private property rights? The law clearly establishes liability against legislative and executive branches for takings of property. The *STBR* Court did not have a majority who determined that the judicial branch can be liable for a taking. Nonetheless, Justice Scalia wrote for a four-Justice plurality, which also included Justices Thomas, Alito, and Roberts, that concluded there was no reason to treat the judicial branch differently from the other two. Even if its opinion is not binding, the plurality thus showed a willingness to entertain such claims. Further Justice Scalia made it clear he was willing to push hard to convince a future fifth Justice to follow suit, creating a majority ruling.

This article focuses on the second issue: Did Florida's creation of a fixed statutorily authorized "erosion control line" (ECL) that replaces the normal property boundary, the ambulatory mean high water line (MHWL) along the Gulf of Mexico or Atlantic Ocean, constitute a compensable taking of property rights of Gulf or oceanfront property owners? This issue arises regardless of whether the act itself constitutes the taking or the Florida Supreme Court's holding is the taking. In particular, this article explores the historical context of the Florida Supreme Court decision that Justice Scalia emphasized in finding that no taking occurred.

Under Chapter 161, Florida Statutes, when a government conducts beach renourishment, the resulting waterward boundary of the formerly beachfront parcel becomes the ECL. The ECL is supposed to be located where the parcel met the ocean or Gulf before the new sand was deposited.

In *Walton County* and *STBR*, private property owners argued that *Board of Trustees v. Sand Key Associates*, 512 So.2d 934 (Fla. 1987), controlled. A majority of the Florida Supreme Court in *Sand Key* held that sand deposits accreting onto Gulf-front parcels vested in the property owner as long as third parties' activities led to the fill. In contrast, government and public interest representatives argued the language in *Sand Key* was *dicta*. Those interests said that *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927) (*Martin*), controlled. In his opinion in *STBR*, Justice Scalia noted:

In *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lake bed belonging to the State, causing land that was formerly below the mean high water line [sic] to become dry land, that land continued to belong to the State.

Stop the Beach Renourishment, 130 S. Ct. at 2611 (citing *Martin v. Busch*, 93 Fla. at 578, 112 So. at 287).

Initially, Justice Scalia's reference to the mean high water line is legally wrong. The mean high water line separates private uplands from submerged lands

underlying tidally influenced waters. Boundary lines between private and public property in Florida along the Gulf of Mexico, which was what was at issue in *STBR*, are defined by the MHWL. Lake Okeechobee, the subject of *Martin*, is a non-tidally influenced water body, where the ordinary highwater line, or OHWL, is the sovereign boundary. *Martin* itself cites to the OHWL of the lake. 112 So. at 283. See generally S. Ansbacher and J. Knetsch, *The Public Trust Doctrine and Sovereignty Lands in Florida: A Legal and Historical Analysis*, 4 FLA. ST. U.J. LAND USE & ENVTL. L. 337 (1989) (discussing the differences between MHWL and OHWL at length).

The U.S. Supreme Court first accepted the MHWL as the sovereign boundary of tidewaters in *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935). The MHWL is determined by a 19-year lunar cycle, which obviously cannot apply to non-tidally influenced waters. See *id.* at 23–24, n.2 & accompanying text (explicating the relationship between lunar cycles and the tides). *Borax* used an 18.6-year cycle, but the modern Florida determination is 19 years. Subsections 177.27(14) and (15), Fla. Stat., of the Florida Coastal Mapping Act define the “mean high water line” as the sovereign boundary based on the average “over a 19-year period.” *Id.* at (14).

Justice Curtis’s concurrence in *Howard v. Ingersoll*, 54 U.S. 381, 414 (1851), is the most commonly cited test for determining the OHWL as the boundary of navigable non-tidal waters. He said one should use soil and vegetation analysis. The Supreme Court expounded on the use of the OHWL to explain the expansion of navigable waters from those determined by common law in *Barney v. Keokuk*, 94 U.S. 324 (1876). Under English common law only tidewaters were navigable for purposes of public ownership. Conversely, “[i]n this country as a general thing, all waters are deemed navigable which are really so” *Id.* at 325. Coincidentally the *Martin* Court noted the difficulty of determining OHWL in flat and marshy central and southern Florida. *Martin v. Busch*, 93 Fla. at 564, 112 So. at 283–84.

II. *Martin v. Busch*

The U.S. Supreme Court was vexed by *Martin*. The Justices puzzled at oral argument why the Florida Supreme Court in *Walton County* had not mentioned,

let alone relied upon, this opinion. Multiple Justices asked the advocates why that was so if *Martin* appeared to support the Florida Supreme Court decision. Transcript of Oral Argument (Dec. 2, 2009), at 27 (J. Scalia); 56 (J. Kennedy). No one directly answered this question.

One can only guess why the Florida Supreme Court did not discuss *Martin*. Nonetheless, the Florida Supreme Court majority in *Sand Key* held that *Martin* did not even address accretion or reliction. Rather the majority concluded that *Martin*’s sole issue was a boundary dispute. The parties in *Martin* were arguing over which survey should be used to identify the ordinary high water mark. *Sand Key*, 512 So.2d at 939. The opinion in *Sand Key* stated that any language concerning reliction or accretion in *Martin* is *dicta*. *Id.* at 940. Just to be straightforward, Justice Ehrlich wrote a spirited dissent in *Sand Key*. He said that *Martin* held exactly as Justice Scalia ultimately concluded it did. 512 So. 2d at 941–47 (Ehrlich, J., diss.). Nonetheless, *Sand Key* appeared to be the settled Florida law until *Walton County*.

More to the point, *Martin* addressed a unique set of circumstances. No one acquiring “Swamp and Overflowed Lands” along the shore of Lake Okeechobee in the early 20th century had any reasonable expectation of rights to develop waterward of their parcels. One must ferret through a lot of Florida swampland history to understand this point.

The lands in *Martin* lay alongside the southern shore of Lake Okeechobee. This massive lake was formed some 6000 years ago. See Florida Department of Environmental Protection (FDEP): *Brief History of Lake Okeechobee* (last updated: Feb. 11, 2009), http://www.dep.state.fl.us/evergladesforever/about/lakeo_history.htm. While it served for a millennium as a primary source of water to the Everglades, various developers and state agencies commenced large-scale drainage and channelization of the lake in the 1880s. *Id.*

The drainage was part of a regional “improvement” policy directed at reclaiming the Everglades. Florida became a state on March 3, 1845, and immediately became the subject of drainage plans. The first state legislature passed a resolution that allowed Florida’s congressional delegation to ask Congress to authorize

a survey of the Everglades. This was aimed at determining the value and viability of mass-scale drainage for reclamation. Acts and Resolutions of the First General Assembly of the State of Florida 151 (1845). U.S. Senator James D. Westcott from Florida pushed the Treasury Department to requisition the survey.

The federal government in 1847 appointed surveyor Buckingham Smith to inspect the lake and the Everglades for possible public works. See J.E. Dovell, *A History of the Everglades in Florida* (unpublished Ph.D. dissertation, University of North Carolina-Chapel Hill) (1947) (Dovell), http://sofia.usgs.gov/memorials/dovell/flhistsoc_glades_dovell.txt. While many had surmised the connection, Smith's report was the first official document to confirm that the lake was the primary source of waters that flow into the Everglades. U.S. Senate Doc. No. 242, 30th Cong., 1st Sess., at 16–17. Smith famously concluded:

The Ever Glades are now suitable only for the haunt of noxious vermin or the resort of pestilent reptiles. The statesman whose exertions shall cause the millions of acres they contain, now worse than worthless, to teem with the products of agricultural industry; that man who thus adds to the resources of his country . . . will merit a high place in public favor, not only with his own generation, but with posterity. He will have created a State!

Id. at 34.

Smith's report included a letter from Colonel Robert Butler, who was the U.S. Surveyor General for Florida. Colonel Butler recommended that the federal government convey the Everglades to Florida. He emphasized that the region was inland (not true) and lacked navigable rivers. He concluded that federal reclamation would therefore interfere with Florida sovereignty. Conveyance to the new state would facilitate habitation and agriculture. Dovell, *supra* at n.22 and accompanying text (citing Doc. No. 242, at 155). Drainage of the lake and its tributaries was central to Smith's proposal:

To reclaim the Ever Glades . . . and the low lands on the margin of the Kissimmee River and its

tributaries, and other rivers emptying into Lake Okeechobee, this lake must be tapped with such canals running into the Caloosahatchee on the one side, and into the Locahatchee or San Lucia, or both on the other; and cuts must also be made from the streams on both sides of the peninsula into the Glades.

Doc. No. 242, at 16.

Florida Senator Westcott, who had initiated Smith's work, moved quickly to implement the report. He introduced Senate Bill 338 in 1848, to give Florida "all of the lands, lakes and watercourses held by the United States south of Township 36 South [which crossed the state approximately one government survey Township north of the lake's north shore], through the islands or keys adjacent to the coast and north of Cape Sable." *Id.* Senator Westcott's bill required all drainage to begin by 1852, and to be done by 1862. Additionally, it required that all proceeds from land sales must go to reclamation projects as long as drainage works were required to implement the project. *Id.*

The Westcott bill went before the Committee on Public Lands. "The Committee looked with favor on the fact that if the proposed improvements were carried out, the United States would derive pecuniary benefit, at no expense, in the bottom lands of the Kissimmee River and its tributaries which were that [sic] valueless by reason of their annual overflowed condition." Dovell, *supra*, <http://sofia.usgs.gov/memorials/dovell/thesis/ChapterIII.txt>.

Florida junior Senator David Yulee objected to the geographic limitation from Range 36 South southward. He noted that a similar proposal related to Arkansas would convey all wetlands to that state. He asked for Westcott to extend his bill's grant to all wetlands in Florida. Dovell, *supra* at n.39 & accompanying text. While this request resulted initially in an impasse Yulee won out. The 1850 Congress passed the Swamp and Overflowed Lands Act, which President Fillmore signed into law on September 28, 1850 Act of Sept. 28, 1850, ch. 84, 9 Stat. 519 (codified at 43 U.S.C. §§ 982–84). The act covered swamp and overflowed

lands in twelve public domain states (Louisiana, the 13th public domain state, was the sole subject of an 1849 act). Florida received almost one-third of all swamp and overflowed lands ever conveyed by Congress—20,325,013 out of 64,895,415 acres.

The 1850 federal act states in pertinent part that “[t]he proceeds of said lands, whether from sale or by direct application in kind, shall be applied exclusively as far as necessary, to the reclaiming [of such lands by means of levees and drains].” Dovell, *supra* at 347 n.79 & accompanying text (quoting 43 U.S.C. § 983). In *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861 (1940), the Florida Supreme Court concluded the state could convey swamp and overflowed lands only when in the perceived statutory public interest to dike and drain.

The clear intent of the 1850 act, together with similar acts in 1849 and 1860, was to dike and drain. The federal Bureau of Land Management’s surveying manual addresses the determination of the Swamp and Overflowed Lands Act:

In *San Francisco Savings Union et al. v. Irwin*, 28 Fed. 708 (1886), aff. *Irwin v. San Francisco Savings Union, et al.*, 136 U.S. 578 (1890), the court stated: “The act of 1850 grants swamp and overflowed lands. Swamp lands as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and to render them suitable for cultivation.”

Bureau of Land Management (BLM), *Manual of Surveying Instructions* at para. 7-95 (1973), http://www.blm.gov/cadastral/Manual/73man/id286_m.htm. The U.S. Geological Survey (USGS) amplifies the several swamp and overflowed acts’ goals:

The sentiment in Congress during the middle of the 19th Century was that public domain had little value until it became settled, thereby ceasing to be public domain. Wetlands were actually considered a menace and hindrance to land development.

The original purpose of the grants was to enable the States to reclaim their wetlands by the construction of levees and drains. The States were supposed to carry out a program of reclamation that not only would lessen destruction caused by extensive inundations but would also eliminate mosquito-breeding swamps.

USGS: Northern Prairie Wildlife Research Center, *Wetlands of the United States: Their Extent and Their Value to Waterflow and Other Wildlife; A Century of Wetland Exploration*, <http://www.npwrc.usgs.gov/resource/wetlands/uswetlan/century.htm>.

Florida prepared for the swamp and overflowed lands conveyance for two years. The Florida Senate Committee on Internal Improvements issued a report on November 24, 1848:

The committee expressed the belief that from all opinion available, there appeared to be little doubt that the Everglades could be drained. This drainage would render the region valuable, but *the committee favored the introduction of private enterprise*, and could not consent to involve the state in the expense, especially when there was some uncertainty of the success of the undertaking.

Dovell at n.42 and accompanying text (emphasis added). Florida accepted the Swamp and Overflowed Lands grant in the 1850 Florida legislative session. The legislature created the Florida Board of Improvement, with state executive officers acting ex officio as members, together with one voting member for each judicial district in the state. Dovell at n.43 & accompanying text. The 1855 legislature revised the board, whose voting members or “trustees,” were the governor, comptroller, treasurer, attorney general, and state lands registrar. *Id.*

The 1855 act authorized the trustees to fix the sales price for swamp and overflowed lands to facilitate their drainage “*as in their judgment appeared most advantageous to the Internal Improvement Fund and to the settlement and cultivation of the lands.*” *Id.* (emphasis added) The act further authorized grants to

Florida corporations that operated railroads or canals. The state told Congress that the swamp and overflowed lands would be conveyed under the public trust for the following purposes:

[I]n the direction of drainage and reclamation of the lands, but [they] may be divided as to the means by which that end is to be accomplished into three [parts]

1. Internal Improvement by railroads and canals;
2. drainage devoted immediately to that purpose;
3. encouragement of actual settlement . . . by allowing preemption.

Id. at n.46 & accompanying text (quoting Letter of the Trustees of the Internal Improvement Fund to the U.S. Senate Sub-Committee of the Committee on Public Lands, I.T.B. Minutes, III, 508). The Florida Legislature focused the internal improvement system on the conversion of the swamp and overflowed lands *Id.* at n.47 & accompanying text (citing Report of the Joint Commission Created by the Legislature of 1907 to Investigate the Acts and Doings of the Trustees of the Internal Improvement Fund, 33).

The Seminole Wars and then the Civil War delayed drainage plans until 1866. Immediately after the war applications flooded in for acquisition for drainage. On April 6, 1866, William H. Gleason obtained trustees' approval to purchase 640-acre (a government section) tracts, at the rate of \$40 per section. The trustees would convey one section for every 50,000 cubic feet of ditch or drain he excavated. Dovell, http://sofia.usgs.gov/memorials/dovell/fhistoric_glades_dovell.txt. Other purchasers contracted with the trustees to "drain and reclaim lands adjacent to the Caloosahatchee and Kissimmee rivers as well as Lake Okeechobee and any or all tributary areas." *Id.* The contractors would receive half of all lands reclaimed if they began work within one year and completed the task within seven years. Dovell at n.147 & accompanying text.

Nonetheless, most of Florida railroad and canal companies' value plummeted because of their reliance on Confederate currency, adding to the impacts of structural damages from the war itself. *Comprehensive*

Everglades Restoration Plan (CERP): Development of the Central & South Florida (C&SF) Project, http://www.evergladesplan.org/about/restudy_csf_devel.aspx. The trustees were unable to do much because they faced angry bondholders of the transportation companies. They tried to raise funds by selling at increasingly fire sale prices *Id.*

The trustees' funds were ultimately placed with a federal receiver. Most of the trust's income during this period went to pay off compound interest and litigation. They sought a private savior *Id.*

Enter Hamilton Disston. In return for purchase of a massive swath of Florida, he agreed to conduct wide-scale public improvements. The first project in 1882 dredged a canal to connect the lake with the Caloosahatchee River, and on to the Gulf of Mexico. *Id.* This dropped the lake's water level substantially *Id.* He built multiple other major canals in the area, which opened Central Florida for steamboats *Id.* While Disston's holdings dissipated upon his death in 1896, he had made his mark.

By the 1880s, the Governor and Cabinet of Florida, acting as the Board of Trustees of the Internal Improvement (now Trust) Fund, focused Florida development on drainage and land reclamation. In 1881 alone, they sold some 4 million acres into private ownership for reclamation. The trustees conveyed about 2,780,000 acres to private companies as a premium for waterway development. Sansbacher and J. Knetsch, *Negotiating the Maze: Tracing Historical Title Claims in Spanish Land Grants and Swamp and Overflowed Lands Act*, 17 FLA. ST. U.J. LAND USE & ENVTL. L. 351, 356 (2002). The Florida legislature passed various "ditch and drain laws between 1893 and 1901 that authorized the State and counties to build drains, ditches and watercourses to reclaim lands." *Id.* at 357.

This is the context in which the State of Florida first conveyed Busch's lands into private lands, via the Henderson deed, or Everglades Patent No. 137, on April 29, 1903. Of additional significance, the patent issued to Busch's predecessor stated the state conveyance "was authorized by the Swamp Grant Act of September 28, 1850." Answer of the State in

Martin, quoted in *Martin v. Busch*, 93 Fla. at 545, 112 So. at 278. The state received lands under the 1850 federal act, which was more commonly known as the Swamp and Overflowed Lands Act, with a public trust duty to “reclaim and facilitate the development of swamp and overflowed lands.” S. Ansbacher and J. Knetsch *The Public Trust Doctrine and Sovereign Land in Florida: A Legal and Historical Analysis*, 4 FLA. ST. U.J. LAND USE & ENVTL. L. 337, nn.5, 6 & accompanying text (1989).

One need only examine the language of the original Henderson Swamp and Overflowed patent to understand that purchasers from the state had actual notice that the dike and drain obligations severely impaired their reasonable, investment-backed expectations. The State Board of Trustees of the Internal Improvement Fund conveyed these lands to John W. Henderson and others, as heirs of John A. Henderson. The deed resolved a dispute between the trustees and their land agent, John A. Henderson, which was “prejudicial to the practical application of the swamp and overflowed lands to the purpose of drainage, reclamation, and internal improvements by the Board.” *Martin v. Busch*, 112 So. at 274 (quoting Henderson deed). In pertinent part, the patent stated:

And the [grantees’ father] indicated to the Board he would accept an area of said swamp and overflowed lands that are unsurveyed and contiguous, and that are in estimated acreage of less area than the acreage he would be entitled to, even at the present prices of one dollar per acre, as compensation in full for his account for services as agent to date, thus eliminating all questions arising therefrom and embarrassing to the further application of the lands to the purpose of the act of Internal Improvement. The lands thus to be taken are embraced between the line of existing surveys and the margins of the Okeechobee and tributaries, and are more particularly described by what would be the projections of the existing lines of survey as follows: ***

TO HAVE AND TO HOLD the above granted and described premises unto the said parties of the second part, their heirs and assigns forever

SAVING AND RESERVING unto the said, the Trustees of the Internal Improvement Fund of the State of Florida, and their successors, the right at any time to enter upon the said land and make or cause to be made and constructed thereon such canals, cuts, sluiceways, dikes and other work as may, in the judgment of the said Trustees, or their successors, be necessary and needful for the drainage and reclamation of any of the lands granted to the State of Florida by Act of Congress, approved September 28th, 1850, and to take from the said lands hereby conveyed, and to use such gravel, stone or earth as may in the judgment of the said Trustees, or their successors, be necessary to use in the making and construction of said canals, cuts, sluiceways, dikes and other works upon said lands for the purposes aforesaid.

The Hendersons conveyed to Busch on October 20, 1914. Obviously, though, the Hendersons could not convey to Busch any greater interest than they received, nor could they convey free of the statutory and deed restrictions in favor of the trustees. Justice Whitfield’s opinion emphasized that the trustees had no authority to convey sovereign lands, when they deeded the Henderson patent in 1904. The trustees only held such authority once the legislature granted them the powers under Chapters 7861 and 7891 Acts of 1919.

III. The 1926 “Great Miami Hurricane”

The Busch interests in *Martin* emphasized the Hendersons’ and their own roles in developing both their parcel and the town of Moore Haven where the parcel was located. Moore Haven lay alongside the southwestern corner of Lake Okeechobee. While Henderson and Busch might have helped to develop Moore Haven, their timing was most unfortunate. *Martin* was issued right after Moore Haven was virtually wiped off the map by the 1926 Great Miami Hurricane. While this article focuses on the 1926 storm, the Lake Okeechobee hurricane of 1928, the year following *Martin*, killed thousands and dealt the town a quick second blow from which it never really recovered. National Weather Service, Memorial Web Page for the 1928 Okeechobee Hurricane, <http://www.srh.noaa.gov/mfl/?n=okeechobee>.

A modern critique of James O.Wright, who was the principal 20th-century government engineer who supported drainage development in the Everglades, summed up the impact of the two storms:

[P]ioneers blamed the disaster on state drainage officials; Florida's chief drainage engineer (Fred C. Elliot) blamed God. Although the federal government built a dike around most of Lake Okeechobee during the 1930s, the Everglades Drainage District declared bankruptcy on New Year's Day 1931, and as a consequence, no additional reclamation work of any significance was attempted until 1949. After decades of promotion and settlement, most of the Everglades remained uninhabited.

C.F. Meindl, et al., *On the Importance of Environmental Claims Making: The Role of James O. Wright in Promoting the Drainage of Florida's Everglades in the Early Twentieth Century*, 92 ANNALS ASS'N AM. GEOGRAPHERS 682, 697 (2002) (citations omitted) (emphasis added).

Precious little flood protection separated Moore Haven and the lake before the 1926 storm. The developers of Moore Haven constructed a muck levee of between five and nine feet high alongside the lake. R. Post, *Reassessing the Impact of Two Historical Florida Hurricanes*, AM. METEOROLOGICAL SOC., Oct. 2003, at 1367, 1369. The principal purpose of the levee was to act as part of the ditch and drain system, rather than to protect the area residents and property from flooding. A.J. Mitchell, *Lake Okeechobee and Safety from Tropical Storms*, MONTHLY WEATHER REV., Jan. 1933, at 13, 14. The levee failed catastrophically when it was most needed for the latter function.

One must remember that the Florida Supreme Court issued *Martin* on March 15, 1927. Six months previous, on September 18, 1926, the "Great Miami Hurricane" slammed ashore, causing apocalyptic damage to Miami and Miami Beach, before cutting across the Florida peninsula, and virtually eradicating the town of Moore Haven from the southern shore of Lake Okeechobee. As noted above, Busch's parcel lay in Moore Haven. "[Busch] and his predecessors in

title developed and improvement [sic] the same at large expense, and . . . platted and laid off [Moore Haven] . . . , which said map embraces and includes that part of the [Busch parcel] . . ." Busch complaint, quoted in *Martin*, 93 Fla. at 543, 112 So. at 277. A 1933 article by an official in the Jacksonville office of the Weather Bureau stated that the barometer reading of 27.61 in Miami was the lowest ever recorded at that time in the United States, and scarcely above the then-world record of 27.02. The storm remained massive and overwhelming by the time it smashed into Moore Haven Mitchell, *Lake Okeechobee and Safety from Tropical Storms*, *supra* at 13, 14. Mitchell's account of the 1926 storm might be hyperbolic, but it is instructive:

The dwellers on Lake Okeechobee may have been cognizant of the fact that high water was possible under a concert of conditions, but the possibility of a disaster on this erstwhile tranquil lake had never been suggested.

Metaphysically, the hurricane is the monarch of the air; like a thing of life it marches with measured tread over land and sea; it grants no favors, but it exacts terrible tribute.

It was this knowledge and the coincidental occurrence of high water on Lake Okeechobee and the Miami hurricane of 1926 with the sequence of a major tragedy at Moore Haven and Miami, which brought to the attention of all concerned the necessity for greater protection of human life and property against the almost irresistible powers of wind and water

* * *

It was the high water together with the severe wave action that washed away much of the levees in the vicinity of Moore Haven during the storm of 1926, the same having been provided to protect, rather than to prevent the lake overflow onto the Everglades; the levees were not constructed with the viewpoint of life protection, as the same, probably, had never received consideration from any source. This, however, is no criticism of those who directed activities on the lake, as their ability

was unquestioned and their vision as to the occurrence of untoward events was as reliable as were the teachings of history relating to Lake Okeechobee and associated waters.

Id. Mitchell reminds us that the lowered waters that led to Busch's claim had risen again by the 1926 storm. Prior to drainage, the lake elevation was 21 to 22 feet above the Gulf, but dropped to 17 to 19 feet after the drainage work. *Id.* at 13. The deepest part of the lake was ordinarily about 15 feet deep after the drainage. The elevation was 18 feet before the storm, and crested at 19.8 feet. *Id.* at 14. Since the deepest water was 15 feet when the elevation was at 15, *id.* at 13, the depth was likely close to 20 feet when the 1926 storm hit. The lake waters were almost as high when the hurricane slammed Moore Haven as they were before the massive dike and drain process. They had nowhere to go except by sheetflow. Mitchell was right; muck levees would not hold back all that water.

The storm swept over and through the muck levees, causing utter ruin to the little town where the Busch parcel lay. Floodwaters remained in Moore Haven for many weeks after the storm. National Weather Service, Memorial Web Page for the 1926 Great Miami Hurricane, <http://www.srh.noaa.gov/mfl/?n=miamihurricane1926> (NWS Memorial). The great lake almost certainly remained overlying much of the disputed parcel when the Court issued its opinion six months after the storm passed. A newspaper memorial in 1993 emphasized the enormity of destruction:

[T]he hurricane thundered across the Everglades northwest to Okeechobee. Its winds whipped the waters of the lake against a flimsy muck dike. The levee gave way near the little town of Moore Haven on the southwest shore of the lake. Without warning a wall of water nearly 15 feet high poured into the town. Buildings were torn from their pilings.

"We saw the Methodist Church float by" recalled one spectator.

How many drowned in the little town of 900 was not known, though the toll may have been as high as 300. *Moore Haven remained under water for eight weeks.*

S. McIver, *1926 Miami: The Blow That Broke the Boom*, SUN SENTINEL, Sept. 19, 1993 (emphasis added).

The massive scale damage of the 1926 storm on Miami, and the resulting ruin of Florida's economy, had to weigh on the *Martin* court as well. The hurricane "ended the economic boom in South Florida." *Living and Working in South Florida-Hurricane Preparedness (History)*, http://www.southcom.mil/usag-miami/sites/hurricane/hurricane_history.asp. See McIver, *1926 Miami: The Blow That Broke the Boom*, *supra* (storm finished off an already reeling Florida boom). Damages in 1926 dollars totaled an estimated \$105 million. NWS Memorial, *supra*. A detailed analysis of the costs of hurricanes in the United States from 1900 through 2005 determined that the Great Miami Hurricane was the most costly storm in Florida's history, with \$140-\$157 billion of damage "normalized" in equivalent 2005 dollars. R. PELKE, ET AL., *NORMALIZED HURRICANE DAMAGES IN THE UNITED STATES: 1900-2005*, at 2, 29, 39. That study concluded: "A simple extrapolation of the current trend of doubling losses every 10 years suggests that a storm like the 1926 Great Miami Hurricane could result in perhaps \$500 billion in damage as soon as the 2020s." *Id.* at 19. No Florida court in the spring of 1927 could have ignored the crushing impact on Moore Haven and the whole state just six months before.

IV. MARTIN'S LEGAL CONTEXT PRIOR TO *STBR*

A later decision by the Florida Second District Court of Appeal puts *Martin* into context. *Padgett v. Central and Southern Florida Flood Control Dist.*, 178 So. 2d 900 (Fla. 2d DCA 1965), concerned a declaratory and damages action over whether the flood control district's construction of a levee on the shore of Lake Okeechobee was a taking of any property rights of the Padgetts. The levee did not lie on the Padgett's land, but it lay on former, subsequently drained lake bottom between the private parcel and the then-current waters of the lake. The levee obstructed the Padgett's view of and access to the lake.

The Padgett's predecessors took title by a deed that paralleled the Henderson deed:

SAVING AND RESERVING unto the said, The Trustees of the Internal Improvement Fund of the State of Florida, and their successors, the right at any time to enter upon the said lands and make or cause to be made and constructed thereon such canals, cuts, sluice-ways, dikes and other works as may in the judgment of the said Trustees, or their successors, be necessary and needful for the drainage or reclamation of any of the lands granted to the State of Florida, by Act of Congress, approved September 28th, 1850,***

Id. at n.9. The enabling statute for the conveyance contained parallel reservation language. *Id.* at n.10 (quoting Comp. Gen. Laws, 1927, § 1570).

While *Padgett* quoted the reservation language from *Martin*, there is one factor that was central to the *Padgett* opinion. The Florida Court of Appeal cited *Martin*, 93 Fla. at 578, in noting that a trustee's deed in 1904 conveying Swamp and Overflowed Lands bordering the lake did not convey any rights to sell sovereign lands. The trustees lacked statutory authority to convey sovereign lands until the passage of Chapters 7861 and 7891, Laws of Florida, Acts of 1919.

The U.S. Supreme Court decision in *Barney v. Keokuk*, 94 U.S. 324 (1876), turned on a similar issue. The Court noted that the sovereign state owned submerged lands waterward of the ordinary high water of the Mississippi River. A private landowner's parcel was bounded on the riverside by a municipal right-of-way. The Court held:

A street bordering on the river; as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended for the purpose of access to the river and the usual accommodations of navigation in such a connection

.....

Id. at 340. The *Barney* Court found that use of fill waterward of the OHWL of the Mississippi for a public wharf, levee, and steamboat landing was reasonably connected to the riparian road on the plat overlying the boundary of the private parcel. The Court concluded that the private property owner took title

subject to all reasonable public use of the great river and rim road. In that sense, *Barney* was a precursor to *Martin* and the use of Lake Okeechobee under the Swamp and Overflowed Lands Act.

Barney contains an additional instructive passage that the Florida Supreme Court cited, but did not quote, in *Walton County*:

It is generally conceded that the riparian title attaches to the subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself.

Id. at 335.

Thus, in Florida, it was eminently reasonable to assume after *Sand Key* that filled lands created by third-party governmental action inured to the adjacent property. Until the Florida Supreme Court concluded otherwise, most of us thought *Martin* was done. What the Florida Supreme Court did implicitly Justice Scalia did explicitly—exhume *Martin*. Regardless, *Martin* was based on such unique circumstances that it should not apply to beachfront parcels that were acquired generally by deeds with no limitations comparable to Swamp and Overflowed patent chains of title. This should certainly be true of Gulf-front or oceanfront parcels that were acquired before the passage of Chapter 161's statutory predicate of the redefining of the boundary from the MHWL to the ECL after public beach renourishment.

The U.S. Supreme Court in *STBR* might well have ruled the same way as it did, armed with this knowledge. But perhaps not.

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HIGH COURT OKS BOTH BEACH RENOURISHMENT AND THE JUDICIAL TAKINGS DOCTRINE

Ilya Shapiro

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.

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.

In June, over half a year since argument, the Supreme Court finally decided *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 540 U.S. ___, 130 S. Ct. 2592 (June 17, 2010). 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." The state won. The property owners lost. SCOFLA was vindicated.

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 preexisting property rights (albeit under two different theories), and the other two declined to reach the question. Although the *Stop the Beach* 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." 389 U.S. 290, 96–97 (1967). Paradoxically, even as the particular property owners here are out of luck, Justice Stewart's judicial takings doctrine has been strengthened.

The Stakes in *Stop the Beach*

Before drawing any more conclusions, let's back up and take a look at this case more closely. *Stop the Beach* 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. 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. (There is some dispute as to whether the beach areas belonging to the petitioners had been eroded, but that factual issue is immaterial to the legal result.) The plan involved dredging sand to add about 75 feet to the beach.

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 waterline. 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. (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.)

After a beach restoration project, however, the mean high-water line is replaced by a fixed “erosion control line.” 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.”

Digging Deeper into the Florida Court’s Decision

The groundwork for SCOFLA’s decision was laid when the U.S. Supreme Court decided *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, which established the “total taking” standard for regulatory takings, the Court discussed how background principles of state law help determine when a taking has occurred. 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 *Id.* at 1030. But if a well-established permissive use of land is extinguished, the analysis is different.

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.

That loophole had already been exploited by Oregon in the case of *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 113 S. Ct. 1332 (1994), in which beachfront owners sought a permit to erect a seawall on their portion of the beach. 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. In dissenting from the denial of certiorari, Justice Antonin 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.” 113 S. Ct. at 1334 (Scalia, J., dissenting from denial of cert.).

Cato’s brief argued that this is precisely what the Florida Supreme Court had done here: Its holding departed from long-established state law that protected the rights of beachfront landowners. 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 ‘nonindependent right of contact with the water’ and by mischaracterizing the significant right of contact as being only ‘ancillary’ to the right of access.” *Walton County v. Stop the Beach Renourishment*, 998 So. 2d 1102, 1123 (2008) (Lewis, J., dissenting).

Such a drastic departure 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.

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." *Stop the Beach*, 130 S. Ct. at 2602. 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." *Id.* at 2610.

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. 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.

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. 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.

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*, 545 U.S. 469 (2005), five years ago. 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. Many property rights advocates thus view *Kelo* as a Pyrrhic victory—much as I have implied about *Stop the Beach* but in a different way.

Kelo contained the Manichean conflict of a morality tale, however, while *Stop the Beach* 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.

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

WHY WE MAY NEVER SEE A JUDICIAL TAKINGS DOCTRINE

Daniel L. Siegel

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.


Where courts depart from the common law it is important that cases challenging judicial takings—whether labeled as such or otherwise—continue to be brought. 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* 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*, the case is far from a complete loss for defenders of property rights. Moreover, state courts and legislatures are now on notice that they violate long-held property rights at their peril.

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The likelihood of the U.S. Supreme Court creating a judicial takings doctrine was greatly diminished by its decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 540 U.S. ___, 130 S. Ct. 2592 (June 17, 2010). Only four Justices supported that expansion of the Takings Clause (Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito), opining that a state court commits a “judicial taking” when it “declares that what was once an established right of private property no longer exists.” *Id.* at 2602. And even those Justices would have limited the concept in a number of ways. First, they suggested that the remedy for a judicial taking would be reversal of the state court’s decision, not compensation. *Id.* at 2607. Second, they indicated that the alleged property owner would have the burden of proving the absence of any doubt about the existence of the property right. *Id.* at 2608 n.9 & 2611.

The remaining four Justices (Justice Stevens recused himself) refused to create a judicial taking concept in the first place. Rather, they expressed serious concerns about the basis for and impacts of that doctrine. Justice Breyer, joined by Justice Ginsburg, concluding that because of those concerns the issue should be “left for another day.” *Id.* at 2618 (Breyer, J., concurring). In turn, Justice Kennedy, joined by Justice Sotomayor suggested that “arbitrary or irrational” property rights decisions could be subject to due process rather than takings review. *Id.* at 2615 (Kennedy, J., concurring).

The reluctance of the four Justices to establish this new doctrine is well taken. There are good reasons why since the states ratified the Fifth Amendment in 1791, the Supreme Court has never held that a court can be subject to a claim for just compensation under the Takings Clause. That novel concept would challenge our nation’s federal structure, improperly freeze the common law, and create a host of potentially insurmountable practical problems. As a result, it is highly doubtful that a majority of the current Justices would ever embrace the doctrine.

Most fundamentally, under our federal system, the sovereign states determine their own property laws. State courts in particular have a special ability to develop rules of property grounded in the individual state's unique history and physical landscape. The Court therefore rejected the judicial takings concept over a century ago in *Sauer v. City of New York*, 206 U.S. 536 (1907). Reviewing a landowner's claim that New York's highest court allowed the City to take the landowner's easement of access without just compensation, the Court explained that state courts have "overruled their own decisions . . . *Id.* at 548. The Court made it clear however, that this is a matter for the states, not the federal judiciary to decide. "Surely such questions must be for the final determination of the state court." *Id.*

A judicial takings doctrine, however, would transfer the authority to determine a state's property law from the state to the federal judiciary. That shift would disregard our Founding Fathers' recognition that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292-93 (Clinton Rossiter ed., 1961).

Moreover, a judicial takings doctrine would ignore the evolving nature of the common law. As the Supreme Court explained back in 1930, courts administering the common law have the right to alter prior decisions "to conform with changing ideas and conditions . . . without offending constitutional guaranties, even though the parties may have acted to their prejudice on the faith of the earlier decisions." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930). More recently, the Court similarly reasoned that under the common law "there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001).

In some ways, however, the most troubling aspect of the new doctrine would have been its practical implications. There are many, including the following:

1. Eleventh Amendment and judicial immunity each prevent lower federal courts from hearing takings claims against state courts. When government "takes" property, it is required to pay compensation. The Takings Clause does not prohibit improper acts, but rather mandates compensation for proper acts. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). The Eleventh Amendment, however, bars federal court compensation claims against states. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008). On top of that, judicial immunity would bar a suit against a state court and its judges for monetary relief. *Mireles v. Waco*, 502 U.S. 9 (1991) (*per curiam*). Intriguingly, Justice Scalia's opinion avoids these central problems by declaring that damages are "even rare for a legislative or executive taking," *Stop the Beach Renourishment*, 130 S. Ct. at 2607, and implicitly will never be imposed in a judicial taking suit. That approach would resolve the Eleventh Amendment and immunity problems, although it would also appear to undermine the Court's prior determination that parties have the right to compensation for temporary takings. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

2. Federal district court review of state court decisions would additionally be prohibited by the *Rooker-Feldman* doctrine. Under that doctrine, U.S. district courts lack subject matter jurisdiction over challenges to final state court decisions. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283-84 (2005). Justice Scalia acknowledges this problem, explaining that a party would be limited to petitioning the Supreme Court for a writ of certiorari. *Stop the Beach Renourishment*, 130 S. Ct. at 2609. He raises new problems, however, by going on to suggest that a non-party might somehow "challenge in federal court the taking effected by the state supreme-court opinion." *Id.* at 2609-10. If this concept had been adopted by a majority of the Supreme Court, litigators and lower courts would no doubt have faced years trying to sort out questions such as who could be sued for such a taking and when a claim would be ripe.

3. Logically, and disturbingly, a judicial takings doctrine would apply to the U.S. Supreme Court. If the Takings Clause is in part directed to the judiciary then it must apply to the federal judiciary because the clause applies to federal actions. See, e.g., *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 11–12 (1990). Yet the Supreme Court periodically issues decisions that arguably, to use Justice Scalia’s proposed judicial takings test, “declares that what was once an established right of private property no longer exists.” *Stop the Beach Renourishment*, 130 S. Ct. at 2602. For example, in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977), the Court explained that “from 1845 until 1973,” it had let the States apply their own boundary laws in determining the private ownership of land along a state’s navigable waters when the location of the waters shifted. Then, in 1973 it issued a decision holding that, for states admitted after the original 13 states, federal common law determined ownership in most of these disputes. *Id.* at 369–70 (explaining its holding in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)). As a result, some parties lost their established right to real property (The Court reversed itself again four years later in *Corvallis Sand*.) Similarly, in *United States v. Causby*, 328 U.S. 256, 260–61 (1946), the Court determined that “[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe But that doctrine has no place in the modern world.” When the Supreme Court issues decisions such as these, can losing parties or others allege that the Court took their property? If so, that would not only create a troubling opportunity for parties to have a second bite at the apple; it would also raise its own host of procedural and practical problems.

Given these and numerous other constitutional, doctrinal, and practical conundrums, it is highly improbable that Justices Breyer, Ginsburg, Kennedy, or Sotomayor would ever embrace this new doctrine. Therefore, unless a future replacement for one of those Justices or newly-appointed Justice Elena Kagan is sympathetic to the concept, the judicial takings doctrine probably suffered a quiet death in *Stop the Beach Renourishment*.

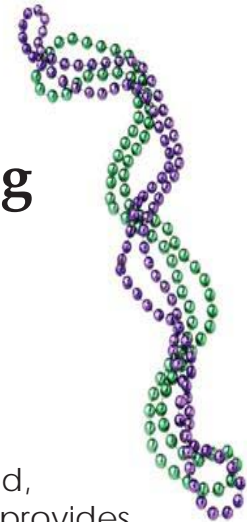
Daniel Siegel is a supervising deputy attorney general with the California Department of Justice. He authored an amicus curiae brief in *Stop the Beach Renourishment*, on behalf of a majority of the states, explaining why the Supreme Court should not establish a judicial takings doctrine. The views expressed in this article are the author’s and do not necessarily reflect those of the California Department of Justice.

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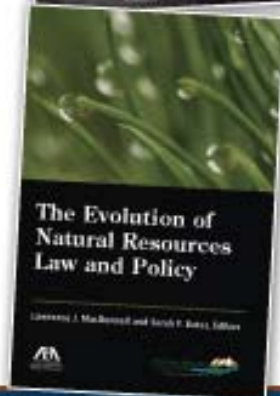
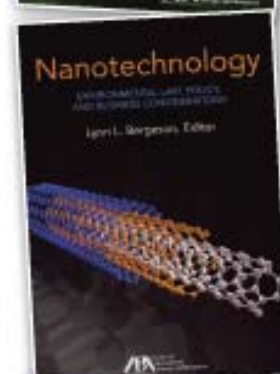
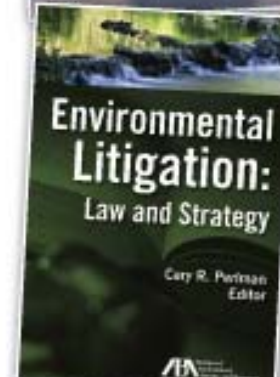
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