Beach Blanket Bingo: The Ruling in *Stop the Beach Renourishment v. Florida*

By Dwight H. Merriam



PHOTO: BY DWIGHT H. MERRIAM

Municipal lawyers looked forward to the decision in the takings case argued before the U.S. Supreme Court on December 2, 2009, as something like a blind date—it could turn out to be really fun and exciting, or a miserable waste of time. With the decision in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*[1] on June 17, 2010, it appears neither side will be all that eager to get back together soon to see if there might be some common ground. Both sides staked out their own positions, if somewhat ambiguously, and launched a couple of barbs not likely to be forgotten.

The case is simple; the underpinnings exceedingly complex. Here's the sound-bite version, though: Is it a taking of private property without just compensation in violation of the Fifth Amendment of the U.S. Constitution for the State of Florida to claim ownership, under the public trust, of any new beach area formed after the State restores and stabilizes the beach?

So, it's another takings case. Ho hum. (Tell me something else that's just as exciting, like spot zoning or a setback violation.) Those of you with a couple of decades of local government law experience are likely to be saying, under your breath, "Been there, done that." Not in this case, however—it wasn't some local or state agency, or even a state statute, that allegedly took the property rights; it was, claimed the plaintiffs, the Florida Supreme Court. This is the first "judicial" takings case to make its way all the way to a decision by the U.S. Supreme Court. More about that later.

Beaches and the Common Law

Florida loves its beaches and for good reason: its tourist economy is utterly dependent on them. Impress your friends with these dandy facts: Florida has 1,197 miles of shoreline and 825 miles of sandy beaches[2] (by way of sad comparison, my home state of Connecticut has a little less than 100 miles of shoreline). Of 62.3 million visitors in 2001, 22.4 million—over a third— said going to the beach was their principal activity during their stay.[3] Those beach tourists poured sand out of their shoes and $24 billion into the state's economy each year. However, the beaches are endangered. In 2008, there were 400 miles of critically-eroding beach, and almost 100 more miles of non-critically eroding beach.[4] Sea level rise promises to worsen the loss. It's not surprising, then, that over four decades ago, Florida enacted legislation giving the State the authority to protect and enhance its beaches.[5]

Just in case you were competing in the finals of a Frisbee™ championship the day your law school real property professor covered the common law of land titles as it relates to shorelines, let me offer up this condensed version: If you have a waterfront lot and the deed says "bounded by the waters of Chesapeake Bay," you'll need to go find the ordinary high water mark or mean high-tide line to define the extent of your land. Beyond that, you have riparian rights (more correctly, *littoral* rights, because what's involved is an ocean, not a lake or river). I looked it up in my *Merriam-Webster's* dictionary (where else?) and the first choice pronunciation for littoral is \li-t(ə-)rəl\. Compare that with the word "literal" \li-t(ə-)rəl\. They are pronounced almost alike. Or you can put the emphasis on the last syllable. (You say tomato, I say tomato.)

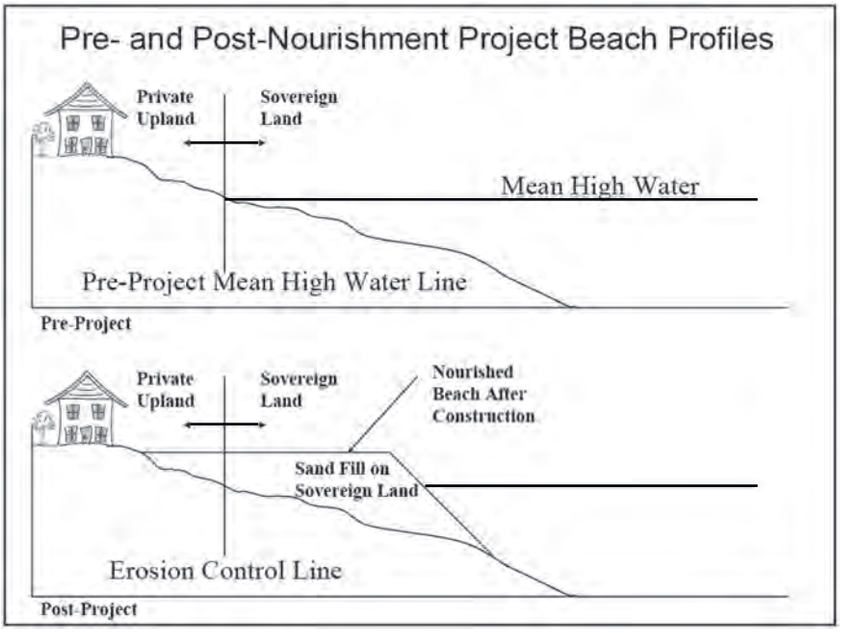
Problems arise when such land slowly erodes and the landowner loses land, physically and legally, as the mean high-water mark moves inland. There is no right to rebuild that beach, as a general

rule, but there are circumstances with altered shorelines and structures where an owner does have the right to maintain, repair, and rebuild. On the other hand, should the sand gods look favorably on an owner and the beach in front of a coastal McMansion grows slowly through accretion, the owner wins the coastal Lotto™—more land to exercise dominion over!

Now, for a different rule: if a hurricane wipes out your beach in a sudden and violent act, you can "renourish" or reconstruct the beach right back to where it was. This is called "avulsion," and the owner doesn't lose title to that land. You get to pile the sand back until you get your sandy domain back up to where the mean high-tide line was the day before the storm. Avulsive acts can also expand your land area, but you won't own it. In *Stop the Beach Renourishment*, it was argued that dumping large amounts of sand on the beach in a short time was an avulsive act, creating new dry land that did not become the property of the upland abutting owner. Given that the filled, submerged land is already subject to the public trust and the rights of the public, this theory of avulsive creation may be unnecessary.

The Decisions Below

The case began when a group of coastal property owners challenged a Florida statute[6] which permanently fixed the historic high-tide line by way of an established "Erosion Control Line" (ECL). The State was spending real money piling sand onto eroded beaches and didn't want that dynamic line moving in and out with erosion and accretion. The property owners said the permanent ECL took away their right to gain new dry land created by the State filling seaward of the high-tide line and by accretion. They also claimed that the statute took their littoral right of direct, physical access to the water, which would be interrupted by the State's new strip of dry land created by the filling and any accretion. The Florida Supreme Court held for the State, finding no taking had occurred under the State's established common law precedents regarding property rights along changing coastlines.[7] The eight members of the U.S. Supreme Court hearing the case agreed. (However, the Florida District Court of Appeals and Florida Supreme Court decisions are well worth reading, as they provide useful information not found in the Supreme Court's decision. You'll learn plenty about accretion and avulsion ... and takings law.[8])



Justice Stevens, who owns a waterfront home in a Florida beach renourishment area, was a no-show at the Court's oral argument, so it was eight justices. He didn't formally recuse himself and no one challenged his participation, at least not directly. His potentially conflict-creating ownership surfaced before the argument on the website of the conservative Cato Institute, when a faculty member posted documents about Justice Stevens' ownership of the condominium.[9] This wasn't the first time the justice faced this kind of issue: eleven years ago, he recused himself in a well-known Iowa right-to-farm case with a claimed taking, at a time when he owned a 200-acre farm there.[10]

At the oral argument, the State seemed to gain the upper hand. "You didn't lose one inch," Justice Breyer said to the property owners' lawyer. "All you lost was the right to touch the water. But the court here says you in effect have that right because you can walk right over it and get to the water."[11] Even Justice Scalia, assessing the value of the government beach renourishment program, said: "I'm not sure it's a bad deal."[12]

This Alien Life Form of Takings

Justice Scalia had been itching for a judicial takings claim since the Court denied certiorari in 1994 in *Stevens v. Cannon Beach*, in which it was claimed that the Oregon Supreme Court had decided a beach access case at variance with settled common law and, in doing so, had opened private land to public use.[13] He filed an acerbic dissent to the denial:

> No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. Since opening private property to public use

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constitutes a taking, if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking. To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast.[14]

My guess is that Scalia convinced the Chief Justice and others to let him have his day in court on the judicial takings question. Remember, under the Rule of Four it only takes four of the nine justices to grant a writ of certiorari. That rule is not found in the Constitution or any other law, or even in the Court's own rules—it's a custom the Court has followed since it was given the authority to decide which appeals it might hear by the Judiciary Act of 1891, Judiciary Act of 1925, and the Supreme Court Case Selections Act of 1988. The Rule of Four prevents a majority of the Court from deciding which cases to hear. How much do you want to bet that the four who voted in favor of certiorari are the same four led by Justice Scalia in the decision?

The Roberts Court has failed to follow the path of restraint that the new Chief had promised.[15] Some may see this case as another example of the Court being pulled off the path by a strong minority.

You probably hadn't heard of "judicial takings" before this case. I've taught land use law for 31 years without covering it in any detail, and co-authored a book on takings which had just five pages (of over 500 pages) devoted to the subject. A run-of-the-mill *regulatory* taking claim is the result of legislative or executive branch action—think of *Lucas*[16] and *Penn Central*.[17] The theory of the *judicial* taking is that a court can take your property by interpreting and applying the law contrary to precedents. While, as I noted, this is the first judicial takings case to be decided by the Court, Justice Potter Stewart referred to the concept in his concurrence in *Hughes v. Washington*,[18] a 1967 case about beachfront accretions:

Is it a taking of private property without just compensation in violation of the Fifth Amendment of the U.S. Constitution for the State of Florida to claim ownership, under the public trust, of any new beach area formed after the State restores and stabilizes the beach?

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.[19]

Lining Up for the Vote(s)

There was a remote chance that Justice Stevens might vote (just as Chief Justice Rehnquist retained his right to do so when he was disabled by illness), but he didn't. In the unlikely chance he did vote, it was expected he would have gone with the bare majority, ruling in favor of the State, while Chief Justice Roberts would dissent (he favored the property owners during the argument). By choosing not to vote, Stevens surrendered his right as the senior justice in the majority to pick who would write the opinion. That left some serious NASCAR-like bump drafting between Justices Scalia and Kennedy. Scalia could go with the majority for the State and offer up a milquetoast opinion that even property owners could love; however, if Scalia were to dissent and Kennedy became the senior justice in the majority for the State, the opinion for the government was likely to be weaker than it would be if Stevens were overseeing it. Finally, there was talk about a possible 4-4 tie, which would leave the Florida Supreme Court decision standing, but with no written decision and no precedent created by the Court. The odds-makers predicted a clean win for the State, not a tie, and they were mainly correct.

The "Shaky Sandcastle" —The Decision

On June 17, 2010, carrying on its proud tradition of leaving the toughest takings case to the bitter end of the Term, the Supreme Court handed down its decision in *Stop the Beach Renourishment,* its first property rights case since *Kelo*,[20] *Lingle*,[21] and *San Remo*[22] were decided five years ago. The Court sided with the Florida Supreme Court in finding no taking had occurred. On that, the vote was 8-0. On whether there is such a thing as a "judicial" taking, the court fractured 4-4 (some might count it as 4+2 to 2).

The pundits pounced. Even the *New York Times* jumped on the dog pile with an editorial decrying Scalia's promotion of judicial takings as "harebrained."[23] The reaction has been mostly overblown. This is a case the Court simply should not have taken. The Florida Supreme Court correctly decided the takings claim with a well-reasoned, rational analysis, consistent with Florida precedent. Indeed, as some of us were writing about the decision granting certiorari and the oral argument, it was feared that, once the Court actually took a hard look at what the Florida Supreme Court decided, the Court might rule that certiorari had been improvidently granted (as it did in a prior land use case, *PFZ*

Properties, Inc. v. Rodriguez [24]).

After upholding the Florida law, the Court didn't need to decide whether there could ever be a judicial taking. Scalia wouldn't let go, and enlisted the Chief Justice and Justices Thomas and Alito in support of his cause:

> States effect a taking if they recharacterize as public property what was previously private property. ...The Takings Clause ... is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ("nor shall private property be taken" (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.[25]

In a concurring opinion, Justice Kennedy, joined by Justice Sotomayor, challenged the idea and argued that such cases should be analyzed under the Due Process Clause. (Kennedy, as the Court's swing voter, is the one to watch. Sotomayor is difficult to predict, but it is interesting that she sided with Kennedy, not Breyer.) Kennedy left the door open for a judicial taking claim:

> If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented.[26]

By my count, that makes the numbers presently and potentially amenable to judicial takings as four plus two. In another concurring opinion, Justice Breyer, joined by Justice Ginsburg, simply said that it was unnecessary to reach the issue of judicial takings.

With the 8-0 vote on the taking claim, Chief Justice Roberts predictably gave the job of writing the opinion to Scalia, who ascended to the bully pulpit to press ahead on the judicial takings front. From that advantageous position, he chose to tweak Breyer for arguing that the plurality should not address issues "better left for another day":

> One cannot know whether a takings claim is invalid without knowing what standard it has failed to meet. Which means that Justice Breyer must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the "unnecessary" constitutional question whether there is such a thing as a judicial taking.[27]

The winners here include the States, as the Court has shown deference to the common law of Florida. Property rights advocates came out of this intact: they could have lost it all if the Court was forced to decide whether judicial takings really exist, and they found they did not. Had Stevens not bought that waterfront condo with its eroding beach years ago, the outcome might have been different. Government sort of won because of the unanimous decision of no taking, and the 4-4 standoff on the judicial takings issue creates no precedent. The big question remains: will there now be more attempts to bring judicial takings claims?

"Copy Cat" Certiorari

Like copy-cat crimes, the inevitable repetition ensued in the form of new petitions for certiorari. I know of one in the works, and I have heard of two others that have been filed. One is from Hawaii, in a case where the state appellate court held that a state statute was a taking in the year it was enacted, but not a taking of "future accretions."[28] On November 01, the U.S. Supreme Court denied review.[29] The other case hails from Montana, where the state's supreme court has held that riverbeds, thought to be in private ownership or owned by the federal government, are owned by the state.[30]

Will the Court grant the Montana petition or further judicial takings certiorari petitions? Who knows? Scalia has this shaky four-plus-maybe-two-if-the-case-is-right block supporting the concept. Justice Kagan, taking up Stevens' spot, is likely to vote as Stevens would have had, against judicial takings. In short, it is hard to see any upside for Scalia and his three closest allies with a new judicial takings case in the near future, regardless of the merits. Also, the Court will need to look behind these petitions at the reasonableness of the state court decisions and their interpretation of state law, as it did, ultimately, in *Stop the Beach Renourishment*. For a judicial taking certiorari petition to be granted, it will likely need to be a case where there is a clear departure from settled law, overwhelmingly adverse consequences, and an inequitable result.

Conclusion

Two big issues remain. First, who pays the just compensation? The courts can't raise their own money ("The Montana Supreme Court will be holding a car wash and bake sale this Saturday in the parking lot of the courthouse to raise money to pay a taking claim..."). Scalia's notion that, maybe, invalidation of the challenged ruling is enough is contrary to *First English*,[31] and doesn't solve the temporary taking problem for the period in which the property may have been rendered unusable. Perhaps the legislatures will be obligated to pony up the cash. One must consider, also, that federal courts may be liable to judicial takings claims, given that there's nothing in the Court's decision to the contrary.

Second, what about federalism? Allowing a property owner, who loses his attempt to vindicate private property rights in a state court, to head off to the highest court for a second opinion would be completely contrary to the attempts by the federal courts to stay out of state and local matters, especially in land use. Still, there are instances where property owners are left high and dry by untenable state court or lower federal court decisions, and, under the rule of law, they ought to have access to the highest court in the land.

In the end, the real question may be: is a judicial takings claim the only route to relief?[32]

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Judicial Takings

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Notes

1. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 130 S. Ct. 2592 (2010).
2. *Brief of Amicus Curiae*, The Florida Shore and Beach Preservation Association, The Florida Association of Counties, and The Florida League of Cities In Support of Respondents, 2009 WL 3236333 at *17 (U.S. Oct. 5, 2009), citing the Fla. Dep't of Env. Protection, Bureau of Beaches and Coastal Systems, *Strategic Beach Management Plan* (May 2008) at 2.
3. *Id.* at *20 n.3.
4. *See generally*, Fla. Dept. of Env. Protection, *Critically Eroded Beaches in Florida* (June 2009) at 1-3, available at http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt09.pdf.
5. The Florida Beach Erosion Control Program was established in 1964.
6. The Florida Beach and Shore Preservation Act, *Fla. Stat.* ch. 161, part I (2009). The specific sections of the Act in issue were sections 161.191 and 161.201.
7. Walton County v. Stop Beach Renourishment, Inc., 998 So.2d 1102 (Fla. 2008).
8. All of the decisions and many of the briefs are collected at www.inversecondemnation.com. Type in "beach takings case" in the search window or go directly to http://www.inversecondemnation.com/inversecondemnation/beachfront-takings-case-resources.html. The Supreme Court decision is at http://www.supremecourt.gov/opinions/09pdf/08-1151.pdf.
9. Tony Mauro, *Was Stevens' Condo the Reason for Justice's Recusal in Fla. Property Rights Case?*, The National Law Journal, Dec. 07, 2009.
10. Bormann v. Bd. of Sup'rs in and for Kossuth County, 584 N.W.2d 309 (Iowa 1998), *petition for cert. denied*, Girres v. Bormann, 525 U.S. 1172 (1999) (U.S. Feb. 22, 1999) (No. 98-1003).
11. Oral Argument Transcript, 2009 WL 4323938 at *8 (Dec. 02, 2009).
12. *Id.* at *20.
13. Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994).
14. *Id.* at 1334-35 (citations omitted).
15. Jeffrey Toobin, *Activism v. Restraint*, The New Yorker, May 24, 2010, cited in Blumm and Dawson, *The Florida Beach Case and the Road to Judicial Takings*, (2010) available at http://ssrn.com/abstract=1669707. Blumm and Dawson cover the decision and its background in detail.
16. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
17. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).
18. 389 U.S. 290 (1967).
19. *Id.* at 443.
20. Kelo v. City of New London, 545 U.S. 469 (2005).
21. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
22. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).
23. *Common Sense and Private Property*, New York Times, June 17, 2010 at http://www.nytimes.com/201%6/18/opinion/18fri1.html?_r=1&ref=editorials.
24. PFZ Properties, Inc. v. Rodriguez, 928 F. 2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992).
25. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 130 S. Ct. 2592, 2596.
26. *Id.* at 2618.
27. *Id.* at 2603.
28. Maunalua Bay Beach Ohana 28 v. State of Hawaii, 122 Haw. 34, 222 P.3d 441 (Haw. Ct. App. 2009).
29. 2010 U.S. LEXIS 8503 (Nov. 01, 2010).
30. PPL Montana, LLC v. State of Montana, 229 P.3d 421 (Mont. 2010).
31. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).
32. For a good sense of opinions from both sides, see John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary is Different*, Vermont Law School Legal Studies Research Paper Series Research Paper No. 10-45, Vermont Law School (Aug. 02, 2010) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652351, and Thomas, Murakami, and Eyerly, *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, Aug. 09, 2010, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1655658. Seems like everyone is duking it out on SSRN these days. **ML**

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5. *id.*
6. Mary William Walsh, *San Diego Agrees to Settle SEC Pension Fraud Case*, N.Y. Times, Nov 15, 2006, athttp://www.nytimes.com/2006/11/15/business /15pension.html?ref=business.
7. These individuals worked for the City of San Diego during the time of the 2002 /2003 bond offerings, but not at the time the complaint was filed.
8. Securities Exchange Act of 1934, 15 U.S.C. §77(a)(q) (2006).
9. Press Release No. 2010-204 (Oct. 27, 2010). **ML**

Supreme Court

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practice" rule of causation. The sole rationale for discarding the requirement was that claims for declaratory and other prospective relief allegedly did not result in the sort of financial burdens imposed by damages awards, which the Ninth Circuit perceived as the basis for *Monell*'s rejection of respondeat superior liability against governments. The County, however, maintains that "[u]nless a plaintiff establishes constitutional liability under that standard, no remedy, whether it be damages, injunctive or declaratory relief, is appropriate." For their part, the respondents argue that when a plaintiff seeks prospective relief, a separate showing of municipal responsibility is not required because the other standards applicable to such claims (e.g., Article III standing constraints) ensure the requisite connection exists between the local government and the challenged conduct. Accordingly, the question before the Supreme Court is whether the "custom, policy, or practice" requirement extends to prospective equitable relief sought against a local entity.

A decision is forthcoming. **ML**