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By Timothy M. Mulvaney

Uncertainties Remain for Judicial Takings Theory

The U.S. Supreme Court waded into the waters of judicial takings last summer with a divided opinion that effectively carries no precedential value but is likely to have lower courts and property scholars trying to decipher its meaning for many years to come.

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010), the Court decided that some Florida gulf-front property owners are not entitled to compensation under the federal Constitution's Takings Clause when a state beach restoration project separates their private property from the water's edge. Although the state prevailed in this instance, the case leaves the legal landscape at the intersection of public and private property rights in a haze.

This is because four Justices endorsed a "judicial takings" theory that, moving forward, would make the Takings Clause—"nor shall private property be taken for public use, without just compensation"—applicable to a new, broad set of circumstances.

The case involves a Florida law that authorized the use of public funding to restore sand on eroded beaches to protect coastal property from hurricanes. Fla. Stat. § 161.011-161.45 (2007). In 2003, the city of Destin and Walton County sought permits to add 75 feet of sand along a 6.9-mile shoreline. Most waterfront landowners welcomed this complimentary shore protection, but a small group objected to the project on the ground that the new beach area would be open to the public and would redefine the boundary of their property. These plaintiffs argued that they deserved compensation because the legislation "took" their pre-existing right to retain exclusive ownership up to the water's edge and also denied them their right of ownership to any natural accumulations of sand in the future.

The Florida Supreme Court held that the landowners never had either of these alleged rights under Florida law and, thus, no compensation was due. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008). In appealing this decision to the U.S. Supreme Court, the landowners modified their takings claim. Although the Takings Clause traditionally has been applied only to actions by the legislative and executive branches of government, the landowners no longer focused their suit on the Florida legislation authorizing beach restoration or on the actions of the state executive agency—the Florida Department of Environmental Protection—charged with promulgating regulations to facilitate the execution of that legislation. Instead, they challenged the Florida court's decision by exhuming the arguably problematic theory that the judiciary can so significantly reinterpret established state law that the court's decision itself constitutes a taking requiring compensation under the federal Constitution.

Theory of Judicial Takings

The judicial takings doctrine on which the property owners relied has a very limited history. After the U.S. Supreme Court had made veiled references to the theory in the late 19th century (see, e.g., Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 233-34 (1897)), Justice Stewart discussed it in some detail in his concurrence in Hughes v. Washington, 389 U.S. 290, 294-98 (1967). It would be almost 30 years before another member of the Supreme Court raised the prospect of judicial takings. In dissenting from the denial of certiorari in Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994), Justice Scalia, joined only by Justice O'Connor, wrote that the federal Takings Clause may be implicated if a state court invokes "nonexistent rules of state substantive law." Relying on the premise espoused by Justices Stewart and Scalia in these prior cases, the plaintiffs in Stop the Beach Renourishment claimed that the Florida Supreme Court's declaration that the alleged property rights never existed was so unpredictable in light of state precedent that they deserved compensation.

Delving into State Property Law: Accretion and Avulsion

These Floridian landowners, however, failed to convince even one member of the U.S. Supreme Court that a taking had occurred. In a unanimous opinion, the Court explained that all property in Florida seaward of the Gulf of Mexico's mean high-water line belongs to the state, while gulf-front property owners ordinarily own the land or beach.

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between that line and their homes. The Court stated that Floridian gulf-front owners have the right to naturally occurring, imperceptible additions of land over time. Under this doctrine of "accretion," the public-private property boundary is dynamic, changing as the beach naturally expands (or erodes). The Court explained, however, that sudden "avulsive" events do not change the property boundary.

**Despite the Unanimous Verdict for the State, Four Members of the Court Delivered to the Property Rights Movement a Conceivably Groundbreaking Consolation Prize.**

in Florida. Although avulsion is most commonly associated with hurricanes in light of their power to rapidly change the existing landscape, the Court concluded that the doctrine applies even if the avulsion is caused by the state through beach restoration or similar projects.

By engaging in the rare task of delving deep into Florida state court precedent, the U.S. Supreme Court unanimously found that the state retains ownership of restored beaches, which sit atop previously submerged, state-owned tidelands, and need not provide compensation to the claimant landowners. Specifically, the Court pointed to a 1927 Florida case called Martin v. Busch, 112 So. 274 (Fla. 1927), which held that the state retained ownership to new dry land created when the state drained a lake. The U.S. Supreme Court found the property owners' interpretation of dicta in another prior Florida case, Board of Trustees v. Sand Key Associates, 512 So. 2d 934 (Fla. 1987), unconvincing. Although the property owners argued for interpreting Sand Key as entitling coastal landowners to have the mean high-water line as their property boundary in perpetuity, the Court found that interpretation inconsistent with Florida's common law doctrine of avulsion.

**Delving into the Justices' Divergence**

Despite the unanimous verdict for the state, four members of the Court favored the state without deciding the judicial takings issue. Justice Kennedy, joined by Justice Sotomayor, asserted that determining whether a judicial decision declaring property owners' rights can amount to a taking is unnecessary so long as the Constitution's Due Process Clause remains adequate to protect property owners from the judicial elimination of their existing property rights. Justice Kennedy stated, 

"[T]he Court should consider with care the decision to extend the Takings Clause in a manner that might be inconsistent with historical practice . . . . If and when future cases show that the usual principles . . . like due process, are somehow inadequate to protect property owners, [only] then [would] the question whether a judicial decision can effect a taking . . . be properly presented." Id. at 2616–17.

Justice Breyer, joined by Justice Ginsburg, concluded that no taking had occurred under any conceivable test, such that the difficult questions surrounding judicial takings, or any other theory, need not be addressed. Justice Breyer did not respond to Justice Scalia’s barb chastising Breyer for not “grappl[ing] with the artificial question of what would constitute a judicial taking if there were such a thing.” Id. at 2603.

Notably, Justice Stevens removed himself from the case, presumably because he owns a waterfront condominium in Florida. See Tony Mauro, Was Stevens' Condo the Reason for Justice's Recusal in Fla. Property Rights Case?, Nat’l L.J., Dec. 7, 2009. Justices need not recuse themselves solely because they own property in the locus of a case, and it is unclear whether Justice Stevens needed to do so merely because he owns a coastal residence. Indeed, Justice Scalia and Chief Justice Roberts also own coastal land, in North Carolina and Maine, respectively. Had all coastal property owners on the Court recused themselves, which likely was unnecessary, a 4-2 majority of the Court would have rejected endorsing a judicial takings doctrine; had Justice Stevens participated with the other eight Justices,

**Effects on Property Law Litigation**

Alas, the 4-4 split on judicial takings leaves the issue unresolved, for no opinion commanded a majority of the Court. Still, although four Justices’ endorsement of the judicial takings theory is not binding precedent, it promises a surge of litigation. In this litigation, it could prove problematic that, beyond acknowledging that no such judicial taking transpired under the particular facts of *Stop the Beach Renourishment*, the plurality opinion provides little guidance on what is required to prove that a property right actually is “established.” The category of property laws that are not “established” might prove empty because state courts simply will, as Prof. Benjamin Barros quipped, “paper up” their opinions. D. Benjamin Barros, *Supreme Court Rules in Stop the Beach*, PropertyProf Blog (June 17, 2010), http://lawprofessors.typepad.com/property/2010/06/supreme-court-rules-in-stop-the-beach.html. Justice Scalia, however, writing for the Court in 1987, stated that the Takings Clause stands for “more than a pleading requirement” and that compliance with it demands “more than an exercise in cleverness and imagination.” *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987).

The concept of judicial takings also raises additional practical difficulties. Among others, three such difficulties ostensibly contributed to the cautious approach of Justices Kennedy, Sotomayor, Breyer, and Ginsburg.

First, assessing judicial takings claims places federal courts in the position of rummaging into the intricacies of state property law, a task for which they arguably are ill equipped. As Justice Kennedy presaged at oral argument, courts will “have to become real experts in Florida law” to decide the judicial takings question. Oral Argument Transcript at 25, *Stop the Beach Renourishment, Inc. v. Florida Dept of Envtl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151), available at www.supremecourt.gov/oral_arguments/argument_transcripts/08-1151.pdf. In *Stop the Beach Renourishment*, the U.S. Supreme Court did just that by focusing on fundamental canons of Florida law surrounding state sovereignty and littoral rights. Yet whether this will become a common practice remains uncertain. If indeed it does, and a successful judicial takings claim comes to pass, the Court will have to squarely address complicated questions surrounding the appropriate remedy, for no state judiciaries are currently appropriating funds to pay compensation for judicial takings.

Second, the theory of judicial takings seemingly contradicts the prohibition on lower federal court review of state supreme court decisions without specific congressional authorization, set forth in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Justice Scalia, though, suggested that judicial takings present no such procedural problems. He stated that the only remedial avenue for parties aggrieved in state supreme courts is on certification to the U.S. Supreme Court (the path followed by the landowners in *Stop the Beach Renourishment*, but one that is rarely available to litigants in light of the few certification petitions granted by the Court each term). Peculiarly, however, Justice Scalia wrote that persons that were not parties in the original state court case could challenge the decision in that state court case (even possibly a decision made by a lower state court) as a judicial taking in the lower federal courts if that decision affects their property value.

Third, the judicial takings theory brings into question the very judicial power of state courts. Justice Scalia’s plurality opinion stated that “[a] construct of federalism provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.” This seems to stand in stark contrast to the Court’s earlier pronouncement that the states, in declaring and interpreting their laws, serve as laboratories for the development of innovative approaches to modern problems. *Chandler v. Florida*, 449 U.S. 560, 579-80 (1981), favorably citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). State courts have long served the role of recognizing the evolving nature of property rights under common law doctrines in the face of changing circumstances and social values. The constitutional hurdle created by judicial takings certainly would compromise the ability of state courts to make such transitions.

**Other Takings Doctrines Implicated**

Litigation in the near future will shape the existence and scope of the judicial takings theory supported, though not officially endorsed, in *Stop the Beach Renourishment*. But, in addition to the

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**Assessing Judicial Takings Claims Places Federal Courts in the Position of Rummaging Into the Intricacies of State Property Law.**
many questions raised about judicial takings, the decision leaves other takings issues unresolved as well. One such issue arises from the fact that beach renourishment projects do not merely involve dredging sand from the ocean bottom and placing it into near shore waters. Instead, these projects require that some of the dredged sand be placed on top of existing dry land in order to “anchor” the new beach into place.

The U.S. Supreme Court’s decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), declared that any physical occupation of private property, however de minimis, is a per se taking that requires compensation. (In Loretto, the Court held that an ordinance requiring apartment owners to allow cable companies to install a cable wire along the outside of their buildings amounted to a per se taking.) Does a government act that requires the placement of anchoring sand on a small piece of dry private property to protect the remainder of that property run afoul of Loretto’s “automatic” taking rule when that anchoring sand is open to the public?

Normatively, it is easy enough to suggest that it should not—the effect on the landowners’ value and use of their property is negligible because the land on which the new sand is placed would succumb to the sea in short order without the beach restoration project. Doctrinally, however, it may be difficult to conclude otherwise given Loretto’s formalism. This divergence between norm and doctrine raises the specter of whether Loretto and other formal categories of automatic takings that have followed (and even derived from) it should be reconsidered in light of their inflexibility.

Conclusion

The U.S. Supreme Court’s recent decision in Stop the Beach Renourishment may raise more questions than it answers in the field of takings jurisprudence. In light of the many unsettled issues outlined above, some might suggest that the creation of a judicial takings doctrine, as well as any expansion of or even continued reliance on per se takings rules, is imprudent. In its first modern regulatory takings decision in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), the Court identified several factors as relevant in attempting to strike an appropriate balance between public and private rights in individual takings cases. Today, this case-by-case balancing approach serves as the principal takings test when per se (and now possibly judicial takings) rules do not apply. It is possible that refinement of the Penn Central factors—reasonable investment-backed expectations, economic effect, and character of the government action—rather than judicial takings and per se rules, could serve as a preferred approach toward a takings framework that best deals with legal transitions needed in a changing world.