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Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection

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***Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et. al.*, 130 S. Ct. 2592 (2010).**

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ABSTRACT

A homeowners association sued the state of Florida to stop a beach restoration project that would have created seventy-five feet of new beach separating the private homes from the ocean front. The U.S. Supreme Court rejected the homeowners' argument that the project was an unlawful taking because it would end the homeowners' ability to receive new sand deposits from the ocean onto their private beachfront. The Court held that the Takings Clause of the Fifth Amendment of the U.S. Constitution applies equally to court orders and decisions of the judicial branch as it does to actions of the legislative and executive branches.

I. INTRODUCTION

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et. al. was delivered by the United States Supreme Court in June of 2010.[165] With the exception of Justice Stevens, who did not participate in the decision of this case, a unanimous court held that the Florida Department of Environmental Protection's (FDEP) effort to restore an eroded beach did not constitute an unconstitutional "taking" of private beachfront property under the Fifth Amendment to the U. S. Constitution. Despite the appearance of unanimity however, the Court was deeply divided in their reasoning, and the opinion was a complicated mix of pluralities and partial concurrences.

[165] *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Protec. et. al.*, 130 S. Ct. 2592, 2613 (2010) (Kennedy & Breyer, JJ., concurring in part).

II. FACTUAL BACKGROUND

In 1961, Florida's legislature passed the Beach and Shore Preservation Act[166] (Act) to enable local governments to maintain and repair eroded beachfront.[167] The Act requires local governments, wanting to undertake renourishment projects, to apply to the FDEP to obtain necessary permits and funding.[168] If the project requires laying fill material on state-owned submerged lands, the Board of Trustees of the Internal Improvement Trust Fund (Board), which is the government entity holding title to the lands, must approve the project.[169] Once a project is underway, the Board designates an "erosion control line," set by reference to the mean high-water line on the beach, which is determined by averaging the reach of the high-tide over the preceding nineteen years.[170] This erosion control line distinguishes a private owner's beachfront property from the state's trust land.[171] Once the erosion control line is set, fill is placed seaward of the line, creating new beach on previously submerged state land.[172]

III. PROCEDURAL BACKGROUND

In 2003, Florida's city of Destin and Walton County applied to the FDEP for permits to restore approximately seven miles of beachfront that had been washed out by hurricanes.[173] The project would add seventy-five feet of new beach seaward of the mean high-water line by applying fill to submerged state trust land.[174] The FDEP issued a public notice that it intended to

[166] *Id*. at 2599 (citing Fla. Stat. §§ 161.011-161.45 (2007)).
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*. at 2598, 2599.
[171] *Id*. at 2598 (citing *Miller v. Bay-To-Gulf, Inc.*, 141 Fla. 452, 458-460, 193 So. 425, 427-428 (1940)).
[172] *Id*. at 2599.
[173] *Id*. at 2600.
[174] *Id*.

grant the permits, and the Board approved the use of the fill and the creation of the erosion control line.[175]

In response, a group of homeowners, whose property bordered the project area, formed a non-profit corporation named Stop the Beach Renourishment, Inc. (Homeowners) to bring an administrative challenge to the proposed project.[176] After an administrative panel denied the Homeowners' challenge, the case was taken to the Florida District Court of Appeal for the First District, which held that approval of the project had eliminated the rights of two homeowners to both receive accretions[177] on their property and to have contact between their property and the water.[178]

Because the project infringed on these property rights, the district court held that in issuing the permits the FDEP had performed an unlawful taking of the two homeowners' future accretions.[179] After setting aside the approval of the permits, the district court certified to the Florida Supreme Court the question of whether the Act unconstitutionally deprived upland property owners of their littoral property rights without just compensation.[180] The Florida Supreme Court held the Act was not unconstitutional and denied the Homeowners' request for a rehearing. The Homeowners then appealed the Florida Supreme Court's denial of rehearing to the United States Supreme Court on the grounds that the Florida Supreme Court's decision was

[175] *Id*.
[176] *Id*.
[177] Accretions are additions of sand, sediment, or other deposits to water front lands. Traditionally, for land to qualify as an accretion, it must have formed as a result of a gradual drying that is so slow that the result only becomes noticeable after many years. When an accretion is formed it is considered to be part of the littoral property of the private property owner. *Id*. at 2598 (citing F. Maloney, S. Plager, & F. Baldwin, Water Law and Administration: the Florida Experience § 126, pp. 385-386 (1968)).
[178] *Id*. at 2600.
[179] *Id*.
[180] *Id*.

itself an unlawful taking and denied the Homeowners' property interest in future accretions.[181] The United States Supreme Court granted certiorari.[182]

IV. UNITED STATES SUPREME COURT DECISION

A notable trend in recent U.S. Supreme Court decisions is the increasing delivery of plurality opinions where the justices join and dissent with one another on a section by section basis.[183] *Beach Renourishment* is no exception. Indeed, Justice Scalia delivered the opinion of a unanimous Court; however, concurrences by Justices Kennedy and Breyer and joined by others evidence the Court's unanimous judgment was determined by following very different lines of reasoning.

Beach Renourishment culminated in two separate but related issues. The first issue was whether the Florida Supreme Court unlawfully took property without compensation when it held that the Homeowners' property rights to future accretions did not exist.[184] The second, and more divisive, was whether a court of law or other member of the judicial branch can "take" property under the Fifth Amendment's takings clause.[185]

A. The Florida Supreme Court did not unlawfully take property without compensation when it held that the Homeowners' property rights to future accretions did not exist.

[181] *Id*. at 2600-2601.
[182] In granting certiorari, Justice Scalia, writing for the majority, recognized the Court would not ordinarily consider an issue that was first presented to a state court in a petition for rehearing unless the state court addressed it. However, where the state-court decision itself is claimed to be in violation of the U.S. Constitution, the state court's refusal to hear an issue will not bar the Court's power to hear the case. *Id*. at n. 4.
[183] Joseph M. Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine after* Rapanos v. United States, 41 Suffolk U. L. Rev. 97, 98 (2007).
[184] *Beach Renourishment*, 130 S. Ct. at 2611.
[185] *Id*. at 2608.

Writing for the majority, Justice Scalia began the opinion with the fundamentals of Florida's property law. As a general rule, state law governs property rights, including property rights in navigable waters and the land that lies beneath them.[186] Under Florida law, the state owns all lands permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line) in trust for the public.[187] The separating line between private beachfront, or littoral property, and state-owned trust land is the mean high-water line.[188] Because of their unique position, littoral property owners have special property rights in relation to the water and the foreshore.[189] These special rights include the right to access the water, the right use water for specific purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions[190] to the littoral property.[191] Traditionally, for land to qualify as an accretion it must have formed as a result of a gradual process that is so slow that the result only becomes noticeable after many years.[192] When the change to the land is sudden and immediately apparent, it is classified as an avulsion[193] and the littoral property owner is not entitled to the same property interest as to an accretion.[194]

Florida law grants the littoral owner title to any dry land added to his property by accretion.[195] Submerged land that rapidly becomes dry however, is not considered accretion and

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[186] *Id*. at 2597.
[187] *Id*. at 2598.
[188] *Id*. (citing *Miller*, 141 Fla. at 458-460, 193 So. at 427-428).
[189] *Id*.
[190] Unlike accretions which are additions of sand, sediment, or other deposits to water front lands, relictions are lands that were once covered by water which later become dry when the water receded. *Id*.
[191] *Id*.
[192] *Id*.
[193] An Avulsion is defined as "the sudden or violent action of the elements causing, for example, a channel of a river to abandon its old bed for a new one, or the removal of a substantial quantity of earth from the land of one owner and its subsequent deposit on that of another. The difference between avulsion and reliction or accretion is that avulsion is perceptible while in progress." *Id*. at 2588 (citing *Bd. of Trustees of the Internal Imp. Trust Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, 946 (Fla. 1987)).
[194] *Id*. at 2598.
[195] *Id*.

the title to that land remains in the hands of the state.[196] Thus, whenever there is an avulsion separating littoral property and any future accretion land, a private property owner cannot claim the new accretions as part of *his or her* property because the accretion is added to the state's avulsion land.[197]

The Homeowners claimed their property interest in enjoying future accretions added to their beachfront was unlawfully taken when the FDEP approved the beach restoration project.[198] However, as the U.S. Supreme Court pointed out, there can be no taking of property by the government unless a party had an interest in that property to begin with.[199] The Court recognized the state of Florida holds the title to all lands submerged underneath the water.[200] Furthermore, the Court recognized under Florida law that previously submerged land exposed suddenly by the process of avulsion belongs to the original owner and not to the littoral owner whose property is adjacent.[201] Any new accretions then become the property of the avulsion owner: the state of Florida. From this analysis the Court concluded, under the traditional common law of property, that the Homeowners did not have a property interest in future accretions so long as their land is separated from the sea by avulsion lands.[202]

In response to the common law principals, the Homeowners argued the Court should create an exception to the avulsion rule when the State is the cause of the avulsion.[203] Relying

[196] *Id*.
[197] *Id*. at 2599 (emphasis in original).
[198] *Id*. at 2611.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*. at 2612.
[203] *Id*. at 2611.

upon Florida case law, the Court rejected this argument.[204] From the Court's analysis, Florida law has long recognized that dry land created by filling submerged land is classified as an avulsion, and the state retains the title to that property.[205] Furthermore, the Court declined to create an exception to the rule of avulsion under the guise of judicial restraint.[206] The Takings Clause in the Fifth Amendment protects property rights as they were established under law.[207] The Court held that it would be improper to declare a taking of property that is not granted to a private property owner under Florida property law because Florida does not make a distinction between ownership of avulsions created by nature and avulsions created by government action.[208]

B. A Court of Law can execute a taking under the Fifth Amendment's Takings Clause.

The second and more divisive issue was whether a court can be the government actor that takes property under the Takings Clause of the Fifth Amendment.[209] The Court recognized that unlike the Habeas Corpus[210] or Ex Post Facto[211] Clauses in the U.S. Constitution, the Takings Clause of the Fifth Amendment[212] is not addressed to the action of a specific branch of government.[213]

The plurality opinion written by Justice Scalia contended that there was no textual support for the proposition that takings executed by the judicial branch were somehow different

[204] *Id.* (citing *Martin v. Busch*, 93 Fla. 535, 574, 112 So. 274, 287 (1927) (holding "when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line to become dry land, that land continued to belong to the State")).
[205] *Id.* at 2612.
[206] *Id.* at 2613.
[207] *Id.* at 2612.
[208] *Id.* at 2612-2613.
[209] *Id*. at 2608.
[210] U.S. Const. art. I, § 9, cl. 2.
[211] *Beach Renourishment*, 130 S. Ct. at 2601 (citing U.S. Const. art. I, § 9, cl. 3).
[212] *Id.* (citing U.S. Const. amend. V, § 3).
[213] *Id*.

from takings affected by any other branch of government.[214] Additionally, Justice Scalia, writing for the majority, stated that it would be an absurdity to allow the judiciary to do by court order what a legislature could not do by statue.[215] The Takings Clause bars *the government* from taking private property without just compensation, and the particular state actor doing the taking is irrelevant for constitutional purposes.[216]

Although the Court did not develop its own test for determining whether a court has performed a taking, the majority was quick to list other constitutional tests believed to be inappropriate for determining the presence of a judicial taking.[217] First, the majority dismissed the "fair and substantial basis" test taken from independent state grounds jurisprudence without explanation.[218] It further dismissed an "unpredictability" test that a judicial taking would constitute so drastic a change in state law that would be unpredictable for relevant precedents.[219] In its dismissal of tests, the majority showed its unease at giving recognition and legitimacy to any test which is based on notions of "fairness" or "substantive" concepts.[220]

Both Justice Kennedy's and Justice Breyer's concurring opinions advocated caution to the plurality. In his concurrence, Justice Breyer admitted that there could possibly be such a thing as a judicial taking, but he stated that this question of constitutional law is "better left for

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[214] *Id*.
[215] *Id*. (citing *Stevens v. City of Cannon Beach,* 510 U.S. 1207, 1211-1212, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari)).
[216] *Id*. at 2602 (emphasis in original).
[217] *Id*. at 2607-2608.
[218] *Id*. at 2608 (citing *Broad River Power Co. v. S.C. ex rel. Daniel*, 28 U.S. 537, 540 (1930) (indicating if a state court can show that its decision is based entirely on state law, and the decision does not implicate a federal question, than the U.S. Supreme Court does not have power of review. However, to ensure that state courts do not attempt to "evade" Supreme Court review, the Court has developed the "fair and substantial basis" test, which examines whether the state court's decision is fairly supported on state law principals)).
[219] *Id*. at 2610.
[220] Justice Scalia spent most of his plurality opinion criticizing Justice Kennedy for advocating a test based the Fourteenth Amendment's Due Process Clause. For a personal testimonial of Justice Scalia's unease with notions of "fairness" in judicial tests see: Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. Chi. L. Rev. 1175 (1989).

another day."[221] Justice Kennedy's concurrence took issue with the plurality's conclusion that there is such a thing as a judicial taking under the Takings Clause of the Fifth Amendment.[222] Rather, Justice Kennedy stated that if there were such a thing as a judicial taking, it would be checked by the Due Process Clauses of the Fifth and Fourteenth Amendments.[223] Justice Kennedy believed these amendments would have a greater ability to protect private liberty interests than the Takings Clause.[224]

V. THE COURT'S ANALYSIS

Beach Renourishment is an interesting case in both its holding and its warring opinions. The Court held there was not a taking of two homeowners' property rights to future accretions and that Florida's property law considered the placement of fill sand an avulsion, allowing Florida to retain title of the land. The Court further concluded that any accretion that develops after the placement of fill sand is part of the avulsion owner's property and not the littoral owner's property.

However, the refusal of the Court to create an exception to the avulsion rule when the state is the cause of the avulsion is troubling for several reasons. First, the common law concepts of accretions, littoral property, and avulsions pertained to naturally occurring phenomena, not human-caused events. Second, the supporting case law cited by the Court held that littoral owners did not have a property right to accretions separated from the littoral property by an avulsion was not as analogous as the Court made it seem. The major Florida case cited by the

[221] *Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring).
[222] *Id*. at 2615 (Kennedy, J., concurring).
[223] *Id*.
[224] *Id*.

Court[225] concerned property rights where natural bodies of water were drained dry and the littoral property owner did not have a right to the formerly submerged land. In *Beach Renourishment*, however, the dispute was not over a property right to newly accessible land. Rather, the dispute was over the separation of property that would belong to the Homeowners, had Florida not created an entirely new piece of property separating the original beachfront from the ocean.

The issue of whether there is such a thing as a judicial taking is one that currently receives little regard, but one that will likely create a landmark decision in the near future. Although the Justices debated fiercely over the existence and logistics of judicial takings, they reached few concrete conclusions. They did, however, make very clear that they were laying a foundation for a future decision where the issue of judicial takings will be established or dismissed as dicta.

VI. CONCLUSION

Beach Renourishment will not change the current landscape of takings litigation, but it is likely to be the foundation for new takings jurisprudence. Whether the U.S. Constitution (or the Court) will permit a judicial taking and what judicial standards shall be applied to a judicial taking case has yet to be seen. Based on *Beach Renourishment,* it is likely that a landmark decision regarding the scope and meaning of the Takings Clause of the Fifth Amendment will be coming sooner than later.

[225] *Id*. at 2611, 2612 (see *Martin*, 93 Fla. at 574, 112 So. at 287).