

Guest Commentary: Beach Decision Draws No New Line In Sand
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Beach Decision Draws No New Line In Sand

But high court launches debate about topic of judicial takings

By DWIGHT MERRIAM

On June 17, the U.S. Supreme Court handed down its decision in *Stop the Beach Renourishment*, its first property rights case since *Kelo*, *Lingle* and *San Remo* five years ago. 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."

The reaction is mostly overblown. This is a case the Court should not have taken. The Florida Supreme Court correctly decided the takings claim with a well-reasoned, rational analysis consistent with Florida precedent.

Coastal property owners had challenged a Florida statute which permanently fixed the historic high tide line (they call it the "Erosion Control Line," or ECL under the law). The state set that line because it is spending real money piling sand onto eroded beaches and officials don't want that dynamic line moving in and out with erosion and accretion (the gradual deposition of sand by natural forces).

The property owners said the ECL takes 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 takes 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 filling and any accretion.

The Florida Supreme Court held for the state – there had been no taking under the state's established common law precedents regarding property rights along changing coastlines. The U. S. Supreme Court agreed 8-0.

Scalia Pushes Point

Justice Antonin Scalia had been itching for a judicial takings claim since the Court denied certiorari in *Stevens v. Cannon Beach* (1994). You probably haven't heard of "judicial takings." A run-of-the-mill regulatory taking claim is the result of legislative or executive branch action. The theory of judicial taking is that a court can also take your property by interpreting and applying the law contrary to precedents. This is the first judicial takings case for the Court, though former Justice Potter Stewart referred to the concept in his concurrence in *Hughes v. Washington* (1967).

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

"States effect a taking if they recharacterize as public property what was previously private property. ...The Takings Clause [in the Constitution]... 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."

Justice Anthony Kennedy, joined by Sonia Sotomayor, in a concurring opinion challenged the idea and argued that such cases should be analyzed under the Due Process Clause. Kennedy, as the swing voter on the Court, is the one to watch. Sotomayor is difficult to predict, but it is interesting she sided with Kennedy, not Justice Stephen 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."

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

Justice John Paul Stevens did not appear at oral argument and didn't vote, after a Cato Institute scholar circulated documents indicating Stevens owned a waterfront

condominium in Florida in a beach renourishment area. He had also recused himself in an Iowa right-to-farm case 11 years ago at a time when he owned a 200-acre farm there.

By not participating, Stevens surrendered his right as the senior justice in the majority to pick who would write the opinion, the assumption being that it would be a 5-3 vote for the government with Kennedy or Scalia the senior justice for the majority and the chief justice joining the dissenters. With the 8-0 vote, the chief justice gave the job 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.”

The winners here include the states because 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 condo 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, but will there now be more attempts to bring judicial takings claims? •

The decision is available at www.supremecourt.gov/opinions/09pdf/08-1151.pdf.