

Commentary

Stop the Beach Renourishment— Six Perspectives

“No foul,” the Justices unanimously declared on June 17 when the U.S. Supreme Court ruled that Florida does not owe six Panhandle beachfront property owners monetary compensation from the state’s beach renourishment program (*Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S.Ct. 2592, June 17, 2010; see 62 PEL 334 in this issue). The 8–0 decision (retiring Justice Stevens did not participate presumably because he owns beach property in Florida) affirmed the ruling of the state’s highest court.

This case left many scratching their heads. Instead of acknowledging that the state was protecting their properties at the public’s expense, petitioners argued that the state’s efforts to rebuild the eroded beach in front of their homes took away valuable property rights without paying them compensation, such as their exclusive right to access the beach, their unobstructed views of the beach, and their right to future accretion of new sand. The property owners prevailed in April 2006 when the district court ruled that the beach-

front reconstruction project was an unconstitutional taking of their riparian rights (*Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, 27 So.3d 48 (Fla. App.1 Dist. April 28, 2006) (NO. 1D05-4086), *rehearing denied* (July 3, 2006)).

Florida’s highest court accepted the case, with the question framed as follows: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?” In September 2008, the Florida Supreme Court held that provisions of the Beach and Shore Preservation Act that fix shoreline boundaries and that suspend operation of common-law rule of accretion—but preserve littoral rights of access, view, and use after the erosion control line is recorded—do not, on their face, unconstitutionally deprive upland owners of littoral rights without just compensation (*Walton County v. Stop Beach Renourishment, Inc.*, 998 So.2d 1102, (Fla. Sept. 29, 2008), *rehearing denied* (Dec. 18, 2008)).

Then the excitement began. The petitioners sought review in the U.S.

Supreme Court but added a new twist. They believed the Florida Supreme Court’s ruling constituted a “judicial taking” because the court had invoked “nonexistent rules of state substantive law” to reverse 100 years of uniform holdings that littoral rights are constitutionally protected (2009 WL 698518). This issue raised eyebrows and, after the U.S. Supreme Court accepted review, more than 20 amicus briefs were filed.

Justice Scalia authored the majority’s decision that trounced the petitioner’s claim. The Florida Supreme Court did not engage in an unconstitutional taking. Scalia, however, failed to convince a majority of his brethren to embrace the judicial takings doctrine. Chief Justice Roberts, along with Justices Thomas and Alito, agreed with Scalia, but a fifth member would not take the bait.

The case of the year for planners and land use practitioners has generated great interest in the popular media and the bar. Six constitutional law scholars and litigators, each having followed this case closely, share their opinions in their mini-commentaries below.

—Lora A. Lucero, *ACP, Editor*

Green Light for Beach Renourishment, Red Light for Judicial Takings

John D. Echeverria

The Supreme Court’s resolution of *Stop the Beach Renourishment* has a frightening near-miss quality to it. Four justices led by Justice Scalia would have embraced, for the first time in the nation’s history, the petitioner’s radical judicial takings theory, and wreaked other far-reaching damage to established takings doctrine. Fortunately, the remaining four justices (Justice Stevens recused himself) deflected this missile, leaving prior doctrine intact.

Truly Implausible Claim

The headline is that the Supreme Court *unanimously* rejected what was, under any standard, an utterly implausible takings claim. An organization representing a handful of property owners along the Florida Panhandle asserted that they suffered a “taking” because the state and local governments acted to protect them and their neighbors from erosion by building up

the shoreline with sand pumped from the ocean offshore. While most owners welcomed the protection, the plaintiff group claimed that the seven-mile-long renourishment project impaired its members’ property rights by eliminating their direct contact with the ocean and, once the protective buffer was in place, denying them the speculative benefit of any future accretions to their coastal properties.

An irony of the plurality's position is that the logic of their legal reasoning suggests that federal court rulings on issues of federal property law should also give rise to takings claims.

The full Court responded that, whatever legal test might apply in this type of case, the plaintiff's members suffered no taking. They agreed the public has a perfect right to place a sand buffer on publicly owned submerged land in order to protect coastal property owners and the community as a whole. Furthermore, this public exercise of public property rights, the Court said, had no effect whatsoever on any property rights held by coastal property owners under Florida law. To the plaintiff's argument that these particular owners didn't need or want the project because they preferred to bear what they viewed as a minor erosion risk to their particular properties, the Court implicitly responded that a small minority cannot claim an effective veto over a public project by invoking nonexistent property entitlements.

Did a ridiculous case such as this provide the pretext for the invention of a new judicial takings doctrine? Fortunately not, but barely so.

Right-Wing Judicial Activism Falls Short
Justice Scalia and three other justices agreed that the takings claim lacked merit, but would have used this frivolous case to launch the judicial takings theory. Even though Justice Scalia announced the judgment of the Court, the crucial parts of his opinion discussing the judicial takings concept failed to command support from a majority of the Court and therefore have no precedential weight. A clearer example of (attempted) right wing-judicial activism does not exist, for a number of reasons:

- Recognizing a judicial takings theory would have been a remarkable break with precedent, because never before in its long history has the Supreme Court recognized this possibility. Furthermore, even Justice Scalia admitted that the drafters of the Bill of Rights never envisioned that the Takings Clause would apply to judicial rulings.

To avoid this difficulty, the Scalia plurality cavalierly declared that compensation is not the exclusive remedy for a taking and a judicial-taking claimant could seek equitable relief, either on direct review in the U.S. Supreme Court or in federal district court. If there is one thing we think we know about the Takings Clause, it is that it is not designed to block government from acting but to require payment of compensation when government proceeds with "otherwise proper" action. In other words, the plurality threatened to upend settled takings doctrine in order to support its novel takings theory, the elaboration of which was actually unneeded to decide this particular case.

- The Scalia plurality proposed a completely unyielding rule to implement its judicial takings theory: that any change in "established" state property law would constitute a judicial taking. This standard flies in the face of centuries of history demonstrating that the common law evolves over time; numerous Supreme Court decisions recognize that the state common law of property can and will evolve, without offending the U.S. Constitution. Indeed, Justice Scalia himself, writing for the majority in *Lucas v. South Carolina Coastal Council* (505 U.S. 1003, 112 S.Ct. 2886 (1992)), recognized that background principles of state law can evolve without offending the Takings Clause, observing that "changed circumstances or new knowledge may" justify a change in established property rules over time. Now, speaking for a quixotic plurality, Justice Scalia contradicts *Lucas* and suggests that the states must lock background principles in stone unless they are willing to pay for any change pursuant to the Takings Clause.

Finally, the Scalia plurality threatened to destroy the traditionally respectful relationship between the federal and state courts. The Supreme Court has long purported to respect the state courts as the "final expositors" of state law and in the past affirmed its "scrupulous regard for the rightful independence of the state governments," including but not limited to the state court systems. By proposing an expan-

sive new doctrine of judicial takings, the plurality would set up the Supreme Court, and apparently lower federal courts as well, as intrusive federal overseers of a core state judicial function.

An irony of the plurality's position is that the logic of their legal reasoning suggests that federal court rulings on issues of federal property law should also give rise to takings claims. Yet the plurality appears to treat the judicial takings theory as being uniquely applicable to the state courts. No doubt the state courts decide more state property law questions than the federal courts decide federal law property questions. But federal courts nonetheless routinely address property issues involving, for example, the scope of the federal navigational servitude vis-a-vis riparian owners or the nature of private grants to federal lands.

The Takings Clause applies, of course, to the federal government and applies to the states only by virtue of its incorporation via the 14th Amendment. In *McDonald v. City of Chicago* (130 S.Ct. 3020 (2010)), decided by the Supreme Court a few days after *Stop the Beach Renourishment*, the Court emphasized that, simply because the Second Amendment applies to the states through the 14th Amendment, it does not apply in a "watered-down" version. It follows *a fortiori* from this reasoning that a judicial takings doctrine applicable to the states would have to apply with at least the same force to the federal courts.

Recognizing a judicial takings doctrine applicable to the federal courts would raise further questions about where such claims might be brought. The U.S. Court of Federal Claims has essentially exclusive jurisdiction over all takings claims against the United States. Thus, the claims court would apparently hear virtually all takings claims arising from rulings by the federal courts, including presumably the claims court itself. The plurality's failure to even recognize the possibility of federal judicial takings, or their implications for the theory of judicial takings as a whole, underscores the hazard in this novel idea for traditional notions of federal-state judicial comity.

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Death Knell for Judicial Takings in the Supreme Court?

Notwithstanding the nearness of the miss in *Stop the Beach Renourishment*, the Court's fractured opinion probably sounds the death knell for the judicial takings idea in the Supreme Court, at least for the foreseeable future. There were, of course, four solid votes for the judicial takings concept, but Justice Kennedy, the traditional swing vote on takings as on so many other issues, quite unambiguously concluded (together with Justice Sotomayor) that the eminent domain power is reserved to the political branches, and that judicial rulings on property issues, to the extent reviewable at all under the U.S. Constitution, should be reviewed under the relatively deferential standards of the Due Process Clause. Justice Breyer (joined by Justice Bader Ginsburg) took the narrower approach of simply deferring the merits of the judicial takings idea; on the other hand, he offers no suggestion that he is sympathetic to the concept. Finally, future Justice Kagan, who filed a brief casting serious doubt on the judicial takings idea, would likely not become its champion on the Supreme Court.

There is more, however, than the narrow margin of victory for the justices wishing to reject or at least defer the judicial takings concept. The Court

took longer than six months to issue its decision from the date of oral argument. It is fair to assume that Justice Scalia emerged from the confidential conference following the argument with an assignment to write an opinion for a Court unanimously agreed on affirming the Florida Supreme Court. Yet the Court produced anything but a unified product.

While it may be decades before some justices' private papers are opened to the public and scholars can study the actual tug-of-war that ensued, it is fair to assume that Justice Scalia and his colleagues engaged in a good deal of intellectual pushing and shoving in an effort to craft an opinion that a majority of the Court could support. It is self-evident that this effort failed, and that the failure produced a new round of fireworks, with Justice Scalia offering a biting critique of the positions and reasoning of Justices Kennedy and Breyer. Kennedy, he said, engaged in "Orwellian" reasoning, made an argument based on an "impossible" premise, focused on "nonexistent or insignificant problems," and advanced an alternative standard for constitutional review of judicial rulings that "never means anything precise." He characterized Justice Breyer as making statements that were "not true," of "being coy" and even "odd."

Clearly at some point in the course of the Court's deliberations, Justice Scalia

threw up his hands in frustration and, adopting a rhetorical approach better adapted to a dissent than a majority opinion, abandoned all pretense of seeking some middle ground on the legal issues. Instead, he let fly with his criticisms. After this no doubt painful process, it is difficult to imagine that Justice Scalia could assemble a majority any time soon willing to take a second, sympathetic look at the judicial takings concept.

Green Light for Beach Renourishment

The one clear practical outcome of *Stop the Beach Renourishment* is that Florida authorities have been granted a green light to proceed with beach renourishment projects without fear they may be subject to legal challenges under the Takings Clause. Beach renourishment is expensive, will likely become more expensive with more rapid erosion resulting from climate change, and is highly problematic from an environmental standpoint. To whatever extent coastal communities in Florida feel they need this tool in their toolkit to address coastal erosion, it will be available to them.

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Unitary Law of State Takings

Steven J. Eagle

The Supreme Court's recent decision in *Stop the Beach Renourishment* has potential ramifications extending well beyond its narrow holding on rights of accretion or even its widely anticipated discussion of judicial takings.

Justice Scalia wrote for a unanimous Court that the petitioner's members did not own rights to accretion of their littoral properties. Joined by Chief Justice Roberts and Justices Thomas and Alito, he also asserted that judicial action could constitute a taking under the Takings Clause.¹ Justice Kennedy, joined by Justice Sotomayor, argued that a judicial

arrogation of property might better be regarded as a deprivation of substantive and procedural due process. Justice Breyer, with Justice Bader Ginsburg, argued that it was both unnecessary to the judgment and imprudent for the Court to decide the validity of judicial takings. Neither concurring opinion rejected judicial takings outright.

The Court accepted the Florida Supreme Court's view of a close question of state property law, although its opinion did not convincingly refute the logic of the intermediate appellate court it overruled.

On the "judicial takings" issue, Justice Kennedy correctly stated that consideration of the issue was untimely. However, in an appropriate case the Court should hold that states might take private property by judicial decree as well as by legislative, executive, or administrative action. Perhaps the most consequential implication of Justice Scalia's "state action, not state actor" rationale might be the elimination of different levels of deference the Court has accorded land use decisions by different government actors.

While property rights typically are created by state law, the state cannot subsequently abrogate them through what I have termed “definitional takings” by the legislature, or by the “*ipse dixit*” of judges.

Finally, despite Justice Kennedy’s infatuation with substantive due process in theory, it generally is an unsatisfactory substitute for takings analysis. Even in those cases of property deprivations where it is appropriate, substantive due process would provide meaningful protection for property owners only if the Supreme Court overturns U.S. Courts of Appeals precedents that have rendered it toothless.

Littoral Owners’ Property Rights in Accretion

In common law and in Florida, the boundary between private littoral property (encompassing inland and dry sand areas) and public trust property (wet sand and submerged land beyond) was the mean high-water mark, which moves over time. Through the doctrines of accretion and reliction, extensions of beaches resulting from slow deposits adding to the land or slow recession of water belonged to landowners. The Florida statute at issue replaced this dynamic boundary with a fixed “erosion-control line,” meaning that landowners could not benefit from future accretion.

The Florida court “described the right to accretions as a future contingent interest, not a vested property right,”² despite the powerful emotional tug and monetary bonus that almost inevitably accompany ownership to the water’s edge. The possibility of accretion, being far from merely conjectural, was an element leading Florida to recalculate mean high-water lines every 19 years.

“Judicial Takings” Was Raised Prematurely, But is Correct in Principle

Stop the Beach Renourishment is of interest primarily because the Court granted certiorari on the issue of “judicial takings.”³

Justice Breyer reiterated that “[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”⁴

Justice Scalia responded: “One cannot know whether a takings claim is invalid without knowing what standard it failed to meet” (130 S.Ct. 2592 at 2603). However, the predicate to any taking is that the asserted right of which the plain-

tiff had been deprived was “property.” The Court held, 8–0, that the right to possible accretion was not a property interest.

In an appropriate case, however, the doctrine of judicial takings should be vindicated. As stated by Justice Scalia, its essence is that:

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 government actor. . . . There is no textual justification for saying that the existence of the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. (130 S.Ct. 2592 at 2601)

In support of his point, Justice Scalia cited his dissent from denial of certiorari in *Stevens v. Cannon Beach*,⁵ based on the Oregon Supreme Court’s “invoking nonexistent rules of state substantive law.” The Stevens court discarded the trial court’s finding that a littoral owner’s dry sand area was available for public recreation through implied dedication or prescriptive easement. Instead, it found for the state, *sua sponte*, on the basis of Oregon customary law. Importantly, that custom was deemed to run along the entire coast, without the need for parcel-specific litigation, as would be the case with dedication or prescription.⁶ However, a “custom” is a reasonable and universal rule of action in a locality, followed not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because it “is in effect the common law within that place to which it extends, although contrary to the general law of the realm.”⁷

While property rights typically are created by state law,⁸ the state cannot subsequently abrogate them through what I have termed “definitional takings”⁹ by the legislature,¹⁰ or by the “*ipse dixit*” of judges.¹¹ The uncompensated taking of private property by statute violates the federal Takings

Clause, as does a taking by regulation. As Justice Scalia noted, nothing in the Constitution’s text suggests that an equivalent judicial act should be treated differently (130 S.Ct. 2592 at 2601).

“State Takings” Undermine Dolan’s Legislative/Adjudicative Distinction

In *Dolan v. City of Tigard* (512 U.S. 374, 114 S.Ct. 2309 (1994)), the Supreme Court held that exactions of property interests as a condition for development approval required an “individualized determination” that there was “rough proportionality” between the exaction sought and the burden that the development would impose. Chief Justice Rehnquist noted that cases such as *Euclid v. Ambler Realty Co.* (272 U.S. 365, 47 S.Ct. 114 (1926)) and *Pennsylvania Coal Co. v. Mahon* (260 U.S. 393, 43 S.Ct. 158 (1922)), where the Court broadly deferred to land use regulations, “involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel” (512 U.S. 374, 385 (1994)).

However, as one commentator noted, “[i]n reality the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction.”¹²

In *Parking Association of Georgia, Inc. v. City of Atlanta* (450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995)), the city council required parking lot operators to help beautify Atlanta for the upcoming Olympic Games by converting 10 percent of the paved area in existing lots to landscaping, and to plant at least one tree for every eight parking spaces.¹³ The Georgia Supreme Court rejected the owners’ takings claim because “the city made a legislative determination with regard to many landowners . . .” (450 S.E.2d at 203 (quoting Dolan, 512 U.S. at 391)). The dissent retorted that “[i]n *Dolan*, the Supreme Court placed the burden on the city because it had singled out a particular parcel

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to bear an extraction. Here, the city has singled out a particular use within the city to bear the extraction.”¹⁴ The U.S. Supreme Court denied certiorari. Justice Thomas, joined by Justice O’Connor, issued a stinging dissent:

It is hardly surprising that some courts have applied *Tigard’s* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.¹⁵

The logic of Justice Scalia’s *Stop the Beach Renourishment* plurality argument, with its stress on state acts as opposed to state actors, would make the *Dolan* legislative versus adjudicative distinction untenable.

Perhaps the *Dolan* distinction could be salvaged by relating it to functions rather than actors, as exemplified by the Oregon Supreme Court in *Fasano v. Board of Commissioners of Washington*

County (507 P.2d 23 (Or. 1973)). The *Fasano* court explained: “Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations.”¹⁶ However, the majority approach, exemplified by the California Supreme Court in *Arnel Development Co. v. City of Costa Mesa* (620 P.2d 565 (Cal. 1980)) rejects the notion that courts may distinguish which legislative acts are truly “legislative” and which are not.

Substantive Due Process, and Its Unfulfilled Promise

Justice Kennedy’s preference for substantive due process analysis as a substitute for judicial takings seems largely incorrect and otherwise unhelpful. As Justice Scalia noted, the Court has preferred “an explicit textual source of constitutional protection” to generalized due process protection (S.Ct. 2592 at 2606). However, not every deprivation of property is an arrogation of that property to government’s own use. In *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005), the Court declared that takings analysis did not supplant substantive due process analysis, which was “logically prior to and distinct from” it.¹⁷ A state court construction of

the meaning of state law might not be arbitrary or capricious and nevertheless constitute a compensable taking.

As I have argued, such non-takings deprivations ought to be protected by a meaningful level of substantive due process protection.¹⁸ However, despite the importance of substantive due process as a buttress against arbitrary deprivations of property, the doctrine has not fared well in the federal courts. Many circuits have unjustifiably borrowed from search and seizure precedent from the Fourth Amendment, and define a substantive due process violation in property rights cases as State conduct so egregious as to shock the conscience.¹⁹

As Justice Breyer observed, the concept of “judicial takings” implicates a multitude of complex issues involving property law and federal procedure (130 S.Ct. 2592 at 2619). A unitary standard for evaluating state takings would raise important issues of comity, as well. Both potentially would substantially increase the caseload of federal courts. *Stop the Beach Renourishment* establishes the groundwork for subsequent exploration of these issues, as well as the potential for increased protection of private property rights.

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Is an Answer Blowin’ in the Wind?²⁰

Harvey M. Jacobs

The decision in *Stop the Beach Renourishment* was anxiously awaited among the property rights and land use communities. This term it was the Court’s major statement on property rights and takings. With its decision, the Court continues its dance with property rights. In so doing, the Court both intrigues and confounds. As a result, there are things we know, things that we might know, and things we do not know.

Things We Know

The plaintiffs believed they were bringing a case about the substantive matter of property rights. First and foremost, who owned what, and why?

The Court quickly and unanimously addressed these matters. The actions of the state of Florida were reasonable both vis-a-vis common law and Florida statutory law. The state was acting within its rights when it brought sand in and created and extended the

beachfront, and in so doing modified the access and property right composition of those private property owners adjoining the sea. The Court found nothing controversial in the facts of the case. Reading this early part of the decision, one can wonder why the Court even took the case. Their assessment is, in essence, “this is clear, there is no controversy, the state was acting within its rights, and the state did nothing untoward.”

The question of the existence and extent of judicial takings is one of the major unresolved questions about takings.

As a result of their reasoning, we know that states may take beach enrichment actions like Florida took, and that in so doing they are fully within their common law (and hopefully statutorily reinforced) rights.

Something else we know. In the matter of land use and property rights, the Court is inclined to defer to states and their legislative processes. In the very first sentence of the full opinion, Justice Scalia, speaking for all eight justices, notes that “[g]enerally speaking, state law defines property interests. . .” (130 S.Ct. 2592 at 2597). In this way, this decision can be viewed as in line with the Court’s more narrowly decided decision in *Kelo v. City of New London* (545 U.S. 469 (2005)). For those in the majority in *Kelo*, the fact that the City of New London was acting under the specific authorization of a state statute legitimated the process, even if some in the majority may have had doubts about the city’s action.

So the Court does not use *Stop the Beach Renourishment* to add anything to its existing jurisprudence on whether and how states and local governments can affect private property rights. Common law and states are the starting points for governmental actions that affect private property owners. Actions supported by common law and specifically enabled and authorized by state law are likely legitimate and it will be difficult for private property owners to contest them.

Things We Might Know

One thing we might learn from the decision is that the Court is not particularly interested in property or property rights *per se*. That is, in deferring to state law, thus acknowledging the limited role for the federal government in state actions, the Court largely brushes aside the substantive question of what is and should be in the bundle of rights.

What is the Court interested in, then? Simply, they want to answer the question: When does government take property and, specifically, is there such an action as judicial takings? This focus of the Court on judicial takings was both a morphing of the original *Stop*

the Beach Renourishment action, and a search for an opportunity, by Justice Scalia in particular, to engage the matter of judicial takings, a subject he has long been interested in.²¹ So in terms of the Court’s present (and future) focus, it is not the matter of what is and is not a property right. It is a matter of what the government may and may not do in taking a property right. The Court has already established that the administrative and legislative branches of government can constitute legitimate actions that impinge on individual private property rights (like regulation), especially when these actions come out of common law and are buttressed by specific state legislation. But the Court also acknowledges that occasionally these actions will overreach, and that the Court has authority to admonish such overreaching. The question before the Court in this case is, does this same line of reasoning apply to the actions of state judges?

Justice Scalia makes a compelling plain-English argument for recognizing the existence of judicial takings: “The Takings Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, not with the governmental actor . . .” He goes on to say: “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” (130 S.Ct. 2592 at 2601).

Is he right? Three of his colleagues agree with him, two might or might not agree with him, and two appear skeptical. So does one view the Court as 4-4 on this issue (which is how they officially ruled in this part of the case) or 6-2 (which is how several conservative commentators want to describe what they believe may be a leaning that emerges out of the case?)²²

Things We Do Not Know

The question of the existence and extent of judicial takings is one of the major unresolved questions about takings.²³ Whether such a thing even exists, or should exist, and what would be

the consequences if it did, is of great debate.²⁴ As a result of *Stop the Beach Renourishment*, we do not know if there is an action such as judicial takings. We know that plurality of the Court strongly and unambiguously believes there is. Whether and how these members will convince one or more other Justices to join them in their opinion is unknown. Placing a wager, I will bet that the answer is no; they will not convince one or more Justices to join them. As a result, the existence and scope of judicial taking will remain a divided issue, debated in academic journals, referenced in lower court cases, but not clarified in the immediate future by the Court, and therefore not a substantive matter for planners and planning practice.

What Does It All Mean for Planning Practice?

As planners learn, law matters. It matters both symbolically and literally. Symbolically, Americans and their elected officials hold beliefs about what the Declaration of Independence, the Constitution and its Bill of Rights, and the U.S. Supreme Court say about the rights of individuals, the limitations on the powers of government, and the relationships among levels of governments. It is very often the emotionality of these beliefs that structure the electoral, legislative, and policy processes. For example, public debate will often begin with lead-ins such as: “As an American I am entitled to . . .”; “Government doesn’t have the right to . . .”; “America was founded to . . .”; “The Constitution says . . .” Whether or not the statement that follows the lead-in is historically or legally correct, it is almost always difficult to refute it and redirect the conversation. So law matters because we use it, and what we believe to be true about it to direct our public conversations about property rights, land, natural resources, communities, the individual, and the state.²⁵

Literally law matters because decisions establish guideposts for how planners think about what is appropriate policy action. If, for example, a regulation were proposed that would take all economic value from a set of properties and there

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was no background principle of nuisance to justify it, then existing jurisprudence makes clear that such regulation would be viewed as a taking, and the government would need to be prepared to offer compensation for its actions.²⁶

If I weigh the literal versus the symbolic—which is more important—from my perspective, it is the symbolic value of law.

From a literal point of view, government is empowered to do much more (to act more assertively) than most governments are willing to do. What holds government back from the literal limit of its authority? The symbolic value of law. Government does much less than it could, in theory, do on behalf of the public interest, because of how groups of citizens, elected officials, and administrative personnel (mis)understand what the law actually says and what it allows or prohibits in terms of public action. It is the symbolic nature of law that, more than anything else, structures our interactions around land use, natural

resources and environmental issues vis-a-vis the rights of the individual and the power of the state.

How does *Stop the Beach Renourishment* add to this dialogue? Not in any significant way. The case is, in some real ways, a dud (not that that is bad). It was argued with great anticipation and animation,²⁷ and yet the results say very little that is new. I'm not sure it will enter the symbolic narrative in any significant way or even matter much to property and land use scholars.

The major exception is, of course, the matter of judicial takings. The unknown is to what extent the Court will continue to seek out cases which allow it to opine on this subject, and whether, in so doing, it will change the opinions of any present or future judges.

But even if the Court were to define the existence and scope of judicial takings, I doubt whether it would have much impact on most land use decision making. Why? Because most policy is local, most policy decisions

are uncontested, and the decisions that are contested don't go very far. Think about zoning permits, appeals to a zoning board, and appeals beyond a zoning board. And for the overwhelming majority of local processes, it is the symbolic nature of law, not its literalness, which structures the terms of debate and dispute (what a landowner and a government can and cannot do), though it is the literalness of law that often settles a specific disputed question.

There are many important questions to address with regard to property rights, individual rights, government authority, and the role of the branches of government. But at least for now, from the perspective of the U.S. Supreme Court, many of the answers are blowing in the wind.

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Scalia Agonistes: Takings Law Under the Florida Sun

Daniel W. Bromley

Only those economic advantages are rights which have the law back of them . . . whether it is a property right is really the question to be answered.

—JUSTICE R. JACKSON,
WILLOW RIVER POWER CO. (324 US 499, 502
(1945))

What Does Scalia Want?

To a Peircean pragmatist it is a thing of delight to watch the thrashing about of a libertarian logical positivist as he seeks to escape the contradictions of his flawed epistemological convictions.²⁸ Observing Justice Scalia at work is high comedy for those of us who are not the objects of his abundant derision. I should imagine that his hectoring is rather tiresome to those who must live with it for nine months every year. The place to start, it seems, is to ask: Why all the fuss?

It appears that the often aggressive forces of nature have a tendency to re-

move sand from beaches (what Scalia insists on calling “property”). If it were but acknowledged that we cannot master all of nature, we would know that natural processes do not easily accommodate the quixotic drawing of artificial “lines in the sand.” After all, sand under thrall of wind and water tends to move. Here, when remediation is undertaken at public expense, the new sand does not belong to riparian owners. Their inability to expropriate the new domain resulting from this public works project outrages the Justice. For someone with such refined disgust for governments and the things they do, it seems odd to see him wish to bestow the majority of the benefits of government action on a very small coterie of particular individuals. Apparently, libertarians want to make sure that the benefits of government—if indeed there must be any at all—accrue only to certain favored

groups. After all, if government benefits are spread around too democratically, more people will clamor for some of them. Things might quickly get out of hand. In this particular case, those privileged to own beachfront property deserve protection from an overbearing state, while also benefiting from the agreeable largesse of the public purse.

The irony here is magnified by the fact that, had public money not been spent to augment the sand barrier between the voracious ocean and the dwindling remainder of these riparian estates, the high-water mark would eventually approach the agreeable front porches of aggrieved petitioners. It seems that these expenditures by local governments serve to increase the residual economic value of the riparian estate—regardless of where the ownership line ends up being drawn. Notice that the vulnerable riparian estate is

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enhanced to the extent that artificial beach replenishment throws up an enlarged barrier against the inevitable encroachment of the ocean. While it vexes the Justice that the new sand does not “belong to” the riparian owners, they are major beneficiaries of it. (As we shall see, this relates to the long and tedious confusion in takings jurisprudence between “use” and “benefit.”) The petitioners did not have to pay for its establishment;²⁹ its existence offers important buffering for their remaining land/sand, and thus the value of their parcel (what Scalia insists on calling their “property”) is increased. One gets the impression that petitioners would prefer to watch their riparian estate gradually be “taken” by natural forces than to lose their exclusive access to the wind and water that threatens them.

The obverse of takings is givings and here we see the latter at work. The public sector is bestowing (“giving”) enhanced economic value to riparian owners and is failing to collect the full market value of that increment to the estates so benefited. The increased taxes from riparian owners—if any materialize—cannot possibly compensate the local jurisdiction for its costs of the project.

Text and Meaning

Grasping a concept is mastering the use of a word.³⁰

Scalia draws comfort from earlier takings jurisprudence (*Loretto*, *Lucas*, and *Webb’s Fabulous Pharmacies*), but conveniently fails to mention cases that cut the other way (*Penn Central Transportation Co.*, *Hawaii Housing Authority*, *Keystone Bituminous Coal Association*, *Babbitt*). Artful citation is not novel, but it bears watching. The requisite attention must concern concepts. Like most positivists, Scalia is beguiled by the contrived clarity of simple terms. More particularly, positivists *create* their artful meaning from the terms they happen to find endearing.

He abuses Justice Kennedy for the claim that the framers did not envision the takings clause applying to judicial decisions. This is an odd digression

since Scalia has never been interested in what the framers did or did not *envision*—he only cares about what they *said*. And, like most positivists, he believes that he knows what they meant (envisioned) by what they said. More correctly, *they* meant what *he* means from the words *they* used. He writes: “Where the text they adopted is clear, however (‘ . . . nor shall private property be taken for public use’), what counts is not what they envisioned but what they wrote” (130 S.Ct. 2592 at 2606). Where, exactly, does Justice Scalia turn for his confidence that the above text is clear? Indeed, there are four problematic phrases on display here: “private property,” “taken,” “for,” and “use.” If Scalia has paid attention to the contested history of the Supreme Court’s takings jurisprudence, he should know that these terms—ideas and therefore concepts—have been at the core of takings disputes from the very beginning.

As Justice Jackson recognized, so-called “private property” is nothing but a Kantian noumenon requiring consent on the part of civil society—a *bürgerliche Gesellschaft*. The term “taken” is precisely the problematic idea to be worked out. What was “taken” under *Loretto* or *Penn Central*? The term “for” asks us to consider the *purpose* behind the action under discussion. Was sand replaced *for the purpose of* providing the common folk access to the beaches of Walton County? Was sand replaced *for the purpose of* protecting the foreshore from further erosion? Was sand replaced *for the purpose of* depriving current riparian owners the pleasure of direct and exclusive access to the ocean? What, exactly, does Scalia have in mind when he celebrates the superficial clarity of the takings clause? And this brings us to the contested term “use.” It is common in takings jurisprudence to see the monogrelized statement about taking land for “public benefit” rather than for “public use.” They are not the same.

The Justice finds willful clarity in a phrase that is legendary for its lack of specificity. Clarity begs specificity. The simple word “table” can refer to five to six different “things”—some with three legs, some with four legs, some sitting

low to the ground, some far above the floor, and some reserved for dons and other worthies.

On “Established” Rights

Perhaps the most bizarre aspect of Scalia’s lament is his deceitful attack on “. . . judicial elimination of established private property rights” (130 S.Ct. 2592 at 2606). One would suppose that a Supreme Court justice would grasp the idea that most of what comes before the Court concerns matters that one party considered to be “established.” Indeed, these cases come to the Court precisely because their very status of being “established” is now found to be problematic. Chief Justice Roberts may succeed in deceiving members of the Senate with his bizarre allegory that justices merely “call balls and strikes.” But anyone who pays attention cannot be in doubt that the purpose of the Supreme Court is to keep redefining the “strike zone” as new circumstances warrant. That is precisely the purpose of the Court. It is what the Court “is for.” In a telling comment on what the Court does, consider the following characterization attributable to Justice Oliver Wendell Holmes:

A case comes to court as a unique fact situation. It immediately enters a kind of vortex of discursive imperatives.

There is the imperative to find the just result in this particular case. There is the imperative to find the result that will be consistent with the results reached in analogous cases in the past. There is the imperative to find the result that, generalized across many similar cases, will be most beneficial to society as a whole—the result that will send the most useful behavioral message. There are also, though less explicitly acknowledged, the desire to secure the outcome most congenial to the judge’s own political politics; the desire to use the case to bend legal doctrine so that it will conform better with changes in social standards and conditions; and the desire to punish the wicked and excuse the good, and to redistribute costs from parties who can’t afford them (like accident victims) to parties who can (like manufacturers and insurance companies).

It is disingenuous for anyone, but especially a Justice of the Supreme Court, to speak of social arrangements as “established.”

Hovering over this whole unpredictable weather pattern—all of which is already in motion, as it were, before the particular case at hand ever arises—is a single meta-imperative. This is the imperative not to let it appear as though any one of these lesser imperatives has decided the case at the blatant expense of the others. A result that seems just intuitively but is admittedly incompatible with legal precedent is taboo; so is a result that is formally consistent with precedent but appears unjust on its face.³¹

It is disingenuous for anyone, but especially a Justice of the Supreme Court, to speak of social arrangements as “established.” The economy is al-

ways in the process of becoming, and the purpose of the law is to see legal arrangements as both consonant with—and instrumental to—that becoming.³² To suppose that anything in a democratic market economy is “established” is to let wishes trump cognition. More correctly, such talk is the refuge of those who want to preserve the world in their image. It is also an instrument of the intellectually lazy who seek to replace hard work with cheap assertions. To say that property law is “established” is the exact opposite of what every lawyer in the land knows to be the case. They, after all, deal with law out on the ground.³³ This is a very different law from that practiced by the few who sit,

imperiously robed, in elegant chambers where they conduct their business in a manner that resembles nothing quite so much as a graduate-level seminar—personal insults included.

American property law is as fluid as the sands of Walton County—and a good thing too. For those aware of the historic connection between ownership of land and political revolutions, it is well understood that reform is the antidote to revolution. Only originalists miss the point.

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‘If a Local Government Legislator or Building Permit Official Must Answer to the Takings Clause, Then Why Not the Judicial Branch?’³⁴

John J. Delaney

The Plurality Opinion³⁵

The Plurality Opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito) states that the Takings Clause is “not addressed” to the action of a specific branch or branches of government. It is concerned simply with the act, not with the governmental actor, and strongly asserts that there is “no textual justification” for saying that the scope of a state’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. The Plurality Opinion also cites “common sense” as leading to the same conclusion because it would be absurd to allow a state to “do by judicial decree what the Takings Clause forbids it to do by legislative fiat.” It cites the Court’s precedents as not supporting the proposition that “takings effected by the judicial branch are entitled to special treatment.”

In summary, argues the Plurality Opinion, the Takings Clause bars the *state* from “taking private property with-

out paying for it no matter which branch is the instrument of the taking.” The particular state “*actor*” is irrelevant. The Concurring Opinions do not strenuously refute these arguments, but focus instead upon the difficulties that might be involved with judicial takings, and the “more appropriate alternatives” thereto, such as those arising under “general due process principles.”

The Concurring Opinion of Justice Kennedy³⁶

The two Concurring Opinions are summarized in part in the Concurring Opinion of Justice Kennedy (joined by Justice Sotomayor), stating that “this case does not require the Court to determine whether or when a judicial decision determining the rights of property owners can violate the Takings Clause of the Fifth Amendment.” His Concurring Opinion further notes that “certain difficulties . . . should be considered before accepting the theory that a judicial decision that eliminates an ‘established property right’ . . . constitutes a violation of the Takings Clause.”

The “vast governmental power” to take private property for public use upon payment of just compensation is typically held by legislative bodies which in turn “grant substantial discretion to executive officers” as to what property should be taken. These are matters “for the political branches—the legislature and the executive—not the courts.”

By contrast it is “natural” to read the Due Process Clause as “limiting the power of the courts” to eliminate or change established property rights. Thus, “without a judicial takings doctrine” the Due Process Clause could “prevent a state from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat.” To announce that courts can effect a taking when deciding cases involving property rights would raise “difficult questions.” Therefore, the Court should not adopt such a “sweeping rule” at this time. Justice Kennedy further opines that the “evident reason” for recognizing a judicial taking doctrine would be to “constrain the power of the judicial branch.”

The long “shadow” of *Williamson County* has erected standing, ripeness, and finality requirements of such magnitude that access to the “sunshine” of the federal courts for takings claimants is now virtually denied.

However, in making this assumption, neither he nor Justice Breyer come to grips with the Plurality Opinion’s point that the Takings Clause bars the non-compensated taking of property across the board, “no matter which branch is the instrument of the taking.”

The Concurring Opinion of Justice Breyer³⁷

The Concurring Opinion of Justice Breyer (joined by Justice Bader Ginsburg) states that Part IV of the Court’s Opinion makes it “clear” that state court property decisions “can involve state property law issues of considerable complexity.” Accordingly, Justice Breyer is concerned that the Plurality Opinion could open the doors of federal courts to “constitutional review” of potentially large numbers of state law cases in an area of law that is familiar to state, but not federal judges. However, Justice Breyer’s concern may be misplaced because the doors of federal courthouses have been virtually closed to takings claimants for a quarter-century. This is attributable to the Court’s unfortunate decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (73 U.S. 172, 105 S. Ct. 3108 (1985)). In short, Justice Breyer concludes that there is no “need” for the Court to decide more than what it decided in Parts IV and V of its Opinion, namely that the Florida Supreme Court’s decision did not amount to a “judicial taking.”

Had the Plurality Opinion Become the Court’s Opinion, Its Impact Upon Federal Courts Would Likely Not Be Immediate

The long “shadow” of *Williamson County* has erected standing, ripeness, and finality requirements of such magnitude that access to the “sunshine” of the federal courts for takings claimants is now virtually denied.³⁸ The Court’s central holding therein is that in order to have standing, a takings plaintiff must demonstrate that it has obtained both a “final decision from the agency regarding the application of the [challenged] regulation” to its property, and has also sought “compensation through the procedures the state has provided for this purpose.”³⁹ From this arose the il-

lusory theory that once state procedures were used unsuccessfully, *Williamson County* would allow a takings plaintiff to somehow return to a federal court to vindicate her claim. However, when implemented, this theory turned into a catch-22, trumped repeatedly by public agency defendants asserting *res judicata*, collateral estoppel, claims preclusion, or issue preclusion.⁴⁰

Even if the Plurality Opinion had become the Court’s opinion, there is little reason to believe that under current applications of *Williamson County*, the doors of federal courts would be opened to plaintiffs who have unsuccessfully pursued judicial takings claims in state courts. They would be treated in the same manner as other takings plaintiffs. However, as noted in Justice Kennedy’s Concurring Opinion, a significant concurring opinion by the late Chief Justice William Rehnquist in the case of *San Remo Hotel L.P. v. City and County of San Francisco, California* (545 U.S. 323, 125 S. Ct. 2491 (2005)), offers hope for all takings claimants. *San Remo* holds that the full faith and credit statute precludes further litigation of issues that have been litigated in California courts, and that no exception is available under that statute that would provide a federal forum for a litigant seeking to advance federal takings claims that are not ripe until entry of a final judgment denying just compensation. There is no “right” to vindicate federal claims in a federal forum.

Chief Justice Rehnquist (joined by three other Justices) expressed a different view in *San Remo*. Although having voted with the majority in *Williamson County*, he stated that it was “not clear” that *Williamson County* was correct in “demanding” that once a government agency had reached a “final decision” regarding a claimant’s property, the claimant “must seek compensation in state court” before bringing a federal takings claim in federal court. Moreover, only a prudential requirement, rather than a constitutional principle, might be involved in such cases. The Chief Justice compellingly questioned why the Court should “hand over” federal takings claims to state courts merely be-

cause of the state courts’ “relative familiarity” with local land use matters, while allowing plaintiffs in other matters “to proceed directly to federal court.” He found the *Williamson County* “justifications” for the state litigation requirement to be “suspect,” while its impacts on takings claimants are dramatic. Until the concerns of the late Chief Justice move the Court to modify the catch-22 scenarios created by *Williamson County*, property owners asserting takings claims will continue—uniquely among federal claimants—to be barred from federal courts, while governmental defendants in such cases will remain free to defend themselves in a state or federal court of their choosing.⁴¹

Substantive Due Process Review as a “Substitute” for Review Under the Takings Clause—A Hobson’s Choice for Property Owners?

This is not a new issue in Supreme Court jurisprudence.⁴² The Plurality Opinion notes that “the great attraction of Substantive Due Process as a substitute for more specific Constitutional guarantees is that it *never* means never—because it never means anything precise.”⁴³ Although a “wonderfully malleable concept,” the Substantive Due Process Clause cannot be used to “do the work of the Takings Clause [when] an explicit textual source of constitutional protection” exists in another Amendment regarding a “particular sort of government behavior.”⁴⁴ Moreover, the “liberties” protected by Substantive Due Process “do not include economic liberties.”⁴⁵

At least two other practical reasons exist for not offering the due process bone as a substitute for the Takings Clause when the judicial branch overreaches. The first is that when the challenged permit or approval is discretionary in character, federal courts often hold that the property owner has no protected property interest in the permit that is sufficient to give rise to a substantive due process claim under the federal constitution.⁴⁶ While this may be true with regard to some permits, it certainly should not be the case in all instances. The development

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review process has become increasingly complex in many jurisdictions across the country. The further an applicant proceeds in a multi-review process—accumulating more approvals with each passing month (or year)—the higher and more reasonable become the applicant’s expectations. At some point in the development review process, the applicant has achieved a protected property interest or a legitimate claim to entitlement that deserves recognition by the courts. *See Penn Central Transp. Co. v. City of New York* (438 U.S. 104, 98 S. Ct. 2646 (1978)).

A second concern about the substantive due process alternative is that, as noted in the Plurality Opinion, “even a firm commitment to apply it would be a firm commitment to do nothing in particular.” Minimal rational basis review is often all that is required.⁴⁷ However, it gets worse.

A new and even lower standard, known as the “shock the conscience” standard, is emerging and has been cited in some federal courts as justification for rejecting substantive due process claims. This standard is similar to that used by the Court in *County of Sacramento v. Lewis* (523 U.S. 833, 836, 118 S. Ct. 1708 (1998)), a case in which the Court found that the actions of the municipal police in a hot pursuit car chase did not shock the conscience. For example, the Third Circuit has adopted the “shock the conscience” standard in lieu of the “improper motive” test previously followed in that circuit. In the case of *United*

Artists Theatre Circuit, Inc. v. Township of Warrenton, Pa. (316 F.3d 392, 401 (3d Cir. 2003)), the court upheld the township’s lengthy delay of a development approval, ruling that there was no deprivation of substantive due process unless such action “shocks the conscience” of the court. In so ruling, the court relied upon *County of Sacramento*. Other courts have made similar rulings, to the dismay of plaintiffs.⁴⁸

Looking Ahead—Beware of Substantive Due Process Review of Regulatory Exactions

In 2005, the Court issued an important opinion in *Lingle v. Chevron U.S.A., Inc.* (544 U.S. 528, 125 S. Ct. 2074), in which it corrected its earlier decision in *Agins v. City of Tiburon* (447 U.S. 255, 100 S. Ct. 2138 (1980)) by deleting the “first prong ‘taking’ test” therein, that a regulation effects a taking when it “fails to substantially advance a legitimate state interest” (public purpose). *See Agins* at 260. The *Lingle* Court held that this was not a takings test but was instead a test grounded in due process. Specifically, “unconstitutional conditions” may not be imposed upon an applicant for a development permit in exchange for a government-conferred “discretionary benefit” that is unrelated to the property (*Lingle*, 544 U.S. at 547, 125 S. Ct. at 2081, 2086).

In so ruling, the *Lingle* Court relied upon its decision in *Dolan v. City of Tigard* (512 U.S. 374, 114 S. Ct. 2309 (1994)), which held that there must

be “rough proportionality” between a regulatory exaction and the impact of the proposed development.⁴⁹ The burden of proof is on the government to “quantify the relationship of the exaction to the development impact,” and the Court will use higher scrutiny than the minimal “rational basis” test.⁵⁰ All of the above notwithstanding, it remains to be seen whether state and federal courts will consistently apply these heightened standards when reviewing regulatory exactions, or simply slide back into the “minimal rational basis”/“shock the conscience” mode described in the preceding section.

Finally, the Court has stated that its rough proportionality rule has not yet been “extended” beyond the “special context” of “adjudicative exactions requiring dedication of private property.”⁵¹ Whether this means that the Court will not extend rough proportionality beyond dedications of real property, or simply hasn’t had cases before it involving personalty, such as monetary exactions, requirements for off-site improvements, and the like, is not clear. This will be a crucial question for citizens who must cope with exaction issues on a regular basis.

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A Doctrine in Need of Renourishment

Brian W. Blaesser

As the old real estate adage goes: “First, trade up; then get to the water.” In *Stop the Beach Renourishment*, the adjoining beachfront property owners obviously thought they had successfully followed this adage, achieving their littoral rights to “touch” the ocean. Their sense of fulfillment has now been tempered by the U.S. Supreme Court’s opinion affirming

that the Florida Supreme Court’s decision upholding the state’s Beach and Shore Preservation Act did not itself effect a taking of Petitioner members’ littoral rights in violation of the Fifth and 14th Amendments.

In the core of the opinion in which all eight justices concurred (Parts I, IV, and V), Justice Scalia’s analysis cen-

tered on the “background principles” of Florida property law that defeated the Petitioner’s takings claim: (1) the state as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners; (2) if an avulsion exposes land seaward

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of littoral property that had previously been submerged, that land belongs to the state even if it interrupts the littoral owner's contact with the water. In the majority's view, these principles undercut Petitioner's takings claim that prior to the Florida Supreme Court's decision, littoral property owners had rights to future accretions and contact with the water superior to the state's right to fill in its submerged land.

It struck me as curious that Justice Scalia reached the conclusion that he did with respect to the question of whether a state-initiated avulsion can interrupt the littoral property's right to "contact" with the water. At oral argument he stated that "the notion that the only purpose of the contact with the water is so that you can have access" was "silly." The only explanation would appear to be that in order to persuade the other Justices to coalesce around Parts I, IV, and V, Justice Scalia found it necessary to temper his true view on the substantive merits of the case.

However, in Part II, Justice Scalia carefully lays the foundation for an eventual majority of the Justices on the judicial takings issue. Because I devote my commentary to a substantive issue tangential to the judicial takings doctrine, I do not devote this space to the multiple arguments on that question. Rather, to set the backdrop for the principal focus of my comments, I note the following. Despite the strenuous arguments by Respondents and their amici against the doctrine of judicial takings, Justice Scalia makes a compelling *theoretical* argument that state courts should not be immune from claims brought under the Takings Clause—concerned as it is with state action, regardless of who the state actor is. To be sure, state courts are the final interpreters of state law, and the Supreme Court must look to state law to define property interests under the Fifth Amendment. It is tempting, therefore, to conclude that there is no basis for seeking review under the Takings Clause of the Fifth Amendment of a state court's ruling on the nature and scope of a state prop-

erty interest. But the Supreme Court, in its property jurisprudence, has never fully embraced this "positivist" view.⁵² Moreover, so long as the Supreme Court does not retreat from the general principle established in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (449 U.S. 155 163-165 (1980)) that the "state" cannot recharacterize as public property what was previously private property, without payment of compensation, the Takings Clause of the Fifth Amendment, to quote the Court in that case, "stands as a shield against the arbitrary use of governmental power"—whichever branch of government that is.

So I believe that Justice Scalia has made the case for judicial takings—at least in theory—but much like an object left protruding in the sand at low tide, he has left an issue unresolved that greatly diminishes the likelihood that a judicial takings claim will ever get to federal court. In Part III, he rejects the Respondents' argument that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the so-called *Rooker-Feldman* doctrine, which bars federal district courts from hearing a proceeding to reverse or modify a state court judgment, and limits the loser in state court to seeking relief only in the U.S. Supreme Court. Not to worry, writes Justice Scalia. There is still the ripeness doctrine:

The finality principles that we regularly apply to takings claims (*see Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)), would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court. *If certiorari were denied, the claimant would no more be able to launch a lower court federal suit against the taking effected by the state supreme court opinion than he would be able to launch such a suit against a legislative or executive taking approved by the state supreme court opinion; the matter would be res judicata. (Emphasis added)*

Having litigated and written about the ripeness issue over the years, I am disconcerted that a Justice who has taken such a keen interest in property law and the takings issue would defend the theory of judicial takings while ignoring the sticky dilemma created for takings plaintiffs by the preclusion doctrines (*res judicata* and collateral estoppel), the full faith and credit statute, 42 U.S.C. § 1738, most recently applied by the Court in *San Remo Hotel, L.P. v. City and County of San Francisco* (545 U.S. 323, 125 S.Ct. 2491 (2005)), and the state compensation prong of the *Williamson County* ripeness doctrine that he recites in almost cavalier fashion.

As a general rule, a plaintiff is barred from relitigating a state case in federal court under *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). An exception to these preclusion doctrines exists under the so-called *England* exception if the plaintiff is forced into state court involuntarily when a federal court abstains because questions of state law are unsettled, and the plaintiff informs the state court of the federal claim. The plaintiff may then return to federal court when the state case is concluded. Even if a federal takings claim is reserved under the *England* exception, and never raised in state court, the collateral estoppel doctrine could bar the federal takings case if that case involves issues raised in a prior state court proceeding that had been necessary in order to comply with the *Williamson County* requirement.

In other words, issue preclusion may act separately to bar federal court review of a "ripened" takings case because it prevents relitigation of any factual or legal issues decided in a prior proceeding even though the case raises claims entirely different from those raised in the prior proceedings. In recognition of this problem—before the Supreme Court's decision in *San Remo*—the Second Circuit had held that an *England* reservation would protect a ripened takings claim from both claim and issue preclusion. The Ninth Circuit held to the contrary in *San Remo*, and the Supreme Court affirmed, rejecting

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the Second Circuit's reasoning, thereby making successful compliance with the state compensation requirement of *Williamson County* even more difficult than it already is.

Justice Scalia's ideological soul mate, former Chief Justice Rehnquist, was not oblivious to the perverse effect of the Court's *San Remo* decision on the ability of a plaintiff to successfully fulfill the state compensation requirement, stating: "[O]ur holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to characterize the state courts' denial of compensation as a required element of the Fifth Amendment takings claim" (*San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351, 125 S. Ct. 2491, 2509 (2005)).

Ironically, it is Justice Kennedy, who declined to join Justice Scalia in Part II of *Stop the Beach Renourishment*, who points to this same problem as another reason why the Court should "not go beyond the necessities of the case to recognize a judicial takings doctrine."

Justice Kennedy cautions: "This Court's dicta in *Williamson County* regarding when regulatory takings claims become ripe, explains why federal courts have not been able to provide much analysis on the issue of judicial taking" (130 S.Ct. 2592 at 2618). This acknowledgment, however, hardly justifies Supreme Court abdication or timidity on the takings issue and all that the takings issue implicates, including the ripeness doctrine, the abstention doctrine, and the judicial takings doctrine.

Justice Kennedy should heed Chief Justice Rehnquist's *San Remo* observation that he quotes in *Stop the Beach Renourishment*—"Williamson County's state-litigation rule has created some real anomalies, justifying our revisiting the issue" (130 S.Ct. 2592 at 2618, quoting Rehnquist, C.J., *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351, 125 S.Ct. 2491 (2005)). As the perennial "swing vote" on the Court, Justice Kennedy should join with Chief Justice Roberts and Justices Alito, Scalia, and Thomas to revisit *Williamson County*. Their focus should be on *Williamson County*'s state compensation requirement, taking note of the former Chief Justice's statement in *San Remo*, that "[i]t is not obvious that either constitutional or prudential

principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim" (*San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 349, 125 S. Ct. 2491, 2508 (2005)).

We can be certain about one thing: People will continue to seek the premium values of beachfront property despite the sensitive environmental issues at stake. For that reason, the battle over the theory and wisdom of the judicial takings doctrine is likely to be resumed in another case in the near future. Without a reassessment by the Court of its *Williamson County* ripeness doctrine—in particular the state compensation requirement—the judicial takings doctrine, if ultimately recognized by Court, will have little import for plaintiffs seeking redress of their federal takings claims in federal court.

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ENDNOTES

1. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").
2. 2010 WL 2400086 at *7 (quoting *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1112, 1119-20 (Fla. 2008)).
3. 129 S.Ct. 2792 (2009), see also 2009 WL 698518 (cert. petition).
4. 2010 WL 2400086 at *26 (Breyer, J., concurring in part and concurring in the judgment) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).
5. 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of cert.).
6. 854 P.2d. 449, 466 (Or. 1993).
7. David L. Callies, *Custom and Public Trust: Background Principles of State Property Law*, 30 ENVTL. L. REP. 10003 (Jan. 2000) (emphasis added).
8. See Bd. of Regents of State Coll. v. Roth, 408 U.S. 564 (1972).
9. STEVEN J. EAGLE, REGULATORY TAKINGS, § 7-13(a) (4th ed. 2009).

10. See *Palazzolo v. R.I.*, 533 U.S. 606, 627 (2001) ("Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.").
11. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").
12. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U.L. REV. 242, 266 (2000).
13. 450 S.E.2d 200 (Ga. 1994) at 201-02. The ordinance's "stated purpose is to improve the beauty and aesthetic appeal of the City, promote public safety, and ameliorate air quality and water run-off problems." *Id.* at 202.
14. *Id.* (citing *Dolan*, 512 at 391, n.8).
15. *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1116 (1995) (denying cert.) (Thomas, J., dissenting).
16. *Id.* at 26-27.
17. *Id.* at 543.
18. Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U.L. REV. 899, 954-57.

19. See, e.g., *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).
20. With acknowledgments and apologies to Bob Dylan, "Blowin' in the Wind," on *The Freewheelin' Bob Dylan*, Columbia Records, 1963.
21. See Justice Scalia's dissent in the denial of cert in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994).
22. Ben Barros, *What's at Stake in Stop the Beach Renourishment?* (2009), PROPERTY PROF BLOG, available at <http://lawprofessors.typepad.com/property/2009/07/whats-at-stake-in-stop-the-beach-renourishment.html>; Timothy Sandefur, *Judicial Takings in Stop the Beach Renourishment* (2010), available at Pacific Legal Foundation website, <http://plf.typepad.com/plf/2010/06/judicial-takings-in-stop-the-beach-renourishment.html>; and Ilya Shapiro, *Mixed Result in Complicated Property Rights Case* (2010), available at Cato Institute website: <http://www.cato-at-liberty.org/2010/06/17/mixed-result-in-complicated-property-rights-case>.
23. See Ben Barros, *Supreme Court Rules in Stop the Beach* (2010), PROPERTY PROF BLOG, available at <http://lawprofessors.typepad.com/property/2010/06/supreme-court-rules-in-stop-the-beach.html#tp> (conservative comment).
24. See John Echeverria, *In Stop the Beach Renourishment Ruling, Conservatives Come up One Vote Short in Quest to Remake Property Rights Law* (2010), CENTER FOR PROGRESSIVE

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REFORM BLOG, available at <http://www.progressivereform.org/CPRBlog.cfm?idBlog=480598E4-9B74-D4DC-69FCF9E648F55238> (contrasting comment).

25. See Harvey M. Jacobs, *Fighting Over Land: America's Legacy . . . America's Future?* J. AM. PLAN. ASS'N 65, 2: 141–149 (1999); Harvey M. Jacobs, *Planning is Un-American! (or, what to say when you are accused of being a communist)*, SMALL TOWN & RURAL PLAN. (June): 1, 6–7, 9 (2009); and Harvey M. Jacobs, *Social Conflict Over Property Rights: The End, A New Beginning or a Continuing Conversation?* HOUSING POL'Y DEBATE 20, 3: 329–349 (2010).

26. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

27. See Adam Liptak, *Homeowner Rights and Hot Dog Sellers Are Talk of Court*, THE N.Y. TIMES (December 3, 2009), available at <http://www.nytimes.com/2009/12/03/us/03scotus.html?ref=politics>.

28. See DANIEL W. BROMLEY, SUFFICIENT REASON, VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS, Princeton University Press (2006); Daniel W. Bromley, *Volitional Pragmatism*, ECOLOGICAL ECON., 68:1–13 (2008).

29. Of course, their small share of the local tax base devoted to the public works project means that they did pay something, although probably not very much.

30. ROBERT B. BRANDOM, ARTICULATING REASONS, Harvard University Press (2000) at p.6.

31. L. MENAND, THE METAPHYSICAL CLUB, Farrar, Straus, and Giroux (2001) at p.339.

32. See DANIEL W. BROMLEY, SUFFICIENT REASON, VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS, Princeton University Press (2006); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY, Harvard University Press (2003).

33. Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction?* VT. L. REV. 17(3):647–82 (1993); Daniel W. Bromley, *Constitutional Political Economy: Property Claims in a Dynamic World*, CONTEMP. ECON. POL'Y 15(4):43–54 (1997); Daniel W. Bromley, *Property Rights: Locke, Kant, Peirce, and the Logic of Volitional Pragmatism*, in PROPERTY RIGHTS IN THE 21ST CENTURY, ed. by Harvey M. Jacobs, Elgar (2004).

34. Nearly three decades ago, in *San Diego Gas and Electric Co. v. City of San Diego* (450 U.S. 621, 101 S. Ct. 1287 (1981)), a case involving a major rezoning of the utility's property from industrial to agricultural use, the U.S. Supreme Court dismissed for lack of jurisdiction an appeal from the California courts of the plaintiff utility's claim for compensation based upon inverse condemnation. The Court did not reach a decision on the merits of the utility's compensation claim because the state court had not made a "final" decision as to whether a taking had actually occurred. *San Diego Gas* is significant because of a famous dissent by the late Justice William Brennan indicating for the first time since 1922 (in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393), that a majority of the Justices agreed that compensation is required once a regulation is found to have constituted a taking of private property. On behalf of himself and three other Justices, with a fifth Justice concurring but for the finality issue, Justice Brennan stated that the exercise of the police power can result in a compensable taking within the meaning of the Just Compensation Clause. In so doing he posed the following rhetorical question, which is paraphrased in the title of this paper: "If a policeman must know the Constitution, then why not a planner?" *Id.* at 661, Note 26.

35. *Stop the Beach Renourishment, Inc. v. Florida*, 130 S.Ct. 2592, 2010 WL 2400086 (U.S. Fla.) (June 17, 2010) at *4 - *19 (plurality opinion).

36. *Stop the Beach Renourishment, Inc. v. Florida*, 130 S.Ct. 2592, 2010 WL 2400086 (U.S. Fla.) (June 17, 2010) at *19 - *24 (Justice Kennedy's concurring opinion, joined by Justice Sotomayor).

37. *Stop the Beach Renourishment, Inc. v. Florida*, 130 S.Ct. 2592, 2010 WL 2400086 (U.S. Fla.) (June 17, 2010) at *24–*26 (Justice Breyer's concurring opinion, joined by Justice Bader Ginsburg).

38. See, e.g., Delaney & Desiderio, *Who will clean up the "Ripeness Mess"?* 31 Urb. Law 2 (1999).

39. *Williamson County*, 473 U.S. 172 at 186, 105 S. Ct. 3108 at 3116 (1985) (emphasis added). See also *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 105 S.Ct. 1659, 1665 (1997). See generally DELANEY, ABRAMS & SCHNIDMAN, *HANDLING THE LAND USE CASE*, Sec. 32:3, pp. 32–8–32–10, Thomson-West, 3rd Ed. (2010).

40. See, e.g., *Dodd v. Hood River County*, 136 F. 3d 1219 (9th Cir. 1990); *Wilkinson v. Pitkin County*, 142 F. 3d 1319 (9th Cir. 1998). See generally FEDERAL LAND USE LAW AND LITIGATION, West (2010) ed. by Blaesser and Weinstein, Sections 3:27, 3:52, 9:15.

41. See Int'l Coll. of Surgeons v. City of Chicago, 522 U.S. 156, 118 S. Ct. 523 (1997) (Takings suit filed against city in a state court was properly removed by the city at its discretion to a federal court).

42. See, e.g., Steven Eagle, Symposium, *When Does Retroactivity Cross the Line? Winstar, Eastern Enterprises and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (Spring 2000), advocating increased "recognition of the need for discerning whether governmental restrictions of private property is legitimate under due process principles apart from the issue of Compensation under the Takings Clause." (*Id.* at 2). His comprehensive analysis concludes that "while the Supreme Court has been reluctant to more fully employ the Due Process Clause in dealing with property rights issues, it cannot provide for coherent judicial review otherwise." (*Id.* at 25.)

43. Plurality Opinion at 20.

44. *Id.* at 16, 20.

45. *Id.* at 16.

46. See, e.g., *Gardner v. City of Baltimore*, 969 F.2d63 (4th Cir 1992); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911 (2nd Cir. 1989). These and similar decisions are based on the Supreme Court's decision in *Bd. of Regents v. Roth*, 408 U.S. 564, 578, 92 S. Ct. 2701, 2709, 2710 (1972).

47. See, e.g., *Natale v. Town of Ridgefield*, 170 F. 3d. 258, 262 (2d Cir. 1999) (Arbitrary conduct that might violate zoning regulations must be so outrageously arbitrary as to constitute gross abuse of governmental authority under the Due Process Clause); *Gilbert v. City of Cambridge*, 932 F. 2d. 51 (1st Cir. 1991) (A court facing a substantive due process challenge to municipal legislation need only inquire whether a "conceivable rational relationship" exists between the ordinance and legitimate governing ends); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d. 1102, 1104 (8th Cir. 1992) (In zoning and land use disputes, the plaintiff alleging a substantive due process violation must show that the local government's action as "truly irrational").

48. See *Catanzaro v. Weiden*, 188 F.3d 56, 64 (2d Cir. 1999); *G.M. Eng'rs and Assocs., Inc. v. W. Bloomfield Twp.*, 922 F.2d 328, 332 (6th Cir. 1990); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006).

49. *Dolan*, 512 U.S. 374, 114 S. Ct. at 391.

50. *Id.* at 391, 395–396.

51. *Lingle*, 544 U.S. at 547, 125 S. Ct. at 2086.

52. See, e.g., *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42-43, 64 S.Ct. 384 (1944); *Muhler v. N.Y. & H.R. Co.*, 197 U.S. 544, 25 S.Ct. 522 (1905).