

**VERMONT LAW SCHOOL  
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BERKELEY LAW**

**THE 13<sup>TH</sup> ANNUAL CONFERENCE ON LITIGATING TAKINGS  
AND OTHER LEGAL CHALLENGES TO LAND USE AND  
ENVIRONMENTAL REGULATION**

**NOVEMBER 5, 2010  
BERKELEY, CALIFORNIA**

**Judicial Takings Redux:  
*Stop the Beach Renourishment v.  
Florida Department of Environmental Protection***

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Fractured Supreme Court decisions that do not produce a majority tend to get ignored, partly because they seldom establish strong judicial trends. Yet the Supreme Court's decision in *Stop the Beach Renourishment v. Florida Dept. of Env'tl. Protection* would seem far more important than the attention it has received to date suggests. For the first time in a century, a majority of the sitting Supreme Court justices have publicly concluded that the United States Constitution constrains the ability of state courts to eliminate or significantly modify at least some established economic rights.

In the 19<sup>th</sup> century, the United States Supreme Court actively patrolled for and overturned state court decisions that invalidated contract rights (primarily in the form of state bonds for internal improvements). See Barton H. Thompson, Jr., *A History of the "Judicial Impairment Doctrine" and Its Lessons for the Contract Clause*, 44 *Stan. L. Rev.* 1373 (1992). At the turn of the 20<sup>th</sup> century, Justice McKenna, in a plurality opinion for himself and three other justices, strongly implied that courts cannot constitutionally strip owners of their property by the expediency of overruling prior precedents. *Muhlker v. New York & Harlem Railroad*, 197 U.S. 544 (1905). However, Justice Holmes (joined also by three justices) objected strongly to what he viewed to be an unwarranted interference with state property law. Several opinions in the 1930s seemed to agree with Justice Holmes, opining that state courts "may ordinarily overrule their own decisions without offending constitutional guaranties"; none of the cases, however, expressly addressed the possibility of judicial takings. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930); see also *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Justice Stewart revived the proposition that courts could violate the Constitution by changing established property rights in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 296-298 (1967), but no other justice joined his opinion. While at least two lower federal courts in the late 20<sup>th</sup> century held that state court opinions are subject to the takings clause (see *Robinson v. Ariyoshi*, 753 F.2d 1468 (9<sup>th</sup> Cir. 1985), vacated, 477 U.S. 902 (1986); *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978)), the Supreme Court remained silent.

*Stop the Beach Renourishment* was not a great vehicle for considering the question. All eight justices participating in the case concluded that the Florida Supreme Court had not eliminated or modified any established property principles. Four justices nonetheless reached out (over criticism by the others) to explicitly hold that the takings clause of the United States

Constitution constrains state court decision making. And rather than merely reserving debate for a future case, two other justices expressed their view that, although the takings clause might not be relevant, the Due Process clause restricts in at least some situations the ability of state courts to abandon or modify judicial precedent on property issues.

## **I. An Overview of the Opinions**

The Court split three ways in its analysis of *Stop the Beach Renourishment*. Justice Scalia wrote the plurality opinion (for himself, the Chief Justice, and Justices Thomas and Alito), recognizing judicial takings but holding that the Florida decision did not constitute one. Justice Kennedy, joined by Justice Sotomayor (perhaps for purely strategic reasons), raised concerns about using the takings clause to police judicial decisions, but stated that a judicial decision eliminating an established property right “could be set aside as a deprivation of property without due process of law.” According to the concurrence, it is “natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.” Justice Kennedy, however, concurred in the portion of the plurality opinion holding that the Florida decision was constitutional. Justice Breyer, joined by Justice Ginsberg, also concurred that there was no unconstitutional taking of property, but reserved for future consideration whether judicial decisions can ever take property.

Although it is dangerous to read too much into the opinions of a highly fractured court, at least five members of the court (the plurality and Justice Kennedy) and perhaps six (if Justice Sotomayor was not voting purely strategically) appear to agree on three propositions:

*1. State judicial decisions that change established property rights can violate the United States Constitution in at least some settings.* In the view of the plurality, the key constitutional provision is the takings protection; in Justice Kennedy’s view, it is the due process clause (and perhaps the takings protection, although he expresses considerable doubt whether the takings protection should be applied).

*2. To violate the Constitution, a state judicial decision must clearly change an established property right; the burden of showing a violation rests on the property owner.* According to the plurality, the property owner has the burden of showing that the state decision contravenes an “established property right.” If there “is doubt” whether prior court decisions established a property right, the property owner loses. Justice Kennedy goes a step further and suggests that a state decision runs into constitutional problems only if it “eliminates or

substantially changes established property rights, which *are a legitimate expectation of the owner.*” The latter proviso appears to reflect Justice Kennedy’s view that the “common-law tradition . . . allows for incremental modifications to property rights.”

3. *The remedy for a state judicial decision that contravenes an established property right is invalidation of the decision, not compensation.* According to the plurality, compensation “is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking.” Justice Kennedy avoids the issue of compensation by suggesting that the appropriate constitutional provision is the due process clause rather than the taking protection; indeed, the desire to avoid the compensation issue may be the principal reason why he turned to a due process rationale.

## **II. The Challenges of “Judicial Takings”**

As Justice Scalia suggests in his plurality opinion in *Stop the Beach Renourishment*, neither the wording of the Constitution nor any *substantive* difference between courts and legislatures/executives justifies excusing courts from the takings restrictions of the Constitution. See Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1455-1458, 1472-1498 (1990). So why was he unable to garner a majority for his opinion (and why does the concept of judicial takings remain so controversial among legal analysts)? The more generic split on takings issues is obviously part of the problem. Those justices (and members of the academy and bar) already skeptical of expansive takings protections are unlikely to advocate for their extension to courts, further constraining the ability of the state to adapt property law to changing knowledge, conditions, and norms. More importantly, as I wrote 20 years ago, there are a number of structural or procedural challenges to extending the takings protections to the courts – many of which are illustrated by *Stop the Beach Renourishment*.

**1. Remedy.** The constitutional takings protections do not prohibit the legislature or executive branch from taking property; they simply require that compensation be paid for any taking. Because the judiciary does not have its own source of funding, extending the takings protection to the courts means that either (1) legislatures must pay for judicial takings over which they have had no control, or (2) courts cannot make any changes that would constitute a judicial taking. In *Stop the Beach Renourishment*, neither the plurality nor Justice Kennedy was willing to accept the first option, which would have raised serious separation-of-power concerns. As noted, both the plurality and Justice Kennedy suggested instead that invalidation would be the

proper remedy, although their rationales for this conclusion differed. While this conclusion avoids the problem of ordering the legislature to pay for a judicial action, it places the courts in a very different posture than the legislative and executive branches. While the legislature and executive can eliminate or reallocate private property rights if they pay for it, the judiciary cannot engage in the same activity (except by agreement of the legislature). By recognizing judicial takings, the court therefore relegates changes in property rights that would constitute takings to the legislative or executive branch.

If courts were not constrained by the Constitution from “taking” property, however, courts would enjoy a power not shared by the legislature or the executive to change property rights without the payment of compensation. And there is evidence that legislatures have sometimes pushed property issues into the courts specifically in the hope that the state could thereby reallocate property rights without having to pay compensation. See Thompson, *Judicial Takings*, supra, 76 Va. L. Rev. at 1509-1511. However courts resolve the judicial-takings quandary, therefore, property issues will be skewed one direction or the other. In Justice Kennedy’s view, moreover, courts are not the appropriate branch of state government to engage in such fundamental reshuffling of rights.

**2. Legal Indeterminacy.** Another major challenge to the concept of “judicial takings” is how to determine when there has been a shift in property rights. State courts seldom explicitly say that they are eliminating or substantially modifying established property rights. Even when judicial decisions run against the expectations of property owners, courts generally say that they are merely clarifying the intent of prior cases, resolving conflicts among separate lines of cases, clearing away prior confusion and misunderstanding, or applying preexisting principles to new settings or conditions. Given the diversity and malleability of legal building blocks, there will be few cases where the Supreme Court (or any other reviewing court) will be able to say for sure whether there has been a change in the law.

*Stop the Beach Renourishment* illustrates this problem. When the Court granted certiorari, at least four of the justices presumably believed that the Florida Supreme Court might have changed the property rules regarding ocean-front property. Yet the Court ultimately concluded unanimously that the Florida Supreme Court’s decision was consistent with the state’s common-law precedent (although, interestingly enough, on different grounds than the Florida Supreme Court used to defend its result).

All three opinions responded to the problem of legal indeterminacy by setting a high threshold for establishing a change in the law. As noted earlier, the plurality apparently would require property owners to establish that prior opinions had established a clear property right. The plaintiff in *Stop the Beach Renourishment* argued that there had been a taking of property because no prior Florida decision supported the result. The plurality disagreed. “This puts the burden on the wrong party. There is no taking unless petitioner can show” a prior established right. According to Justice Kennedy, plaintiffs must show an abandonment of “settled principles.” Although a high standard minimizes the risk of misinterpreting prior state decisions, it also makes it unlikely that the Supreme Court will find that many state court decisions have violated constitutional restraints.

**3. Workload.** Yet another concern in pursuing a judicial-takings doctrine is workload. If a change in established property law is unconstitutional, property owners will be tempted to appeal all cases that they lose to the Supreme Court on the ground that the state court abandoned prior precedent. And given indeterminacy in the law, many of these claims may be superficially appealing. Justice Breyer explicitly raises this concern in his concurring opinion: “the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal judges.”

### **III. The Future of Judicial Takings Doctrine**

Those who worry about an activist court applying Constitutional provisions to restrain state court decision making on property issues probably can stop worrying. Although a majority of the Court recognized constitutional restrictions, it seems unlikely for the reasons discussed above that the Court will apply them to invalidate state court decisions except in extreme and unusual circumstances. Plaintiffs will seldom be able to show a clear abandonment or modification of established property rights. And members of the Court are unlikely to want to assume the role of appellate courts for state property cases.

This does not mean that *Stop the Beach Renourishment* and the concept of judicial takings are unimportant. Both can serve as useful reminders to state courts of the importance of property precedents, and both emphasize that the same logic that calls for compensation in the case of legislative or executive takings warns against judicial changes in property rights. Indeed, a number of state supreme court justices have used the concept of judicial takings to urge greater

fidelity to precedent in property cases than in other settings – and even to demand strict fidelity to precedents. See, e.g., *Bott v. Natural Resources Comm’n*, 327 N.W.2d 838, 849-853 (Mich. 1982); *Dolphin Lane Assocs. V. Town of Southampton*, 339 N.Y.S.2d 966, 975 (1971); *State v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1363 (Or. 1977). See also *Hawaii v. Zimring*, 566 P.2d 725, 756 (Haw. 1977) (Vitousek, J., dissenting); *Van Ness v. Borough of Deal*, 393 A.2d 571, 577-578 (N.J. 1986) (Mountain, J., dissenting).