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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.<sup>1</sup> 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,”<sup>2</sup> 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.”<sup>3</sup>

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.”<sup>4</sup>

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*,<sup>5</sup> 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.<sup>6</sup> 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.”<sup>7</sup>

While property rights typically are created by state law,<sup>8</sup> the state cannot subsequently abrogate them through what I have termed “definitional takings”<sup>9</sup> by the legislature,<sup>10</sup> or by the “*ipse dixit*” of judges.<sup>11</sup> 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.”<sup>12</sup>

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.<sup>13</sup> 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

The actions of the state of Florida were reasonable both vis-a-vis common law and Florida statutory law.

to bear an extraction. Here, the city has singled out a particular use within the city to bear the extraction.”<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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.

Steven J. Eagle teaches at George Mason University School of Law in Arlington, Virginia, and is a leader in the American Bar Association’s Section of State and Local Government Law. Eagle is the author of *Regulatory Takings*, 4th ed. (Lexis Publishing 2009), and may be reached at [seagle@gmu.edu](mailto:seagle@gmu.edu).