

DO WE REALLY NEED A JUDICIAL TAKINGS DOCTRINE?

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Stop the Beach Renourishment, Inc. (STBR) sought a hearing in the Supreme Court because, in its view, “[t]he Florida Supreme Court invoked ‘nonexistent rules of state substantive law’ to reverse 100 years of uniform holdings that littoral rights are constitutionally protected.”¹ According to STBR, this state-court ruling was a “judicial taking” because it was “a sudden and dramatic change in law” that was “unpredictable” given the relevant Florida precedents.² Such a mercurial change in state law, STBR argued, required the Supreme Court to adopt a novel and untested judicial takings doctrine to remedy this infringement of state-law property rights. Four Justices agreed that the Court should adopt a judicial takings doctrine, but concluded that no judicial taking occurred in this case.

This Essay seeks to determine whether the problem in *Stop the Beach Renourishment* was so novel that it required the Supreme Court to adopt a radical new remedy. It concludes that there is nothing new about STBR’s claim of mercurial state adjudication that effectively denies a federal constitutional right. The Supreme Court has been addressing precisely such claims—including those involving property rights—for over a century in a consistent fashion. There is therefore no need for the Supreme Court to adopt a new takings doctrine that substantially alters the federal–state balance by making federal courts the arbiters of state property law.

The Supreme Court has always kept a watchful eye on willful manipulation of state law by state courts seeking to deny federal rights. For example, 15 years ago the Supreme Court unanimously reversed a state-court judgment that denied a large class of taxpayers a remedy for a tax that violated the Federal Constitution.³ The state supreme court disregarded both a state statute that squarely supported the claimed refund, and a long line of its own cases broadly construing that statute in favor of taxpayers.⁴ The Supreme Court’s response to this highly implausible reading of state law

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1. Reply Brief for Petitioner at i, *Stop The Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3495336.

2. *Id.* at 11, 20.

3. *Reich v. Collins*, 513 U.S. 106, 108 (1994).

4. *Id.* at 111.

was blunt. While a State is ordinarily free to “reconfigure its remedial scheme over time, to fit its changing needs,” the Court said, “what a State may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *mid-course*”⁵

The Court’s choice of words is instructive. Even in the face of judicial machinations that eviscerated due process, the Court made no reference to the state supreme court as the branch of government that violated the plaintiffs’ constitutional rights. It spoke only in terms of “the State” even though the only state actor involved was the state supreme court. Moreover, in a display of comity and respect for state tax adjudication,⁶ the Court, having reversed the judgment below on federal constitutional grounds, remanded the case to the same state court “for the provision of ‘meaningful backward-looking relief.’”⁷

The principal case relied upon to support this judgment was *NAACP v. Alabama ex rel. Patterson*, a landmark case in the field of state-court obstruction of federal constitutional rights.⁸ In *Patterson*, the Court unanimously reversed a highly idiosyncratic procedural ruling of the Alabama Supreme Court that nullified the plaintiffs’ First Amendment rights. As Justice Harlan wrote for the Court, “[w]e are unable to reconcile the procedural holding . . . in the present case with [the state supreme court’s] past unambiguous holdings”⁹ Based on a review of prior state cases on the point, the Court held that “[n]ovelty in [state] procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior [state] decisions, seek vindication in state courts of their federal constitutional rights.”¹⁰ Notwithstanding this alarming inconsistency in a case involving core First Amendment rights, the Supreme Court simply reversed the state judgment and remanded the case to the state court for further proceedings.

In these two cases and others like them, the Supreme Court has addressed allegations, just like those in *Stop the Beach*, that state law has been manipulated by a state court in order to deny federal constitutional

5. *Id.* (emphasis in original).

6. *Cf.* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2328 (2010) (“[T]he comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration.”).

7. *Reich*, 513 U.S. at 114 (quoting *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 32 (1990)).

8. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

9. *Id.* at 456.

10. *Id.* at 457–58 (citing *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930)).

rights.¹¹ In these cases, antecedent state-law issues like the scope of property rights, the interpretation of contracts, and the application of state rules of procedure “are local questions conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis.”¹² The rationale for this rule is simple: a litigant’s “constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, . . . for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked.”¹³

This was the legal backdrop prior to Justice Scalia’s plurality opinion endorsing the judicial takings doctrine. Indeed, Justice Scalia acknowledged as much, writing that “[t]o assure that there is no ‘evasion’ of our authority to review federal questions, we insist that the nonfederal ground of decision

11. *See Sauer v. City of New York*, 206 U.S. 536, 547–48 (1907) (determining that a state-court decision denying appellant compensation for alleged “taking” did not violate appellant’s constitutional rights). *See also Ford v. Georgia*, 498 U.S. 411, 423–25 (1991) (discussing a state court’s manipulation of a procedural rule to frustrate equal protection claim); *James v. Kentucky*, 466 U.S. 341, 351–52 (1984) (remanding a case to a state court to determine whether the state court’s error of obstructing a federal constitutional right to jury guidance was harmless); *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960) (“It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support.”); *Staub v. City of Baxley*, 355 U.S. 313, 319–20 (1958) (holding that a state court’s findings that appellee lacked standing and failed to attack “specific sections” of an ordinance did not defeat federal jurisdiction when protection of federal rights are sought); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654–57 (1942) (declaring that the United States Supreme Court may not re-examine a decision of a state supreme court based on non-federal grounds except to ensure that the ground is not so unsubstantial as to effectively evade a constitutional issue); *Lawrence v. State Tax Comm’n of Miss.*, 286 U.S. 276, 282–83 (1932) (announcing that state court may not deny appellant’s right to federal review of constitutional equal protection claim); *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537 (1930); *Fox River Paper Co. v. R.R. Comm’n of Wis.*, 274 U.S. 651, 653–54 (1927) (holding that federal jurisdiction was not affected by state law because protection of a federal right was sought); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (holding that when a Missouri law governing jurisdiction conflicted with federal law, the state court cannot treat the local law “as defeating a plain assertion of federal right”); *Ward v. Love County*, 253 U.S. 17 (1920) (holding that a state-court decision frustrated a vested property right). *Cf. Volt Info. Sci. Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 492 (1989) (Brennan, J., dissenting) (“Even less can I agree that we are powerless to review decisions of state courts that effectively nullify a vital piece of federal legislation.”).

12. *Beeler*, 315 U.S. at 654 (citing *Broad River*, 281 U.S. 537).

13. *Lawrence*, 286 U.S. at 282 (1932) (internal citations omitted). *See also* MERRIAM-WEBSTER, INC., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 786 (1976) (defining “evade” as “to take refuge in evasion: use craft or stratagem in avoidance: avoid facing up to something”).

have ‘fair support.’”¹⁴ He then immediately explained this away: “A test designed to determine whether there has been an evasion is not obviously appropriate for determining whether there has been a taking of property.”¹⁵ If, however,

[The judicial takings doctrine] is to be extended there it must mean (in the present context) that there is a “fair and substantial basis” for believing that petitioner’s Members did not have a property right to future accretions This is no different, we think, from our requirement that petitioners’ Members must prove the elimination of an established property right.”¹⁶

Justice Scalia’s dismissal of the “fair or substantial” test as “not obviously appropriate” for analyzing the decision of the Florida Supreme Court in *Stop the Beach Renourishment* is puzzling. While he appears to equate the two tests, they operate very differently. Under Justice Scalia’s test, the Court must decide whether the state court has eliminated “an established property right.”¹⁷ Under the fair and substantial test, by contrast, the Supreme Court undertakes a far less invasive review of the state-court decision, with an eye towards ferreting out bad faith designed to nullify federal rights. Justice Scalia’s test gives the Supreme Court, and presumably the lower federal courts should they become players in the judicial takings game, the power to make rulings on the scope and meaning of state property law. Under the fair and substantial test, state courts continue to have the responsibility to fashion state property law, with the Supreme Court available to take a second look should the plaintiff make colorable allegations of manipulation by the lower court.

Is a new judicial takings test either necessary or advisable to analyze takings cases like *Stop the Beach Renourishment*? The Court’s precedents strongly suggest that it is not. These include property rights cases in which the Court has reviewed state-law rulings on property law to determine whether there was a fair or substantial basis in state law for the failure to reach the plaintiff’s takings claim.

In *Broad River*, a case cited and minimally quoted by Justice Scalia,¹⁸ a profitable power company claimed that the state supreme court’s analysis of the

14. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2608 (2010) (Scalia, J., plurality opinion) (quoting *Broad River*, 281 U.S. at 540).

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* Although *Broad River* contains one of the Court’s fullest and clearest articulations

state's franchise laws forced it to continue to operate an unprofitable subsidiary. The power company argued that "the continued operation of the railway under compulsion of the court would deprive respondents of their property without due process . . . in violation of the *Fourteenth Amendment*"¹⁹

In its decision, the Court reiterated that "[w]hether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court."²⁰ When "the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis."²¹ If the state-law basis for the denial of the federal right is "unsubstantial, constitutional obligations may not be thus evaded."²² This language appears to fit to a tee the allegations of bad-faith adjudication in *Stop the Beach Renourishment*.

The Court in *Broad River* then reviewed South Carolina franchise law to determine whether there had been an "evasion" of the federal takings claim by the state court. The Court ruled that there had been none because the state-law analysis of the lower court did not "so depart[] from established principles as to be without substantial basis"²³ The state-court judgment was accordingly affirmed. Although far less intrusive than Justice Scalia's requirement that the plaintiff must prove the denial of an established property right, the fair or substantial test applied in *Broad River* was sufficient to protect the plaintiff's property rights.

Likewise, in *Fox River Paper Co. v. Railroad Commission of Wisconsin*, the plaintiffs were riparian owners of riverside land who had built and operated a dam for 50 years without any regulation by the State.²⁴ By a statute enacted in 1925, the state authorized condemnation of such dams, to be accomplished by the forced sale of the dam to the state at a price

of the fair or substantial test and its rationale, Justice Scalia quotes just three words from the case: "evasion," and "fair support." *Id.*

19. *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 539 (1930) (emphasis added). Although the power company referenced the Due Process Clause of the Fourteenth Amendment, it was undoubtedly referring to the incorporation of the Fifth Amendment's Takings Clause through the operation of the Amendment's Due Process Clause. *Cf. McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030–31 (2010) ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment").

20. *Broad River Power Co.*, 281 U.S. at 540.

21. *Id.*

22. *Id.* (citations omitted).

23. *Id.* at 543.

24. *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651 (1927).

determined by the state commission.²⁵ The riparian landowners challenged the state statutory scheme as a taking, a claim rejected by the Wisconsin courts because of the landowners' failure to comply with the statutory permit requirement. The Supreme Court affirmed. "There being no question of evasion of the constitutional issue," the Court held, "this Court . . . must accept as final the ruling of the state court of last resort on all matters of state law."²⁶

It is hard to see why the fair or substantial analysis of *Broad River* and *Fox River* could not have been applied in *Stop the Beach Renourishment*. From the outset, STBR argued that if carried out as planned, the State's beach restoration project would result in a taking.²⁷ The state court of appeals even agreed with STBR, but the state supreme court did not. On the antecedent state property-law question, the court ruled that STBR's members did not have property rights that had been taken.

STBR then sought review in the Supreme Court on the question whether "[a] judicial taking occurs when the decision of a state court effects a 'sudden change in state law, unpredictable in terms of the relevant precedents.'"²⁸ Is this question significantly different from the assertions of judicial manipulation of state law in order to "evade" (i.e., deny) an asserted federal constitutional right, such as those made and accepted by the Supreme Court as recently as 1994 in *Reich* and in other precedents like *NAACP v. Patterson* and *Broad River*? There simply is no need for a new judicial takings doctrine.

A judicial takings doctrine that empowers federal courts to define state property law also subverts a healthy federal–state balance. Justice Frankfurter made this point well in a case in which the Court found no fair or substantial basis for the state court's construction of a highly technical pleading rule.²⁹ He wrote

[t]his is one of those small cases that carry large issues, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as between the Nation and

25. *Id.* at 652–53 (citing and quoting WIS. STAT. §§ 31.02, 31.07, 31.09 (1925)).

26. *Id.* at 655 (citations omitted).

27. Reply Brief for Petitioner, *supra* note 1, at 4.

28. *Id.* at 20–21 (quoting *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring)).

29. *Staub v. City of Baxley*, 355 U.S. 313, 319–20 (1958) (holding that state court's findings that appellee lacked standing and failed to attack "specific sections" of an ordinance did not defeat federal jurisdiction when protection of federal rights are sought).

the States, and more particularly the distribution of judicial power as between this Court and the judiciaries of the States.³⁰

While the Supreme Court unquestionably has power to review a state court's denial of a nonfrivolous constitutional claim in order to safeguard federal rights, "equally important is observance by this Court of the wide discretion in the States to formulate their own procedures for bringing issues appropriately to the attention of their local courts . . ." ³¹ The Supreme Court, he explained, "is powerless to deny to a State the right to have the kind of judicial system it chooses and to administer that system in its own way."³²

As Justice Scalia acknowledged in the second paragraph of the Court's *Stop the Beach Renourishment* opinion, "[g]enerally speaking, state law defines property interests, . . . including property rights in navigable waters and the lands underneath them."³³ As well it should. The technicalities of Florida property law are almost without exception the exclusive province of the Florida courts and the state legislature. This point is well made by Justice Scalia's probing analysis of the property "rights of the public and the rights of littoral landowners" under Florida law.³⁴

It is reasonable to question, as Justice Frankfurter did, whether such meticulous analysis of state law by the federal courts is good for federalism or an optimal use of the limited resources of the Supreme Court and the lower federal courts. The answers to these questions are suggested by Justice Jackson's opinion for the Court in a takings case that turned on the minutiae of New York State personal property law.³⁵ In order to reach the conclusion that the state court's decision had a fair or substantial basis in state law, he was forced to penetrate the maze of the State's laws concerning rights to succession by will. These he characterized, not altogether happily, as "[t]he whole cluster of vexatious problems arising

30. *Id.* at 325–26 (Frankfurter, J., dissenting).

31. *Id.* at 328–29.

32. *Id.* at 329. Professor Wechsler later made a similar point about these federalism concerns: "The initial question" he wrote, "is the old one of how far the tradition that confines review to the adjudication of controlling federal questions . . . precludes the Court from passing upon issues of state law. This always has been viewed as a matter of much moment for the dual system . . ." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1050 (1977).

33. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) (citations omitted).

34. *Id.* at 2611. *See generally, id.* at 2610–13 (discussing the nuances of Florida common law regarding avulsions and the rights of littoral landowners).

35. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944).

from uses and trusts, mortmain, the rule against perpetuities, and testamentary directions for accumulations.”³⁶

Are these the kinds of legal questions that the Supreme Court should be grappling with on a regular basis under a judicial takings doctrine? Apparently so, at least according to four Justices. All of the Justices agreed that the Florida decision was consistent with state property law and that STBR’s takings claim should be rejected. But the four-Justice plurality went further, expressing the view that the state judiciary as well as its political branches can directly effect a taking without just compensation. Citing just two cases decided in 1980 (and none of the many fair or substantial cases) to support this new theory,³⁷ Justice Scalia embraced the “judicial takings” doctrine in no uncertain terms. “Our precedents,” he wrote for the plurality, “provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.”³⁸

Perhaps Justice Scalia’s words have an unintended meaning. In the past, when a state-court ruling has come before the Supreme Court based on the assertion that the state decision is an “evasion” of a federal takings claim, the Court has treated that claim just like any other claim of bad-faith evasion. If there was a fair or substantial basis in state law for the state court’s decision, the high Court has declined to look further and left state property law to the state courts. Given this long history, the challenge for proponents of the judicial takings doctrine remains: Do we really need it?

36. *Id.* at 48.

37. See *Stop the Beach Renourishment*, 130 S. Ct. at 2601–02 (Scalia, J., plurality opinion) (citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–65 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 79–84 (1980)).

38. *Id.*