A DIVIDED RULING FOR A DIVIDED COUNTRY IN DIVIDING TIMES

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INTRODUCTION

The recent United States Supreme Court case of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* held—in a 4–4 ruling—that a judicial taking occurs when a state court's decision directly eliminates an existing and established property right that was clear under state law.[1] That was the first time in constitutional takings jurisprudence that the high court has so held.

I participated in the case as amicus curiae on behalf of a trade association representing the interest of the title insurance industry. This article addresses my own participation in the appeal, its resolution, and its implications.

I. THE INITIAL ISSUE

My involvement as amicus involved the interests of title insurance companies. The insurance issued by such companies insures that title to real estate is good and free of encumbrances.[2] Such insurance allows buyers to invest in real estate with confidence. That confidence has a multiplier effect. Title insurance not only helps "buyers to buy," but it helps sellers to sell, lenders to lend, brokers to transact, builders to build, industries to expand, and so on. Thus, the overall economic impact of title insurance is great.

Title insurance itself is unique. Unlike casualty insurance—which insures against unknown future events such as accidents or storms—title insurance deals with known events of the past.[3] It insures, for instance, that a seller's title to real estate can be seamlessly traced backwards in time to a point beyond the statute of limitations for claims against that title.[4] This allows purchasers of real estate to purchase property with assurance as to what they are receiving.

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1. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).
2. 1 JOYCE PALOMAR, TITLE INSURANCE LAW § 1:8 (2008).
3. *Id.* §§ 1:15, 1:16.
4. 1 LAWRENCE JOEL FINEBERG, HANDBOOK OF N.J. TITLE PRACTICE § 803 (3d ed. 2005) (citations omitted).

A prerequisite to the issuance of title insurance is a search of the title history of the property.[5] The title search entails, among other things, an analysis of recorded legal documents in light of known rules of law, so that the title insurer can conclude that insuring the property is acceptably free of risks.[6]

Thus, title insurance, unlike other forms of insurance, focuses more on analytical risk elimination rather than the risk assumption associated with casualty insurance.[7] While the title searches designed to eliminate risks will generate increased operating expenses—if those title searches demonstrate minimal levels of risk—title insurance can be issued at relatively low cost and with a high degree of confidence.[8]

Low risk, low premiums, and high confidence are thus the very essence of the business model of title insurance. That business model accomplishes important social objectives. It gives homeowners, investors, banks, businesses, and others a low cost and proven way to insure their investments in land.[9]

The structure of this business model led to the title industries' interest in this case. Put simply, the retroactive re-allocation of property rights by judicial decisions can be disastrous to the title insurance industry. By retroactively eliminating rights in property, such decisions manufacture claims against title insurance carriers whose business model is ill-equipped to handle them. Such decisions nullify "risk elimination" and create situations where title insurance companies operate with high expenses, low premiums, and potentially high claims expenses. That is a threat both to the title insurance industry and to the individuals—be they homeowners, businessmen, developers, or investors—who rely on the title industry to insure their investments. Put simply, retroactive changes in property law not only deny rights of property owners and harm the title industry, but disrupt established mechanisms of trust upon which individuals and businesses rely to manage their affairs.

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5. PALOMAR, *supra* note 2, § 1:16.
6. FINEBERG, *supra* note 4, § 1005.
7. PALOMAR, *supra* note 2, § 1.15.
8. *Id.*
9. *Id.*

II. A LARGER PROBLEM

The problem affects more than just the insurance industry and investors in property. Increasing population and consequent increasing demand necessarily cause conflict over access to natural resources. Supply concerns over oil and water are well known; land is no different. The New Jersey Department of Environmental Protection (NJDEP) notes: "The allure of New Jersey's coastline has proven so great that the vast majority of its more than 8 million residents live within 30 miles of the coast . . . ." [10] With the densest population in the country, "it has become increasingly important to preserve and enhance public access to and use of its coastal resources."[11] "Enhance" in that context means "expand" and the NJDEP makes that clear when it notes that "it is the duty of the state to not only allow and protect the public's right to use [tidal waterways and their shores], but also to ensure that there is adequate access to these sites."[12]

Of course, the enhancement of "public access" to "tidal waterways and their shores" necessitates a diminution of the property rights of private costal property owners. In New Jersey that diminution of private rights has been underway for decades via judicial interpretations of the public trust doctrine.

III. A CASE STUDY ON THE JUDICIAL EROSION OF RIGHTS IN PROPERTY

The public trust doctrine in New Jersey involves use of the state's waterways.[13] More specifically, that doctrine provides that land within the state which is covered by tidal waters is owned by the state, but is held in trust "for the common use of all the people."[14] Traditionally, the public's rights of use to such areas included rights of navigation, fishing, and the harvesting of oysters.[15] In the twentieth century, however, the doctrine

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10. NEW JERSEY DEP'T OF ENVTL. PROT., PUBLIC ACCESS IN NEW JERSEY: THE PUBLIC TRUST DOCTRINE AND PRACTICAL STEPS TO ENHANCE PUBLIC ACCESS 1 (2007), http://www.nj.gov/dep/cmp/access/public_access_handbook.pdf.

11. *Id.* at 2

12. *Id.* at 13.

13. The discussion on the public trust doctrine herein comes largely from seminar materials the author prepared for the New Jersey Institute for Continuing Legal Education and which are contained in N.J. INST. FOR CONTINUING EDUC., DEALING WITH EASEMENTS, RIGHTS OF WAY & MORE (2009) (on file with author).The material is reprinted with permission of NJICLE.

14. Borough of Neptune v. Borough of Avon-by-the-Sea, 294 A.2d 47, 51 (N.J. 1972).

15. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360–63 (N.J. 1984).

evolved to include the public's right to recreation at the state's seashores.[16] By 1981, the New Jersey Supreme Court had expanded the public trust doctrine beyond simply those lands "seaward of the mean high water mark."[17] In *Lusardi*, the Court noted that the use of tidal lands includes the right of access to dry sand on adjoining beaches.[18] This requirement was added to the public trust doctrine to enable citizens to walk across land to get to the shoreline or to rest on such dry land coincident with their use of the water.[19]

There was a significant limitation on these public trust rights. Up until *Matthews v. Bay Head*, this right of access to land adjoining public waterways only applied to public land.[20] There was no right to cross or to use privately owned land which adjoined the water.[21] In the *Matthews* decision, the New Jersey Supreme Court for the first time addressed the applicability of the public trust doctrine to privately owned beaches.

As noted above, the court in *Matthews* acknowledged the existence of two different types of access to privately owned beachfronts. One type of access is the right to cross privately owned beaches in order to get to the water. The other type is the right to use areas of dry sand at the water's edge as an adjunct to use of the water.[22] *Matthews* held—for the first time—that privately owned land could be made subject to the public trust doctrine depending upon the circumstances of the case. Those circumstances included the "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner . . . ."[23]

In the *Matthews* case, a private beach association intended—as its avowed purpose—to provide beach access to the citizens of the municipality in which the beach was located.[24] To accomplish its objectives, the association worked closely with the municipality itself.[25] The association charged fees to its members to offset maintenance costs of

16. *Borough of Neptune*, 294 A.2d at 54.
17. Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981).
18. *Id.*
19. *Id*.
20. *Matthews*, 471 A.2d at 363.
21. *Id*. at 363–64.
22. *Id.* at 364.
23. *Id.* at 365.
24. *Id*. at 359.
25. *Id.* at 367–68.

the beach.[26] Finally, the facts in *Matthews* showed that there was no public access in that municipality other than that which was provided by the association.[27] Under those circumstances, the Supreme Court held that the private association could be—and in fact was—compelled to provide access to all members of the public and not just residents of the municipality of Bay Head.[28]

The application of the public trust doctrine to private property came full circle in 2005. In that year the New Jersey Supreme Court decided another case on this issue—*Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc*.[29] The *Matthews* case had been the first case applying the public trust doctrine to private property. However, the *Raleigh* case was the first New Jersey Supreme Court opinion dealing with private beaches which—in essence—were not serving a public function, as did the private association in *Matthews*.[30]

In *Raleigh*, access to a former public beach became restricted to the paying clients of the beach's private owners.[31] However, that beach—the Atlantis Beach—was one of the only beaches in that area which was reasonably accessible to members of the public residing in that neighborhood.[32] *Raleigh* also dealt with a pre-existing New Jersey development permit.[33] The permit was issued to a third party when the Atlantis Beach had been open to the public, which had anticipated continuing public access to the Atlantis Beach.[34] The New Jersey Supreme Court, in a 5–2 decision, held that the entire Atlantis Beach should be open to the public upon payment of a fee set by the Department of Environmental Protection.[35]

In the decades from *Borough of Neptune* to the *Raleigh* decision, the New Jersey Supreme Court had come full circle. A "public access" doctrine that originally only applied to publicly owned beaches was now being utilized to compel private landowners to open their beach to the general public. That is significant. Had the New Jersey legislature enacted a

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26. *Id*. at 359.
27. *Id.* at 368.
28. *Id.*
29. Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005).
30. *Id.* at 120–21.
31. *Id.* at 121–22.
32. *Id.*
33. Referred to as a CAFRA permit. CAFRA is shorthand for Coast Area Facilities Review Act.
34. *Raleigh*, 879 A.2d at 124.
35. *Id.* at 125.

regulatory scheme to accomplish such a result, serious issues would be raised about such a law's constitutionality. More specifically, it would have raised the question as to whether a taking of property had occurred without payment of just compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution. Such an action—had it indeed been enacted by the legislature—might very well have constituted a taking under the principles of federal constitutional law.

The United States Supreme Court has stated on numerous occasions that the Court has been unable "to develop any set formula for determining when justice and fairness require that economic injuries caused by public action" must be deemed a taking.[36] United States Supreme Court jurisprudence does, however, recognize different categories of takings and has developed case law within each category. For instance, regulatory takings occur when a regulation so intrudes upon a property owners' rights that the property is considered taken despite the absence of a physical taking.[37] On the other hand, physical takings occur when all or even part of a property is physically taken from an owner for public use.[38] A subset of the physical takings category involves situations where significant individual property rights—out of the "bundle of rights" which constitutes ownership—are taken from an owner without compensation.[39] In such cases there exists no "permanent" occupation of the property but certain fundamental rights of ownership are, indeed, permanently taken away.[40] Would the requirement of public access to private property be such an invasion of the fundamental rights of ownership so as to constitute a taking?

In *Kaiser Aetna*, administrative action by the U.S. Army Corps of Engineers forced a marina owner to grant public access to a privately owned lagoon. The Supreme Court held that the right to exclude a person from one's property was so fundamental to the rights of ownership that requiring "public access" constituted an unconstitutional taking of property without compensation in violation of the Fifth Amendment.[41] Accordingly, a government act which forced the opening of private beaches to public use might very well be a violation of the United States Constitution.

That brings us back to the *Raleigh* decision. If forcing a marina owner

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36. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (internal citation and quotation marks omitted)).

37. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–31 (1992).

38. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425–26, 441 (1982) (requiring landlord to permit permanent installation of communications cable equipment on her property).

39. Kaiser Aetna v. United States, 444 U.S. 164, 176–80 (1979).

40. *Id.* at 179–80.

41. *Id.*

to open his lagoon to the public constitutes a taking, why is a court's decision forcing a beach owner to open his beach to the public—such as in *Raleigh*—any different?

IV. AN UNCERTAIN FAILURE

Stop the Beach Renourishment suggests that it makes no difference if the state actor involved in a taking is a judge rather than a legislator. Notwithstanding its holding, the opinion cannot be looked upon as a unifying reconciliation of constitutional takings jurisprudence. There are several reasons for this.

First, there was a lack of consensus as to the basis of the ruling among the Court. There was a four-Justice majority opinion and two separate two-Justice concurring opinions.[42] Each of the two concurring opinions concurred in the result—a finding of no constitutional violation—but not in the reasons therefore.

How then is a lawyer supposed to gauge the precedential value of the majority decision? The situation is even more uncertain when—even as this is being written—a new nomination to the Court is wending its way towards Senate consideration.[43]

Second, the tenor of the opinion suggested that nothing in the way of consensus would be reached any time soon. In his majority opinion, Justice Scalia addressed Justice Breyer's concurrence:

> BREYER responds that he simply advocates resolving this case without establishing "*the precise* standard under which a party wins or loses." But he relies upon no standard at all, precise or imprecise. He simply pronounces that this is not a judicial taking if there is such a thing as a judicial taking. The cases he cites to support this Queen–of–Hearts approach provide no precedent.[44]

The "Queen-of-Hearts" reference is to the Queen of Hearts portrayed in *Alice in Wonderland* who was guided more by whim than by anything else. One of the favorite whims of the Queen of Hearts was to say "off with his

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42. Justice Stevens took no part in the opinion.

43. The U.S. Senate confirmed Elena Kagan Associate Justice of the Supreme Court on August 5, 2010; Kagan assumed this role on August 7, 2010. *Biographies of Current Justices of the Supreme Court*, Supreme Court of the United States, http://www.supremecourt.gov/about/biographies.aspx (last visited Dec. 1, 2010).

44. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2604 (2010) (internal citations omitted).

head" to an unfortunate subject.[45] This, of course, was not a particularly gentle statement by one U.S. Supreme Court Justice regarding another. And Justice Scalia was only slightly kinder in addressing the concurrence of Justice Kennedy. Perhaps the Queen of Hearts reference was meant in jest but reading the opinion one gets the opposite impression. One senses that the discussions in chambers over this decision were conducted with considerable discord. In any event, the tenor of the opinion suggested a significant divisiveness in relation to the issue which is unlikely to be resolved in the near future.

Third, the Supreme Court in deciding this case did not articulate a specific rule that state court rulings on these issues would be reviewed with deference, but suggested that would indeed be the case. For instance, Petitioners in the case were beachfront owners. They asserted that their right to contact with the water was abrogated by the State of Florida's replenishment of the beach with sand and consequent assertion of title to the lands so filled. Petitioners claimed that the act cut off their right to contact with the water—a valuable attribute of waterfront ownership under existing Florida law. Their point was well taken.

Florida's littoral law is based upon its incorporation of the common law after its admission to the Union.[46] The common law, in turn, does not consider "contact" with the water to be subsidiary to the right of access. Just the opposite is true. The very essence of the common law right inheres in contact with the water. Farnham's classic treatise on the common law of water and water rights states:

> The courts do not fully agree in their enumeration of these rights. Some concede more than do others; but the principles involved which will be developed in the course of this and succeeding chapters accord the owner of riparian land the right to have the water remain in place, and to retain, as nearly as possible, its natural character.[47]

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45. LEWIS CARROLL, ALICE IN WONDERLAND 65 (Donald J. Gray ed., 1st ed., 1971).

46. *See, e.g.*, Hayes v. Bowman, 91 So. 2d 795, 798–800 (Fla. 1957); Broward v. Mabry, 50 So. 826, 829–30 (Fla. 1909); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors & Shippers, 48 So. 643, 644–46 (Fla. 1909).

47. 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 62, at 279 (1904). *See also* JOHN M. GOULD, LAW OF WATERS § 149, at 300 (3d. ed. 1900) (a riparian proprietor has the right to water frontage belonging by nature to his land).

Additionally, the Florida Supreme Court specifically affirmed that common law principle. It affirmed that littoral owners had "the right of access to the water, *including the right* to have the property's contact with the water remain intact . . . ."[48] While the United States Supreme Court decision was able to distinguish *Sand Key*, those distinctions were based upon technical readings and analysis of the law. They were not based upon a sympathetic view of the reasonable expectations of landowners. The Court thus evidenced that State actions would be treated deferentially, but that the reasonable expectations of landowners would not.

This is a significant limitation. The compendium of decisions representing the long history of property litigation in any jurisdiction constitutes a treasure trove of opportunities to find precedent sympathetic to a particular point of view—even if it constitutes an anomaly. Such decisions could be utilized to preclude the finding—which is required by *Stop the Beach Renourishment*—that the "right" allegedly taken was a well-established property right under state law.

Moreover, any seasoned appellate lawyer is aware of, and bemoans, "result-oriented" decisions found in the jurisprudence of a jurisdiction. Such decisions mangle precedent in order to enable a court to reach a preordained decision, often from a desire to achieve a particular state policy objective. Of course, the evil in such opinions is not only the injustice done to the parties, but also the precedents they set. In future judicial takings jurisprudence, such decisions could be utilized to nullify takings claims legitimately grounded in reversals of existing precedent.

Fourth, for a property right to be protectable under this decision it must be explicitly stated to exist and specifically found in precedent. It cannot be a right which is found by implication or otherwise.[49] This is more of an impediment than one might imagine. In a recent case argued by my firm before the New Jersey Supreme Court, the issue involved the right of a surviving tenant in a joint tenancy—after the death of the other joint tenant—to title to the property in question, free and clear of the debts of the predeceasing joint tenant. Of course, that right is well-established and has been a cornerstone of the common law since the days of Blackstone.[50] It was, in fact, so well established that no New Jersey case had ever had to rule on it—a fact that was aptly pointed out by a Justice during oral argument.

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48. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987) (emphasis added).

49. *Stop the Beach Renourishment*, 130 S. Ct. at 2612.

50. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 183 (1766).

That being the case, is such a right protected under *Stop the Beach Renourishment*?

Perhaps not.

In deciding *Stop the Beach Renourishment*, Justice Scalia stated, "The Takings Clause only protects property rights as they *are established under state law*, *not as they might have been established* or ought to have been established."[51]

But any experienced property law practitioner will tell you that a good amount of property law—especially some of the most fundamental aspects—simply is not established in the fashion that *Stop the Beach Renourishment* seems to require. It is, instead, accepted as self evident, often arising from the common law of England—such as the law involving joint tenancies. If, as a result, the rights established by such principles are not protected rights, much of the significance of *Stop the Beach Renourishment* is illusory.

One might object that the limitations in *Stop the Beach Renourishment*—that the rights sought to be protected be both clear and well-established—were necessary. The absence of such limitations could have effected a federalization of state law and an undue intrusion into state judicial processes by federal courts. But the real significance of that issue and other issues involving the opinion may be much different. A different perspective is suggested in the concluding remarks below.

V. REFLECTIONS ON THIS CONTROVERSY

Stop the Beach Renourishment may do little to prevent the erosion of property rights. For instance, it is difficult to see—if the opinion had been in place at the time—how its application would have prevented the slow evisceration of the property rights of waterfront owners occurring under the public trust doctrine in New Jersey. The significance of *Stop the Beach Renourishment* lies elsewhere. Indeed, the opinion seems to stand out more for that which it symbolizes than for what it actually says. In reality, *Stop the Beach Renourishment* was less an adjudication than it was a troubling microcosm of twenty-first century America.

On the one side are advocates of strict protection of property owner interests. On the other side are the advocates of broad powers of the states to take action meant to protect the common weal. In a country traditionally committed to individual rights, this is a significant conflict. Increasing

51. *Stop the Beach Renourishment*, 130 S. Ct. at 2612 (emphasis added).

population pressures bearing down on finite resources will undoubtedly exacerbate that conflict in the years to come.

Another side of the controversy involves the extent to which a federal judiciary should interfere in the decisions of state courts on issues of property rights interpretation. Concern about over-federalization of state law is no longer just an academic issue,[52] it is increasingly a divisive—and even frightening—issue "in the streets" of this nation.

Perhaps the most troubling aspect of the opinion is how issues of such consequence can be peacefully resolved. Increasingly, United States Supreme Court decisions fail to generate consensus on important issues. The ongoing multitude of plurality opinions does not provide realistic guidance to lower courts or—for that matter—to the citizenry. Nor do such opinions craft wise courses to guide a needful nation through troubled times. Instead adjudications such as *Stop the Beach Renourishment* merely reflect the divisiveness of an increasingly politicized appointment process in an increasingly divided nation. And that may be the real significance of the opinion. *Stop the Beach Renourishment* was thus less the resolution of a controversy than it is the freeze-frame image of a nation. It did not resolve growing conflicts about state–federal relations. Nor did it solve the increasing conflict between pubic needs and private rights or provide an alternative to the conflicts which now plague our public rhetoric. It did none of these things. It did something else, something much different. It just painted a picture of us, as a nation, as who we are and where we are.

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52. *See, e.g.*, Robert Cohen, J., *Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371 (1995).