

IN STATES WE TRUST: THE IMPORTANCE OF THE PRESERVATION OF THE PUBLIC TRUST DOCTRINE IN THE WAKE OF CLIMATE CHANGE

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“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.”¹

INTRODUCTION

On June 17, 2010, the Supreme Court of the United States handed down its opinion in the much-anticipated environmental case last term, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.² Justice Scalia delivered the 8–0 opinion of the Court, deciding that the Florida Supreme Court did not take property without just compensation in violation of the Federal Constitution in its ruling governing the restoration of beach front land, thus affirming the Florida Supreme Court’s previous decision.³ The Court was split 4–4 as to the question of whether there had been a “judicial taking,” or even, whether a “judicial taking” can ever exist.⁴ Four Justices supported the proposition that property taken by a legislature or a court can constitute a “taking” within the meaning of the Constitution, while four Justices determined the Court did not need to reach that issue in the *Stop the Beach Renourishment* case, but determined the state supreme court did not violate the Constitution.⁵ This ruling by the Court signifies an important step for states in maintaining their sovereignty and ability to best protect their lands and waters under state law. This is a particularly important decision as states

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1. Justice Antonin Scalia’s majority opinion in *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2612 (2010).

2. *Id.*

3. *Id.* at 2613.

4. *Id.* at 2614–18 (Kennedy, J., concurring).

5. *Id.* at 2618–19 (Breyer, J., concurring).

begin to grapple with impacts of climate change on their coastlines. As the nation increasingly sees its beaches erode, its roadways flood, and its valued land reclaimed by the sea, the well-established practice of state sovereignty will enable states to best decide the proper means to maintain and preserve their lands and water for future generations.

This Essay will explore the ramifications that the *Stop the Beach Renourishment* decision may have as states cope with impacts of climate change on the nation's coastlines, and will focus on the importance of state sovereignty, specifically the public trust doctrine, to address these changes. This Essay will first explore the history and importance of the public trust doctrine. Second, this Essay will discuss the value that the nation's coasts have for the nation as a whole and how the impacts of climate change threaten the collective resource of the coasts. Lastly, this Essay will examine the recent decision of *Stop the Beach Renourishment* and what it means for the management of coastlines in coastal states, commonwealths, and territories.

I. THE HISTORY AND IMPORTANCE OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine is rooted in the sixth century Institutes and Digest of Justinian, the basis for Roman civil law. The Institutes provided assurance for citizens of Rome that there were certain things that were "common" to all, including the air, running water, the seas, and the shores of the seas.⁶ These common uses were incorporated into English common law and came to the United States, applied in both state and federal courts in the early 1800s. Simply put, the public trust doctrine recognizes that there are unique qualities to certain lands that should be protected and maintained for future public use, and the resources of these lands are to be held by the state in a trust for the benefit of all people.

The public trust doctrine includes two parts: the *jus publicum*, providing the public right to use and enjoy trust lands and water for commerce, navigation, fishing, bathing, and other related public purposes, and the *jus privatum*, providing the private proprietary rights in the use and possession of public lands.⁷ Each state has the ability to apply the public trust doctrine to trust lands and "waters within its borders according to its own views of justice and policy . . ."⁸ This distinct authority and

6. J. INST. II.I.D.1.8.4.158 (Thomas Collett Sanders trans., 1876).

7. COASTAL STATES ORG., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d. ed. 1997).

8. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

responsibility places decisions for some of the nation's most treasured lands and waters in the hands of state courts, state legislatures, and their designees, such as state coastal and land commissions. The Supreme Court has recognized the need for this delegation to the states, noting, "[g]reat caution . . . is necessary in applying precedents in one State to cases arising in another."⁹ While the roots of the public trust doctrine are common in all states, each state, commonwealth, and territory has evolved its interpretation of the public trust doctrine over time to best serve the needs of its jurisdiction.

As climate change becomes an increasing threat to the special lands protected by the public trust doctrine, the importance of respecting states' rights to exercise their authority to manage those special lands will be increasingly vital to the protection and preservation of the nation's coasts. States are already coping with managing shoreline change and are uniquely equipped with the knowledge of their individual shorelines to best decide the tools that work in their respective states to maintain the environmental and economic resource of the coasts.¹⁰ It is the strength of each state, commonwealth, and territory, and their distinct approaches to coastal management, that allows for the nation as a whole to enjoy the benefits of the coastlines.

II. THE UNITED STATES IS A NATION ROOTED IN AND RELIANT ON THE COASTS AND CLIMATE CHANGE THREATENS THAT RELIANCE

The United States "is a nation intrinsically connected to and immensely reliant on the ocean."¹¹ Since the country's inception, the coasts have served

9. *Id.*

10. Coastal programs are beginning to address climate change by examining the social, environmental, and economic impacts of accelerated sea level rise scenarios, resulting shoreline changes, and potential adaptation strategies. COASTAL STATES ORG., THE ROLE OF COASTAL ZONE MANAGEMENT PROGRAMS IN ADAPTATION TO CLIMATE CHANGE 2–11 (2008). For example, in 2006, the North Carolina Estuarine Biological and Physical Processes Work Group released a report recommending the use of land use planning, such as buffers and setbacks, and vegetation control, such as wetlands and upland plantings, as erosion mitigation options for much of its estuarine shoreline. See BONNIE M. BENDELL, NORTH CAROLINA DIV. OF COASTAL MGMT., THE NORTH CAROLINA ESTUARINE BIOLOGICAL AND PHYSICAL PROCESSES WORK GROUP, RECOMMENDATION FOR APPROPRIATE SHORELINE STABILIZATION METHODS FOR THE DIFFERENT NORTH CAROLINA ESTUARINE SHORELINE TYPES 1–4 (2006), available at <http://www.nccoastalmanagement.net/Hazards/EWG%20Final%20Report%20082106.pdf>. Similarly, in Massachusetts, the Coastal Hazards Commission drafted recommendations related to coastal hazards information, policy, planning and regulations, shoreline protection, and infrastructure. See MASS. COASTAL HAZARDS COMM'N, PREPARING FOR THE STORM: RECOMMENDATIONS FOR MANAGEMENT OF RISK FROM COASTAL HAZARDS IN MASSACHUSETTS 1–40 (2007).

11. U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY, FINAL REPORT 1 (2004), available at <http://www.oceancommission.gov>.

as the means by which the world's peoples, cultures, and resources have mingled together. Thomas Paine saw the "ocean barrier [as] 'strong and natural proof' that the authority of England over America 'was never the design of Heaven.'"¹² Henry David Thoreau observed "that the Atlantic Ocean gave America 'the opportunity to forget the Old World,'" and "regard[ed] the Pacific Ocean as 'perhaps mankind's last chance before the Styx.'"¹³ In the first years following the Louisiana Purchase in 1803, "many Americans valued the acquisition less for its land and other natural resources than as a pathway to the Pacific and [therefore to] Asia."¹⁴ Travel via the oceans and Great Lakes opened the channels of commerce that allowed the nation to become an economic world leader. As Walt Whitman eloquently stated, "[a]nd where has that commerce ever flowed without carrying wealth and dominion with it?"¹⁵ Whitman's prediction rings true across the nation: it is no coincidence that as the nation has grown, major cities and economic hubs have centered on the oceans and Great Lakes. To this day, the nation remains dependent upon the oceans and coasts for food, recreation, jobs, wildlife habitat, transport of goods, climate control, and as the much-coveted location of the majority of American homes. Indeed, America was built upon, and remains dependent upon, the coasts.

A nation that is so reliant on its coasts has a lot to lose when those coasts are threatened. The situation faced by the state of Florida that led to the *Stop the Beach Renourishment* case presents a trifecta of events that is becoming more and more common with the changing climate: the interrelated threats of sea level rise, coastal erosion, and increased storm intensity and frequency.¹⁶ Over the past century, there has been an estimated sea level rise increase of approximately four to eight inches.¹⁷ This is due to both increased ocean water temperatures and increased aggregate water due to melting glaciers and ice fields. An increase in sea level rise and warming seas is also leading to an increase in storm intensity and frequency.¹⁸ Furthermore, increased sea level rise results in greater

12. BENJAMIN W. LABAREE ET AL., *AMERICA AND THE SEA: A MARITIME HISTORY* 4 (1998) (internal citation omitted).

13. *Id.* at 4–5 (internal citation omitted).

14. *Id.* at 5.

15. *Id.*

16. For a full discussion of the climate change impacts that led to the *Stop the Beach Renourishment* case, see Brief for Coastal States Organization as Amicus Curiae in Support of Respondents, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151) (2009 WL 6046172).

17. *Id.* at 18.

18. Richard A. Anthes et al., *Hurricanes and Global Warming—Potential Linkages and*

erosion on the coasts. While erosion and accretion are part of the natural dynamic sea, sea level rise, flooding, and increased storms are causing a greater amount of erosion without increased accretion.¹⁹ The concept of climate change is no stranger to the Court; the Court recognized the significant impacts associated with climate change in its landmark 2007 decision in *Massachusetts v. Environmental Protection Agency*.²⁰ In *Massachusetts*, the Court acknowledged that scientific experts have reached a strong consensus that global warming will result in sea level rise and possibly increased ferocity of hurricanes.²¹ Indeed, sea level rise, erosion, and increased storm intensity and frequency occurred over the last two decades in Florida, thus prompting the Florida Department of Environmental Protection (DEP) to address those impacts through beach renourishment. As these factors and other impacts of climate change become more prevalent on the coasts, it will be increasingly important for coastal states, commonwealths, and territories to address these impacts in the most appropriate manner for their particular coasts.

III. THE STATE OF FLORIDA WAS DELEGATED THE RESPONSIBILITY TO
MANAGE ITS COASTS AND THE *STOP THE BEACH RENOURISHMENT* DECISION
PROTECTS STATES' FUTURE ABILITY TO MANAGE THEIR COASTLINES

The State of Florida was well equipped to deal with the situation that presented itself in the City of Destin and Walton County leading to the *Stop the Beach Renourishment* case. The Florida Legislature recognized the importance and volatility of Florida's beaches when it enacted the Beach and Shore Preservation Act nearly half a century ago.²² In the Act, the legislature determined that the erosion of Florida beaches was a "serious menace to the economy and general welfare" of Florida's inhabitants.²³ Additionally, the legislature declared it "a necessary governmental responsibility to properly manage and protect Florida beaches . . . from erosion."²⁴ The legislature had delegated to the DEP the authority to identify critically eroded beaches and determine whether they were in need

Consequences, 87 BULL. AM. METEOROLOGICAL SOC'Y 623, 624–26 (2006).

19. Accretion is "[t]he gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river or on the seashore." BLACK'S LAW DICTIONARY 21 (7th ed. 1999).

20. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 521 (2007).

21. *Id.* at 521–22.

22. Beach and Shore Preservation Act, FLA. STAT. ANN. § 161.011 (West 2008).

23. *Id.* § 161.088.

24. *Id.*

of restoration and renourishment.²⁵ According to a 1970 amendment to the Act, the Board of Trustees had the ability to survey, establish, and record a fixed boundary line, called the Erosion Control Line (ECL), between state sovereign lands and upland property areas of restoration.²⁶ Under the Florida Administrative Code, “Critically Eroded Shoreline” is defined as “a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost.”²⁷ In determining to renourish the critically eroded beaches in the City of Destin and Walton County, the state of Florida followed the proper procedures set forth in the Act.

The Court agrees Florida followed its own law and that the Florida Supreme Court did not take property without just compensation. The *Stop the Beach Renourishment* opinion begins with a sentence that upholds states’ ability to manage their coastlines according to their laws: “[g]enerally speaking, state law defines property interests, including property rights in navigable water and the lands underneath them.”²⁸ The Court further acknowledges that the state of Florida, according to the Florida Constitution, “owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line).”²⁹ Typically, in the state of Florida, this boundary between private beachfront land and state-owned land is the mean high-water line.

In its opinion, the Court distinguishes the rights afforded to the public and the rights reserved for beachfront, or littoral, owners. A littoral owner, in addition to the public rights, holds the right to access the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the property.³⁰ The Court defines “accretions” as a gradual and imperceptible addition of sediment, sand, or other deposits and “relictions” as the gradual and

25. *Id.* § 161.101(1).

26. *Id.* § 161.161.

27. FLA. ADMIN. CODE R. 62B-36.002(4) (2010).

28. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) (citing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998); *United States v. Cress*, 243 U.S. 316, 319–20 (1917); *St. Anthony Falls Water Power Co. v. St. Paul Water Comm’rs*, 168 U.S. 349, 358–59 (1897)).

29. *Id.* at 2598; FLA. CONST., art. X, §11; *Broward v. Marbry*, 50 So. 826, 829–30 (Fla. 1909).

30. *Stop the Beach Renourishment*, 130 S. Ct. at 2598.

imperceptible recession of water.³¹ However, the Court distinguishes the act of avulsion from that of accretions and relictions, defining an “avulsion” as the “sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.”³² The Court notes that in Florida, “formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State).”³³ The beach renourishment project in question before the Court qualifies as an act of avulsion. The Court notes that in the case of avulsion, the boundary line between private and public land remains the mean high-water line before the event.³⁴ Therefore when a new strip of land is created by avulsion, the littoral property owner is no longer in the position to receive accretions on his land, as any additions would be on the state land. The Florida District Court of Appeals for the First District ruled that the ECL set by the Act had eliminated the right of the littoral owners to receive accretions and the right for their properties to remain in contact with the water.³⁵ However, the Florida Supreme Court determined that the district court had failed to consider the doctrine of avulsion, and with that consideration, the state had the right to reclaim the restored beach for public use. The question then arises as to whether a distinct right of the littoral owners was denied when the dynamic mean-high water line was replaced with a permanent ECL set at the historical mean-high water line.

In Section II of the opinion, Justice Scalia, joined by Justices Roberts, Thomas, and Alito, notes that judicial restriction of property can constitute a taking, and that a taking occurs, “[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”³⁶ For a taking to exist, an actual, vested right must be eliminated from the littoral owner. The Court determined that the facts in the *Stop the Beach Renourishment* case do not support the existence of this right. In Section IV of the Court’s opinion, Justice Scalia notes that, “[t]here is no taking unless petitioner can show that, before the Florida Supreme Court’s decision, littoral-property owners had rights to future accretions and contact with the water superior to the

31. *Id.*

32. *Id.* (quoting *Bd. of Tr. of Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987)); *see also* 1 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 69, at 320 (1904) (defining avulsion).

33. *Stop the Beach Renourishment*, 130 S. Ct. at 2598.

34. *Id.* at 2599 (citing *Bryant v. Peppe*, 238 So. 2d 836, 838–39 (Fla. 1970)).

35. *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 54 (Fla. Dist. Ct. App. 2006).

36. *Stop the Beach Renourishment*, 130 S. Ct. at 2602.

State's right to fill in its submerged land. . . . [I]n our view the showing cannot be made."³⁷ The Court cites Florida case law to support that the State, as the owner of submerged land adjacent to the littoral property, has the right to fill in its land as long as it does not interfere with rights of the public or the littoral land owner.³⁸ The Court also notes that if an act of avulsion creates land seaward of a littoral property on once submerged land, the land belongs to the state even if it interrupts the littoral owner's contact.³⁹ Prior law suggests that this holds true even when the avulsive event is caused by the State. Accordingly, the right to accretions by the littoral owner in the *Stop the Beach Renourishment* case is subordinate to that of the State's right to fill. "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."⁴⁰ With that very sentence, a sentence that all eight voting Justices agreed to, the Court acknowledges the pivotal role state law holds in property rights.

CONCLUSION

This decision should be considered a great step forward not only for the respondents in the case, but for all coastal states, commonwealths, and territories. The facts of this particular case may have been unique to Florida, indeed even to the City of Destin and Walton County; however, it is precisely that uniqueness that positions Florida as the best arbiter of the facts. Faced with the impacts of climate change, the DEP examined the situation it was presented with and decided that beach renourishment was the proper tool to address the imminent risk to a valued public resource. As climate change impacts continue to be felt throughout the nation, this decision is a step towards ensuring that each coastal state, commonwealth, and territory will be able to meet its longstanding responsibility to its citizens and the nation as a whole.

37. *Id.* at 2611.

38. *Id.* (citing *Hayes v. Bowman*, 91 So. 2d 795, 799–800 (Fla. 1957) (discussing the right to fill, as conveyed by the State to private property owners)); *State ex rel. Buford v. Tampa*, 102 So. 336, 341 (Fla. 1924) (same).

39. *Id.* (citing *Bryant*, 238 So. 2d at 838–39 (ruling that avulsion creating dry land did not divest the state's title in that land)).

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