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Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envt'l Prot., 130 S. Ct. 2592 (2010).

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Case Summaries

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Alabama v. North Carolina, 130 S. Ct. 2295 (2010).

Will Bridges*

I. Introduction

In *Alabama v. North Carolina*,[1] the Southeast Interstate Low-Level Radioactive Waste Management Compact and its member states brought an action in the U.S. Supreme Court against North Carolina, alleging a breach of the Compact after North Carolina failed to obtain the license necessary to open a waste storage facility,[2] and later failed to comply with sanctions

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1. Alabama v. North Carolina, 130 S. Ct. 2295, 2295 (2010).

2. *See id.* at 2300 (stating that "[t]he complaint sets forth claims of violation of Plaintiffs' rights under the Compact (Count I), breach of contract (Count II), unjust enrichment (Count III), promissory estoppel (Count IV), and money had and received (Count V)").

levied against it.[3] The U.S. Supreme Court assigned the case to a Special Master, who filed two reports.[4] The Court overruled all nine exceptions to the Special Master's reports filed by the respective parties, and adopted the Special Master's recommendations.[5] The Court held that the terms of the Compact did not allow for monetary sanctions,[6] and that North Carolina took the necessary steps in order to obtain a waste storage license.[7]

II. Background

Pursuant to the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act,[8] the Southeast Interstate Low-Level Radioactive Waste Management Compact was formed in 1986 for the purpose of "develop[ing] new facilities for the long-term disposal of low-level radioactive waste generated within the region."[9] A facility located in Barnwell, South Carolina was designated as the Compact's initial waste disposal site.[10]

The South Carolina facility was slated to cease operating as the Compact's disposal site in 1992. The Commission administering the Compact designated North Carolina as the host state for a new waste facility to replace the South Carolina site at the end of 1992.[11] North Carolina requested financial assistance for licensing and building the facility, and the commission obliged the state's request, creating an

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3. *Id.* at 2304.

4. *See id.* at 2300–01 (explaining what the reports contained). "[G]ranting North Carolina's cross-motion to dismiss Count I . . . denying North Carolina's motion to dismiss . . . Counts II-V . . . denying Plaintiff's motion . . . and granting North Carolina's motion for summary judgment on Count II; and denying North Carolina's motion for summary judgment on . . . remaining claims in Counts III-V."

5. *Id.* at 2316.

6. *Id.* at 2306–08.

7. *See id.* at 2309–12 (finding that North Carolina took appropriate steps towards obtaining licensing, and that the state was not required to bear the financial burden of licensing alone, given that the history of the Compact was one of "shared financial burdens").

8. *See* 42 U.S.C. § 2021(d) (2006) (permitting state governments to enter into regional radioactive waste disposal compacts, which they would not have been able to do absent congressional action).

9. *See* Alabama v. North Carolina, 130 S. Ct. 2295, 2302–03 (2010) (describing the origins of the Compact, and listing its member states: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia).

10. *Id.* at 2303.

11. *Id.*

assistance fund.[12] Although it complied with its duties, North Carolina was unable to complete the task on time.[13]

In July 1995 South Carolina withdrew from the Compact, depriving the Compact of further revenues from the Barnwell waste disposal facility.[14] In 1997, the Commission ceased financial assistance to North Carolina.[15] In December of that same year, North Carolina informed the Commission it would commence an orderly shutdown of its licensing project.[16] In 1999, two Compact member states, Florida and Tennessee, filed a complaint with the Commission alleging that North Carolina had failed to fulfill its obligations under the Compact, and requesting the return of the nearly $80 million in funding given to North Carolina by the Commission, plus interest, damages, and attorney's fees.[17] North Carolina responded by withdrawing from the Compact.[18]

In December 1999, the Commission held a sanctions hearing and found that North Carolina had failed to meet its obligations under the Compact.[19] The Commission adopted a resolution demanding that North Carolina repay the approximately $80 million in funding it had received, with interest, to the Commission, as well as a $10 million penalty and attorney's fees.[20] North Carolina refused to do so, and in July 2000, the Commission requested leave to file a bill of complaint so as to enforce its sanctions resolution.[21]

III. Holding

The Court overruled all seven of the plaintiffs' exceptions to the Special Master's report. The Court held that the terms of the Compact did not allow for monetary sanctions or designate the Commission as sole arbiter of disputes.[22] The Compact specifically enumerated a number of sanctions, and the Court found the absence of any provision specifically

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12. *Id.*
13. *See id.* (explaining why North Carolina was unable to finish on time). "The estimate in 1989 was . . . $21 million and . . . two years to obtain a license . . . [t]hat proved to be wildly optimistic . . . [b]y . . . 1994 the estimate was $112.5 million . . . by December 1996 the estimated cost had increased by . . . $27 million and the projected [licensing] date . . . had become August 2000."
14. *Id.* at 2304.
15. *Id.* at 2304.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 2304–05.
21. *Id.*
22. *Id.* at 2306–08.

authorizing monetary sanctions determinative.[23] Further, the Compact was void of any express terms designating the Commission as sole arbiter of disputes, and the Court found that it was thus not bound by the Commission's decision.[24]

The Court found that the terms of the Compact did not require North Carolina to take any and all steps to license a waste disposal facility, but did establish that North Carolina was not expected to proceed with the costly licensing process without external financial assistance—"The history of the Compact consists entirely of shared financial burdens."[25] North Carolina took the necessary and appropriate steps to obtain the license, was within its rights to refuse further action without financial assistance from the Commission, and did not breach an implied duty of good faith and fair dealing when it withdrew from the Compact.[26]

In addition, the Court also overruled both of North Carolina's exceptions to the Special Master's report.[27] The Court held that it was reasonable for the Special Master to deny North Carolina's motion for summary judgment, and that the Commission's claims were not barred by sovereign immunity.[28]

IV. Future Implications

Alabama v. North Carolina highlights the complications that can arise from the disposal of radioactive materials. Waste disposal is just one of many issues complicating the use of nuclear power to provide energy to U.S. consumers. North Carolina was designated as a host state by the Commission in 1986,[29] and over a decade later the State still had not obtained the requisite license or completed construction of the waste facility[30]—this in spite of the fact that the Court found North Carolina to have behaved appropriately in pursuing its obligations under the terms of the Compact.[31]

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23. *Id.* at 2306.
24. *Id.* at 2308.
25. *Id.* at 2309.
26. *See id.* at 2309–12 (finding that North Carolina took appropriate steps towards obtaining licensing, and that the state was not required to bear the financial burden of licensing alone, given that the history of the Compact was one of "shared financial burdens").
27. *Id.* at 2313–2316.
28. *Id.*
29. *Id.* at 2302.
30. *Id.* at 2304.
31. *See id.* at 2309–12 (finding that North Carolina took appropriate steps towards obtaining licensing, and that the state was not required to bear the financial burden of licensing alone, given that the history of the Compact was one of "shared financial burdens").

The Southeast Interstate Low-Level Radioactive Waste Management Compact is not the only such compact to run into trouble. Despite the passage of both the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act and the Low-Level Radioactive Waste Policy Act, as well as "significant incentives offered by the federal government" since the 1980s, "[t]he states have failed to create a nationwide system of regional low-level radioactive waste . . . disposal sites."[32] Moreover, as Justice O'Conner pointed out in *New York v. United States*,[33] low-level radioactive waste includes "[r]adioactive material . . . present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants."[34] The inability of the states to effectively deal with the disposal of only low-level radioactive waste foreshadows the problems certain to arise from the disposal of increased radioactive waste that would accompany any future increase in the nation's dependence upon nuclear power for its energy needs.[35]

If the U.S. is to produce any meaningful, measurable reduction in dependence on carbon-based or "fossil" fuels for energy delivery in the near future, such an increase in nuclear power will be a key part of that equation. However, it has been decades since the last nuclear power facility was brought online, and the lengthy process of addressing radioactive waste

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32. Emma Garrison, *Entergy Arkansas, Inc. v. Nebraska: Does a Radioactive Waste Compact Nuke Sovereign Immunity?*, 30 ECOLOGY L.Q. 449, 450 (2003) (discussing the controversy arising out of Nebraska's refusal to grant any of the licenses necessary to build a facility after "[t]he Central Interstate Low-Level Radioactive Waste Commission . . . voted and selected Nebraska to host the [Compact's] regional LLRW disposal facility in 1987").

33. *See* New York v. United States, 505 U.S. 144 (1992) (declaring the Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional in part). The Court held that the monetary and access incentives provided by Congress in order to encourage formation of Interstate Low-Level Radioactive Waste Management Compacts were valid exercises of power under the Commerce, Taxing, and Spending Clauses of the Constitution. *Id.* at 173–74. However, the Court held that the "take title"provision, which offered States a choice between regulating waste as called for by Congress, or taking possession of low level radioactive waste produced in-state and being held liable for damages incurred by waste generators as a result of any failure to do so promptly, was unconstitutional. *Id.* Under the "take title" provision, a State could not decline to administer the federal program, it could only choose between two alternate applications, a result the court found to be "inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 176–77.

34. *Id.* at 149.

35. *See* H. Josef Hebert, *Nuclear waste won't be going to Nevada's Yucca Mountain, Obama official says*, Associated Press, March 6, 2009, http://www.chicagotribune.com/news/nationworld/chi-nuke-yucca_frimar06,0,2557502.story (reporting the Obama administration's decision to de-fund the highly contentious Yucca Mountain nuclear waste repository despite the fact that 13.5 billion dollars had been spent on the project to date) (last visited Sept. 25, 2010) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

disposal and other issues associated with nuclear power will severely impact any plans to increase nuclear power generation on the horizon.

Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envt'l Prot., 130 S. Ct. 2592 (2010).

Daniel Issacs Smith*

I. Background

In 2003, the City of Destin and Walton County set out to correct the effects of erosion from multiple hurricanes along approximately seven miles of beach within their borders.[1] Florida's Beach and Shore Preservation Act[2] ("the Act") provides such local governments with an avenue to restore and maintain eroded beaches through an application and permit process.[3] After the city and county received state approval for the restoration project, a group of beachfront property owners brought an unsuccessful administrative challenge directly to the state's Department of Environmental Protection ("FDEP").[4]

Stop the Beach Renourishment Project, Inc., sued in District Court of Appeal for the First Circuit of Florida[5] arguing that the beach restoration project amounted to an unconstitutional taking of property under the Takings Clause of the Fifth Amendment.[6] The Court concluded that there was a taking; the FDEP's actions had deprived the petitioners of two property rights: "(1) the right to receive accretions; and (2) the right to have the contact of their property with the water remain intact."[7] The District Court then certified the question to the Florida Supreme Court, which concluded that there was no taking, upholding the state's right of ownership of the part of the beach added by the process of avulsion.[8]

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1. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600 (2010) (discussing the counties' efforts to dredge and replenish approximately 75 feet of shoreline in the contested areas).

2. *See* Beach and Shore Preservation Act of 1961, Fla. Stat. §§ 161.011–161.45 (2007) (setting out the guidelines for municipality and state rights in regards to beach restoration).

3. *See Stop the Bea*ch, 130 S. Ct. at 2599 (discussing the regulatory process in which cities and counties can apply for state assistance with beach restoration projects).

4. *See id.* at 2599–600 (stipulating the administrative process prior to this action).

5. *See id.* at 2600 (evaluating the relevant procedural posture leading up to the Supreme Court's ruling on this issue).

6. *See id.* (establishing the basis for the petitioner's case).

7. *Id.*

8. *See id.* at 2611–13 (identifying the final action in the case prior to the United States Supreme Court's grant of certiorari). Avulsion occurs when there is a "sudden or perceptible loss of or addition to land by the action of the water. . . ." *Id.* at 2598 (quoting Board of Trustees of Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So. 2d 934, 936 (Fla. 1987)). Alternatively, "[a]ccretions are additions of alluvion (sand, sediment,

The petitioners then sought review, arguing that the Florida Supreme Court's decision itself was a taking of their members' littoral rights.[9] The Supreme Court, in an opinion by Justice Scalia, affirmed the Florida Supreme Court's decision that no taking occurred. At the outset, it is important to note this was a plurality decision.[10] While the Court unanimously agreed that no taking occurred, there was a 4-4 split over whether or not a court, through a judicial decision, could deprive a property owner of established property rights; and, if so, what standard a court should use to determine if a "judicial taking" has occurred.[11]

II. Holding

Scalia's plurality opinion is supported by prior common law decisions in Florida and elsewhere, where the "littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State)."[12] When accretion occurs, the property boundary becomes the newly calculated mean high-water line.[13] On the other hand, when avulsion adds to property, the new boundary remains at the level where the mean high-water line was prior to avulsion.[14]

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or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes." *Id.* The important distinction, which lies at the heart of this case, is that accretions must have occurred "gradually and *imperceptibly* -- that is, so slowly that one could not see the change occurring." *Id.* (emphasis added). It would be extremely difficult for the petitioners here to argue that this change was imperceptible.

9. *See id.* at 2600 (rehashing the argument that petitioners used before the Supreme Court).

10. *See id.* at 2613 (stating that Justice Stevens did not take part in the decision of this case).

11. *See id.* at 2613–19 (summarizing the issue and primary holding of this case). A "judicial taking," in this sense, is a situation where a court decision deprives a property owner of a previously held property right. *See id.* at 2601–08 (summarizing the history of the Takings Clause with respect to the judiciary effecting a taking through its action or holding). Specifically, the property owners in this case argue that the state Supreme Court's decision will deprive them of the two property rights established by the District Court of Appeal: first, the right to receive accretions to their property; and second, the right to have their property maintain its contact with the water. *Id.* at 2600.

12. *Id.* at 2598. While many other jurisdictions refer more generally to riparian water rights, meaning abutting any body of water, the Florida Supreme Court more specifically distinguishes between riparian rights and littoral rights. *Id.* The former refers to any body of water "abutting a river or stream," while the latter refers to bodies of water "abutting an ocean, sea, or lake." *Id.* at 2598 n.1 (quoting Walton Cty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 n.3 (2008)). The Court here follows the Florida Supreme Court's terminology in discussing applicable Florida law. *Id.* at 2598.

13. *See id.* at 2599 (summarizing the regulation's rule that the property line remains the mean high-water line unless changes come through the process of avulsion).

14. *See id.* at 2598 (outlining the alterative part of the rule that states retain ownership of previously owned land added to by avulsion).

Importantly, and as the Court holds here, additions to property in this manner eliminate the littoral owner's right to subsequent accretions.[15]

What Florida did in this instance amounts to avulsion, not accretion.[16] Since the formerly submerged land and foreshore belong to the state, accretions no longer directly connect the newly extended shoreline to the property owner's land, but rather to that of the state.[17] Thus, a fixed "erosion control line" is created as the new permanent property line, as was the case here.[18] Ultimately, the Supreme Court needs to resolve the apparent conflict between the state's right to fill submerged land adjacent to littoral property and the property owners' established property rights.[19]

At length, Scalia addresses the issue of whether or not this type of action, termed a "judicial taking," is constitutionally permissible; he posits that it is.[20] First, in order to establish a taking, the Court says that the petitioners here would need to show that their "rights to future accretions and contact with the water [are] superior to the State's right to fill in its submerged land."[21] Further, although the Court affirms the lower court decision that such rights are not superior, meaning that no judicial taking had in fact occurred, Scalia sets out a test for determining whether such a taking is valid for use in future cases.[22] The "test for a judicial taking . . . [is] whether the state court has declare[d] that what was once an established right of private property no longer exists."[23] Scalia goes on to say that Justice Breyer's reasoning for evaluating a takings claim is faulty because "[o]ne cannot know whether a takings claim is invalid without knowing what standard it has failed to meet."[24] In furtherance of this, he cites an exhaustive list of cases where the Supreme Court has recognized a right or

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15. *See id.* at 2610–11 (indicating the legitimate ways in which property rights can be taken by government action such as that in the case at hand).

16. *See id.* at 2598 (analyzing the practical difference between accretion and avulsion).

17. *See id.* at 2599 (identifying one of the specific property rights that can be "taken" in cases such as this). The foreshore is "the land between the low-tide line and the mean high-water line." *Id.* at 2598. Thus, it is the land between the current property boundary and the formerly submerged land. *Id.*

18. *See id.* (upholding the regulatory rule that when land is added to by avulsion, the previous mean high-water line becomes the permanent property line). Traditionally, the erosion control line is set at the existing mean high-water line. *See id.* at 2599 (outlining the statutory rules for determining where the erosion control line is). Technically speaking, however, the board can set the erosion control line "seaward or landward of that." *Id.*

19. *See id.* at 2611 (identifying the balancing rights, those of the state and those of property owners, at issue in this particular case).

20. *See id.* at 2602–08 (concluding that "judicial takings" are constitutionally permissible under the Fifth Amendment).

21. *Id.* at 2611.

22. *See id.* at 2604 (establishing a test for determining when a judicial taking occurs).

23. *Id.* (internal citations omitted).

24. *Id.* at 2603.

established a test and then "gone on to find that the claim at issue fails."[25] Regardless of either side's belief, the test enumerated by Scalia appears to be mere dicta due to the lack of a clear majority and the fact that the test plays no part in the ultimate holding. Thus, a future court would need to establish this test as part of an actual judicial takings decision.

III. Concurrence

The first concurring opinion, written by Justice Kennedy and joined by Justice Sotomayor, agrees that no taking has occurred here, but disagrees with Justice Scalia's "judicial takings" analysis.[26] In any future case where a potential judicial taking has occurred, Kennedy suggests that courts must first find that "usual principles, including constitutional principles that constrain the judiciary like due process," are alone insufficient to uphold the rights of property holders.[27] Only then could a court discuss the question of whether a property owner's rights have been "taken" by the court's decision.[28] Justice Kennedy goes on to discuss the potential issues arising out of the concept of judicial taking, if such a thing even exists.[29] Specifically, he discusses two issues: first, it is unclear how a party can properly raise such a claim; and second, it is unclear what remedies are available to parties after finding a judicial taking.[30]

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25. *See id.* (discussing other cases where courts have established tests or recognized certain rights, but the underlying claim still fails). "*New Jersey v. T. L. O., 469 U.S. 325, 333, 341-343 . . . (1985)* (holding that the *Fourth Amendment* applies to searches and seizures conducted by public-school officials, establishing the standard for finding a violation, but concluding that the claim at issue failed); *Strickland v. Washington, 466 U.S. 668, 687, 689-700 . . . (1984)* (recognizing a constitutional right to effective assistance of counsel, establishing the test for its violation, but holding the claim at issue failed); *Hill v. Lockhart, 474 U.S. 52, 58-60 . . . (1985)* (holding that a *Strickland* claim can be brought to challenge a guilty plea, but rejecting the claim at issue); *Jackson v. Virginia, 443 U.S. 307, 313-320, 326 . . . (1979)* (recognizing a due process claim based on insufficiency of evidence, establishing the governing test, but concluding that the claim at issue failed); *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390, 395-397 . . . (1926)* (recognizing that block zoning ordinances could constitute a taking, but holding that the challenged ordinance did not do so); *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 225, 241, 255-257 . . . (1897)* (holding that the *Due Process Clause of the Fourteenth Amendment* prohibits uncompensated takings, but concluding that the court below made no errors of law in assessing just compensation)." *Id.* (italics in original).

26. *See id.* at 2613 (setting out Justice Kennedy's reasons for concurring separately).

27. *See id.* at 2618 (discussing the way that Justice Kennedy would have decided this case).

28. *See id.* at 2613 (suggesting that judicial takings claims must first pass constitutional muster before being evaluated under the test established in the majority's opinion).

29. *See id.* at 2616–17 (positing potential issues arising out of judicial takings claims).

30. *See id.* (identifying specifically the two major issues that Justice Kennedy believes could arise out of judicial takings claims).

Justice Breyer's concurrence, joined by Justice Ginsburg, gives even less credence to judicial takings while still holding that there was no taking.[31] Once the Court arrives at the conclusion that no taking has occurred, Breyer states that it is unnecessary to address the constitutional issue of whether a judicial decision can affect a taking if there is no just compensation.[32] Simply put, Justice Breyer says, "[t]here is no need now to decide more than what the Court decides in Parts IV and V, namely, that the Florida Supreme Court's decision in this case did not amount to a 'judicial taking.'"[33]

IV. Future Implications

As decided, this case should benefit beach restoration and preservation projects across the country. State ownership of newly dredged beaches will create a greater incentive for continuing preservation efforts and proper management. However, from the property owners' perspective, the state is effectively converting the beach from privately owned property to publicly accessible beachfront.[34]

Conversely, if the Court had decided this case as the petitioner supports, states would have a lower incentive to continue preserving beaches—why should state tax money provide for preservation of privately owned land? Private beachfront property owners presumably would not have sufficient resources to maintain their land as effectively as the state. It seems as though property owners would need to join forces to be able to combat the problem, forcing like property owners to pay private assessments towards beach preservation efforts.

Legal scholars have had some opportunity to comment on the outcome of this case, with mixed results. Some scholars suggest that the Court needs to firmly state that "the Takings Clause does not apply to judicial decisions."[35] Others suggest that, while this case is important in the realm of property law, it nonetheless "effectively carries no precedential

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31. *See id.* at 2618 (setting the basis for Justice Breyer's separate concurrence).

32. *See id.* at 2618–19 (agreeing with Justice Kennedy's concurrence that the Court should not establish a test for judicial takings when the constitutional question has already been answered in the negative).

33. *Id.* at 2619.

34. *See* Gary K. Oldehoff, *Florida's Beach Restoration Program Weathers a Storm in the Courts: Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 84-Nov Fla. B.J. 10, 12 (2010) (summarizing the Stop the Beach opinion from the perspective of a local attorney).

35. *Judicial Takings*, 124 HARV. L. REV. 299, 300 (concluding that our Takings Clause jurisprudence should not include judicial takings as allowable).

value."[36] Finally, some see this ruling as "a significant silver lining to an ostensibly adverse Supreme Court ruling."[37] In the long run, as climate change continues to affect water levels across the globe, this will be a crucial issue with particularly strong implications in coastal states.

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36. Timothy M. Mulvaney, *Uncertainties Remain for Judicial Takings Theory*, 24-Dec Prob. & Prop. 10, 11 (2010) (analyzing the effect of the Supreme Court's decision in the *Stop the Beach Renourishment* case).

37. Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia's Shifting Sands*, 35 VT. L. REV. 423, 435 (2010) (giving the opinions of two scholars who participated in the case as amicus curiae).