

# The Volokh Conspiracy

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## Is the Judicial Takings Issue Headed Back to the Supreme Court?

Ilya Somin • September 16, 2010 1:30 am

Just three months ago, in the *Stop the Beach Renewal* case, the Supreme Court split 4–4 over the question of whether a decision by a state court could violate constitutional property rights in a way that amounts to a “taking” requiring compensation under the Fifth Amendment. Recently, the Montana Supreme Court issued a decision in *PPL Montana v. State of Montana* that could bring this issue back to the federal Supreme Court. The property owners who lost in the state Supreme Court have asked the federal Supreme to hear the case. Ilya Shapiro of the Cato Institute (which, together with the Montana Farm Bureau, filed an amicus brief urging the Court to take the case) has some details on the case:

The Montana Supreme Court overturned more than 100 years of state property law concerning navigable waters by effectively converting the title in hundreds of miles of riverbeds to the State. The majority of that court ruled that the entirety of the Missouri, Clark Fork, and Madison rivers were navigable at the time of Montana’s statehood, producing a broad holding that eradicates property rights to the rivers and riverbanks that Montanans had enjoyed for over a century.

Before this case, the hydroelectric energy company PPL Montana and thousands of other private parties exercised their property rights over these non-navigable stretches that the state never claimed. Today, Cato joined a brief filed by the Montana Farm Bureau Federation supporting the PPL Montana’s request that the U.S. Supreme Court review the Montana high court’s ruling for possible Takings Clause violations under the Fifth

Amendment.

We argue two main points. First, that the Court should adhere to its standard for navigability rights set out in *Utah v. U.S.* in 1933. Unlike the approach taken by the Montana Supreme Court's majority — that entire rivers were navigable simply because certain reaches of the river were navigable — the U.S. Supreme Court in *Utah* used an approach of meticulously analyzing the rivers at issue section-by-section. Second, this arbitrary ruling against rights long protected by Montana law amounts to a "judicial taking," as explained last term [in] *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*.... There, a plurality of the Court held that there is no "textual justification" for limiting takings claims deriving from executive or legislative action, thereby extending it to a judicial action of the same nature (and two other members of the Court found potential relief in the Fourteenth Amendment's Due Process Clause). Here, the Montana court did exactly that, violating due process rights that the Montana legislature could not and further violating the procedural due process rights of the thousands harmed by the decision in not affording them notice or a hearing.

If the Supreme Court takes this case, it may be less willing to grant broad discretion to state courts than it was in *Stop the Beach*, because the relevant state law doctrine (the definition of "navigable") is derived from federal law. In *Stop the Beach Renewal*, Justice John Paul Stevens recused himself, thereby producing an equally divided 4-4 court on the judicial takings issue. Stevens has since been replaced by Elena Kagan, who has very little record on property rights. I analyzed her brief confirmation hearing testimony on the subject here. If the Supreme Court returns to the "judicial takings" issue, it would be her first major test in this field. Property rights advocates can at least take comfort in the fact that Kagan's views can hardly be worse from their point of view than those of the justice she replaced.

Of course the odds are always against the Supreme Court's agreeing to hear any given case. But the justices clearly are interested in the judicial takings issue, which still remains unresolved after *Stop the Beach Renewal*.

Categories: Property Rights

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