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Justices Debate Issues in an Oceanfront Case

By ADAM LIPTAK

WASHINGTON — A project to restore eroded beaches in the Florida Panhandle did not violate the Constitution's takings clause even though the state claimed ownership of the strip of land the project created next to the ocean, the Supreme Court ruled on Thursday.

The vote was 8 to 0 against property owners who challenged a ruling of the Florida Supreme Court that had, as they put it, turned oceanfront property into ocean-view property.

But the justices' unanimity was superficial. They agreed on the proper result but were deeply divided about how to reach it.

Justice Antonin Scalia, writing for the court's four-member conservative wing, would have used the case to establish the possibility of a "judicial taking" even as he said no such thing had happened here.

Four justices said it was unwise to reach the issue of whether courts, like the other two branches of government, are subject to the limitations in the takings clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation").

That group, too, split two ways, with Justice Anthony M. Kennedy, joined by Justice Sonia Sotomayor, suggesting that the due process clause might provide better protection for property rights threatened by court decisions.

Justice Stephen G. Breyer, joined by Justice Ruth Bader Ginsburg, said little more than that

there was no unconstitutional taking here.

Justice John Paul Stevens did not participate in the decision and did not say why. He owns an apartment in a beachfront building in Fort Lauderdale, Fla.

Libertarian and business groups expressed disappointment with the outcome but welcomed Justice Scalia's analysis of the possibility of judicial takings.

"The part of the decision that was unanimously unfortunate turned on a narrow and probably mistaken interpretation of state property law," Ilya Shapiro of the Cato Institute said in a statement.

Much more important, he continued, "the remainder of Justice Scalia's opinion makes clear that judicial takings are just as much a violation of the Fifth Amendment as any other kind."

Liberal groups, on the other hand, focused on the result and not the jurisprudential infighting.

"As the oil spill now ravaging our nation's coastlines vividly demonstrates, it is crucially important that the government have the authority to step in to protect our beaches and coastal communities," Doug Kendall, president of the Constitutional Accountability Center, said in a statement.

In the end, the case, Stop the Beach Renourishment v. Florida Department of Environmental Protection, No. 08-1151, turned on interpretation of Florida law. The state allows property owners to keep oceanfront land gained through gradual and imperceptible accretion but gives new land created suddenly to the owner of the seabed, which is typically the state.

The project at issue, all of the justices agreed, was in the second category.

Justice Scalia acknowledged that the result may seem counterintuitive and unfair. "After all," he wrote, the owners' "property has been deprived of its character (and value) as oceanfront property by the state's artificial creation."

But that did not, he said, make it a taking.

"The takings clause only protects property rights as they were established under state law, not as they might have been established or ought to have been established," Justice Scalia wrote.

In the part of his opinion joined by only three others — Chief Justice John G. Roberts Jr. and Justices Clarence Thomas and Samuel A. Alito Jr. — Justice Scalia used language tart even by his standards to deride Justice Breyer's failure to discuss whether there can be judicial takings.

In finding there was no taking here without saying what standard he employed, Justice Breyer's approach, Justice Scalia said, was "reminiscent of the perplexing question 'How much wood would a woodchuck chuck if a woodchuck could chuck wood?' "

"He simply pronounces," Justice Scalia said of his colleague, "that this is not a judicial taking if there is such a thing as a judicial taking."

Justice Breyer, for his part, said it would be a mistake to decide too much too quickly.

Justice Scalia's approach, Justice Breyer said, would threaten "to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges."

In a second case, New Process Steel v. National Labor Relations Board, No. 08-1457, the court called into question about 600 decisions issued by the labor board over 27 months starting at the beginning of 2008 because it was operating with only two of five members as three vacancies went unfilled.

The court split 5 to 4, with Justice Stevens joined by the court's four more conservative members in the majority.

The statute governing the board did allow delegation to a group of three members with a quorum of two, Justice Stevens wrote. But Congress could not have intended for two members to continue issuing decisions indefinitely by dint of a "Rube Goldberg-style delegation mechanism."

The law, Justice Stevens said, "does not authorize the board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

Justice Kennedy, writing for four dissenters, said "that state of affairs was, to say the least, not ideal." But he said it was better than no board at all.