The Florida Beach Case Comes to Supreme Court: A Badly Flawed Test Case for Property Rights Advocates

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On Wednesday, the U.S. Supreme Court will hear oral argument in Stop the Beach Renourishment v. Florida Department of Environmental Protection. By the time they finish hearing from both sides, the justices may wonder whether this case was worth their time and effort. (My amicus brief on the case is here).

Petitioner is a small non-profit organization whose members own coastal properties in two communities along the Florida panhandle. Petitioner’s primary argument is that its members suffered “takings” of their property interests within the meaning of the Takings Clause of the Fifth Amendment.

The case potentially raises two interesting questions, but for various reasons the Court may well find itself incapable of addressing the merits of those questions. In any event, the Court will not likely disturb the judgment of the Florida Supreme Court rejecting petitioner’s case.

The first issue is whether a Florida state agency and local governments “took” private property by authorizing and implementing a program designed to restore ocean shorelines ravaged by hurricanes. The program involves dredging large quantities of sand from the ocean bottom and depositing the sand along the water’s edge to rebuild the beach and create a buffer against future erosion losses.

The takings argument arises from a provision of the Florida Beach and Shore Preservation Act replacing, in certain beach areas, the fluctuating, common law coastal boundary with a fixed, statutory line. This line is set at the current boundary separating private uplands from public tidelands at the initiation of a beach restoration project. Once this line is set, the public commits to maintain the sand buffer on the seaward side of the line; if the government fails to maintain the buffer, the fluctuating common law line springs back into action. Petitioner claims a taking because a project deprives owners of their alleged right to continuing contact with coastal waters and to ownership of land area that might be added to their properties by waves and tides.

This claim has an obvious “looking a gift horse in the mouth” quality to it. The primary purpose of the project, financed with general taxpayer funds, is to protect property owners from economic loss. One wonders how owners could feel aggrieved by this kind of public generosity, which probably explains why the majority of the neighbors in the area did not join in the lawsuit. In this golden era of government bailouts, one can hardly be surprised that some coastal property owners might seek both subsidized protection from storms and effective ownership of the artificial beach created above public tidelands at public expense. But it seems inconceivable that the federal Constitution can be read to support such an extravagant claim.
But the Supreme Court is not likely to even reach this claim. Petitioner based its taking challenge to the restoration program exclusively on the Takings Clause of the Florida Constitution without even mentioning the federal Takings Clause. Because the U.S. Supreme Court only has jurisdiction to resolve federal law issues, this taking claim does not present a proper issue for the Court to consider. (Another procedural problem is that petitioner probably has no valid claim for relief under the Takings Clause because it (unlike its members) does not actually own coastal property.)

The second issue, and the one that has gotten the most public attention, involves the so-called “judicial takings” theory, the idea that a state court ruling on an issue of state property law can result in a federal taking. The issue arises because the Florida Supreme Court largely avoided the (Florida law) taking claim based on the beach restoration project by ruling that the petitioner’s members did not actually possess the asserted rights of coastal property ownership they claimed. Petitioner raised its judicial taking claim for the first time in a petition for rehearing challenging this ruling.

There are two very different views of the judicial takings theory. One view is that no such legal doctrine exists and the Supreme Court should not adopt this novel theory now. According to this view, the Takings Clause requires, as matter of federal law, that government pay just compensation when it “takes” recognized property interests. But, the argument proceeds, the clause turns to state law to define “property,” and no federal court, including the U.S. Supreme Court, has authority to review state court definitions of state-law property interests. This is basically the position articulated by Oliver Wendell Holmes and embraced by the Supreme Court over a hundred years ago.

The other view, advanced most forcefully by Justice Antonin Scalia (but never embraced by the full Court), is that the Takings Clause establishes a broad federal mandate against redistributionist government policies affecting property. In order to enforce this mandate, the argument proceeds, the Supreme Court must police state court interpretations of state law that might undermine the federal constitutional protection.

In *Lucas v. South Carolina Coastal Council*, Justice Scalia famously opined that a “total” taking claim could not be defeated by a legislative declaration that the government was seeking to prevent public harm, because that would make takings analysis turn on whether the legislature had a “stupid staff.” Borrowing this thinking, judicial takings advocates contend that allowing federal taking claims to depend on state court definitions of the underlying property interests would make takings claims turn on whether state courts have “stupid” law clerks; unless state judicial law-making is subject to federal court supervision, state courts could evade the federal Takings Clause simply by declaring that state property rights do not (or no longer) exist.

Ultimately, Justice Holmes has the better of the argument based on the text, constitutional history, and longstanding Supreme Court precedent. Of course, even Justice Holmes recognized that in certain circumstances the Supremacy Clause authorizes federal courts to reach federal claims when allegedly adequate and independent state law
grounds ostensibly barring review have, in fact, no “fair and substantial” basis. But it would be light years from that narrow, established doctrine to the novel theory that a state court ruling on a matter of state law can itself provide the basis for a federal taking claim.

Regardless of how the Supreme Court resolves the issue of the validity of the judicial takings theory, it appears unthinkable that the Court could find such a taking in this case. The primary ground for claiming a judicial taking, that the Florida Supreme Court refused to recognize an owner’s right to continuing contact with the water, is contradicted by the Florida court’s well-reasoned analysis that no such right actually exists under Florida law. Even assuming a judicial taking claim might conceivably be available when a state court makes some revolutionary change in state law, it is hard to see how such a claim could lie when the state’s highest court says, in perfect good faith, that it is making no change in state law.

U.S. Supreme Court precedent is replete with affirmations of the competence of the state courts to resolve legal issues that come before them, including but not limited to federal constitutional issues. The federal courts, the Supreme Court has repeatedly said, have a duty of “comity” to the state courts. It is problematic enough to apply a “stupid staff” analysis in crafting takings doctrine applicable to the legislative branch, but it would cut closer to the judicial bone to apply the same type of analysis to the state courts.

It might be objected that some state courts, particularly those with memberships selected through popular elections, are peculiarly political institutions not deserving of the same respect as truly independent, non-political judiciaries. But at least those surviving members of the Florida Supreme Court who participated in Bush v. Gore should be forgiven in advance for viewing any such argument in this case with a severely jaundiced eye.

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