

Does Denying Property Owners Ownership Rights to Land Up to the Water Line Amount to a “Judicial Taking”?

CASE AT A GLANCE

Beachfront property owners in Florida enjoy common law property rights over land up to the “mean high water line,” which occasionally shifts as a result of natural phenomena, including storms. The Florida Supreme Court ruled that Florida law denies such rights to owners whose property abuts state “beach renourishment” projects. The owners argue that this creates a “judicial taking” and seek compensation under the Fifth Amendment. The Supreme Court has never previously decided the issue of whether a state court judicial decision can be considered a taking.

Stop the Beach Renourishment v. Florida Department of Environmental Protection
Docket No. 08-1151

Argument Date: December 2, 2009
From: The Supreme Court of Florida

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ISSUES

Can a state court decision that reinterprets state property law amount to a “judicial taking” requiring compensation under the Takings Clause of the Fifth Amendment?

Does the Florida Beach Renourishment Act’s stipulation that the state takes title over all land seaward of the pre-renourishment project “mean high water line” deprive landowners of property without due process of law, in violation of the Fourteenth Amendment?

FACTS

Under Florida’s Beach and Shore Preservation Act (the Act), the state government is required to establish “renourishment” projects to restore waterfront land that has become “critically eroded.” Once the projects are complete, the Act gives the state title to any newly dry land that has been cleared as a result of the project’s pushing back the waterline. This deprives waterfront property owners of their previously existing right to ownership of land up to the “mean high water line” (MHWL). This is exactly what happened to the six waterfront property owners in Florida’s Walton County, whose holdings abutted a renourishment project established in the area. The property owners formed a group called Stop the Beach Renourishment, which is the petitioner in this case.

The project established in their area resulted in the creation of additional dry land between the property owners’ holdings and the ocean—land which was claimed by the state. The property owners argued that the state’s acquisition of land inside the MHWL constitutes a taking that requires compensation under the Takings Clause of the Fifth Amendment. The Florida Supreme Court ruled against the

property owners, holding that state law did not give them the right to own all property up to the new MHWL created by the project.

The property owners now argue, in the U.S. Supreme Court, that the Florida court decision amounts to a “judicial taking” that deprived them of property rights through a sudden and unexpected revision of state law by the state judiciary.

CASE ANALYSIS

Previous precedents hold that even a small “physical invasion” or occupation of a landowner’s property by legislation or executive action is a taking that requires compensation under the Fifth Amendment, which mandates that “just compensation” be paid whenever property is taken for “public use,” e.g., *Loretto v. Teleprompter Corp.*, 458 U.S. 419 (1982). However, the Supreme Court has never ruled on the issue of whether a deprivation of property that results from a state court decision reinterpreting state law might count as a taking. Thus, it is unclear whether the Takings Clause applies to so-called “judicial takings.”

The petitioners argue that the Supreme Court should hold that judicial takings do exist, and that they require compensation under the Fifth Amendment. As the petitioners’ brief puts it “[i]f a state, through its legislative or executive branches, cannot violate the Fifth Amendment by taking property without paying compensation, why should the judicial branch be allowed to do so?” The brief also notes that the Supreme Court has previously held that state court actions can violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, among other constitutional rights, and claims that the Takings Clause should not be treated any differently. They note that nothing in the text or history of the Takings Clause

indicates that any particular branch of government is excluded from its scope.

To determine whether a judicial taking has occurred, the property owners urge the Court to adopt a test first proposed by Justice Potter Stewart in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290 (1967). Justice Stewart wrote that a judicial taking occurs whenever owners lose their property rights as a result of a state judicial decision that “constitutes a sudden change in state law, unpredictable in terms of relevant precedents.” Adopting this test, the petitioners argue, will avoid any possible flood of judicial takings claims, since only drastic, sudden judicial changes in property law would potentially qualify as takings.

The petitioners cite six Florida Supreme Court decisions that they interpret as reaffirming the right of beachfront property owners to “littoral” (waterfront) property, dating back to 1909. *Broward v. Mabry*, 50 So. 826 (Fla. 1909). Following Justice Lewis’s dissent at the Florida Supreme Court, petitioners emphasize that, under common law, littoral property owners by definition own all the land up to the MHWL. They also claim that Florida common law gave them the right to future accretions of land if the waterline recedes, a right which is also nullified by the renourishment project. Therefore, the petitioners argue that the state supreme court decision in this case is precisely the sort of deprivation of property rights by a “sudden change in state law” that the Takings Clause exists to constrain by requiring compensation. The petitioners also contend that the Florida Supreme Court decision constitutes a “physical invasion” of their property, since the state government is now allowed to physically occupy the land directly adjoining the water and also enable the general public to enter it.

Finally, the petitioners claim that the Beach and Shore Preservation Act deprives them of their property in ways that violate the Due Process Clause of the Fourteenth Amendment, which mandates that states may not take away “life, liberty, or property” without “due process of law.” They point out that the Act allows the state to establish a renourishment project and occupy waterfront property without any hearing before a “judicial officer” or adequate notice for affected property owners. This, they contend, violates the Due Process Clause, which requires at least a minimal judicial proceeding before the state can deprive owners of private property.

The Act does provide for a public hearing on the location of the proposed “Erosion Control Line” (ECL) that is to divide state property from private property. But the petitioners claim that this is inadequate for a variety of reasons, including the fact that the results of the hearing are not binding on the state, that the hearing is not conducted before a judicial officer, that there is no opportunity to call or cross-examine witnesses, and that the property owners are not given any advance notice of the final location of the ECL decided on after the hearing.

The respondents have submitted two separate briefs: one for the Florida Department of Environmental Protection (DEP) (which administers the Beach and Shore Preservation Act) and the Trustees of the Internal Improvement Trust Fund; and one for Walton County and the City of Destin, the jurisdictions where the property in question is located.

The DEP/Trustees brief contends that the Florida Supreme Court decision did not materially alter Florida property law because the land in question was long-recognized as belonging to the state under the common law doctrine of “avulsion,” which holds that the state continues to own previously submerged waterfront land that has become dry as a result of changes caused by a storm or other sudden natural disaster, or by a state project. In this case, the waterline receded from the land as a result of the renourishment project. In addition, they claim that the property owners had no common law right to “contact with the water,” but merely a right of access to the shore, which they would retain even after the renourishment project. The DEP and Trustees also claim that the previous state supreme court cases cited by the petitioners as supporting their position actually protect only the more limited right to access the water. They further argue that Florida precedent did not guarantee waterfront property owners any rights to future accretion of land.

This brief also argues that, even if the state supreme court did change Florida law, no taking occurred because there was no physical invasion or occupation of the owners’ land. Instead, they are said to retain all their preexisting property and are merely denied the use of land newly uncovered by the renourishment project, which they had never previously possessed.

Finally, the DEP and the Trustees contend that the Florida Supreme Court did not address the petitioners’ federal takings claim below, and that the petitioners themselves failed to raise a federal Due Process Clause claim there. As a result, they assert that the Supreme Court lacks jurisdiction to consider either issue. In an amicus brief for the federal government, Solicitor General Elena Kagan also contends that it would be procedurally inappropriate for the Supreme Court to consider the judicial takings issue because, “at bottom,” the petitioners are not complaining of a judicial action but are challenging the constitutionality of the Beach and Shore Preservation Act itself.

The DEP brief does not take any clear position on the issue of whether the Fifth Amendment applies to judicial takings. Instead, it contends that the Supreme Court need not resolve that question in order to decide this case. It does, suggest, however, that “State supreme courts . . . should not be subject to potential Takings Clause litigation and liability absent a clear and incontestable showing that they have abused their judicial authority in such an egregious way that it can be fairly concluded that the decision is plainly a wholly unprincipled and pretextual departure from obvious and well-established legal principles; in addition it must show that it can be fairly concluded that a taking of property via a judicial ouster or physical appropriation was the intended result.” It is not clear whether the DEP and Trustees intend for these two principles to be the criteria for determining whether a federal taking has occurred. The brief merely states that the respondents’ alleged failure to prove that either of these requirements have been met makes the case “a poor vehicle for consideration of a judicial taking theory.”

The Walton County/City of Destin brief adopts many of the same arguments as that of the other two respondents. It too argues that the petitioners failed to raise the Due Process and federal takings claims below. It also asserts that the Florida Supreme Court decision was supported by prior state court precedent and that the petitioners were not actually deprived of any property that they previously owned. Unlike the DEP/Trustees brief, the Walton/Destin brief does clearly

urge the Court to adopt a standard for judicial takings. It argues for a highly deferential approach that would only recognize the existence of a judicial taking if a state court decision altered property rights “in a way that lacks any fair support in previous law” and that “the change in state law wrought by the state court, measured against the correct understanding of state law, has such a severe impact on property rights that it constitutes a taking under federal takings jurisprudence.” Walton and Destin urge “great deference” to state court determinations of property law. Such deference, they contend, is justified by three considerations: state courts’ greater expertise in understanding their own state’s laws; the need for “flexibility” in adjusting property rights to changing conditions; and the difficulty of interpreting state appellate decisions, many of which have meanings that are disputed.

The Walton/Destin brief also asserts that there was no “physical invasion” of the petitioners’ property because the new boundary between the petitioners’ land and the state’s is the same as the old MHWL. This interpretation of the record is vigorously contested by the petitioners in their reply brief.

Finally, Walton and Destin argue that the Court should take into account the fact that the petitioners’ got “offsetting benefits” from the renourishment project abutting their land, such as reductions in the danger of future soil erosion. The brief suggests that this helps prove there was no taking. But it could also be interpreted as an argument for reducing the amount of compensation that would be due to the property owners if the Court rules that a taking occurred.

In their reply brief, the petitioners point out that neither of the respondents’ briefs actually deny that judicial takings are compensable under the Fifth Amendment. They also take issue with the respondents’ assertions that the petitioners’ federal Takings Clause and Due Process Clause arguments were not properly raised below, and with the argument that there was no physical invasion of their property. The bulk of the reply brief addresses the respondents’ interpretation of previous Florida case law and reasserts the argument that the Florida Supreme Court decision in this case was a major departure from a century of precedent.

SIGNIFICANCE

The Supreme Court has not previously ruled on the question of whether a judicial interpretation of state law might amount to a taking under the Fifth Amendment. If the Court does decide the “judicial takings” issue in this case, it would be a very important development. A ruling recognizing the existence of judicial takings would be a significant victory for property rights advocates. Modern state courts periodically reinterpret property law in ways that depart from previous understandings and significantly limit owners’ rights. Interestingly, none of the respondents dispute the argument that judicial takings exist, though Walton County and the City of Destin argue that federal courts should evaluate judicial takings claims under a standard that is highly deferential to state courts.

If the Court does hold that judicial takings can occur under the Fifth Amendment, it will also have to adopt standards for determining what kinds of judicial actions count as takings. The test advocated by the petitioners—“a sudden change in state law, unpredictable in terms of relevant precedents”—is a relatively narrow one that would probably

leave state courts with considerable discretion to revise the common law. But it still has some bite, since it would require compensation for property rights lost through an unexpected reinterpretation or overruling of state precedent. It might lead to a round of litigation seeking to determine what counts as a “sudden change.”

On the other hand, a decision holding that the Fifth Amendment does not apply to judicial takings would be an important triumph for state and local governments that would prefer to allow courts to reshape property law without having to worry about paying compensation for federal eminent domain claims. Governments would win almost as clear a victory if the Court adopts the highly deferential standard for judicial takings advocated by Walton County and the City of Destin. In practice, it would be very difficult and usually impossible to prove that a taking lacks “any fair support” in previous precedent. Given decades of state precedent to work with, skilled lawyers can usually find some potential “support” for almost any alteration of property law likely to be adopted by state judges.

It is possible, however, that the respondents will prevail on one or more arguments that would allow the Court to resolve the case in their favor without considering the judicial takings issue. The issue could be avoided if the Court concludes, as the DEP/Trustees brief urges, that the federal takings issue was not considered by the lower court and therefore cannot be addressed at the Supreme Court level. Alternatively, the Court could also avoid the issue by ruling that no taking occurred because the petitioners were not deprived of any preexisting property rights even if the Florida court ruling did change state law.

The petitioners’ Due Process Clause claim is less momentous than their judicial taking arguments. However, they too could be important. If they prevail on this argument, it would limit the ability of administrative agencies to impinge on property rights without a hearing before a judicial officer. If the Court rejects this position on the merits, it would give agencies a freer hand to take property with relatively minimal procedural safeguards. However, there are at least two ways the Court could avoid reaching the Due Process Clause issue. First, they could endorse the respondents’ claim that the issue was not raised below. Second, if they agree with the respondents’ argument that the petitioners never actually possessed the disputed rights under state law, there might not have been any deprivation of property without due process.

If the petitioners prevail on their takings claim, that would not necessarily render the Due Process Clause claim moot. The takings issue is only a claim for compensation for the loss of their property rights; the state would be able to keep the rights so long as “just compensation” is paid. The Due Process Clause argument, by contrast, contends that the state lacked the right to take the property rights at all—even with compensation—because it failed to provide adequate procedural safeguards.

In sum, the case could be extremely important if the Court uses it as a vehicle for deciding whether or not the Fifth Amendment applies to “judicial takings,” and if so, what the standards are for determining whether such a taking has occurred.

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PREVIEW of United States Supreme Court Cases, pages 141–144.
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