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OPINION

Setting boundaries for property rights

The Supreme Court will decide whether Florida ran roughshod over beachfront landholders.

Timothy Sandefur

August 31, 2009



The U.S. Supreme Court surprised many when it decided it would review an unusual Florida property rights dispute this fall. That case, *Stop the Beach Renourishment v. Florida*, involves some of the most profound questions about the judiciary's role in protecting private property rights.

The case involves a Florida statute determining the boundaries of oceanfront property. Under a 1961 law, the state drew a brand-new line separating public and private land on certain beaches, meaning that some land that would have been privately owned would belong instead to the state. A group of property owners filed suit, arguing that the law deprived them of property without just compensation, violating the state and federal constitutions.

Last December, Florida's highest court rejected their arguments. It held that, while the new boundary gave the state ownership of the beach land, the former owners actually had no such right to begin with. Despite more than a century of Florida law to the contrary, the court announced that the owners actually only had a right to "access" the ocean, and because the state promised to allow them to keep crossing the land to reach the water, it actually hadn't taken anything away when it seized the land itself.

Thus, by simply reinterpreting state property law, the court allowed the state to take property without compensation with a mere stroke of a pen. Yet the U.S. Constitution forbids states from confiscating property — even through legal legerdemain — without payment.

States enjoy a great deal of autonomy in our federalist system, and nowhere is this truer than in property law. States have diverse rules governing what property is recognized and how it may be bought, sold or used. Federal courts normally have no say regarding how state courts interpret their property rules — even if a state's decisions are unprecedented or wrong.

But the U.S. Constitution also guarantees every American's right to due process of law and to protection of private property. If state judges can arbitrarily rewrite a state's property laws, those guarantees would be meaningless. More than four decades ago, Justice Potter Stewart warned that, without a constitutional limit on the states' power to determine the nature of property, states could "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."

In 1993, Stewart's fears came true when the Oregon Supreme Court unexpectedly announced that waterfront property owners could not exclude the public from private beaches. Although federal courts refused to intervene, justices Antonin Scalia and Sandra Day O'Connor objected. "As a general matter, the Constitution leaves the law of real property to the States," they wrote. "But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law."

There must be some limit on the power of state courts to redefine property rights. The Supreme Court long ago limited their power to change other laws in ways that infringe on constitutional freedoms. Southern judges often used cunning interpretations of state law to silence civil rights protesters, only to be reversed by the high court. In one case, after a group of activists was convicted of trespass after holding a sit-in, the justices overruled the conviction on the ground that the South Carolina Supreme Court had "unforeseeably and retroactively expanded [the statute] by judicial construction," in violation of due process.

The Court has particular reason to scrutinize state manipulations of property law. It held in *Lucas v. South Carolina Coastal Council* that the U.S. Constitution requires compensation for restrictions on how property owners may use land — but not if those uses were already barred by "the background principles of the State's law." The ambiguity of "background principles" invited states to rewrite their rules to seize property by fiat. "If anything that a state court chooses to denominate 'background law' — regardless of whether it is really such — could eliminate property rights," wrote Scalia a year later, "our opinion in *Lucas*...would be a nullity."

These cases are about more than federalism and property law. They represent a crisis in political philosophy. In recent decades, the basic constitutional principles of liberty and property have been gradually replaced with the view that bureaucrats should be free to rearrange property to satisfy electoral mandates.

When the U.S. Constitution was written, there was broad consensus in America that private property was a fundamental human right and that government existed to protect it, not to manipulate it to serve purposes politicians deemed more important. But today, the nation's intellectual elite — and particularly judges — have rejected the traditional principles

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underlying property rights. They see property as simply a privilege the government can alter or rearrange at will. America's founders believed that a person's right to own, buy, sell and use property was a timeless moral principle, not a temporary expedient that changes based on who wins elections. Hence the clash between today's lawmakers — who want maximum power to manipulate property — and permanent constitutional principles designed to protect each individual's right to pursue happiness.

The Supreme Court should take a strong stand against states that redefine rights to suit their own interests. Private property rights are fundamental to the U.S. Constitution. That's why it limits state authority: to protect us against governors, legislators and judges.

Timothy Sandefur is a senior staff attorney at the Pacific Legal Foundation, which filed a friend of the court brief in the Florida case. He is also the author of Cornerstone of Liberty: Property Rights in 21st Century America (Cato Institute Press, 2006).

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