The Breakfast Club

Constitutional Minute for 2 May 2023

Right #15: Protection Against "Takings"

"…nor shall private property be taken for public use, without just compensation."

Finally, we finish up the Fifth Amendment.

Once again, you would think that the terms "private property," "taken," "public use" and "just compensation" would be clear and straight forward -- they are not – every noun and adjective in this clause will be interpreted by the federal court system.

Life, liberty and property were central to the Founder's worldview; until Jefferson came along and substituted the pursuit of happiness, those were the three unalienable rights the Founders typically insisted upon.[i]

One of the first private property cases the Supreme Court undertook was 1795's Vanhorne's Lessee V. Dorrance. There, the Court reiterated a familiar view:

> "…it is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man could become a member of a community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact,…"[ii]

In a famous 1792 essay, James Madison famously observed: "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

But today we encounter the concept -- rising in popularity on the Left -- called "the common good." How does government balance protection of your property with "the common good?" Ah, there's the rub.

In *Armstrong v. United States* (1960), the Supreme Court tried to explain the purpose of the Takings Clause this way: "The Fifth Amendment's [Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." I don't know about you, but that doesn't really clarify things for me.

Government at all levels frequently take private property for public use, we see it happening all the time, and, as we will learn shortly, they can "take" your property while leaving you in complete ownership of it.

We normally think of this clause in terms of the taking of land for highways, right of ways, etc. but notice that the Constitution simply says "property" without limiting that term; anything you own can theoretically be "taken" if there is some conceivable public use for it.

The "Poster Child" of the Takings Clause is Kelo v. City of New London, 545 U.S. 469 (2005), where the city confiscated property in a depressed but historic part of town in order to give the property to Pfizer Corporation (yes, that Pfizer Corporation). The City Council's thinking was that Pfizer's ownership would generate lots of jobs and much more in corporate taxes than the properties generated under private ownership. The question before the court was whether "public use" included "public purpose." Approximately forty *amicus curiae* briefs were filed in the case, 62% on behalf of the petitioner, Susette Kelo. Justice Stevens delivered the opinion of the 5-4 Court (with the five representing the liberal wing of the Court); the conservative wing of the court objected in two separate dissents. The Supreme Court's ruling was followed by a widespread denunciation of the opinion and many states, Virginia included, enacted laws or constitutional amendments prohibiting their local governments from taking property for a similar purpose. This decision shows graphically what progressives think of your private property ownership; the "common good" will be the ultimate decider.

What about a "taking" by regulating your use of your property in such a way that reduces your use or enjoyment, i.e. a "regulatory taking?"

In 1986, David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. Two years later, the South Carolina Legislature enacted the Beachfront Management Act, which had the direct effect of barring Mr. Lucas from erecting any permanent habitable structures on his two parcels. Did this "take" the value of his property? I certainly see it that way, but No! said the Court in Lucas v. South Carolina Coastal Com'n. (1992).

So how can we tell when regulation of something like land becomes a "taking?" The Court has not been able to construct a reliable test that would uniformly determine when a regulation becomes a taking. Instead, the Supreme Court decided there is "no set formula" and that courts "must look to the particular circumstances of the case."

Some other significant Takings Clause cases include:

Penn Central v. New York City (1978)

Dolan v. City of Tigard (1994).

Without a consistent test, "takings" will remain "in the eyes of the beholder," i.e., the courts.

For further reading:

Cornerstone of Liberty, Property Rights in 21st Century Amerca, by Timothy Sandefur, 2006.

The Fifth Amendment Takings Clause, by LandMark Publications, 2017.

Property Rights and Eminent Domain, by Ellen Frankel Paul, 1987/2017.

Next week: Right #16: Right to a Speedy and Public Trial (On to the 6th Amendment!)

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[i] See Declaration and Resolves, October 14, 1774, A Declaration on the Causes and Necessity of Their Taking Up Arms, July 6, 1775, and other documents.

[ii] Vanhorne's Lessee V. Dorrance :: 2 U.S. 304 (1795)