Spiegelman & Sisk on Cedar Point Nursery v. Hassid

Lawrence Solum

October 14th, 2021

Sam Spiegelman (Cato Institute, Robert A. Levy Center for Constitutional Studies) & Gregory C. Sisk (University of St. Thomas School of Law (Minnesota)) have posted Cedar Point: Lockean Property and the Search for a Lost Liberalism (2021 Cato Supreme Court Review 165) on SSRN. Here is the abstract:

The Fifth Amendment's Takings Clause provides that "private property" cannot be "taken for public use, without just compensation." While its words are simple, in practice the Clause is anything but. Differing interpretations over its history and its logical scope led to what property law scholar Allison Dunham in 1962 called a "crazy-quilt pattern of Supreme Court doctrine." With property regulations—in contrast to condemnations, directives that restrict specified uses (or non-uses) but do not confiscate anything tangible—growing more varied over time, the Court has especially struggled to develop a coherent jurisprudence for so-called "regulatory takings." Announced in Pennsylvania Coal v. Mahon (1922), most "regulatory takings" are now subject to a three-factor inquiry—called the Penn Central test, after its namesake 1978 case—that nearly always favors the government over aggrieved owners.

Enter Cedar Point Nursery v. Hassid., authored by Chief Justice John Roberts. Decided during the Court's October 2020 Term, this case has the potential to move takings law in a whole new direction. Until Cedar Point, exceptions to the Penn Central test were limited to permanent physical invasions of property and to regulations resulting in a total loss of a property's value. Cedar Point created a new exception—calling all interferences with the fundamental "right to exclude" per se takings. Of course, there are "exceptions" to this exception. When and where owners are not entitled to exclude the state—such as when government intervenes to prevent or enjoin private uses that produce public harms—bona fide property rights are disrupted. Owners are simply being forced to internalize the costs the uses of their property creates. Prohibitions on the setting of fires that might spread to neighbors, for example, are well outside the ambit of one's property rights, even if such proscriptions resemble interferences with a "right to use." This conception of property is deep-rooted in the Anglo-American tradition, recognized since at least the times of William the Conqueror.

Cedar Point goes a long way in returning takings law to this onetime classical liberal approach; one which American courts practiced until the New Deal Court turned property rights (among other individual economic rights) on its head. Focused on fundamental property rights, Cedar Point exhorts a view of ownership that conforms with philosopher John Locke's position that private property is indispensable not just to human progress, but to the dignity of the individual. But the opinion does have its shortcomings. The most devasting of these is Roberts's failure to populate the fundamental-property-rights category beyond the "right to exclude." Instead, Roberts presented a laundry list of "exceptions to the exception." The ruling offers lower courts little in the way of guidance on when to apply it beyond fact-patterns that immediately resemble its own. As such, Cedar Point is more of a launchpad for an eventual reorientation of takings jurisprudence. One in which the Court explicates the entire universe of "fundamental" property rights, and directs lower courts to view state interferences with all such rights as per se takings outside the jurisdiction of Penn Central's ad hocery. It may turn out to be the end of the beginning, but it is hardly the beginning of the end.