



**MONONGAHELA NAVIGATION COMPANY v. UNITED STATES
SUPREME COURT OF THE UNITED STATES**

**148 U.S. 312
March 27, 1893**

JUSTICE BREWER...The Monongahela Company had, under express authority from the State of Pennsylvania, expended large sums of money in improving the Monongahela River, by means of locks and dams; and the particular lock and dam in controversy were built not only by virtue of this authority from the State of Pennsylvania, but also at the instance and suggestion of the United States. By means of these improvements, the Monongahela River, which theretofore was only navigable for boats of small tonnage, and at certain seasons of the year, now carries large steamboats at all seasons...The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for **in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government...**

Should we use Justice Brewer's "test" to determine the "character" of today's government?

In this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses.

Well, I'm not so sure we can call the limitations set forth in the 5th Amendment "exact," for "it is a Constitution we are expounding," not a recipe or statutory scheme.

And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley...in *Boyd v. The United States*: "**Illegitimate and unconstitutional practices get their first footing...by silent approaches and slight deviations...**" This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts

to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

"Obsta principiis": resist encroachment. In other words, "avoid slopes — they may be slippery." In still other words, in 1893 the Court "liberally construed" the Constitution in favor of individual rights.

The language used in the Fifth Amendment in respect to this matter is happily chosen..."Nor shall private property be taken for public use without just compensation." The noun "compensation"... carries the idea of an equivalent...So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this "just compensation"...is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner...

I don't know. It seems that the absence of the word "person" doesn't really have any significance. What do you think?

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes -- that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry...

"It does not rest with the public." What does that mean? Is the Court saying that the proper amount of "just compensation" cannot be determined by a jury? Is this the type of issue that only the judiciary can determine? If that is the intent, where does the Constitution provide for such a limitation? Why couldn't a legislative body determine value? Just asking.

We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property.

In the Act to condemn this property, Congress apparently said that “just compensation” would not include anything for the value of “collecting tolls.”

...The value of property...is determined by its productiveness -- the profits which its use brings to the owner. [Among the elements that enter into this matter are]: Natural richness of the soil as between two neighboring tracts -- one may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available...[P]roperty which is near the centre of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela River, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value...The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner...In this case, it being property devoted to a public use, the amount of compensation was subject to the determination of the State of Pennsylvania, **the State which authorized the creation of the property**. The prices which may be exacted under this legislative grant of authority are the tolls, and these tolls, in the nature of the case, must enter into and largely determine the matter of value. In the case of *Montgomery County v. Bridge Company*, in which the condemnation of a bridge belonging to the bridge company was sought, the court said: "The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible...property. Their value necessarily depends upon their productiveness...Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the **jury**."

OK...question apparently answered. The Court did not mean to imply that a jury cannot determine such things.

So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls...

The theory of the government seems to be, that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the

franchise to take tolls. But this is a misconception. The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual...

In other words, in return for building the lock and dam, the State gave this company the right to operate it and collect tolls. But, while it is true the State (in this case, the Feds), can “take” the property back and run it itself, it nevertheless must pay, as part of the value, the then existing right the company had to future tolls.

Our conclusions are that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that...it has a franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that **the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the Fifth Amendment**, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise.

Note that this Court apparently feels it must justify a “taking” with another power (i.e., the “power to regulate commerce”) as opposed to merely relying on the “Taking Clause” alone.