

The Development of United States Property Rights

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The Development of United States
Property Rights

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Introduction

The right to property is debatably the most fundamental American right, and its breadth and strength is more controversial today than ever before. Thus it is more important than ever to understand that its development was not accidental but has had a long and fascinating history. Such a conception of property was theoretically formed by John Locke, recognized by the Founding Fathers in the U.S. Constitution, and developed through case law. The purpose of this thesis is to show the significance of the idea of private property for America and its citizens, the development and history of that idea through past cases, and the implications of the idea and its development of the future of America.

In America today, it is easy to take the protection of private property for granted. All citizens are equally born into it and it is taken to be a natural right. This thesis purports to show that private property as a right is not only natural but is essential to the form of American democracy and to all other rights that are given to its citizens. Private property is not only a right but is *the* fundamental right on which other rights depend and is the foundation of the very purpose of joining into political association. This seems counterintuitive at first: How can all rights be contingent on one right and why should it be the right of property? Is it property that necessitates political association/government or does government necessitate property? If these claims are true, how have they been applied to the founding and development of America?

It is here that the necessity of a discussion of the theoretical basis of property rights, as the basis of political association, can be seen. If the claims made above are to be accepted, an investigation into the background of such claims is needed. John Locke,

in his *Second Treatise of Government*, provides very persuasive evidence for those claims. It is based on his reasoning that property is given the lofty position that it is in our society. To Locke, property is the essential factor that brought men out of the state of nature into agreement with one another. He says:

And tho' all the fruits [the world] naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and no body has originally a private dominion, exclusive of the rest of mankind, in any of them, as they are thus in their natural state: yet being given them some way or other, before they can be of any use, or at all beneficial to any particular man¹

Though the world was given to all men in common, in using what is common a man necessarily makes part of the common his. In protecting property, we are acknowledging this truth.

To Locke, the essential points are that men are originally free and equal to one another, each man is naturally independent and without obligation, and each man is bound to preserve both himself and others. From this arises the important question: on what grounds can man make a political association? Locke's claim is that self-preservation naturally leads to private property and to the invention of money, all of which necessitates political association. The desire to secure a right to life, liberty, and property gives rise to political life and form. He goes on to show how private property developed: not only does private property arise naturally but the unlimited acquisition of property arises naturally and this works for both individual and common good.

A necessity to investigate even further arises. If Locke's assertions are true and the Founding Fathers applied them in creating the Constitution, it seems necessary to examine exactly how these claims were applied. It would not be enough to simply accept

¹ John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, Inc., 1980), p. 18-19.

the theoretical basis as presented by Locke; the practical application of the theoretical must be observed if one wants to attain a full understanding of United States property rights. It is clear that the Founding Fathers had an inclination towards Locke's theories over others such as Hobbes. Why was this so? Because of this inclination, the United States Constitution is heavily rooted in the ideas that Locke puts forth.

This is especially true on the necessity of the protection of rights of which property is the most important. It is for this reason that James Madison says: "The diversity in the faculties of men from which the rights of property originate ... The protection of these faculties is the first object of Government".² Madison agreed that there is indeed a right to property and that that right is very important and is in fact the first object of government. Property itself orders society and so must be a primary concern for the nation. This idea is confirmed once again in the U.S. Constitution itself. The right to property is protected under Amendment V and Amendment XIV, Section 1. It says that no person will "be deprived of life, liberty, or property, without due process of law"³, an obvious homage to Locke. A further investigation of these Constitutional roots and their significance will be made later. For now it is enough to say that the idea of property as a fundamental right entered America and took root in its founding.

It would not be enough to leave it here because, once again, this would fall short of a full understanding of U.S. property rights. Not only was this idea created and then applied to the founding of America but it has also been developing and changing throughout the years. There has always been a tension between the government and property owners in the extent to which regulations and restrictions can be applied to

² James Madison, *The Federalist No. 10* (Daily Advertiser, 1787).

³ *United States Constitution*, Amendment V

private property. The flow of relative application of the Constitutional protection of property is the essential point of development. This development can best be understood by studying the extensive case law that has followed the idea of property rights.

The application of case law in America is a process that affects every one of its citizens, as laws are built upon and altered. It is through this process that property as a protected right has evolved, moving from a fundamental right that could be interpreted in many ways into a more distilled version. Through the application of case law four distinct stages of development can be seen. These stages are by no means chronological, as they often overlap and can span large periods of time, but merely serve to generally categorize the broad steps that have been taken in forming property rights as they are known today.

The first is the stage of early developments and “near miss” cases. These are cases in which the application and limits of the right to property are tested and range from very early cases such as *Calder v. Bull* in 1796, which narrowed the focus of general rights to only those that are overtly stated, to much later cases such as *Home Building & Loan Association v. Blaisdell* in 1933, in which the “vital interests of its people” is said to overrule the importance of Constitutional rights in this case of the specific national emergency of the Great Depression. They are considered “near misses” because they are cases that present areas that had the potential to expand property rights but inevitably fell short of doing so.

The second stage of development is the rise of the application of the economic substantive due process of law to cases related to property rights. This is an interesting point in its evolution because the substantive due process is legal doctrine that is not

explicitly stated in the Constitution itself but was nevertheless applied to property right cases. This started in 1876 with the case of *Munn v. Illinois*, peaked, and had its last successful case in 1923 in *Adkins v. Children's Hospital*. This period (known as the "Lochner Era") was one in which the right to property largely succeeded over governmental regulations. It was a period that greatly expanded the scope of property rights. Nonetheless, the process was brought to a halt in the third stage of development, in which the use of economic substantive due process of law was gradually phased out into obscurity when applied to property. So by 1938, as seen in the case of *U.S. v. Carolene Products*, its use was completely disregarded. The balance had shifted back towards the government and away from the expansion of property rights.

The last stage is the stage of more recent developments and the application of the "takings" clause. This stage encompasses cases that question the nature and use of the "takings" clause and includes the most recent cases. It is particularly significant to us, as the debate over the clause and its refinement through case law continues today. Especially so because cases such as *Dolan v. Tigard* (1994) show the government's need to justify takings legislation while other cases show how in need of refinement the definition of a taking really is.

As case law has and continues to change the application of the right to property, one last question remains: where is the right to property in the United States headed in the future? This is important because of the fundamental nature of the right and because it applies to and affects everyone in America. It is important to know just how far the government can go in regulating and controlling private property and just how much property owners can push against the government.

This thesis will attempt to demonstrate the important place that the right to private property occupies in the foundation of America and how, in its practical application, it has evolved and where it is headed. It is a truly intriguing process in which John Locke's ideas, as presented in 1690, had such an impact on the Founding Fathers of the United States which in turn set the course by which America would develop.

Part I: Theoretical Background

Chapter 1: Locke's Theory of Property

In discussing property rights in the United States, it is inevitable that John Locke's name comes up. His discussion of property found in *Second Treatise of Government* is fundamental in understanding this conception of property. This is true because of his revolutionary concepts of property and the ends of political association and how those concepts impact everything from basic rights to the very structure of government. It is necessary to attain a complete understanding of Locke's theory in order to recognize the importance of the role of property in America.

Locke's concern in writing *The Second Treatise of Government* is in finding the reason for government. Why should man join into political association at all? He is not satisfied with the 17th century answer of rule by divine right. Locke believes that the right of succession has no basis; that the idea that monarchs somehow have an entitlement through succession as an inheritance from Adam is unjustifiable. To Locke, political power is a right to help the public good. Having stated all of this, Locke wants to find another reason for government. He says that "he that will not give just occasion to think that all government in the world is the product only of force and violence ... must of necessity find out another rise of government, another original of political power, and another way on designing and knowing the persons that have it."⁴ If government is not the product of strength or divine succession alone then there must be something else for which government exists.

In order to find why it is that man joins into political association, Locke enters into a discussion on the natural state of man. He says that, "To understand political

⁴ John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, Inc., 1980), p. 7.

power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, *a state of perfect freedom*”*. ⁵ He wants to consider what men might be like in the state of nature in order to find the reason for government. This state of perfect freedom is a state of equality in which no man is subject to any other. This may be true but “though this be a *state of liberty*, yet it is not a *state of licence*”⁶. Though in the state of nature men are free from one another, they are still restricted by what he calls the “law of nature”. The law of nature says that though one has the liberty to do what one wants with one’s possessions and self, one does not have the liberty to destroy oneself or anyone else nor the right to restrict the freedom of others in any way. The equality that all men have in the state of nature is what mandates the law of nature. So everyone is bound first to self-preservation then to the preservation of all others.

In the state of nature there is no one to either enforce or punish in the name of the law. So it follows that, “the *execution* of the law of nature is, in that state, put into every man’s hands, where by every one has a right to punish the transgressors of that law”⁷. Anyone can execute the law because by breaking the law, on which everyone’s preservation rests, the transgressor is trespassing against all mankind, not just against any particular individual. Locke shows that all men can act as executor of the law through two rights: the right to punish in order to restrain violators and the right of taking reparation. Every man in the state of nature can punish transgressors because of the duty to preserve oneself and all of mankind. Only individuals who have directly suffered

* All italics in quotes are Locke’s own italics

⁵ Ibid. p. 8.

⁶ Ibid. p. 9.

⁷ Ibid. p. 9.

because of another's violation of the law of nature may seek reparation through the right of self-preservation.

One that violates the law of nature has, "declared war against all mankind, and therefore may be destroyed as a *lion* or a *tyger*"⁸. In the state of nature, the state of war can occur at any time. The state of war is a state of "*enmity and destruction*"⁹ where the violated is permitted to kill the violator. When one man takes any freedom from another by force, the state of war is triggered. It is the lack of set laws and unbiased judges in the state of nature that makes it almost impossible to leave the state of war once started.

Locke says, "To avoid this *state of war* ... is one great reason of men's putting themselves into society, and quitting the state of nature: for where there is an authority, a power on earth, from which relief can be had by *appeal*, there the continuance of the *state of war* is excluded, and the controversy is decided by that power."¹⁰ Thus the key point arises: the insecurity of self-preservation that one finds in the state of nature is why men join into political association. The subject of uncertainty in the state of nature will be dealt with at greater length later on but for now it is important to show the role that property plays in all of this.

The idea of property obviously existed before Locke ever wrote about it. It is the radical path that he takes with the idea of property and the significance of property for all men, that property is somehow vastly important in dealing with the most fundamental of rights, that was so new to the concept of property. Locke spoke in an age in which the definition of property was very restrictive. Property was understood as land and materials that gave power to very few landowners. The serfs and servants who worked

⁸ Ibid. p. 11.

⁹ Ibid. p. 15.

¹⁰ Ibid. p. 16.

for them had no property; they themselves were property of landowners and all that they worked for too. Locke's discussion on property changed much of this.

Locke starts his discussion of property by posing the question of why there is property at all. He believes that it is possible to find the answer through reason. Through reason he seeks to find the true purpose and meaning of property. He says the earth and its fruits, "being given for the use of men, there must of necessity be *a means to appropriate* them some way or other, before they can be of any use, or at all beneficial to any particular man"¹¹. So property is a means of appropriating parts of the earth that are of use to each man and Locke seeks to find its significance through reason.

The next step he takes with property can be seen as a radical step, diverging from what was considered the standard notion of property. He says:

*Though the earth, and all inferior creatures, be common to all men yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hand, we may say, are properly his. Whatsoever he removes ... he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.*¹²

The very concept that each man's own person is his own property, subject to no one else, was a radical idea. Property of the self is *the* primary property to Locke. It is from this that all other property flows and it is here where property seems most closely linked to life and liberty. Through the property of the self it is labor that creates all other property. The act of mixing labor (using the property of the self) with things in the state of nature makes whatever man removes from nature, in such a way, his property. This can be taken as far as possible as long as there is enough left in common for everyone else. Locke makes this clearer when he says, "*labour* put a distinction between them and

¹¹ Ibid. p. 19.

¹² Ibid.

common: that added something to them more than nature, the common mother of all, had done; and so they became his private right”¹³.

What is in common to all men is useless to all men when simply left in common. The act of labor changes the common into property. Without this, Locke believes man would have starved. If property is what results from acts of labor, then essential actions that are taken simply as acts of self-preservation (picking up an apple to eat, dipping hands into a stream to drink, etc) are acts that create property. Thus, property is inextricably linked to the self-preservation of all men; property is necessary for life and liberty. This is an essential point when considering the importance of property to political association.

Though property is essential for self-preservation, it is important to know that in the natural state of man there are natural restrictions on the acquisition of property. Without restrictions anyone could take all that they want without any temperance. Locke says, “*God has given us all things richly ... But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others.*”¹⁴ There are natural boundaries to property in the state of nature and they go as far as to allow for the acquisition of what is useful and helpful to man, nothing beyond that. To take as property more than that, to the point of spoilage, is taking the share of others and violating the law of nature. All of this will apply until the introduction of money, as we shall see.

¹³ Ibid.

¹⁴ Ibid. p. 20-21.

In the natural state of man it is also fair to say that there was always enough for all to use without being a bother to anyone else. As a result, “he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man ... who had a whole river of the same water left him to quench his thirst”¹⁵. It was impossible for any one man to either take very much or consume more than a small part through his labor alone. Thus it was impossible for any single man to take so much as to make others have less than they wanted. Because of this every man’s possessions could not help but be very moderate and was without offence to other men. It was simply illogical to take more than one could use.

Two major developments changed property radically and elevated its significance to a whole new level. The first was the effect of enclosure and cultivation of land. Enclosing and cultivating land not only makes property of land but it also adds great value to the land; value that could not be attained without cultivation. Locke says, “he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are ... ten times more than those which are ... lying waste in common”¹⁶. Cultivation of land creates infinitely greater benefits for all of mankind and thus adds value to otherwise wasted land.

The same restrictions that apply to appropriation of property without cultivation applies to land that has been enclosed and cultivated. Land can be enclosed and cultivated only as far as the products of the land are useful to man and not allowed to go

¹⁵ Ibid. p. 21.

¹⁶ Ibid. p. 23.

to waste. But it is clear that based on need, as families increase and the benefits of cultivation are able to support more, that cultivation leads to an expansion of the use of land and, eventually, to the division of land with individual ownership. Locke clarifies this when he says, “when there was not room enough in the same place, for their herds to feed together, they by consent . . . separated and enlarged their pasture where it best liked them” and so, “we see how *labour* could make me distinct titles to several parcels of it, for their private uses; wherein there could be no doubt of right, no room for quarrel”¹⁷. So labor not only creates property but also is the factor that adds any and all value to property through cultivation and leads to the division and ownership of land. Thus there is a crucial link between property and civilization.

The second development that changed property radically was the invention of money. This is important because of the effect it has on the restrictions that are naturally placed on property. To hoard more property than one can make use of is a foolish thing especially because, “The greatest part of *things really useful* to the life of man, and such as the necessity of subsisting made the first commoners of the world look after . . . *are generally things of short duration*”¹⁸. The things that are necessary for self-preservation are short-lived and will spoil quickly if unused. To hoard property is therefore imprudent but to give away that which would spoil is equivalent to making good use of it. To barter that which would spoil for property that could be put to use is also good. To take it a step further, to barter property that might spoil for property that is durable (sheep for shells, wool for shiny pebbles) is not only good but allows for the unlimited acquisition of property. This is because the unlimited acquisition of durable property (currency) does

¹⁷ Ibid. p. 25.

¹⁸ Ibid. p. 28.

not go against the restrictions placed on property, as this process harms no one and no property is allowed to go to waste. So Locke says, “And thus *came in the use of money*, some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life.”¹⁹

The use of money not only allows for the unlimited acquisition of property, it also allows for inequalities in property. Locke says, “men have agreed to a disproportionate and unequal *possession of the earth*, they having, by a tacit and voluntary consent, found out a way how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus gold and silver”²⁰. Men, by agreeing to use money to barter for perishable property, have allowed property to become unlimited and to be unequally acquired.

Property is so very important in the context of the political association because of its inextricable link to self-preservation. The protection of property is therefore very important but becomes even more so after the realization of its ability to benefit all mankind through enclosure and cultivation and the possibility of acquiring it unequally and without limit. Higher stakes are thus added to the insecurity of the state of nature to fall into the state of war. When the importance of property is realized the state of nature becomes that much more of an insecure place. Thus Locke shows that there can be something more than rule because of strength; there is rule because of property and agreement that the protection of property, and by extension life and liberty, is *the* reason to join into political association. So to the question of “why governments?” Locke answers:

¹⁹ Ibid.

²⁰ Ibid. p. 29.

The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.

Property is a prerequisite for the preservation of man and also leads to division of land.

In short it is both necessary for man's survival and for the boundaries of nations and it is therefore of paramount importance to protect.

Joining into political association for the protection of life and property rather than seeing government as the result of force has several effects. This can especially be seen in the shape that Locke believes government should take. He makes this clearer by discussing things that are lacking in the state of nature in order to show what form government should take. He says, "The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*. To which in the state of nature there are many things wanting."²¹ Three crucial things are lacking in the state of nature. The first is a common, known law agreed upon by common consent. The second is an impartial and agreed upon judge that has authority to moderate according to established law. The third is power to execute any sort of judgment. This being the sole reason for the existence of government, Locke shows that this is as far as government may go. He says:

But though men ... give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society require; yet it being only with an intention in every one the better to preserve himself, his liberty and property ... the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property²²

²¹ Ibid. p. 66.

²² Ibid. p. 68.

Political association, which exists to preserve life and property and to compensate for the defects of the state of nature, must therefore take on the structure of a limited government, as it is the only way to ensure the right to property.

The end result of Locke's discussion on property and government is the form that he believes government should take. He divides government into three distinct branches: the legislative, executive, and federative powers. He believes the legislative is the most important aspect of government because it includes the creation of standard laws for the use of society and the establishment of impartial and known judges and so combats the first two defects of the state of nature. It must necessarily be restricted to only work for the preservation of property. Because of this he says, "in well-ordered common-wealths, where the good of the whole is so considered, as it ought, the *legislative* power is put into the hands of divers persons, who duly assemble, have by themselves, or jointly with others, a power to make laws, which ... they are themselves subject to"²³

The executive power is needed to preserve the laws and make sure that they will be followed. The execution of the laws is its responsibility and it is a power wholly separated from the legislative power. The last power is the federative power, which is necessary because of the state that each individual government is in, in regards to other governments. Locke says, "in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind ... So that under this consideration, the whole community is one body in the state of nature, in respect of all other states or persons out of its community."²⁴

Individual political associations are in the state of nature with other political associations

²³ Ibid. p. 76.

²⁴ Ibid.

and individuals outside of themselves. Thus, the federative power is necessary in order to deal with those outside, as if in the state of nature. Powers of war, treaties, and trade all fall under the jurisdiction of the federative power.

It is also worth discussing Locke's *A Letter Concerning Toleration* very briefly in order to show his argument for toleration and the separation of church and state in light of his claim that government exists solely to preserve life and property. After considering Locke's argument on the ends of political association, it is easy to understand and agree when he says, "all the power of civil government relates only to men's civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come"²⁵ and "The end of a religious society ... is the public worship of God and by means thereof the acquisition of eternal life. All discipline ought therefore to tend to that end, and all ecclesiastical laws to be thereunto confined"²⁶. The purpose of government is to protect property and has nothing to do with matters of eternal salvation while the purpose of religion is in the eternal salvation and has nothing to do with civil interests. He uses both scripture and reason to support this argument. Thus, another effect of the protection of property as the end of government can be seen here. Religious toleration and separation of church and state result from the form of government that Locke promotes: government that is limited to protect its people and their rights.

John Locke's notion of property was a radical departure from standard ideas of property and reason for government. Through property and its close ties to self-preservation, Locke is able to show that government is not simply rule by strength and that government should exist for the good of its people. Because of this, everything from

²⁵ John Locke, *A Letter Concerning Toleration* (London: Routledge, 1991), p. 19.

²⁶ *Ibid.* p. 22.

the very form that government should take to the amount of toleration that should be practiced is modified and seen in a new light. This is especially important when trying to understand the place of property in the United States because of the crucial place these ideas played in its conception.

Chapter 2: Constitutional Background on Property

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed*²⁷

The language used by Thomas Jefferson in the Declaration of Independence clearly borrows much of the rhetoric of John Locke. Though Jefferson replaces property with “the pursuit of happiness”, it is plain that his intent was to convey the importance of the protection of the basic rights of man. James Ely, in his work *The Guardian of Every Other Right: A Constitutional History of Property Rights*, says that, “Jefferson, however, substituted the phrase ‘pursuit of happiness’ for ‘estates’, a change that should not be understood as rejecting the emphasis on property rights in revolutionary ideology. The concept of happiness as an end of government was widely accepted in the eighteenth century and was generally equated with economic opportunity.”²⁸ Property was a subject of utmost importance in the years before and after the American Revolution and leading up to the Constitution and would prove to be a crucial factor in the development of the shape the government of the United States would take.

Property played a key role in pushing the thirteen colonies into revolution. The motto of the American Revolution became ‘Liberty and Property’ as colonial leaders placed property rights as an essential part of the enjoyment of political liberties. Thus, Ely says, “The revolutionary slogan ‘No Taxation Without Representation’ reflected the

²⁷ Declaration of Independence

²⁸ James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, (Oxford University Press 1992), p. 29.

view that taxes imposed without consent were a type of confiscation that destroyed the right of property ownership”²⁹.

Of greater importance to the development of the Constitution was the state of property rights during and after the revolution. During the Revolutionary War there were several state abuses of property that took place. One was in the use of bills of attainder to confiscate the properties of those thought to be Loyalists to be used for public purposes. States would enact these bills of attainder in order to declare individuals traitors and to banish these individuals, and confiscate their property. Some of these state actions even occurred *ex post facto* (after the fact). There were also many examples of states appropriating debts owed to the British into their own treasuries. The use of bills of attainder and *ex post facto* laws and the abuse of debts all added to a sense of fragility of the state of the right of property at the time.

These state abuses did not end with the end of the war. Ely says, “In response to depressed economic conditions during the post-revolutionary period, state lawmakers often paid little heed to abstract considerations of property rights. They turned instead to debtor-relief laws and the issuance of paper money, measures designed to aid debtors at the expense of creditors”³⁰. State legislators would continually intervene in relations between creditors and debtors. They also made depreciated paper money legal tender, which often forced creditors to accept almost worthless paper money. Some examples of this type of state abuse included Rhode Island’s paper money scheme, which forced debtors to accept all but worthless paper money and South Carolina’s Pine Barren Act, which allowed debtors to repay their debts with worthless pineland properties. The

²⁹ *Ibid.* p. 27.

³⁰ *Ibid.* p. 37.

individual state constitutions proved ineffective in protecting property rights, as they were unable to stop these abuses in any meaningful way.

One final event that showed the fragile state of property rights was Shays' Rebellion, which took place from 1786-1787. This was an uprising led by a farmer named Daniel Shays. The rebellion took place because of the heavy burden of debts on the farmers. Ely shows how, "Many farmers feared foreclosure or imprisonment for debt as merchants pressed to collect unpaid obligations. The refusal of Massachusetts lawmakers to enact a paper-money scheme sparked protest directed against lawyers, the court system, and the collection of debts"³¹. The inability of Massachusetts and other states to react to the rebellion as well as the awareness of the instability of property led to a more widespread view of the need for a stronger national government and further fueled the debate between the federalists and anti-federalists.

Thus the issue of property rights played a large role in pushing towards the Constitution Convention in Philadelphia held from May 25 to September 17, 1787. Ely says that, "By 1787 many political leaders were convinced that only a more energetic national government could sufficiently protect property ownership, regulate commerce, and restore public credit. Ironically, the assaults on property rights during the Confederation period stimulated greater constitutional safeguards for property holders"³². The Constitution that was finally formed lit a fire under an already heated debate between the Federalists and Anti-Federalists. The Federalists, led by Alexander Hamilton and James Madison, believed in a stronger national government. Specifically, they advocated a stronger government that could guarantee recovery of debts, levy taxes, sustain an army,

³¹ Ibid. p. 39.

³² Ibid.

and protect domestic and foreign interests, including property. The Anti-Federalists were composed of those who supported a weaker national government and were advocates of the Articles of Confederation.

The significance of property in the discussions on the Constitution is shown in Madison's *The Federalist No. 10*. In it, he discusses the threat of faction as a great danger to America. He is talking specifically about faction caused by disagreements on property. He believes the individual state constitutions have failed to preclude this threat; that the individual governments are too unstable and far too susceptible to the interests of the majority. But a stronger national government would have a much greater tendency to dissipate and control faction and would therefore be better at protecting the rights of all and the interests of the community rather than the interests of a single leading faction.

What is interesting is the fact that Madison believes that it is property that is, on the one hand, the most important object for a government to protect and, on the other hand, the cause of the faction that endangers America. He says:

*The diversity in the faculties of men from which the rights of property originate ...The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.*³³

The unequal distribution of property, which is a necessary consequence of liberty and so important to protect, is the most common source of faction. This is because property requires the most amount of impartiality in taxing and protecting but is also the easiest and most tempting area for the predominant party of the time to take advantage of, especially since it is personal, affecting the lives of owners directly. Shades of Locke's

³³ James Madison, *The Federalist No. 10* (Daily Advertiser, 1787).

ideas can be seen here: his conception of the necessity to limit government to protect the most vital right of property.

Madison contends that faction caused by property is a natural outcome of the state of liberty. Thus, one method of removing the threat of faction is to destroy liberty itself. But he says that doing so: “is worse than the disease. Liberty is to faction, what air is to fire, an aliment without which it instantly expires”³⁴. Though liberty and the unequal faculties of men will lead to an unequal distribution of property, which will produce faction, it is more important to preserve liberty and property than to abolish it for the sake of avoiding faction. So once again the importance of the preservation of property (linked to liberty) is emphasized.

Madison says, “A republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking”³⁵. It is the Constitutional scheme of government as proposed in the Constitutional Convention that is the remedy to the problem. The system of electoral representation and America’s potential for growth are the key factors of this representational government that will protect against factions from unequal property. The delegation of a larger population by a much smaller population would diminish the likelihood of partiality and increase the likelihood of public figures working for the public good.

In response to Federalist claims the anti-federalists also wrote a series of articles. One compilation of the “Anti-Federalist Papers” was by Morton Borden, who collected 85 of the more prominent papers and arranged them to resemble the 85 papers in the

³⁴ Ibid.

³⁵ Ibid.

Federalist Papers. The tenth essay in the collection is an article that essentially attempts to counter Madison's argument in his *The Federalist No. 10*.

Under the pseudonym "A Farmer", the Anti-Federalist writer talks about his perception of America's division into three classes in his article that appears in the Maryland Gazette and Baltimore advertiser on March 18, 1788 (named *Anti-federalist No. 10* by Borden). As "A Farmer" puts it, the first class is the faction with a "love for European manners and luxury" that is "really unacquainted with the true mercantile interest of the country"³⁶. This is the class that prefers government as closest to that of Great Britain as possible. The second class is made up of high-minded men who believe "that their ancestors and indeed all the rest of mankind were and are fools", those that follow the high-minded men, and those who have no concern over government and can live under any sort of government. Of the second class he says, "it can be only said to exist at the birth of government, and as soon as the first and third classes become more decided in their views, this will divide with each and dissipate like a mist"³⁷. The third class is made up of what he calls the true democrats, made up of the majority of the yeomanry of America and acting as the old rigid republicans.

It is in the first class in which he places the Federalists. He says men in the first class are, "those aristocrats whose pride disdains equal law – Many men of very large fortune, who entertain real or imaginary fears for the security of property"³⁸. He attempts to show Madison's fear for the security of property as one of personal interest; that those who support such claims have the most to fear because they are the possessors of the

³⁶ Herbert Storing, *The Complete Anti-federalist Volume 5* (Chicago: The University of Chicago Press, 1981), p. 33.

³⁷ *Ibid.* p. 35.

³⁸ *Ibid.* p. 33.

majority of property (he alleged that the first class owned nearly two-thirds of all property). He believes Madison's claims of the fear of faction are absurd and merely a manipulation towards the will of a few individuals. He says, "on the preservation of parties, public liberty depends. Whenever men are unanimous on great public questions, whenever there is but one party, freedom ceases and despotism commences. The object of a free and wise people should be so to balance parties"³⁹. Faction, he contends, is both a natural and necessary component of freedom. He ends his article by saying that the third class, the class that supports a true, pure federal government (the class that the Anti-Federalists were included in), will prevail and continue to influence men towards that view, no matter the outcome of the proposed Constitution.

In the end, the Federalists won out and the Constitution was adopted. The argument of "A Farmer" failed to address the Madison's main argument in *The Federalist No. 10* by only contending that faction is favorable and that protection of property is more of a motive than a cause for change in government. Herbert Storing, in his *What the Anti-Federalists Were For*, says, "at the very heart of the Anti-Federal position, [was] a dilemma or tension. This is the critical weakness of Anti-Federalist thought and at the same time its strength and even its glory. For the Anti-Federalists could neither fully reject nor fully accept the leading principles of the Constitution"⁴⁰. The Anti-Federalists had trouble combating the arguments of the Constitution and even uniting amongst one another. For the most part they simply urged caution against the Constitution. Regardless, what is clear, once again, is the importance the notion of property rights played in this process. Thus Locke's impact is fully felt in the all-

³⁹ Ibid. p. 36.

⁴⁰ Herbert Storing, *What the Anti-federalist Were For* (Chicago: The University of Chicago Press, 1981), p. 6.

important Federalist/Anti-Federalist debate: at its root was the agreement of the significance of property; the debate itself was over how best to protect that right.

So we are able to see the role property played in leading up to the creation and adoption of the Constitution. The realization of its importance in the Revolution along with the state abuses helped to form the Constitution while the necessity to protect property itself and to protect against the faction that could arise from it was a vital argument for the adoption of the Constitution. It is interesting to see then, keeping in mind this background, the exact ways in which the Constitution actually protects property.

The framers of the Constitution did many things to remedy the obvious state abuses to property and commerce. Several of the specific problems that the states caused during and after the revolution, discussed earlier in the chapter, were specifically targeted. One remedy against the states' disruption of debtor/creditor relations was to prohibit states from being allowed to issue paper money⁴¹ and granting Congress the sole power to coin money and to regulate its value^{42*}. Congress was also granted the authority to punish counterfeiting. Thus, states could no longer force creditors to accept worthless paper money to fulfill owed debts and debtor/creditor relations were put under the authority of the federal level since Congress was given the power to create the rules of bankruptcy⁴³. Also, both the federal and state governments were forbidden from passing bills of attainder and ex post facto laws⁴⁴. The danger of confiscation of property through such laws, shown during the Revolutionary War, was clearly addressed here.

⁴¹ *U.S. Constitution*, Article 1, Section 10.

⁴² *Ibid*, Article 1, Section 8.

* Relevant sections of the Constitution can be found in Appendix A.

⁴³ *Ibid*.

⁴⁴ *Ibid*, Article 1, Sections 9 and 10.

There were more powers given to Congress and limits placed on states with the purpose of protecting property in mind. Congress was given the power to create postal roads⁴⁵, which was crucial for the creation and regulation of infrastructure necessary for interstate commerce. It was also granted authority over copyrights and patents⁴⁶. As a form of intangible property, copyrights and patents needed protection too and though some states did indeed protect them, these laws varied from state to state. Lastly, states were forbidden from impairing the obligation of contracts⁴⁷. This was especially crucial during the Marshall years when many state laws were struck down as unconstitutional and found in violation of this clause.

Along with all of the preceding, the 5th Amendment made it so the federal government could not take private property without giving just compensation. It is here that once again Locke's impact can be felt as it says, "nor shall any person ... be deprived of life, liberty, or property"⁴⁸. The 14th Amendment would also come to play a huge role in the development of property rights in its later application into economic substantive due process and also its significance in leading to the application of all of the Bill of Rights to the states. This will be further discussed in the following chapters.

Thus we come to see how much the need to protect property rights played a role in the founding of the American government in its form. Property was not only a vital factor in the American Revolution but was a primary subject of debate and concern when considering and writing the Constitution. The next few chapters will be an investigation

⁴⁵ Ibid, Article 1, Section 8.

⁴⁶ Ibid.

⁴⁷ Ibid, Article 1, Section 10.

⁴⁸ Ibid, Amendment V.

of just how property rights as protected by the Constitution developed through American history through case law.

Part II: Development of Property Rights through Case Law

Chapter 3: Early Cases and “Near Misses”

As we delve into the development of the right to property through case law, two things must be made clear. First, property rights in the United States have always been part of a struggle between the public interest versus the private interest. That is to say, while both private property/interest and public interest have always been considered public benefits, it is the level of emphasis on either side that has been the subject of debate. As we trace the line of this right throughout American history, it will be clear that there has always been a fluctuation of just how far it can go, but it is also important to keep in mind the fact that there has never been a point at which the Supreme Court did not allow some restrictions on property rights through states’ powers. Thus, property rights have never been all encompassing but neither have they been completely unprotected. Second, the right to property becomes even more complicated when realizing and attempting to interpret the intentions of the Founding Fathers because of how very complex their own conceptions of liberty and property were. As Kommers, Finn, and Jacobsohn say, “Property was understood to be closely connected to *all* individual liberties, including political liberty”⁴⁹. The degree to which importance is placed on the protection of property for the individual good versus the greater good of the public will be the defining tension in its development. This is all to say that property rights in the United States has always been a complex subject that has and always will fluctuate in scope.

⁴⁹ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition* (Lanham: Rowman and Littlefield Publishers, Inc., 2004), p. 184.

With the above as a backdrop, we will be able to see the important role that certain cases played in all of this. The first area of importance are some early cases and cases that are “near misses”. Cases that are “near misses” refers to certain relatively earlier property cases that narrow the application of property rights. They can be referred to as “near misses” because they all involve areas through which property rights came close to but fell short of expanding. These cases help to serve as a background for the coming age of the economic substantive due process of law and for the flow of property cases in general. It is also important that the tension between public and private rights as it pertains to property will be made especially clear here.

Several significant points, related to property rights, arise from a very early case, *Calder v. Bull* (1798). This was a simple dispute over a will in which a Connecticut probate court awarded Calder an estate that Bull contested through a will that he claimed had not been appropriately recorded. At this point, Bull convinced the legislature of Connecticut to pass legislation that granted a new hearing and nullified the earlier ruling. This case was eventually pushed up to the Supreme Court, before which Calder raised two points. First, he believed that he did not need to cite specific language in the Constitution because a fundamental, though unstated right had been violated. Second, he argued that the law had been put in place retroactively. Thus he believed *ex post facto* restrictions should apply to the Connecticut law. Calder lost unanimously in the six-man Supreme Court but the opinions found on this matter had great repercussions for every case that would follow thereafter.

Justice Chase, in his opinion, spends much time analyzing the claim that the law was an *ex post facto* law. He rejects the idea that the state enacted law could count as an

ex post facto law because of the fact that historically such laws have always been criminal. Thus, while all *ex post facto* laws are retroactive laws, not all retroactive laws can be considered *ex post facto* laws. He shows how there are four ways in which a law may be considered *ex post facto*. One is that it must make an action that was done before the creation of the law criminal and punishable. Another is that it makes a crime worse than what it was when committed. Yet another is that it is a law that makes the punishment greater and harsher than when the act was committed. Lastly, it changes legal rules and makes it easier to convict the offender.

Of greater significance to property rights (and all rights in general) was Chase's handling of the right to property at the very end of his opinion. There he treats it as an implied right. He says, "It seems to me, that the *right* of property, in its origin, could only arise from *compact express*, or *implied*, and I think ... that the *right* ... is conferred by society"⁵⁰. He argued against Calder through the implicit right of property conferred by society rather than through the Constitution. This is to admit that there are rights in the Constitution that are not explicit but are only implicit. This small section of Chase's opinion would have had a huge impact on all laws and rights if it had been followed. In saying there are implicit rights, arguments could be held for innumerable rights and the necessity to protect such rights.

Justice Iredell while concurring with the ruling of the Court against Calder spent most of his opinion opposing this section of Justice Chase's opinion, claiming instead that if it is not written explicitly it cannot be considered a right. He urged the necessity of caution when he said:

⁵⁰ Ibid. p. 200.

If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void ... If, on the other hand, the Legislature ... shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is ... contrary to the principles of natural justice⁵¹

The Supreme Court's power is not in making void the laws that have been written against what the Court feels to be natural justice or rights (implicit rights), it is in making void the laws that are contrary to the Constitution (explicit rights). This is not only logical but also very practical; if it were up to the Court to enforce unwritten rights then everything would become vague and subjective. Historically, Justice Iredell's opinion has been followed; protected rights must be derived from the Constitution. Thus this early case greatly narrows the focus and clarifies matters by showing that any protection of property rights must come explicitly from the Constitution.

Another case that greatly narrows the scope of property rights is *Barron v. Baltimore* (1833). Barron was the proprietor of a wharf in Baltimore from which he earned his income. While paving the streets, the city of Baltimore essentially ruined the wharf by diverting streams containing sand and gravel into it. Barron sued, claiming that the city had violated the Fifth Amendment; that his property had been seized without just compensation. This raised an interesting question: does governmental ruining of property constitute the same thing as governmental seizure? In this state case, the lower courts grappled with this question; Barron won in the Maryland court but lost in the court of appeals.

But Justice Marshall, upon reviewing this case, declared that the Supreme Court has no jurisdiction over this case at all. To Justice Marshall, the matter was not over whether the act constituted a seizure or not, it was about whether the protection of the

⁵¹ Ibid.

Fifth Amendment can be applied to Maryland at all; clarification of the “takings” clause would have to wait nearly a century (as will be discussed in Chapter 6). In order to make a decision, he used the language of the Constitution itself. In his opinion he says, “the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state”⁵². Section nine of article one, which talks about the limits that are placed on the legislative branch of the national government, only refers to the national government in a passive voice. In contrast, section ten of the same article talks to the state governments specifically. Thus, Marshall concluded that because the Fifth Amendment speaks in the passive voice it must only pertain to the national government, not to state governments. This is a vastly important decision because it not only affected the Fifth Amendment but all Amendments that were written in the passive voice. All Amendments written in the passive voice would thereafter be considered to apply solely to the national government (until the Fourteenth Amendment as we shall later discuss).

What is interesting is the fact that the Constitution’s First Amendment does in fact speak directly to Congress in an active rather than passive voice. Does this show that Marshall’s decision, which had such a great impact, was based on an at least partially faulty idea? Though it is unquestionable that the Founders intended the Bill of Rights to be a limit on federal authority, it is indeed difficult to infer whether they intended it to apply to the states at all. Nevertheless, it is remarkable that such a key decision would be made in such a manner. Thus, the protection of property in the Fifth Amendment and the “takings” clause therein were not applied to the states until much later on.

⁵² Ibid. p. 136.

So far we see through *Calder v. Bull* that rights must be explicitly stated and through *Barron v. Baltimore* that the protection of property through the Fifth Amendment applies only to the national government. Another area through which an expansion of the protection of property was sought was in Article One, Section Ten of the Constitution. Here it says that, “No state shall ... pass any bill of attainder, ex post facto law, or law impairing obligation of contracts”⁵³. What is applicable here is that it says that no state can impair the obligation of contracts. The strength of this clause was tested in the next four cases. Although the original meaning of the Founders seems to be towards private contracts, the question of its application to state contracts will be seen in *Fletcher v. Peck* and *Charles River Bridge Company v. Warren Bridge*. Though *Fletcher* expanded the scope of property rights to include state contracts and protection of implicit ideas in such contracts, *Charles River Bridge Company* nullified *Fletcher* and its implications. Also, the importance of the issue of the public good versus the necessity to protect the obligation of contracts will be seen in the cases of *Stone v. Mississippi* and *Home Building & Loan Association v. Blaisdell*.

The case of *Fletcher v. Peck* (1810) occurred when members of the Georgia legislature were bribed into selling over 35 million acres of state land to certain land speculators at outrageously low prices (1.5 cents per acre) in 1796. Those corrupt legislators were soon after voted out and the next year the new state legislature revoked the land sales. The land was then resold to new buyers. Peck was one such buyer who then sold his land to Fletcher. At this point a federal court stepped in finding that the original Georgia statute, selling the land for 1.5 cents an acre, was valid and that the act of revocation was invalid. Fletcher then appealed to the Supreme Court.

⁵³ *U.S. Constitution*, Article 1, Section 10.

Justice Marshall's opinion affirmed the judgment of the federal court; the original corrupt sales were deemed valid while the second set of sales was invalid. He says, "When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights"⁵⁴. That is, if a state entered into a contract through law, the state cannot revoke rights given by that contract by repealing the law. Thus, because Georgia entered into a contract through the original law, its revocation was invalid.

Marshall's opinion had an impact on property rights in two significant ways. First, in saying that legislation passed by states can be considered contracts that fall under the jurisdiction of the Constitution in Article One, Section Ten, Marshall extended the contract clause to protect not only private contracts but public contracts as well. He did this by showing that state legislation could indeed be deemed contractual. He says, "A contract is a compact between two or more parties, and is either executory or executed ... The contract between Georgia and the purchasers was executed by grant"⁵⁵. The second way in which it impacted property rights was that his opinion said that not only the express parts of a contract but also implied parts could bind a state. He did this by relating the revocation of Georgia's law to *ex post facto* laws. He says, "This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased"⁵⁶. *Ex post facto* laws punish actions taken before the creation of laws against such actions. Marshall believed that the nullification of contracts acted in the same way as *ex post facto* laws. Therefore, the original Georgia law, which is a contract, implicitly promised not to revoke the land and the second law broke that implicit promise.

⁵⁴ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition*. p. 203.

⁵⁵ Ibid.

⁵⁶ Ibid.

This case and its outcome become even more interesting when observing its background. The land scandal stirred up huge controversy and involved many of the most prominent members of American politics at the time. Future president John Quincy Adams represented Peck while Constitutional Convention member and Anti-Federalist leader Luther Martin represented Fletcher. What is even more surprising is that Marshall himself had been personally involved in the controversy before entering the Court. It is also important to note the impact of *Calder v. Bull* in this case. As the authors of *American Constitutional Law* say, “If it were not for the decision in *Calder, Fletcher* might have been decided upon the basis of the *ex post facto* clause [alone].”⁵⁷. *Calder* effectively ended the application of the *ex post facto* clause to non-criminal cases, thus Marshall, who believed in the emphasis of the protection of property against the states as well as the national government, had to find another path for protection.

Property rights would have changed forever if the ideas of implicit sections of contracts had stood. But, this effect of *Fletcher* was put to rest in *Charles River Bridge Company v. Warren Bridge* (1837). The proprietors of the Charles River Bridge who had been authorized to build and operate a toll bridge across the Charles sued when the legislature authorized another company to build the Warren Bridge, which would be without tolls. The Charles River Bridge Company claimed that the commissioning of the second bridge broke the implicit idea in their contract that Massachusetts, in authorizing the original bridge, would not destroy the profit of it.

This case occurred a little over a quarter of a century after *Fletcher*. By then a new Court was in place, Marshall was gone and Justice Taney was the new Chief Justice. Justice Taney denied the idea that Massachusetts had violated the contract by

⁵⁷ Ibid. p. 204.

commissioning the second bridge. He says that, “in grants by the public, nothing passes by implication”⁵⁸. Charles River Bridge Company’s claims could not be applicable because they were not explicitly stated in the contract. Thus, he effectively ended Marshall’s idea that there are implicit parts of contracts that states must abide by. In doing so he showed his emphasis of the importance of the public good. This is made clear when he claimed that, “While the rights of private property are sacredly guarded, we must not forget, that the community also have rights”⁵⁹. Thus, *Fletcher* and *Charles River Bridge* combine to be an ideal example of a “near miss” where the expansion of property rights through the contract clause was attempted but precluded.

Though the previous two cases dealt with the idea of implicit clauses to state contracts, the next two cases deal with the denial of explicit sections of such contracts. In *Stone v. Mississippi*, Stone sued Mississippi after he was told to stop selling lottery tickets because of an act prohibiting their sale. He sued because he believed the contract the state made with him in authorizing him to sell lottery tickets was breached by the law since he was simply exercising the rights conferred to him by the charter.

To Justice Waite the resolution to the dispute in this case was simple. The states possess an inherent right in what is called the police power. Thus, in this case Mississippi was exercising this right by enacting a law prohibiting the lottery. Though it violates explicit rights found in the contract of the charter for Stone to sell tickets, the police power of the state overrode everything else. Justice Waite does admit that police power is impossible to define completely but that no one can deny the fact that it extends over all things that affect public health and morals. Accordingly it can be resolved and

⁵⁸ Ibid. p. 205.

⁵⁹ Ibid. p. 206.

applied in particular cases, such as this one, since the law was clearly to protect public morals. This shows that though the contract clause in Article One, Section Ten of the Constitution protects explicit parts of contracts, the police power of the state is even more important and overrides such considerations. Once again the importance of the protection of the public good over private interest is seen.

The case of *Home Building & Loan Association v. Blaisdell* (1934) also considers the importance of the public versus the private good and the issue of the protection of property under the contract clause. This case took place in the midst of the Great Depression as all of the states dealt with the innumerable farmers filing for bankruptcy. These farmers foreclosed, giving up their worthless land. Thus banks were flooded with worthless land and little money. Minnesota, attempting to avert such a situation, enacted the Mortgage Moratorium Act, which allowed for the postponement of the foreclosure of mortgages and also the period of redemption from a foreclosure.

In a close 5-4 decision, the Supreme Court upheld the Minnesota law. Justice Hughes admits to the fact that the Framers created the contract clause to prevent exactly this kind of law from being enacted. Nevertheless, the overriding consideration in this case is the emergency of unparalleled proportions in the Great Depression; the Framers could never have foreseen such an emergency. Hughes says in his opinion, “While emergency does not create power, emergency may furnish the occasion for the exercise of power”⁶⁰. It was acceptable in this case because it was a limited law, aimed at the preservation and safety of the state and public.

In delivering the opinion, Hughes showed how the contract clause could be seen as just one part of the larger Constitution. In other words, Hughes focused on the purpose

⁶⁰ Ibid. p. 208.

of the clause in the context of the Constitution as a whole (the promotion of the economic safety of the state and its people as a whole) rather than the particular words of the clause itself. Taken in the context of the Great Depression, it makes sense that the Justices would focus on the importance of the preservation and protection of the public more than ever before. When New York created a similar law without the safeguards found in the Minnesota law, the Court instantly struck it down. The Court's posture in *Home Building & Loan Association* comes solely from the state of emergency. Nevertheless, this case "seemed to signal the death of the contracts clause as a significant source of protection for private property"⁶¹. After this the contract clause as a path to the protection of property would hit rock bottom. Thus, we see how these four previous cases tested the application of the contract clause to property rights and found that it could not expand through it.

One more area through which the protection of property was sought occurred after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. After the North won the Civil War, these Amendments were passed especially with the intent of controlling the South and protecting the newly freed slaves. The language of the Amendments and their impact (especially of the Fourteenth Amendment) were brought under scrutiny through the *Slaughter-House Cases (Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Company)* in 1873. The Louisiana legislature granted a monopoly to one slaughterhouse company in New Orleans. This forced many competing firms out of business and stopped many butchers from being able to engage in their profession. These firms and butchers sued

⁶¹ Ibid. p. 211.

claiming protection from such practices through the Thirteenth and Fourteenth Amendments.

They claimed that the Louisiana statute constituted an involuntary servitude that is banned in the Thirteenth Amendment and that it denied the rights that seem to be protected under the Fourteenth Amendment. The Fourteenth says, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”⁶². On the face of it, this Amendment seems to stop all unequal treatment and to protect rights against state interference. Section Five of the Amendment also says that Congress has the authority to enforce such protections. Once again, this was all written post-Civil War in order to control the South. Nevertheless, the broad language found in the Fourteenth Amendment seems to restrict all states and to give the national government much greater power. Such power given to Congress would overturn the entire federal system as it was; neither the states nor the federal government was prepared for such a drastic change.

Justice Miller recognized all of this and the necessity to somehow limit the Amendment. He realized that the new Amendments were written with the purpose of maintaining “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen”⁶³. Thus the Court sought to essentially nullify the Amendment’s effects beyond the protection of the newly freed slaves and the reconstruction of the South. Miller did this by explaining that the

⁶² *U.S. Constitution*, Amendment XIV

⁶³ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition*. p. 137.

language of the Fourteenth supports the idea of the existence of two citizenships: a national citizenship and a state citizenship. A national citizen is one that is either born or naturalized in the United States while a state citizen is one that resides within the state. The privileges and immunities that are protected are those of *citizens of the United States* not citizens of their state. In other words, he made a distinction and claimed that the protections that are offered in the Amendment are protecting national rights and privileges, not state rights. Thus, the claims of the butchers and firms that sued were, “not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration”⁶⁴. So the expansion of property rights through the Fourteenth Amendment was put to rest until its application in the substantive due process of law (discussed in the next chapter).

Through these early and “near miss” cases, we can see that several attempts were made to expand and clarify the protection of property rights. The Supreme Court narrowed the area in which the protection of property can be seen first by denying the idea that natural, unwritten rights can exist and by showing that the Fifth Amendment applies solely to the national government. Next, the use of the contract clause in Article Ten, Section One was quashed and the importance of the protection of the public good over private good was seen. Lastly, any protection that could be found in the procedural elements of the Fourteenth was stripped away. Nevertheless, as we shall see in the next chapter, property rights would find a new path and would enjoy new prominence in what would become known as the “Lochner Era”.

⁶⁴ Ibid. p. 140.

Chapter 4: Rise and Predominance of Economic Substantive Due Process of Law

The early cases and “near misses” showed several areas through which the right to property came close, but were unable, to expand. Nevertheless, it soon found a new route through which it could grow. This was made possible through the Fourteenth Amendment, though through a different path than in *The Slaughter-house Cases*. While *The Slaughter-house Cases* rested on the concept of a procedural due process of law found in the Fourteenth Amendment, the new route relied on the concept of a substantive due process of law. This distinct difference between procedural and substantive due process would have a major impact on property rights for years to come.

The Due Process Clause of the Fourteenth Amendment says, “nor shall any state deprive any person of life, liberty, or property, without due process of law”⁶⁵. On the face of it, this clause seems to say that the government must utilize adequate legal procedures when lawfully taking a person’s life, freedom, or property. Thus, before such actions are taken a fair trial is necessary, with valid evidence, a jury, etc. These would be considered procedural rights. The notion of a substantive due process not only requires such basic procedural rights but also the protection of what are substantive rights. Substantive rights guarantee that a person’s life, freedom, and property can’t be taken without suitable justification, despite the procedures used. Thus, substantive rights act as a barrier before procedural rights are even taken into consideration. The notion of suitable governmental justification becomes the main point of contention once the doctrine of substantive due process of law is embraced. In summary, the idea of substantive due process of law makes it necessary for government to justify any action

⁶⁵ *U.S. Constitution, Amendment IV*

taking the life, liberty, or property, where before it only had to show that it had followed the right procedures in doing so.

As far as property rights are concerned, the first important case in the application of the doctrine of the substantive due process of law is *Munn v. Illinois* (1876). The Illinois state legislature passed a law regulating grain warehouses and fixing storage prices in 1871 in response to recession in grain prices and fear of monopolies by railroad and storage companies. Munn was convicted of operating his grain elevator without a license. He claimed that the requirement of a license was, “unconstitutional because it attempted to fix maximum rates for storage ... [depriving him of] property in violation of the Fifth and Fourteenth Amendments”⁶⁶. In other words, he believed the law was depriving him of his property without justification: a violation of substantive rights.

The Supreme Court was not sympathetic to Munn. Justice Waite in his opinion said, “the government regulates the conduct of its citizens ... and the manner in which each shall use his own property, when such regulation becomes necessary for the public good”⁶⁷. Waite showed that the government could regulate property when “clothed” with the public interest according to the level of that interest. Illinois’s law clearly regulated property based on the public good: the transportation of grain is crucial for the public and Munn was seen to stand at the very “gateway of commerce” as one who gathers tolls for grain transportation. Thus, Munn lost in the Supreme Court.

What is of significance, though, is the fact that the Court played by Munn’s rules. Munn was not dismissed on the basis of procedural rights but on substantive rights. Waite claimed that, “The [Fourteenth] amendment ... simply prevents the States from

⁶⁶ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition*. p. 212.

⁶⁷ *Ibid.*

doing that which will operate as such a deprivation”⁶⁸. What concerned the Supreme Court in this case was whether Illinois was justified in creating the law that Munn claimed deprived him of property. This is contrary to the stance taken in *The Slaughterhouse Cases* where substantive rights were not even considered. This opened the door for the substantive due process of law when considering property cases.

Though *Munn* opened the door for the possibility of the economic substantive due process of law, *Lochner v. New York* (1905) set its use in stone. This case issued in a new era of property rights that would last thirty years and set the new standards by which all property cases would be judged through those years. In 1897, New York enacted a law, which said that no employee can be required to work in a bakery for more than sixty hours a week or ten hours a day. *Lochner* violated this law and was fined. He disputed this fine, contesting that the law was interfering with his rights under the Fourteenth Amendment.

Though the New York courts upheld his conviction, the Supreme Court, in a five to four decision, reversed their ruling. Justice Peckham in his opinion found that the law was an absolute prohibition that, “interferes with the right of contract between the employer and employees ... [which] is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution”⁶⁹. However, he did admit that there is such a thing as police power, which has to do with safety, health, morals, and the welfare of the public. Accordingly, states have the power, “to prevent the individual from making certain kinds of contracts ... Contracts in violation of a statute ... or a contract to let one’s property for immoral purposes, or to do any other unlawful act, could obtain no

⁶⁸ Ibid. p. 213.

⁶⁹ Ibid.

protection from the Federal Constitution”⁷⁰. But, he was adamant that there are limits to the use of state police power. Already we see that the Court is using substantive due process as its standard: the state has to justify its law and must abide by these limits of police power as the Court sees fit. New York’s reasoning behind its statute did not justify its use.

But *Lochner* went further than mere justification. It set the standard of economic substantive due process when it said that for each statute that is brought before the Court, “the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty”⁷¹. States would henceforth have to prove that their laws were not unreasonable, unnecessary, or arbitrary. All property/economic legislation would be subject to heavy presumption to the Constitution and states would have to show their legislation to be essential to police power. Thus the “Lochner Era” began, establishing the necessity of strict scrutiny. The “Lochner Era” was an approximately thirty-year period that started in *Lochner v. New York* and ended in the 1930s with cases like *Nebbia v. New York*. It was an era that repeatedly saw several governmental regulations and statutes struck down under the economic substantive due process.

Where *Munn* opened the door to economic substantive due process and *Lochner* set its standards (especially in strict scrutiny), *Weaver v. Palmer Brothers* (1926) was a case that showed its general use and the common structure of property cases during the “Lochner Era”. A 1923 statute enacted by Pennsylvania, outlawed the use of “shoddy”

⁷⁰ Ibid. p. 217.

⁷¹ Ibid.

and restricted the use of second-hand materials in the manufacturing of mattresses and pillows. “Shoddy” was a term for pillow and mattress stuffing materials, often consisting of remnants and secondary materials of other fabrics, along with whatever was swept up with it off of the factory floors. The state felt that this was unsanitary and warranted the use of its police power for the protection of public health. Pennsylvania sued Palmer Brothers Company to enforce this law but the company claimed that the statute violated the due process clause of the Fourteenth.

Once again, the Court ruled against the state. Pennsylvania simply did not have enough evidence to prove that the use of “shoddy” and second-hand materials was unsanitary. In his opinion, Justice Butler said, “There was no evidence that any sickness or disease was ever caused by the use of shoddy”⁷². The use of strict scrutiny and the effects of *Lochner* are clear here. Because the Court felt that the contested provision did not warrant police power in protecting health and because the act allowed for the use of numerous other materials with a strict ban only on shoddy, the act was deemed unreasonable and arbitrary. Clearly, the burden of proof rested solely and heavily on the shoulders of the state. Thus *Weaver* serves as a prototypical example of the sway of property rights cases during the “Lochner Era”.

Munn and *Lochner* were also applied to other areas. In *Ribnik v. McBride* (1928) economic substantive due process was applied to prices. This is an important case because it shows the effect of *Munn* (as restricting all price regulation outside of monopoly situations) combined with *Lochner* (the necessity of strict scrutiny). Part of the reason the law in *Munn* was upheld was because a monopoly involving the public good was involved. *Ribnik* showed that because *Munn* was resolved in this manner, *all*

⁷² <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=270&invol=402>

price regulation legislation would have to be scrutinized under the standard of being a monopoly or not.

In 1918, New Jersey passed a law regulating employment agencies, requiring a license to run such an agency. In applying for the license, agencies had to file, among other things, a schedule of fees, which had to conform to state standards. In essence, because of existing abuses by private employment companies, New Jersey enacted a law that would regulate prices. The Supreme Court admitted that abuses did indeed exist within private employment agencies. Justice Sutherland said in his opinion that, “the [state’s] power to require a license and regulate the business of an employment agent does not admit of doubt ... [But] is the business one ‘affected with a public interest’ within the meaning of the phrase as heretofore defined by this Court?”⁷³. Abuses or not, the states had to show sufficient public interest.

To the Supreme Court, some regulation of such industries, especially where abuses obviously exist, went without doubt, but price regulation depended on whether the state could show enough public interest. The burden of proof again rested on the state and, in the case of price regulation and according to standards set by *Munn*, the Constitutionality of the law depended on the existence of a monopoly. Therefore, New Jersey could not show its law to be one based on public interest because the employment agencies were not in a monopoly situation. *Munn* set the standard for price regulation and *Lochner* forced the burden of proof on the states.

One more area that was affected by economic substantive due process of law is minimum wage law, as seen in *Adkins v. Children’s Hospital* (1923). The District of Columbia, in 1918, enacted a law fixing the minimum wages for women. The act

⁷³ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=277&invol=350>

commissioned a board to fix wages to adequately supply women with the cost of living for the sake of protecting health and morals. The board was authorized to require all employers to comply by its standards. Suit was brought by Children's Hospital to stop the enforcement of the act, claiming violation of the due process clause of the Fifth Amendment.

To the Supreme Court, *Adkins* was clearly a matter of liberty of contract between employer and employee. The heavy burden of proof by the state could, once again, be seen clearly when Justice Sutherland said, "An interference with [the liberty of contract] so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary unless it be supportable as a reasonable exercise of the police power of the State"⁷⁴. It was up to the District of Columbia to prove that its statute could sufficiently be justified by its police power. Because the District was unable to do so, the Court ruled against the District.

A crucial aspect of this case was the issue of equality between the sexes. This wage law was targeted specifically at women, who, according to the Court, should not be subject to liberty of contract restrictions that could not be imposed upon men under like circumstances. Sutherland made it clear when he said, "It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency ... It is simply and exclusively a price-fixing law, confined to adult women, who are legally as capable of contracting for themselves as men"⁷⁵. The statute, considered under substantive due process of law, was not justified by police power nor was it justified by its exclusive targeting of women.

⁷⁴ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=261&invol=525>

⁷⁵ *Ibid.*

We can see here just how far property rights had expanded. Where in previous years any attempt to expand had been restricted (through police/emergency powers of state and procedural due process), *Munn* and *Lochner* started a time in which property rights could expand further than ever. State statutes on property were continually deemed unconstitutional on the basis of the economic substantive due process of law. This was a time when any regulation of wages or terms of employment was banned, prices were untouchable except in cases of public interest (public interest exclusively being activated by monopolies), and all regulations on property and economic conditions had to be substantially justified by police power. However, the “Lochner Era” did not last forever as cases would arise and challenge the use of the economic substantive due process.

Chapter 5: Fall of Economic Substantive Due Process of Law

As previous cases have shown, the use of economic substantive due process of law often expanded property rights at the expense of public considerations. The use of strict scrutiny truly stopped the states from restricting property in any meaningful way as wages, prices, and contracts were almost untouchable by legislation. Nevertheless, crucial historical events tipped the scales of property rights towards public considerations once again. Several property rights cases resulted, stopping the application of economic substantive due process of law in property.

The Great Depression and its effects throughout the 1930s served as a substantial challenge to economic substantive due process of law. The weaknesses of following the doctrine could truly be felt in the economic conditions of the time and the necessity of protecting prices and employment, even with governmental intervention if need be, could be seen by many. The Supreme Court could no longer protect the laissez-faire economics to the extent that it had throughout the “Lochner Era”. It had to come to terms with the necessity of reform in the face of such glaring problems.

The decline of substantive due process of law could first be felt in the 1934 case of *Nebbia v. New York*. In 1933, the legislature of New York enacted a law that fixed the minimum and maximum retail price of milk. Nebbia was the owner of a grocery store that violated this statute. At his trial, he claimed that the law violated the due process clause of the Fourteenth Amendment. Throughout the process Nebbia had backing from proponents of laissez-faire economics and a conviction that the principles found in *Ribnik* would hold.

This New York statute was really another attempt by the state to help bail out the ailing New York dairy industry. Dairy farmers were simply getting too little return, as the price of milk was extremely low. Milk prices greatly declined in 1931 and 1932 and farmers actually received much lower prices for milk than the cost of production in 1932. As the Court observed, this case and the statute really centered on the nature and necessity of milk itself. This was made clear when Justice Roberts said, “Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards ... which greatly increase the cost of the business”⁷⁶. Low prices could only serve to cause a relaxation of standards that are so necessary. The Court also made clear the necessity of milk for the health of both the people and the entire farming industry. Several forces caused low milk prices but the effects of the Great Depression and unfair trade practices were the primary factors. Large milk producers suffered as smaller producers, who did not have to deal with nearly as much spoilage, could undercut prices.

All of this led the Court to admit that the milk industry was in dire need of control. Nevertheless, the Court needed to examine the Constitutionality of such regulation under the Fifth and Fourteenth Amendments. Surprisingly, it ruled in favor of the New York statute, showing, for the first time, cracks in the use of substantive due process of law. Justice Roberts said that as long as a statute is not unreasonable or arbitrary and has a relation with the malady it is trying to fix, it is permissible. In other words, New York still had to justify its law but the Court was willing to listen and consider it; the law was not struck down immediately because it was a price fixing law in a non-monopoly situation as it previously would have been. Justice Roberts showed that there was no

⁷⁶ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=291&invol=502>

Constitutional principle that stops legislation from correcting price problems and that, “The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property”⁷⁷. Thus he concluded that a state “may regulate a business in any of its aspects, including the prices”⁷⁸.

Laissez-faire economics could not be relied on to save the milk and other ailing industries. Substantive due process no longer required strict scrutiny, only reasonableness.

The downfall of substantive due process really came three years later after a fateful presidential decision by Franklin Roosevelt early in his second term in office. In 1937 President Roosevelt announced what would become known as his “court-packing plan” which would have forced all justices over the age of seventy to retire while the president could appoint new justices to take the retirees’ place. Roosevelt would have been able to add six of his own appointed men to the Court had the proposal gone through. But he miscalculated as his announcement created a firestorm of controversy. It was widely known that the president wanted to pack the Court because it had routinely struck down his “New Deal” laws (through substantive due process) in 5-4 decisions, and so the Supreme Court realized its very existence was at risk. Justice Roberts had been the swing vote through those cases and throughout the “Lochner Era”. In *West Coast Hotel v. Parrish* (1937), he switched sides, essentially ending both substantive due process of law and Roosevelt’s “court-packing” plan in what become known as “the switch in time that saved nine”. Kommers, Finn, and Jacobson confirm this when they say, “The Court’s decision to overrule *Adkins* [in *West Coast Hotel*] removed much of the immediate

⁷⁷ Ibid.

⁷⁸ Ibid.

impetus for the [Court-packing] plan”⁷⁹. Though the impact of Roosevelt’s proposal on Roberts’s decision is debatable, the impact *West Coast Hotel* had on property rights is undeniable.

West Coast Hotel (a similar case to *Adkins*) concerned a 1913 Washington minimum wage law targeted at women. *West Coast Hotel* failed to abide by that law and Parrish (a female employ of the hotel) sued. Justice Hughes delivered the opinion of the Court in this case and, in doing so, completely overturned all of the aspects of the due process clause that had been applied in *Adkins*. First, he denied that the idea of freedom of contract was in the Constitution at all. There is no freedom of contract in the Constitution as it only “speaks of liberty and prohibits the deprivation of liberty without due process of law” and that “In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty”⁸⁰. Second, the relationship between employers and employees is not one of equal footing. Employers are the ones who lay down the rules while employees can only decide to obey or not. Hughes believed that because of the unequal footing, the legislature could properly intervene. Third, the need to protect women further necessitates government intercession. Hughes said that the fact that the law only targeted women and not men did not constitute arbitrary discrimination (as the Court had ruled in *Adkins*) because the Court “is not bound to extend its regulation to all cases which it might possibly reach ... [but] is free to ... confine its restrictions to those classes of cases where the need is deemed to be clearest”⁸¹.

Thus, a return to the pre-“Lochner Era” can be seen. Since public interest in the health of women was clear, “Legislative response to that conviction cannot be regarded

⁷⁹ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition*. p. 226.

⁸⁰ *Ibid.* p. 222.

⁸¹ *Ibid.* p. 224.

as arbitrary or capricious and that is all we have to decide”⁸². So by this time, the restriction against wage laws and the protection of liberty of contract were taken away. Kommers, Finn, and Jacobson confirm the end when they say “*West Coast Hotel* signaled the end of economic due process and aggressive judicial scrutiny of state and federal economic activity”⁸³. A confirmation of its demise came in the case of *U.S. v. Carolene Products* (1938).

In *U.S. v. Carolene Products*, the Supreme Court finally and completely washed its hands of the economic substantive due process of law. Carolene Products was a company that sold imitation milk and cream products made from condensed milk and coconut oil. The Congressional “Filled Milk Act” of 1923 banned such products in an attempt to primarily help dairy farmers who were suffering economically because of fraud milk by milk like products. Carolene Products was indicted for violating this act but claimed that it violated the Fifth Amendment. But Justice Stone was clear, in the 8-1 decision against Carolene, when he said, “The prohibition of shipment of appellee’s product in interstate commerce does not infringe the Fifth Amendment”⁸⁴.

Strict scrutiny or any semblance of it no longer applied. In fact, Stone showed that the opposite applied when he said, “the existence of facts supporting the legislative judgment is to be presumed” and that such laws are not to be deemed unconstitutional unless “it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators”⁸⁵. The burden of proof rested with the defendant, not the government. The new requirement was that it

⁸² Ibid.

⁸³ Ibid. p. 192.

⁸⁴ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=304&invol=144>

⁸⁵ Ibid.

must be shown that there is absolutely no possibility of reasonability of the statute in question.

Thus we see the complete demise of the application of the economic substantive due process of law in property cases. The “Lochner Era”, which proved so fruitful to property rights and laissez-faire advocates, finally came to an end after reigning for roughly thirty years. *U.S. v. Carolene* assured the Supreme Court that it no longer had to concern itself with cases resting on substantive due process as there was essentially no way to meet the requirement of showing no possibility of reasonableness in a law. All of this had a great impact on property rights as:

The Court’s rejection of economic due process, like its abandonment of the contracts clause, has meant that the right to property, arguably the most important of rights at the Founding, is substantially less important than it once was as a foundation for personal autonomy or as a “fence of liberty”⁸⁶

We can now see how property rights have traveled such a long way from the Founding Fathers’ emphasis on Locke, to a state of secondary importance in the post-“Lochner Era”. All hope was not lost, though, as the existence of the “takings” clause in the Fifth Amendment provided one more outlet through which property rights might expand.

⁸⁶ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition*. p. 192.

Chapter 6: Recent Developments in the “Takings” Clause

The most recent developments in property rights have been through the “takings” clause of the Fifth Amendment. Though property rights could no longer expand through the contract clause nor through the economic substantive due process of law, the “takings” clause has shown promise from the second half of the twentieth century on. The Supreme Court, for most of its history, was unwilling to delve into the intricacies of the clause as seen in *Barron v. Baltimore* (as discussed in chapter 3). But *Barron* was, in a sense, overturned as most of the Bill of Rights was gradually applied to the states through the process of incorporation. Incorporation is the legal doctrine whereby the Bill of Rights is applied to the states through the due process clause of the Fourteenth Amendment. Thus the Court’s decision in *Barron* (that the Fifth Amendment applies only to the national government) no longer applies.

The takings clause simply says, “nor shall private property be taken for public use, without just compensation”⁸⁷. This refers to both the government’s longstanding power of eminent domain, which is the authority to take private property for public use or for the protection of public welfare. This power of seizure is not contested at all, nor is the necessity to compensate when a taking has taken place. What is contested is the exact definition of a taking: what exactly constitutes a taking and what exactly is a “public use”? Two categories of takings are recognized: the first is when the government has physically seized private property for public use and is easily identified, while the second is a regulations taking and is much more difficult to specifically define. A regulations taking is one that occurs through governmental regulation that restricts property enough to be considered a taking. Because of the difficulty of definitively defining a taking the

⁸⁷ *United States Constitution*, Amendment V

standards for considering the clause have recently and consistently been through refinement on top of refinement. These considerations are important because the future of property rights rests heavily on this clause, as its development is an ongoing process that has yet to be definitely settled. Also, the takings clause has much more potential than economic substantive due process because it is explicitly stated in the Constitution, unlike the idea of substantive due process of law.

An early case that started the process of refining the definition of a taking was *Pennsylvania Coal Co. v. Mahon* (1922). Pennsylvania enacted a law that stopped the mining of coal under a property if it threatened the surface of the property. Pennsylvania Coal Co. cheaply sold a piece of property with the stipulation that they had the right to remove all of the coal underneath the property. The risks and dangers that might come from the mining of the coal were specifically stated in the transaction. Nevertheless, the land was purchased; but the company was forbidden from mining because of the Pennsylvanian law.

Pennsylvania Coal Co. claimed that the statute was a governmental taking and was therefore unconstitutional. The Supreme Court ruled in favor of Pennsylvania Coal Co. The company's intent to mine was made clear in the contract and very little public interest was found in the regulation (only one house was potentially affected by the mining). Of greater significance was the Court's conception of what a taking is. Justice Holmes set a broad standard when he said "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"⁸⁸. In considering whether a law has gone "too far", Holmes emphasized the

⁸⁸ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=260&invol=393>

importance of considering the “extent of the diminution”⁸⁹ of the property at hand. Thus for the first time we see that the level of damage to the value of the property is a crucial factor in determining a taking. In this case he said, “To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it”⁹⁰. To stop the coal company from mining its coal and thus devaluing its coal was considered a taking.

A taking has thus been inextricably linked to the devaluation of the property in this relatively early takings case. But the amount of devaluation to be considered a taking was also debatable and in need of defining. The case of *Penn Central Transportation Co. v. New York City* (1976) helps to clarify some of these issues. In 1965, New York enacted a landmarks preservation law, which sought to preserve certain landmark buildings throughout the city of New York. The owner of a building designated as a landmark was not allowed to change the building in any major way, substantially alter the building’s appearance, or tear the building down. Penn Central Transportation Co. owned Grand Central Terminal and was offered a deal by U.K. companies to build a 53 or 55 story building on top of the terminal. Because Grand Central Terminal was designated as a landmark, Penn Central was barred from building the tower and its appeals to the landmark commission were rejected. Thus the company sued, claiming that the landmark designation statute was unconstitutional because it had committed a taking in two ways: in preventing the building it was confiscating airspace property and the company was suffering an excessive economic loss.

⁸⁹ Ibid.

⁹⁰ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=438&invol=104>

Justice Brennan, in his opinion, made several important conclusions on the “takings” clause. He admitted that the Court, in defining up to that point a “taking”, had great difficulty, had worked on a case-by-case basis, and had relied heavily on the circumstances of each case. Nevertheless, the Court, through those cases “have identified several factors that have particular significance”⁹¹. A taking can easily be seen to have occurred if the government has physically seized and set apart property for public use but also “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectation are ... relevant considerations”⁹². Once again, the importance of economic impact was taken into consideration in what was set apart as a regulations taking.

On reviewing the company’s claim that the statute had seized airspace property, Brennan said, “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated”⁹³. When considering whether a taking has occurred, property must be considered as whole, not as separate parts or parcels. Thus Penn Central’s argument of airspace seizure failed because the Court was unwilling to consider the airspace alone; the airspace and the building itself had to be taken as a whole. The second argument of excessive economic damage was also rejected because the Court made a distinction between actual economic loss and potential economic loss. The property, as it was without the tower, was still economically sound and profitable. In preventing the building of the tower, New York City was only taking potential profit while leaving the actual profit of the terminal untouched.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

Accordingly, New York City's landmark law was considered sound and the Court, in deciding this case, clarified the "takings" clause a little more. *Pennsylvania Coal Co.* showed the necessity of economic impact in any non-physical taking and *Penn Central* showed that property must be considered as a whole and also clarified the difference between actual and potential economic impact. It also made an important distinction between a regulations taking and a public use taking. A regulations taking must be carefully scrutinized on a case-by-case basis (such as in this case) whereas a public use taking is usually easily identifiable.

The Supreme Court clarified the rules that must be followed in a public use taking, expanded the scope of the clause, and also revealed the potential for property rights to expand when it began to place the burden of proof of rationality on local authorities, as shown in *Dolan v. City of Tigard* (1994). Dolan was the owner of a hardware store in the city of Tigard. She wanted to expand the store with a larger parking lot. The city, however, placed several restrictions on the expansion because of flooding and traffic problems in the area of Dolan's business. The city stipulated that in its expansion, the store must include a stretch of land dedicated to public use and a bike/pedestrian path behind the store to cut down on congestion. In this case, the Supreme Court ruled in favor of Dolan, saying that a public use taking had occurred.

The Court, in rendering its decision, used a new test that said, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related ... to the impact of the proposed development"⁹⁴. It was up to local authorities to prove that the restrictions and stipulations on Dolan's property were sufficiently related to the purpose of those

⁹⁴ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=512&invol=374>

restrictions. Thus the restrictions themselves became the primary focus of the case. The Court wanted the City of Tigard to show that the bike path would indeed alleviate traffic and that the land for public use would serve the public good and help prevent flooding; those two pieces of property were taken solely for public use. However, Tigard only showed that the restrictions *could* prevent traffic and flooding; no substantial evidence of impact could be produced. Scrutinized under the rationality test, the restrictions were ruled to be unconstitutional. The government was thus taking Dolan's land by forcing her to set it apart for public use. So we can see that public use takings are much more strictly scrutinized against than regulations takings.

So for the first time since the "Lochner Era" the burden of proof in property cases was shifted to the government (albeit in a toned down version in the rationality test). Though this clearly expanded the scope of property rights, the Court was not yet done grappling with the clause, as more clarifications were needed. The amount of expansion the Court was actually willing to allow can be seen in the next two cases. First, the issue of a "temporary taking" was argued over in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002).

From 1981-1984, the Tahoe Regional Planning Agency (TRPA) placed two moratoria (one for about 24 months and another for about 8 months) on the Lake Tahoe Basin. The TRPA was a land-planning agency created by California and Nevada. The plaintiffs, an organization of real estate owners in the area, claimed a "taking" had occurred, as all residential development was forced to cease during the moratoria. They claimed that "it is enough that a regulation imposes a temporary deprivation – no matter how brief – of all economically viable use to trigger a per se rule that a taking has

occurred”⁹⁵. They asserted that a temporary regulation must be considered a taking solely on the basis of complete deprivation of property value.

Justice Stevens’s opinion showed that the Court was not willing to go so far. He recognized what the plaintiffs were trying to do in claiming that a “taking” had occurred here. They were basically separating the 32-month moratoria period from the rest of the time of ownership, and claiming that a taking had occurred in that segment of time. Allowing this would force every kind of governmental delay, from moratoria to normal delaying permit processes, to become categorical takings. Most importantly, temporary restriction could not constitute a taking in this case because, “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted”⁹⁶. The temporary property restriction was not rendering the property valueless; property value would return at the end of the restriction. Stevens recognized the fact that fluctuations in property value must naturally occur as a result of governmental actions and is a normal occurrence of ownership. Nevertheless, such cases must be taken on a case-by-case basis; the Court was not willing to recognize a set standard against temporary takings (as the plaintiffs wanted) but neither was it willing to completely shut out the possibility that such a situation could occur under extraordinary circumstances.

So *Tahoe* showed that temporary “takings” cannot trigger the mandatory compensation required by the takings clause, unless under extraordinary circumstances. The final case to be considered, *Kelo v. City of New London* (2005), was a very recent case that, like *Tahoe*, tested just how much the Court is willing to allow through the

⁹⁵ Donald Kommers, John Finn, Gary Jacobsohn, *American Constitutional Law: Second Edition*. p. 227.

⁹⁶ *Ibid.* p. 228.

takings clause. In 2000, the city of New London launched a development project to essentially revitalize its economically downtrodden downtown area. It bought up property from willing sellers and planned to use its power of eminent domain to seize the remaining property from unwilling owners. It claimed that, through this project, over 1,000 jobs would be created and that there would be a substantial increase in tax and tourism revenues. Kelo and eight other petitioners owned homes in the area of the proposed development. All nine properties were in good condition and condemned only because they were located in that area. Unlike all previous takings cases, these plaintiffs questioned whether there was sufficient public use to justify a taking, despite the fact that the government admitted to the taking and was willing to compensate. Up until this case, any legitimate public purpose was assumed to be acceptable public use.

In his opinion, Justice Stevens acknowledged two long-standing principles of the takings clause:

On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking⁹⁷

What made this case so complex was that neither of these principles applied entirely but neither of them could be wholly excluded. The city was not exactly taking the land solely to grant it to other private parties but it was not using the seized land entirely for the use of the general public either. The land was to be developed for public parks but also for many private businesses and offices. But the Court was not willing to believe that the idea of a public use could only be taken literally. The Court believed that public use can both be property literally set-aside solely for the general public and also property

⁹⁷ <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&navby=case&vol=000&invol=04-108>

set aside for, what Stevens called, “public purpose”. Public purpose is a much broader concept than mere (literal) public use and has to do with governmental authority in providing for the needs of the public. Simply put, he believed that “public needs justify the use of the takings power”⁹⁸. Governmental satisfaction of public needs is enough to satisfy the public purpose test of whether there is enough public use.

In this case, the majority of the Court felt that the city of New London did indeed show that the planned area was sufficiently troubled to justify the proposed program. The plan coordinated an assortment of uses for the land (commercial, residential, recreational) with the hopes of alleviating the well-known problems of the area. The Court found that the plan, taken as a whole, undoubtedly worked for a public purpose and so fulfilled the public use requirement of the takings clause. Thus New London’s seizure of property was deemed Constitutional and the idea of public use, by which takings would be defined, was made clearer.

Nevertheless, this case was highly controversial, ruling for New London in a close five to four decision. The dissenting opinions showed a much gloomier picture for the future of the takings clause and urged the necessity for caution. Justice O’Connor and Justice Thomas’s dissents rested on a very different definition of what could be considered public use. Justice O’Connor agreed with the idea that a public use relies on the amount of public purpose in the taking, but she made a crucial distinction in her definition of a public use when she claimed the necessity of actual achievement of public purpose. She cited past examples in which public use was found to be sufficient because “each taking directly achieved a public benefit”⁹⁹. The trouble with takings such as the

⁹⁸ Ibid.

⁹⁹ Ibid.

one found in this case is that “public benefit and incidental public benefit are, by definition, merged and mutually reinforcing”¹⁰⁰. It becomes impossible to distinguish between actual public benefits and incidental benefits from mere private use. She believed, that in the case of New London, the promised public benefits (increased tax revenues, jobs, etc.) could only be seen as secondary and incidental benefits and that “nearly any lawful use of real private property can be said to generate some incidental benefit to the public”¹⁰¹.

Thus, the dissenting Justices believed that the majority decision, in defining public use as mere satisfaction of public needs as the legislature sees fit, substantially weakened the takings clause. They felt that “nearly all real property is susceptible to condemnation on the Court’s theory”¹⁰². Justice Thomas went so far as to say that the Court’s decision brings the public use clause closer to “virtual nullity”. Thus we see the potential for future conflict in the takings clause. It is undeniable that what can be considered a public use was vastly expanded through this case. But the real impact of *Kelo* remains to be seen. It will be interesting to see whether it signals the end of the takings clause, as the dissenting Justices believed.

The takings clause is of great interest to us today because the question of its use and scope has yet to be resolved. For over a half-century the Supreme Court has wrestled with it, trying to set its standards. Nonetheless, the cases that have occurred have yielded refinements, especially in what exactly can be considered a taking. *Pennsylvania Coal Co.* showed that a taking has to do with the value of the seized property, *Penn Central* showed that property must be taken as a whole to be considered under the clause and

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

distinguished between potential and actual profit, and *Tahoe* showed that temporary takings do not count as categorical takings in most situations. *Kelo* delved deeper, questioning the definition of public use itself. But the fact that the burden of proof is on local authorities rather than property owners, as shown in *Dolan*, shows the potential for expansion of property rights in the future, while, paradoxically, the expansion of what can be considered a public use, as shown in *Kelo*, shows that the takings clause might be nearing its end. Nevertheless, as said above, the takings clause, unlike substantive due process, is an explicit Constitutional right that therefore has a much greater future potential. All of these cases show just how complex the application of the clause to property rights has been, and will be in the future. Undoubtedly, we will have many future cases for further refinement.

Conclusion

The long path of the development of United States property rights will continue for as long as the country exists. It has truly changed greatly, from its bare bones, theoretical background in Locke, to its application in the U.S. Constitution by the Founding Fathers, to its continual development through centuries of case law.

In looking over the development of property rights in America, several conclusions can be made. First, the significant role that property played in the founding of America is unquestionable. John Locke's view that property is the essential factor leading into political association was a groundbreaking consideration. He went even further and showed that the need to protect property leads, not only to government, but also to limited government. Therefore, political association exists solely to protect life, liberty, and property. That the Founding Fathers were so influenced by this view shows how much they themselves emphasized the right to property in constructing the Constitution. Thus, the historical abuses of property, that were so obvious previous to the drafting of the Constitution, had to be addressed. So the crucial role that Locke's radical idea played in the founding of America is undeniable.

Second, it is easy to see just how complex and intricate such a seemingly simple right can be. Locke's conception and discussion of property were by no means simple, but his fundamental and basic idea of property as *the* crucial right for which political association is made was the simple idea embraced by the Founding Fathers. Once established in the Constitution, its development through case law can only be described as complex. Its significance and the protection provided for it have fluctuated throughout American history. Clearly, public considerations versus private rights and historical

circumstances have combined to make the scope of property rights continually oscillate. Simply put, property rights (or any right for that matter) cannot be completely straightforward because other fundamental considerations will always exist, fluctuating with the times.

Lastly, the scope of the application of the right to property continues to be a much debated, highly controversial issue. The extent to which the right to property can protect individuals has, as stated above, always been in contention. This will not change anytime soon. Granted, many areas through which property rights could potentially have expanded have been shut off. Chapter 3, on early cases and “near misses”, showed several things: That right must be stated explicitly, that procedural rights in the Fourteenth Amendment cannot be applied, and that there is great difficulty in applying the contract clause to property cases. The application of the Fourteenth through substantive due process of law was also precluded, though it showed much vigor throughout the “Lochner Era”. Indeed, it seems as if all Constitutional paths have been cut off except for the “takings” clause in the Fifth Amendment.

Nevertheless, the takings clause is more than enough to supply for the controversy that has always existed over property rights. Simply put, the takings clause is *the* issue of debate in property rights now and in the foreseeable future. Merely refining the definition of a taking has occupied the Court for over a half a century already. This is already far longer than the approximate 30 years of the “Lochner Era”. The potential of the clause exists for two reasons. The first, as emphasized in chapter 6, is the fact that the takings clause is an explicit Constitutional clause (unlike substantive due process). This alone ensures greater staying power than the economic substantive due process of law.

The second is that the Supreme Court is taking great measures to carefully review and define the clause and its application. The Court has clearly learned from doctrine gone too far, as was the case in economic substantive due process. Previous takings cases show that the Court is not willing to go too far with the clause but neither is it willing to close it off completely. Also, the Justices of the Supreme Court have continually stated the need to take takings cases on a case-by-case basis (especially in regulations takings). Thus, the takings clause has great potential for the future.

This brings us to further considerations of the future of property rights in America. Since property is recognized as a fundamental part of the foundation of America, we can, with good reason, assume that property will always play an important role for all Americans. Nevertheless, caution will always be necessary. As so many paths through which the protection of property could be expanded have been precluded, it is important to use caution when considering any property rights case. If all such paths were to be cut off, the right to property as debatably the most important right would be considerably less significant. On the other hand, the “Lochner Era” has shown the harm that can be caused by the protection of property rights gone amuck. It took the unparalleled emergency of the Great Depression and the great threat to the Supreme Court by Roosevelt’s Court-packing plan to finally end the era in which property considerations overrode almost all other considerations. Thus, in considering the future of property rights, caution will always be necessary from all sides. All of this also shows why the takings clause and its future are so significant.

Property rights will continue to develop for a long time into the future. Though it can be assumed to be fundamental for America and the rights of its people, it will

continue to develop because of its controversial nature. This process of development should be of great interest to every single American, as the importance of the most fundamental idea on which America was founded, property, is at stake.

Appendix A: Relevant Section of the U.S. Constitution
(Article 1, Sections 8-10, Fifth Amendment, and Fourteenth Amendment,
Section 1)

Relevant sections that have been cited have been typed in bold.

Article 1, Section 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and **uniform laws on the subject of bankruptcies throughout the United States;**

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, **by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;**

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;

And To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Article 1, Section 9

The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto Law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Article 1, Section 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; **coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts**, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Appendix B: Table of Cases

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