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Private property rights, eminent domain, and the judiciary: Balancing governmental authority and economic liberties

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Balancing Governmental Authority and Economic Liberties

By

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B.A., University of Louisville, 1989

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ABSTRACT

The law and economics movement and , specifically, the constitutional economics school of thought have emerged out of the perceived need to reach a consensus among several clearly divergent perspectives as to how government should respond to the question of economic liberties, including private property rights. The underlying theory of constitutional economics is a theory of the rules by which political and economic processes are, or will be, allowed to operate through time. In the case of the United States, these rules are found primarily in the Constitution and its amendments.

A fundamental question central to the constitutional economics school is - should the judiciary, and specifically the Supreme Court, restore greater balance between governm ental authority over property and protection of private property rights through the judicial review process and promote governmental restraint regarding related economic regulation. This thesis answers this question in light of historical perspectives of American private property concepts, American eminent domain law, the Supreme Court, and private property rights, and, finally, the constitutional economics school of thought.

PREFACE

Regarding the debate over whether the judiciary should balance protection of private property rights and economic liberties with governmental authority and societal necessity, this paper does take a definitive position. I do not believe one could do otherwise. Government has become so thoroughly pervasive in the life of the average citizen during the twentieth century that the need for judicial review and governmental restraint has never been more important. Basic rights, whether they be rights to speech and press, or whether they be economic rights surrounding private property, are so fundamentally important that they must be protected as guaranteed by the United States Constitution.

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CHAPTER I

ISSUES OF PRIVATE PROPERTY RIGHTS VERSUS GOVERNMENTAL AUTHORITY

The Supreme Court decision in Hawaii Housing Authority v. Midkiff in 1984 represents how far and in what direction American courts have moved in their interpretation of private property rights since the founding of this nation over two centuries ago.[1] The Fifth Amendment of the United States Constitution states that "No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[2] In the Hawaii case, the Supreme Court upheld an Hawaii statute that permits the state to condemn private land so the tenants who occupy the land can then purchase it. The court sanctioned the taking of private land from large landowners for resale to current leaseholders, justifying its actions under the public use

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[1]Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). The decision in this case raises issues relating interpretation of the public use clause of the Fifth Amendment to the Constitution. While some questions may be raised concerning the issue of just compensation, the overriding issue in Hawaii appears to be takings for private use. Many times these issues are combined in cases before the judiciary. They are, in fact, separate issues. The concern expressed in this paper relates to the general direction the court has taken relating to both, a concern which may imply a need for increased judicial activism, taking the form of judicial review.

[2]U.S. Constitution, Article V.

doctrine.[3] However, the concern is not simply about the Hawaii case, rather, the Hawaii decision illustrates the direction and degree in which the courts have moved in their interpretation of property rights, governmental authority, public use, and just compensation - specifically since the decline in the court's use of substantive due process and the priority given to social welfare concerns to the exclusion of private property rights by members of the court.

In order to understand the Supreme Court's position in the Hawaii case, it is necessary to consider the background of landownership in the state of Hawaii, the reasons that Hawaii's state legislature enacted the specific legislation in question, and, the rationale behind the court's decision.

The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific, who developed an economy around a feudal land tenure system in which one island high chief controlled the land and assigned it for development to certain subchiefs. Beginning in the early 1800s, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts over a period of a century and a half proved largely unsuccessful, however, and the lands remained in the hands of a relative few.[4]

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[3]Supra note 1.

[4]Supra note 1, Amicus Curiae 3-5, Brief for Office of Hawaii Affairs, p.32.

In the mid-1960s, after extensive hearings, the Hawaiian legislature discovered that, while state and federal governments owned almost forty-nine percent of the state's land, another forty-seven percent was owned by a total of only seventy-two private landowners. The legislature further found that eighteen landowners, with tracts of 21,000 acres or more, owned more than forty percent of this land, and that on the island of Oahu, the most urbanized of the islands, twenty-two landowners owned seventy-two percent of the island's land titles.[5]

Hawaii's legislature concluded that concentrated land ownership was responsible for skewing the state's residential fee simple market, inflating land prices, and "injuring the public tranquility and welfare."[6] To address these perceived problems, the legislature decided to compel owners of large tracts of land to break up their estates, enacting the Hawaiian Land Reform Act of 1967[7] This Act created a mechanism for condemning residential tracts of land and for transferring ownership to the existing lessees.

Under the Act's condemnation scheme, tenants living on single-family residential lots within development tracts of at least five acres in size are entitled to ask the Hawaii Housing Authority to condemn the property on which they live. The Hawaii Housing Authority then acquires the former

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[5]Ibid, pp.32-33.

[6]Ibid.

[7]Hawaii Revised Statutes, Ch. 516.

owner's full "right, title, and interest" in the land at prices set either by condemnation trial or by negotiation between lessors and lessees.[8] After compensation has been set, the Hawaii Housing Authority may sell the land titles to tenants who have applied for ownership, or it may lease the lot or sell it to someone else. In either case, the existing land owners are subjected to governmental takings for uses that are ultimately private.

The private landowners filed suit in United States District Court, asking that the Act be declared unconstitutional and that its enforcement be enjoined. The decision of the District Court was mixed, declaring parts of the Act unconstitutional, specifically the compulsory arbitration and formulas relating to compensation, while finding other aspects of the Act were, in fact, constitutional.[9] The case next went to the United States Court of Appeals for the Ninth Circuit, which reversed the original decision. The Court of Appeals decided that the Act could not pass the requisite judicial scrutiny of the "public use" clause in the Constitution. It found that the transfers contemplated by the Act, namely condemnation of private land for resale to other private individuals, were unlike those of takings previously held to constitute public uses by the court. The Court of Appeals concluded that the Act was simply "a naked attempt on the part of the state of Hawaii to take the

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[8]Hawaii Revised Statute 516-25 (1977).

[9]Supra note 1, p.240.

private property of A and transfer it to B solely for B's private use and benefit."[10]

However, the Supreme Court did not agree with the decision of the Court of Appeals. Citing the landmark 1954 case of Berman v. Parker, the Supreme Court said that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation" and that the "public use requirement is....coterminous with the scope of a sovereign's police powers." This is the court's rational-basis test at work. While acknowledging that there is a role for courts to play in reviewing a legislature's judgement of what constitutes a public use, the Supreme Court's opinion made it clear that it will not "substitute its judgement for a legislature's judgement as to what constitutes a "public use" unless the use appears totally without reasonable foundation.[11]

The court noted that the Hawaiian land "oligopoly" created artificial deterrents to the normal functioning of the state's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes, and stated that "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[12] In their written opinion, the Supreme Court noted that the Hawaiian statute "presumes"

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[10]Ibid.

[11]Supra note 1.

[12]Supra note 1, p.243.

that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning, and that this presumption by the Hawaiian legislature is both legitimate and rational, providing clear justification for the statutes. However, the court did not review the pre-existing market conditions, but instead presumed the legislature's conclusion was correct.

Finally, the court stated that "the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[13] In other words, according to the Supreme Court, considering the manner in which land titles were held in Hawaii and the perceived disfunction of the land market, exercise of the power of eminent domain was justified. The Supreme Court upheld the Hawaiian legislation in full, reversing the judgement of the Court of Appeals.

This decision and the justifications used by the Supreme Court to reach such conclusions serve to illustrate the current interpretations of private property rights conceived by the American court system. This decision was, and remains, disturbing to many groups and individuals, as will be noted within the scope of this paper, especially when the decision is scrutinized in light of historical concepts and perspectives of American private property

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[13]Supra note 1, pp.243-244.

rights and economic liberties. To many, including the author, the Hawaii decision is seen as a culmination of the Supreme Court's "hands-off" policy, or rational-basis test, regarding governmental authority versus private property rights that began in earnest roughly sixty years ago.

The Hawaii decision raises as many important questions as it answers. But just as important is placing the Hawaii decision and private property rights in an historical context in order to better understand the reasons why our court system began to defer decisions to legislative branches rather then continuing a policy of judicial review in this arena, notably with the emergence of the New Deal court. Especially significant is the court's interpretation of private property rights relative to the decline of the doctrine of substantive due process. Finally, it is important to illustrate that the Hawaii decision is not an isolated incident but is, in fact, one of many court decisions dealing with legislative use of its authority in various issues surrounding private property rights. The deference to legislatures raises serious questions concerning the extent to which these rights have been diminished since the founding of this nation, and specifically during this century.

Issues Concerning Private Property Rights Versus Governmental Authority

The court, in Hawaii Housing Authority v. Midkiff, said that the Hawaiian Land Reform Act of 1967 did not violate the "public use" requirement of the Fifth Amendment of the

United States Constitution. The court further stated that what constitutes a "public use" is strictly a legislative, not a judicial question, as long as there is any reasonable foundation for the legislature's actions - the court's rational-basis test. The exercise of government's eminent domain powers is not prohibited so long as there is a conceivable public purpose and a compensated taking. Finally, the court noted that the government need not even take possession of condemned property for the taking of private property to be constitutional so long as a rational justification of "public use" is present.[14]

Several important questions are raised in reading the court's justifications in the Hawaii case. Who has authority to say what is a "reasonable public use" where the taking of individual's private property for ultimate public use is concerned? Today's court believes that question is best answered by the legislature. Yet one of the functions originally conceived for the Supreme Court by the founders was the protection of individual's or minority's rights against the will of the majority, as represented by the legislature. Has the court delegated this function to the legislature in its Hawaii decision? The court noted that there was still a role for the judiciary in reviewing decisions of the legislature. But with the ruling in Hawaii and supported by the earlier Berman v. Parker decision, the court seems to have all but said that role is no longer

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[14]Supra note 1, p.467.

viable and that deference will be given to the legislature. This is an issue, as noted earlier, that many see as disturbing.

In their decision, the Supreme Court noted that the Hawaiian land "oligopoly" created artificial deterrents to the normal function of the residential land market. The court also noted that when large numbers of people are unable to buy land due to current market prices, then the price structure is "unfair" and the market is "malfunctioning." This may sound reasonable on the surface, but in a capitalist economy, who is to say when a price is "unfair" or that a market is "malfunctioning," especially given a market for land with such limited quantities available, as is the case in the state of Hawaii? Is this the legislature's role? Or is it the market's? The market may have actually been malfunctioning due to a land oligopoly, but the court never reviewed the issue. According to the court, the legislature has the authority to make such a decision.

There is another question raised by the Hawaii decision. Has the interpretation of "public use" now come to mean that property can be condemned and transferred directly to other private individuals for their use? Historically, the phrase "public use" had held a much narrower meaning. Where is the line drawn in legislating for social programs such as urban renewal versus the mere transfer of property? This is not a simple question, but apparently the court has ruled in favor of wide latitude for the former rather than

providing a forum for decision making through the judicial review process.

Finally, does compensation paid to private property owners fully compensate those owners for having their property taken by governmental action? What compensation is a fair compensation? Questions arise such as whether compensation under such condemnation proceedings are, in fact, fair market value compensations. Is a business value to be considered or a social or symbolic value, or simply the land value in a condemnation proceeding? In many cases, the price paid for property often cannot match the burden of upheaval such actions cause. In many instances, entire communities or neighborhoods are affected over and above individuals and families. While there is obviously a need for governmental takings with compensation, issues continually arise over the fairness of compensation actually paid.

These are difficult questions and issues that have been raised by the court's decision in Hawaii Housing Authority v. Midkiff and they are questions that are not easily resolved. However, it does appear that current interpretations of private property rights versus governmental authority in this arena have shifted dramatically over our nation's history, raising debate over what constitutes "public use," or what is "just" compensation, and what is the role of the judiciary in the debate.

Unlike what appears to be the current trend in govern-

ment, the constitutional framers were generally dedicated to the thinking of John Locke and William Blackstone, foremost champions of property rights. This regard is evident in the remarks of Governeur Morris, an influential delegate to the Constitutional Convention from Pennsylvania, as set forth in James Madison's notes:

> Life and liberty are generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main objective of Society. The savage State was more favorable to liberty than the Civilized; and sufficiently to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular government.[15]

Accounts of the convention or other records of the era do not suggest that there was any significant opposition to such views. Many other delegates voiced sentiments in the same vein. As Stanley Katz has observed, the right to property appeared as an unquestioned assumption of the Constitutional period.[16]

The framers were concerned about protecting ownership of any valuable asset, and the freedom to acquire and dispose of it. Dedication to property rights, moreover, requires support of an economic system that would most preserve and enhance it. These goals could be realized by curtailing the economic powers of government and by protecting

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[15]Max Farrand, The Records of the Federal Convention of 1787, (New Haven and London: Yale University Press, 1966), p. 137.

[16]Stanley N. Katz, "Thomas Jefferson and the Right to Property in Revolutionary America," Journal of Law and Economics, (1976), pp. 469-470.

the individual in his exercise of personal activity. The Constitution achieved both purposes: the economic powers of the federal government are limited and enumerated, and individual liberties are supposedly guaranteed. Specifically regarding private property interests, the "taking" clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. This provision can also serve as a very important safeguard for property and commercial interests. The Fifth Amendment also states that no person shall be deprived of life, liberty, or property without due process of law.[17]

At the time of the drafting of the Fourteenth Amendment, during the 1860s, our nation's regard for private property seemed no less diminished than during the founding period. Representative John Bingham, the author of the Fourteenth Amendment, was of the opinion that no one should be deprived of property "against his consent," which is a stronger version of the concept of property rights than found in the Fifth Amendment:

> Who will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights to life, liberty, and property: and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent without due compensation.[18]

The decline of economic liberties, such as private

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[17]Supra note 2.

[18]Congressional Globe, 35th Congress, 2nd session (1859), p.983.

property rights, began in earnest in the late 1930s, as the Supreme Court attempted to balance concern over the development of monopolies and cartels, and, health, safety, and welfare issues on one hand, with the protection of private property rights and economic liberties an the other. While there were instances of antitrust judgements against U.S. businesses prior to the 1930s and legislation such as the Sherman Anti-Trust Act in the late nineteenth century, Bernard Siegan, a contemporary author in law and politics, argues that this process developed in earnest during and after the Great Depression, and that since that time, "legislatures have [had] great difficulty in restraining freedom of speech or press, and almost none in curtailing freedom of [private] enterprise."[19]

From that time forward, the judiciary has been largely closed to the issue of legislative takings through the use of the rational-basis test and its deference to legislative decisions regarding public use, as is indicated in the Hawaii decision, either directly through the use of eminent domain proceedings or indirectly through regulation. As the judiciary has turned towards the political branches in matters concerning economic liberties and property, the results have been described by James Dorn in his Economic Liberties and the Judiciary as "...exactly what Madison and

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[19]Bernard Siegan, "The Supreme Court: The Final Arbiter," Beyond the Status Quo: Policy Proposals for America, ed. David Boaz and Edward H. Crane, (Washington, D.C.: Cato Institute, 1985), p.287.

others warned against: the politization of economic life, great uncertainty about the law, and a system of justice based on myriad notions of social or distributive justice rather than on protection of private property..."[20]

With the decision in the Hawaii case, the court has essentially sent a message to legislatures that, conceivably, any statute having a reasonable relation to the public good, will be sustained, even if the statute sanctions what amounts to takings by government for the eventual use and enjoyment of other private individuals or corporations. As Richard Epstein, a noted conservative scholar and advocate for legislative and judicial reform, wrote in 1985:

> With economic liberties...the court has deployed the so-called "rational basis" test to neutralize the constitutional protection of economic liberties...Under present law, if any conceivable set of facts could establish a rational nexus between the means chosen and any legitimate end of government, then the rational-basis test upholds the statute. In theory, the class of legitimate ends is both capacious and undefined, while the means used need only a remote connection to the ends chosen. In practice, every statute meets the constitutional standard, no matter how powerful the argument arrayed against it.[21]

Considering the Framer's perspective of the judicial function as one of protecting property - which included both economic and personal liberties - it is difficult to understand how today's courts can justify little or no judicial

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[20]James A. Dorn and Henry G. Manne, Economic Liberties and the Judiciary, (Fairfax, Va.: George Mason University Press, 1987), p.5.

[21]Richard A. Epstein, Takings (Cambridge, Mass.: Harvard University Press, 1985).

review of legislative takings regarding private property rights.[22] Under its own interpretation, the court currently allows for substantially no judicial review to balance legislation on one side with perceived fundamental property rights on the other. Furthermore, Dorn, Siegan, Epstein, and others have demonstrated that diminishing of private property rights cannot be justified from the standpoint of economic efficiency.[23]

When the security of property rights is undermined by a judiciary that is unwilling to restrain legislative activism in the pursuit of distributive justice, individual incentives to work, save, and invest are weakened.[24] Furthermore, with a lower likelihood of capturing future income from an efficient use of resources, those resources seem less likely to be directed to their highest-valued uses. Therefore, an erosion of private property rights dampens the entrepreneurial motivations of and within the nation.

The debate over constitutional interpretation and the role of the judiciary has focused primarily on the clash between a generally liberal view of judicial activism and a conservative stand on judicial restraint. In many fundamental ways, these perspectives parallel the generalized debate within the law and politics field - governmental

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[22]Ibid.

[23]Bernard Siegan, Economic Liberties and the Constitution, (Chicago: University of Chicago Press,, 1980), ch. 13; Supra note 21.

[24]Ibid, Siegan.

restraint versus economic regulation including direct and indirect takings. Justice William Brennan, Jr. has been one of the most outspoken proponents of judicial activism, advocating a "living constitution" and judicial policy-making to ensure social justice.[25] On the conservative side of the argument, individuals such as Chief Justice William Rehnquist, Justice Antonin Scalia, and Robert Bork argue for a "jurisprudence of original intention." I would argue that the time has come, with the court's decision in the Hawaii case, to find a different approach than either of these two perspectives - balancing private property rights and societal concerns.

The conservative side of the debate focuses on the "jurisprudence of original intention." Their philosophy concerning the Constitution as a charter for protecting economic property rights is clearly seen by the words of Chief Justice Rehnquist:

> The public perception of the nature and function of the United States Constitution as a whole has tended to become distorted....The Constitution is often referred to as a "charter of liberty" or a "bulwark of individual rights against the state." The original Constitution was neither of these....It was adopted not to enshrine states' rights or to guarantee individual freedom, but to create a limited national government, which was empowered to curtail both states' rights and individual freedom.[26]

The Chief Justice apparently sees no grounds for using the

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[25]Supra note 20.

[26]George Lardner, Jr., "50s Memos Illustrate Rehnquist Consistency," Washington Post (July 20, 1986), pp.A1-A4.

process of judicial review to protect private property rights and liberties.

Underlying Chief Justice Rehnquist's opinions are the same attitudes shown by other conservatives on the bench who favor judicial restraint in reviewing economic legislation and private property rights. Former judge Robert Bork, for example, argues:

> Our constitutional liberties arose out of historical experience and not out of political, moral, and religious sentiment. Attempts to frame a theory that removes from democratic control [the people's sovereignty in] areas of life the framer's intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and history that gives our rights life, rootedness, and meaning.[27]

From the liberal's point of view, many consider the most important response to the constitutional and judicial debates as being Justice Brennan's speech entitled, "The Constitution of the United States: Contemporary Ratification."[28] This speech was delivered at Georgetown University in 1985. Justice Brennan's views of how the Constitution should be interpreted and the role judges should play are at the very center of the debate. More importantly, it appears from all indications that Justice Brennan's views accurately

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[27]Robert H. Bork, "Tradition and Morality in Constitutional Law," The Francis Boyer Lectures on Public Policy (Washington, D.C.: American Enterprise Institute, 1984), p.8.

[28]William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," Speech at Georgetown University, Washington, D.C., October 12, 1985.

reflects the perspective of prevailing liberal jurisprudence. Unfortunately, with Justice Brennan's recent retirement from the Supreme Court, it appears impossible to determine how the court will react to future decisions involving private property rights. However, it does appear that, from all indications, the court's conservative position will be enhanced through Brennan's retirement.

Nevertheless, in his speech before Georgetown University, Brennan noted that society has changed since the writing of the Constitution. Two centuries ago, the concepts of freedom and dignity "found meaningful protection in the institution of real property." In the Framer's time, "property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law."[29] Brennan was aware of the problems in allowing unconstrained expansion of governmental regulation and takings without review by the judiciary. He noted that "the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance [by the judiciary] at the collision points."[30]

Since approximately the 1930s, the court has tended to give priority to rights classified as fundamental or human

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[29]Ibid.

[30]Ibid.

rights. These rights include speech, religion, and a variety of rights pertaining to criminal codes such as arrest, conviction, and punishment. Other rights have not been so favored, even where specifically articulated in the Constitution. In the economic arena, and specifically private property rights, government has been allowed to have wide latitude in creating, adjusting, and diminishing individual rights. For example, land use regulations that diminish property values by as much as even ninety-five percent have been found not to amount to takings under the Fifth Amendment.[31] Ellen Frankel Paul, Research Director and Professor of Political Science at Bowling Green State University, stated in her 1987 paper entitled "Public Use: A Vanishing Limitation on Governmental Takings," that the public use restraint on taking private property by eminent domain has all but vanished under recent Supreme Court interpretations.[32]

This discussion serves to illustrate that there are, in fact, important questions raised by the court's decision in Hawaii Housing Authority v. Midkiff, and that the debate between governmental authority and private property rights appears to be continuous. Furthermore, the debate involves

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[31]Guilliano v. Town of Edgartown, 351 F. Supp. 1076 (D. Mass., 1982).

[32]Ellen Frankel Paul, "Public Use: A Vanishing Limitation on Governmental Takings," Economic Liberties and the Judiciary, ed. James A. Dorn and Henry G. Manne, (Fairfax, Va.: George Mason University Press, 1987), pp.357-358.

political and judicial scholars at the highest levels. Just as the arguments made by the Supreme Court appear rational and well thought out, so do certain arguments on both the conservative and liberal side of the debate. Again, the questions are neither easy nor simple, and the answers likely require balancing legislative authority on one side with private property rights on the other. To begin, one must attempt to understand why the court initiated its hands-off policy regarding private property rights in the first instance.

Substantive Due Process, Private Rights, and the Public Interest

In the latter nineteenth century, substantive due process became the primary judicial protection against governmental regulation of private property and was a major feature of the Supreme Court's advocacy of the growth of capitalism in the United States.[33] From 1890 with the passage of the Sherman Antitrust Act to 1934 the court struck down all or portions of roughly two hundred economic regulatory statutes. But it also upheld many, especially those that were related with the health and safety concerns of the general public. In the 1905 case of Lochner v. New York, the court struck down legislation aimed at regulating and limiting minimum working hours, but in the decade that

[33]Robert G. McCloskey, "Economic Due Process and the Supreme Court," ed. Philip B. Kurland, The Supreme Court Review: 1962 (Chicago: University of Chicago Press, 1962), pp.34-62.

followed, upheld a maximum working hours law for women and a statute regulating work of both men and women.[34]

According to Joel Grossman and Richard Wells, "These alternating decisions indicated the growing importance of social factors in economic decisions, and a changing climate of opinion regarding the interactions of government and organized self-interest."[35] The court soon swung back to the rationale in Lochner with its decision in the 1923 Adkins v. Children's Hospital, which invalidated a minimum wage law in the District of Columbia.[36] However, in 1934 the court upheld a New York statute regulating the price of milk in its Nebbia v. New York decision, arguing for regulation of business which affected a public interest.[37]

These various alternating decisions by the Supreme Court regarding such issues "tended to put the Court in a light that reduced public confidence in its grasp of economic matters."[38] Especially unsettling was the fact that these decisions were coming at a time of great national distress over the economy and concern for public health, safety, and welfare - the Great Depression. Justice Stone,

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[34]Lochner v. New York, 198 U.S. 45 (1905); Muller v. Oregon, 208 U.S. 412 (1908).

[35]Joel B. Grossman and Richard S. Wells, Constitutional Law and Judicial Policy Making, 3rd ed. (New York: Longman, 1988), p.188.

[36]Adkins v. Childrens Hospital, 261 U.S. 525 (1923).

[37]Nebbia v. New York, 291 U.S. 502 (1934).

[38]Supra note 35.

dissenting in the 1936 case of Morehead v. Tipaldo, provided an insightful summary of the decline of substantive due process when he wrote:

> In the years which have intervened since the Adkins case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employee; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation.[39]

Arguably, Justice Stone employed a less than sound economic argument in his dissent, mixing concern over a "fair" wage with a market-determined, or "efficient" wage, although he made sense on moral, social, and political grounds. Nevertheless with political and public pressure rising, the stage was set for the court to adopt its hands-off policy concerning private property rights and economic liberties, and culminating in Hawaii Housing Authority v. Midkiff. Instead of striking a balance between substantive due process and concerns over monopolies, cartels, and health, safety and welfare issues, the court essentially adopted the position that the only permissible judicial limits on governmental

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[39]Morehead v. Tipaldo, 298 U.S. 587 (1936), Stone, J., dissenting.

regulation were specific constitutional prohibitions.[40]

The questions and issues raised in this court decision are important and far-reaching. However, the Hawaii case does not stand alone in terms of the Supreme Court's approach to the regulation of private property rights. Over approximately the last sixty years the court has steadily allowed a certain erosion of these property rights. The 1984 Hawaii decision only represents the present culmination of such decisions - decisions that range from regulatory abuse of private property to uncompensated takings affected by governmental action.

Other Court Decisions Involving Eminent Domain and Property Rights

The case of Pennsylvania Coal Co. v. Mahon (1922) is an example of how judicial review allowed for protection from government regulation of individual private property rights.[41] There the owner of land containing coal deposits deeded to others the surface interest but expressly reserved the rights to remove all the coal underneath the surface. The deed itself contained language by which the buyers (for both themselves and their assigns) waived all rights to damage in the event that the surface fell. Sometime after the original conveyance, Pennsylvania passed the Koehler Act, which forbade any mining that caused damage to the

[40]Supra note 21.

[41]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

surface owner. The court's decision in Pennsylvania Coal Co. v. Mahon was not meant to imply that the surface property owner was without rights. However, the surface owner did willingly transfer portions of those rights to the mining company under a valid contract in the form of a deed, with the court recognizing those rights and the deed's validity. The Supreme Court held the statute passed by the Pennsylvania legislature to be a taking of the mining company's interest, which it clearly was.

Yet that was in 1922. Other, more recent cases indicate how the Supreme Court has disregarded their earlier positions. In Penn Central Transportation Co. v. City of New York (1978), the issue before the court was whether the City of New York, acting pursuant to its landmark preservation statute, was entitled to prevent the owners of Grand Central Terminal from constructing a new office tower over the current structure.[42] The owners simply claimed the right to occupy airspace that could be effectively occupied. The Supreme Court, however, decided that so long as the use of the existing structures was not impaired, the city could wholly prohibit the occupation and use of the airspace without payment of compensation. Considering airspace a right of easement argument rather than a property argument, the court contended that it was a "fallacy" to assume that the loss of any particular right of easement constituted a

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[42]Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

taking of property. But the fallacy is really an affirmation of the standard conception of property applied everywhere in the United States, that ownership is divisible. Historically, American conceptions of property hold air rights over existing buildings are property just as much as the air rights already occupied by the existing structure. However, the court chose to view air rights as a social construction rather than a property right. According to Richard Epstein in Takings, justification and implicit compensation are still matters to be considered, but "the [Penn Central] case is clearly caught by the [Fifth Amendment's 'taking'] clause."[43]

A similar treatment of the right of exclusive possession is found in the more recent Supreme Court case of PruneYard Shopping Center v. Robbins (1980).[44] There, the appellees entered a large shopping center owned by the appellants and erected a booth in order to collect signatures in opposition to an anti-Zionist resolution passed by the United Nations. There was no interference (apart from the fact of partial occupation) with the business of the shopping center, but the views endorsed by the appellees were not the views of the owners of the shopping center. The owners asked the appellees to leave the premises, or, stop their activities regarding collecting signatures, and, the

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[43]Supra note 21, p.64.

[44]PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

appellees had not been given a permit to petition on that location by the local government. The shopping owners were forced into a suit by the appellees for stopping their activities, and the case eventually found its way to the Supreme Court.

In the decision of this case, the opinion of Chief Justice Rehnquist offered no account of the incidents of ownership, including exclusive possession. In private cases, no injunction against entry is dependent upon showing actual damages. The entry itself is a violation of the property owner's right, for which injunctions are available, even if no damages can or should be awarded. Unfortunately, the court found no reason to account for this concept in its ruling. Despite whatever invitations may have been implicitly issued to the public to come onto the property for shopping purposes, no private person could force his way onto the property without the consent of the owners. This does not imply that the owners could, for example, exclude certain individuals or groups from the shopping center property simply because they belonged to a certain minority or held religious beliefs that differed from those of the property owners. The property is, after all, a shopping center, open to the public for the purposes of shopping. But, that should not mean that the owners must make their property open and available to any person or group for any purpose outside the realm of shopping and related activities. In this regard, the court failed in its decision.

Private property damage caused by the government is another form of taking, if the owner is not compensated for his losses. However, in the 1972 case of Laird v. Nelms, this concept seems to have been diminished as well.[45] The plaintiff's farmhouse was flattened by a sonic boom caused by government aircraft, for which damages were sought under the Federal Tort Claims Act (FTCA), which makes the government liable for all property damage "caused by the negligent or wrongful act or omission of any employee of the Government...under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[46] Unfortunately, the Supreme Court held that this case was not subject to the FTCA because the plaintiff could not show "the negligent or wrongful act or omission." Yet private property was destroyed and the owner suffered loss at the hands of the government. But the court ruled there was no taking. In speaking of this case, Richard Epstein noted that if the interpretation of the FTCA statute is correct, it only establishes that the FTCA is itself unconstitutional as applied and the court's decision is in error.[47]

Consequential damages, or losses stemming from an original governmental taking indirectly, amount to govern-

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[45]Laird v. Nelms, 406 U.S. 797 (1972).

[46]28 U.S.C. Sections 1346(b) and 2674 (1982).

[47]Supra note 21, p.42.

ment infringement upon private property rights. Yet, the court does not hold to this concept. One of the most extreme cases in this area is Poletown Neighborhood Council v. City of Detroit (1981), which was the condemnation of a large tract of land that destroyed not only many small businesses and homes but also the sense of community.[48] Detroit made use of the eminent domain power to condemn the Poletown neighborhood in order to make way for a General Motors plant (which may be ultimately a private "taking"). The court allowed no compensation for any property other that the lands themselves, ignoring losses suffered by businesses and individuals, arguing that the government had "taken" only the land and buildings themselves. The emphasis is thus upon the values that have been transferred to the government and not those values that are lost to the owner when the government is unable to make use of them in its own business. In other words, the government paid for the land values, but it did not compensate for the business values, which were lost by the property owners. The general rule that the court upheld remains that "the question is what the owner has lost [in terms of real property], not what the taker [government] gained," which ignores consequential damages, such as lost business values or damage to

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[48]Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

communities.[49] In other words, the government, under this rule, need not pay for that which it destroys, for instance business values, which is a form of taking. The government only compensates, under this rule, for real property.

Andrus v. Allard (1979) is a Supreme Court case that involves statutory property takings, which is another instance where the court has failed to protect private property rights.[50] In this case, the appellees challenged the regulations under the Eagle Protection Act insofar as they prohibited the sale of any birds which were legally acquired before government prohibition.[51] On its face the case seems simple. The right of sale is part of the right of ownership. The loss of this right is not merely a diminution in value but is the deprivation of a property right, a partial taking for which compensation is required. However, the Supreme Court held that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[52] This seems inconsistent with the court's stated premise that partial takings are covered by the eminent

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[49]Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910).

[50]Andrus v. Allard, 444 U.S. 51 (1979).

[51]54 Stat. 250, 1 (1940), amended at 16 U.S.C. 668(a), 1982.

[52]Supra note 21, pp.65-66.

domain clause. The decision looks to what the owner has retained, when the question is always what the owner has lost.

It seems that our judiciary has failed to maintain protection of private property rights from direct and indirect governmental takings. There are numerous other examples as well. Minnesota v. Clover Leaf Creamery Co. in 1981 involved regulatory takings arising out of legislative policies designed to promote certain industries over others.[53] United States v. Fuller in 1973 involved government-induced price increases in the condemned land.[54] In the court's 1982 decision in Teleprompter Co. v. Loretto, infringement of exclusive possession rights amounted to private takings, which the court upheld.[55]

This discussion demonstrates that the Supreme Court decision in Hawaii Housing Authority v. Midkiff is not an isolated incident involving governmental authority and private property rights in recent years. Nor does the issue revolve only around statutory takings that seek to take private property from one individual in order to transfer that property to another private individual. Issues such as historical conceptions regarding property rights versus social reconstruction of property rights, inadvertent tak-

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[53]Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

[54]United States v. Fuller, 409 U.S. 488 (1973).

[55]Teleprompter Co. v. Loretto, 458 U.S. 419 (1982).

ings caused by negligence, consequential damages, and several issues surrounding "just compensation" demonstrate clearly that the Hawaii decision is not an isolated incident. In other words, this discussion serves to demonstrate that the question of whether the court has gone too far in its deference to legislative actions concerning private property rights and economic liberties is legitimate.

Conclusion

Debate continues concerning private property rights and economic liberties in the United States versus governmental authority related to eminent domain and the regulation of private property. The United States is a nation that has, historically, placed private property rights in high esteem and has sought to limit government's abuses of those rights through the judicial review process. But over time, our legislatures have been allowed to diminish private property rights and economic liberties with the aid of a passive judiciary deferring to an active legislature.

Arguably, rights surrounding private property in the United States were originally viewed as fundamental, much like rights to speech, press, or religion. Unfortunately, this seems no longer to be the case. The argument of this thesis is that property should be returned to the status of a fundamental right.

It seems the court had sufficient cause to seek modifi-

cations of its substantive due process policies in light of societal concerns for health, safety, and welfare and in light of concerns regarding the effects of industrialization and monopolies upon the economy and the nation's citizens. However, instead of attempting to strike a balance between private property rights and societal concerns, the court has adopted a hands-off approach to private property rights, especially over roughly the last sixty years.

After over half a century of continuous government expansion and court sanctioning of legislative policies that increasingly infringe upon fundamental rights surrounding property, it seems time for the judiciary, and specifically the Supreme Court, to re-think its current position concerning private property rights versus legislative action through modifications in the use of the judicial review process.

In order to appreciate the significance of these issues, chapter two will consider historical concepts of private property rights, eminent domain, and governmental powers in this arena. This debate over governmental authority versus private property rights is not necessarily a new debate, but rather, is a debate that has continued since the founding of this nation. It is also a debate that has historically left property rights in high esteem while attempting to balance those rights with other societal concerns.

Second, an understanding of American law as it relates

to the Supreme Court and its interpretations of governmental powers of eminent domain is necessary to appreciate the court's current position. The Supreme Court did not suddenly arrive at its current interpretations of eminent domain law overnight. These interpretations developed over time, along with the size and complexity of our society. The discussion in the third chapter reveals that concern over property rights as fundamental rights has been transformed into concern over process, with certain fundamental questions appearing to go unanswered, such as what constitutes "public use," or "just" compensation.

There is, in fact, a case for modification of the court's current hands-off approach to private property rights and economic liberties. Constitutional economics as a school of thought has, in many ways, arisen out of the need to address issues such as those associated with fundamental rights to property raised by the court's decision in Hawaii Housing Authority v. Midkiff. The final chapter will consider the constitutional economics school in light of this discussion and illustrate that the court, of the various means available, is the best equipped institution to restore protection of our fundamental rights to property. Furthermore, constitutional economics may be a means to facilitate questions to be raised by the judiciary in an attempt to balance the debate between private property rights - whether the issue be takings for private use or issues of fair compensation -with social concerns.

CHAPTER II

HISTORICAL CONCEPTS OF AMERICAN PROPERTY RIGHTS, EMINENT DOMAIN, AND GOVERNMENTAL POWERS

In order to appreciate the significance of issues raised in chapter one concerning governmental authority in relation to private property rights, it is necessary to consider historical concepts of private property rights, eminent domain, and governmental powers in this arena. This debate over governmental authority and private property rights is not a new debate as it predates the founding of this nation.

Eminent domain is the power of the sovereign to take property for public use without the owner's consent.[56] The law of eminent domain is fashioned out of the conflict between the people as a whole's interest in public projects and the principle of indemnity to the landowner.[57] The power of eminent domain is not dependent upon any specific grant; it is an attribute to sovereignty, limited and conditioned by the just compensation clause of the Fifth Amendment.[58] The taking clause of the Fifth Amendment then, is

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[56]P. Nichols, The Law of Eminent Domain, Section 1.1 (3rd Edition 1971).

[57]U.S. ex re. T.V.A. v. Powelson, 319 U.S. 266, 280 (1943).

[58]Hanson v. United States, 261 U.S. 581 (1890); Boom Co. v. Patterson, 98 U.S. 403, (1878).

not a grant of a new power to the federal government but rather a limitation upon an already existing power.[59]

The term "eminent domain" appears to have originated in 1625 in De Jure Belli et Pacis by Hugo Grotius in which the author stated that "property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property...for ends of public utility...."[60] Grotius also anticipated the just compensation provision found in our nation's Constitution:

> A king may two ways deprive his subjects of their right, either by way of punishment or by virtue of eminent power. But if he does it the last way, it must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss he suffers out of the common stock.[61]

English common law, from which our nation's theory of law is derived on whole, qualified all property rights by public necessity. Property claims were subject to society's residual rights to levy taxes, to condemn through eminent domain proceedings, and to regulate in the interest of public health, welfare, and morality.

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[59]United States v. Carmack, 329 U.S. 230, 241-42 (1945).

[60]Nichols, supra note 56, Section 1.12.

[61]H. Grotius II, De Jure Belle et Pacis Libritres: Prolegomena, Ch. XIV, Section VII (1625).

In the first decades of national existence, American jurists frequently turned to William Blackstone's Commentaries on English Law for guidance. This was particularly true in disputes involving a conflict between public interest and property rights. Blackstone's conception of property rights adhered to natural rights ideas. He accepted the proposition that the chief end of government was to foster personal liberty and private property. He agreed that, morally, these were inalienable rights of all men, that the rights derived from nature, and that only a tyrannical government would deprive its citizens of them. He acknowledged that the individual's right to property had preceded the social compact and that men brought with them into society their right to property. However, Blackstone did not stop there. Blackstone in effect declared that all legally vested claims enjoyed the same sanctions as those rights which derived exclusively from nature. For him it did not matter whether the original justification for a right continued into the future, whether it had to be earned, or whether it deprived others of a similar right or opportunity. All that mattered was that, if a society had a vested right, government could not rightfully reclaim it.[62] While not denying that men possessed certain natural rights, Blackstone also insisted that on entry into society all men's natural rights became subject to the law. While a

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[62]William Blackstone, Commentaries on the Law of England (Cambridge: Clarendon Press, 1965), pp.117-141.

citizen might have a moral claim to certain property, unless that claim received governmental sanction the property right could not be exercised. Recognizing the ultimate power of government, Blackstone said, "So long therefore as the English Constitution lasts, we may venture to affirm, that the power of Parliament is absolute and without control."[63]

Blackstone's positive law assertion of governmental sovereignty disturbed many Americans, who did not believe that government would never violate men's natural rights to property. As a result, immediately following the ratification of the Federal Constitution, several jurists wrote their own brief commentaries to provide an American interpretation of rights and property.[64]

James Wilson, in his 1789 Lectures on Law, illustrated one American response to Blackstone. Wilson, a Supreme Court justice, agreed with Blackstone's definiton of property right as a legal claim to anything of value. But he emphatically denied that individual property rights existed only at the sufferance of the legislature. Relying on the doctrine of popular sovereignty, Wilson argued that the right to govern derived from the people. The legislature,

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[63]Ibid, p.157.

[64]James Wilson, The Works of James Wilson, ed. Robert Green McCloskey (Cambridge, Mass.: Harvard University Press, 1967); Blackstone, Commentaries on the Law of England, ed. St. George Tucker (Philiadelphia: W.Y. Birch and A. Small, 1803); Nathaniel Chipman, Sketches on the Principles of Government (Rutland, Vt.: 1793); Anonymous, Rudimants of Law and Government (Charleston, S.C.: 1783); Leonard W. Levy, ed., Judicial Review and the Supreme Court: Selected Essays (New York: Harper and Row, 1967).

like all elements of government, had no right to exercise any power which the people had not specifically sanctioned. Further, it would be unreasonable to imagine, said Wilson, that individuals upon entry into society had given up the very rights to which they entered society to secure - the rights of life, liberty, and property. Wilson thus believed that the courts must act as the guardian against legislative encroachment.[65]

In 1795 United States Supreme Court Justice William Paterson set an important precedent for American courts when in Vanhorne's Lessee v. Dorrance he used natural rights to overturn a Pennsylvania statute. At issue was a tract of land claimed under a 1787 law that the Pennsylvania legislature had repealed three years later. Peterson ruled in favor of the plaintiff Dorrance and declared unconstitutional the Pennsylvania law on the grounds that the Pennsylvania constitution prohibited the state from taking personal property without cmpensation. By depriving the plaintiff of his land, said Paterson, the legislature had denied him the means to "enjoy the fruits of his honest labor and industry." Paterson conceded that legislatures possessed a "despotic power" to divest a person of his property, but he insisted that it could be exercised rightfully only for public need and with fair compensation to the injured person. Any other policy "would be laying a burden upon an

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[65]Wilson, supra note 64, Works, pp.4-14, 43, 300-331, 430.

individual which ought to be sustained by the society at large.[66]

Paterson's charge contained a number of important points which subsequent courts would utilize. First, he accepted a person's claim to land ownership as a natural right. A legislature could not deprive a person of this right, at least not after it had recognized that right by granting him a legal title. Secondly, Paterson called on the courts to refuse to recognize as law any legislation which infringed upon individual property rights. He implied that even without constitutional limitation similar to that in the Pennsylvania constitution, courts could still hold legislatures accountable to natural law. When public need demanded the taking of property, Paterson insisted that the legislature could do so only by exercising its power of eminent domain which required fair compensation to the injured party. Finally, Paterson's description of land titles as "contracts" linked the doctrine of natural rights to that of legislative "good faith," which opened the way for later courts to extend natural rights property sanctions to a wider range of possessions and claims.[67]

Three years later a divided Supreme Court in Calder v. Bull endorsed, as well as challenged. Paterson's ruling. In

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[66]Vanhorne's Lessee v. Dorrance, 2 Dallas (U.S.:17-95) 344; Baynard v. Singleton, 1 Martin (N.C.: 1787); Bowman v. Middleton, 1 Bay (S.C.: 1792); Cooper v. Telfair, 4 Dallas (U.S.: 1800).

[67]Vanhorne's Lessee V. Dorrance, 2 Dallas (U.S.: 1795) 344.

1795, due to the structure of Connecticut appellate procedure, the legislature had set aside a probate court decision and then ordered a new trial in the same court. As a result, the probate court reversed its earlier decision. The plaintiff, Calder, brought suit charging that the Connecticut legislature had deprived him of his legally vested property by interfering with the actions of the probate court. Generally, ex post facto laws enable citizens to be prosecuted for acts that were, in fact, legal at the time they were committed. The United States Supreme Court denied Calder's plea on the grounds that the ex post facto clause of the Federal Constitution applied only to criminal cases. Also, since Calder's right to the property had never been legally vested, he had no basis for claiming that the legislature had deprived him of any property. The court's refusal to interpret the ex post facto clause broadly to include nonpenal legislation eliminated a potential abridgement of property claims.[68]

The Calder v. Bull decision set the stage of a debate between Justices James Iredell and Samuel Chase over a judge's authority to honor natural rights property claims in situations where no specific constitutional provision limited the power of the legislature. Iredell, a North Carolina lawyer and a Federalist, declared that although legislatures should not violate individual's right to property without fair compensation, private rights always

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[68]Calder v. Bull, 3 Dallas (U.S.: 1798) 386.

deferred to public necessity. Iredell expressed concern that a few judges had begun to declare legislation unconstitutional for no other reason than it violated "natural justice." He accepted the idea that legislatures' powers were limited by their constitutions, and when a legislature exceeded its authority, judges had no choice but to declare the acts in violation of the constitution. But Iredell insisted that judges base their decisions on the letter of the legislation and the prevailing constitution. He believed that anything else would be a usurpation of power by the courts.[69]

Samuel Chase joined Iredell and his other colleagues on the court in denying the applicability of the ex post facto clause in noncriminal cases and in agreeing that Calder had never possessed a legally vested right of which he could be deprived. But Chase did not want his concurrence to be interpreted as a sign that the Supreme Court had compromised the sanctity of authentic property rights. In response to Iredell's comments, Chase defended a judge's duty to declare unconstitutional any legislation which violated natural law, even if no specific constitutional provision justified the action. Such action, according the Chase, would contrary to the very end of government. "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control," declared Chase, even when its authority is not "expressly restrained by the constitution, or the

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[69]Ibid.

fundamental law of the state." Any act which threatened the vital principals of free government, Chase said, such as the sanctity of property was not law, and the courts should not enforce it.[70]

In 1810 John Marshall in Fletcher v. Peck expanded the meaning of the "contract" clause of the Federal Constitution in an effort to rescue property rights from the position in which Iredell had placed them. In 1795 a bribed Georgia legislature had granted a large tract of land at a bargain price to four land companies.[71] The following year, amid charges of scandal, the voters of Georgia turned out of office all of the involved legislators. Carrying out a popular mandate, the new legislature promptly voided the previous legislature's grant of land. In the meantime the land companies had begun to sell land titles to innocent buyers who in turn sold to others. Fletcher and Peck were two of those second and third parties to the land sales who sued to have the original land grant upheld.[72]

Marshall, speaking for the majority of the court, declared that the title of the land could be clearly deduced from the legislative grant. Georgia, as a party to the

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[70]Ibid; Cooper v. Telfair, 4 Dallas (U.S.: 1800).

[71]Chief Justice Marshall was one investor, and today would have had to excuse himself from judicial review of the case due to conflict of interest rules and procedures.

[72]Peter C. Magrath, Yazoo: Land of Politics in the New Republic (Providence, R.I.: Brown University Press, 1966).

transaction had no right to pronounce its own deed invalid. All title to land ultimately rested on legislative sanction. Marshall insisted that legislatures, no less than individuals, must act lawfully, and they could expect the courts to hold them accountable for their actions.[73] Marshall's defense of land titles as contracts avoided the problem of whether property rights rested on natural or positive law. Now any "legally vested right" or public grant enjoyed the same immunity from state governments as private contracts. Fletcher v. Peck had the effect of including state legislation under the same sanctions which the Fifth Amendment applied to federal legislation.[74]

Marshall's decision became a favored means for owners of corporate charters to protect their franchises from a willful legislature. However, many feared that such grants, if permanent, would provide the basis of a privileged class whose monopolistic grants allowed the to collect unearned profits. For this reason, many supported the idea that a legislature should be free to regulate or repeal any corporate charter it had created.[75]

St. George Tucker, a justice of the Virginia Supreme Court, was an exponent of this anti-corporation viewpoint. He argued that a corporation was a legal entity created by a

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[73]Fletcher v. Peck, 6 Cranch (U.S.: 1810) 87.

[74]Ibid; Barron v. Baltimore, 7 Peters (U.S.: 1833) 243.

[75]Blackstone, supra note 62, Commentaries, pp.466-485.

legislature which had the right to abolish it and take away its property. Tucker insisted that special privilege, such as a corporate charter, did not provide the basis of legitimate property rights. While holding to this view regarding corporate charters, Tucker limited the legislature's power over legitimate, individual property. If a legislature granted title to a "natural person," wrote Tucker, it could not deprive him of his property no matter what the circumstances as long as the owner used the property legally. For Tucker and those who shared his viewpoint, the issue of the sanctity of corporate property came down to the problem of what qualified as natural property. To Tucker, the holdings of legal entities did not qualify as a sacred or legally exempt form of property.[76]

Not everyone agreed with Tucker. Some argued that the courts should provide the owners of corporate charters the same security which Tucker extended to individual property. In a series of decisions, the Marshall Court extended constitutional interpretation to encompass the rights and possessions of men acting collectively as well as individually. In Bank of the United States v. Deveaux (1809), the Supreme Court for the first time dealt with a case involving the legal status of corporate property. Marshall, speaking for the court, did not directly confront the issue of the status of corporations and refused to call a corpor-

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[76]Turpin v. Locket, 6 Call (Va.: 1804) 113; Blackstone, supra note 62, Commentaries, appendix.

ation a "person," but he suggested that a good case could be made for doing so. In 1815, Supreme Court Justice Joseph Story ruled in Terret v. Taylor that the property rights of the owners of corporate stock were no different from the rights of individuals to non-corporate property. Story argued that once a property right had been permanently vested by a legislature, it could not be divested. If legislatures had the right to revoke corporate charters, said Story, they could revoke every land title in the country. He refused to agree to any more legislative control over corporate property than could be rightfully exercised over individual property.[77]

In 1819 Justice Story in Dartmouth College v. Woodward reaffirmed his conviction. Story described a corporation as an "artificial person" which acted as a natural person and therefore possessed all the security of property that a natural person enjoyed. However, the remainder of the Supreme Court failed to follow Story's lead and held that corporations were contracts and that corporate property could not be infringed upon by legislatures under contract law rather that constitutional law.[78]

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[77]Bank of United States v. Deveaux, 5 Cranch (U.S.: 1809) 61; Terret v. Taylor, 9 Cranch (U.S.: 1815) 43; Elliot v. Marshall (Mass.: 1807); Wales v. Stetson, 2 (Mass.: 1806) 146; Gerald T. Dune, Joseph Story and the Rise of the Supreme Court (New York: Simon and Schuster, 1971), pp.389-398.

[78]Dartmouth College v. Woodward, 4 Wheaton (U.S.: 1819) 603.

American courts never defended property rights at the risk of depriving government of its necessary powers. This is clear in Marshall's opinion in Providence Bank v. Billings (1830). Providence Bank sued Rhode Island for levying a tax on its property. Basing its argument on a previous decision of Marshall's in New Jersey v. Wilson (1812), the bank argued that since its 1791 charter had not contained a specific statement giving the state the right to tax its property and the state had not taxed the bank prior to 1822, to tax it now would violate the charter between the bank and the state guaranteeing tax immunity to the bank's property. To tax it without any explicit statement of right, declared the bank's lawyers, amounted to an unconstitutional taking of property.[79]

Marshall's argument denied the bank's situation was analogous to New Jersey v. Wilson in which the plaintiff's land title contained a specific guarantee of tax immunity. "That taxing power is of vital importance, that it is essential to the existence of government, are truths which cannot be necessary to reaffirm," declared Marshall. "The power of legislation and consequently of taxation operated on all the persons and property belonging to the body politic. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the

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[79]Providence Bank v. Billings, 4 Peters (U.S.: 1830) 514; New Jersey v. Wilson, 7 Cranch (U.S.: 1812) 164; Morton J. Horwitz, "The Transformation in the Conception of Property in American Law, 1789-1860," University of Chicago Law Review, XL (1973), pp.248-290.

public burdens, and that portion must be determined by the legislature." Marshall made it clear that in disputes between public need and private interests the courts would interpret private rights strictly and in the public's favor. With only occasional exceptions, Marshall's conception of taxing power and property rights became standard in American law.[80]

The Marshall Court avoided defining the limits of eminent domain and police powers. The closest it came was in Barron v. Baltimore (1833) when it ruled that the phrase in the Fifth Amendment, "nor shall property be taken for public use without just compensation," applied exclusively to federal action and not state. Several of the original state constitutions contained clauses similar to the Fifth Amendment, but none specifically granted to states the power to condemn private property. Nevertheless, by 1820, in every state except South Carolina the courts insisted that natural law imposed on governments a moral obligation not to "take" private property except for "public use" and with "fair" and "just" compensation.[81]

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[80]Barron v. Baltimore, 7 Peters (U.S.: 1833) 243; Stanley I. Kutler, Privilege and Creative Destruction: The Charles River Bridge Case (Philiadelphia: Lippencott, 1971), pp.142-145; James Kent was a prominent dissenter to Marshall's interpretation of the taxing power. Kent insisted that taxation was justified only so much as it protected and enhanced property and thus a taxpayer should receive an equivalent in services for his taxes.

[81]J.A.C. Grant, "The 'Higher Law' Background of the Law of Eminent Domain," Wisconsin Law Review, VI (1930-31), pp.67-85; Harry N. Schieber, "Road to Munn: Eminent Domain and the Concept of Public Purpose in the State

Chancellor James Kent of New York devoted much of his time during the first half of the nineteenth century to the issue of property and public power versus private rights. Kent's views, expressed in his court decisions and in his Commentaries on American Law, represent a natural rights statement of government's eminent domain and police powers versus the individual's right of private property. Kent accepted eminent domain as an inherent power of government, but he placed strict natural rights limits on its exercise. "The right of eminent, or inherent sovereign power," said Kent, "gives to the legislature the control of private property for public uses, and for public uses only." It could not be used to transfer the property of one person to another or to equalize wealth. Kent insisted that in the last resort the question of public use should be determined by the courts, not the legislature. In an important eminent domain decision, Gardiner v. Newburgh (1816), Kent ruled that compensation was due, not only for property directly taken, but also for losses resulting from a public project no matter how indirect the "consequential damages." In this case, New York has diverted a stream which destroyed the value of the plaintiff's property, even though the state had not acted directly upon his property. Kent ruled that the public's action had changed the nature of Gardner's property and prevented him from pursuing his livelihood. All costs,

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Courts," Perspectives in American History, V (1971), pp-329-403.

declared Kent, direct and indirect, for public enterprises must be distributed equally among all members of the society, and the unfortunate few whose property happen to be used or damaged should not be required to bear a disproportionate burden.[82]

Kent accepted the necessity of regulating private possessions in the general interest. "The government may," Kent wrote, "by general regulations, interdict such use of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens." But he insisted that all regulation must fall under the traditional common law understanding of "police powers." Unless certain property endangered the community's health, comfort, or moral well-being it was not subject to regulation under the police powers, and the burden on proof rested in the regulators, not the regulated.[83]

Pre-Civil War courts rejected many of Kent's restrictions on legislative power over property. For the most part, judges allowed legislators to determine public use in eminent domain proceedings and ignored any consideration of consequential damages. Even so, American courts never entirely repudiated the idea that individuals possessed a natural and inalienable right to sanction any actual "taking" of property without due process as administered by

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[82]Kent, Commentaries on American Law, 2d ed.(New York: O. Halsted, 1832), pp.338-339; Gardiner v. Newburgh, 2 Johns Ch. (N.Y.: 1816) 162.

[83]Ibid, Kent, Commentaries, pp.340-347.

the courts, and the insisted on compensation for losses.[84]

The court's attitude toward property rights was well illustrated in the Supreme Court's 1837 Charles River Bridge v. Warren Bridge ruling. In 1785 the Massachusetts legislature had granted the Charles River Bridge Company a forty-year charter to build and operate a toll bridge across the Charles River to Boston. Later, the legislature extended the charter to seventy years. In 1829, under popular pressure for a free bridge, the legislature chartered the Warren Bridge Company to build a second bridge adjacent to the first with the understanding that after six years the new bridge would become state property and toll free. The proprietors of the Charles River Bridge sued the Warren Bridge Company for destroying their property in the form of future profits which their monopoly privilege guaranteed until 1855.[85]

According the William Scott in his In Pursuit of Happiness, more than a single bridge monopoly was at stake.[86] At that time, railroads were rapidly supplanting toll roads

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[84]Kutler, supra note 80, Creative Destruction, chapter x; The Mohawk Bridge Co. v. Utica and Schenectady Railroad Co., 6 Paige (N.Y., 1837) 555; Tuckahoe Canal Co. v. Tuckahoe and James R.R. Co., 11 Leigh (Va.: 1840) 42; Mills v. County of St. Clair, 8 Howard (U.S.: 1850) 569; Bridge Proprietors v. Hoboken Company, 1 Wallace (U.S.: 1864) 116; Hoke v. Henderson, 2 Dev (N.C.: 1833) 1; Taylor v. Porter, 4 Hill (N.Y.: 1943) 140; Wynehamer v. State of New York, 13 (N.Y.: 1856) 378.

[85]Kutler, supra note 80, Creative Destruction.

[86]William B. Scott, In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century (Bloomington, IN.: 1977), p.128.

and canals as the most efficient form of transportation. If the courts recognized the older charter privileges of the canal and toll roads as an exclusive right of conveyance between communities, a government would have to condemn the toll roads and canals and compensate the owners for their loss before it could avail itself of the advantages of more rapid transportation. Many communities would have been deprived of all the advantages accruing from rail transportation because rail service was not then universal.

Led by Roger Taney, appointed chief justice by Andrew Jackson, the Supreme Court ruled that the bridge company's charter did not give it exclusive privilege to build and operate a bridge. In charter grants, ruled Taney, when the claims of private rights conflict with public good "nothing passes by implication." Since the company's charter did not specifically grant an exclusive right, the court could not assume that the legislature intended exclusiveness. Taney pointed out that the company's franchise had not been revoked and its bridge remained intact. Only its claim for future income had been impaired. Since property had not been actually taken or legal rights denied, the state did not owe the bridge company compensation. Taney insisted, "while the rights of private property are sacredly guarded, we must not forget the community also have rights, and that the happiness and well-being of every citizen depends on

their faithful preservation.[87]

Joseph Story disagreed with Taney and dissented in favor of the bridge proprietor's claims. Story insisted that the right to private property included a public "pledge that the property will be safe; that the enjoyment will be coextensive with the grant; and that success will not be the signal of a general combination to overthrow its rights and to take away its profits." To do anything less would violate the owner's natural right to his property and be in conflict with the "fundamental principles of a free government."[88]

Taney and Story agreed on essentials - the sanctity of private property and the necessity of social progress - but they appeared to have disagreed on priorities. Taney's reliance on a strict interpretation of the bridge company's charter allowed him to avoid the issue of damages. Since no right existed, there were no damages. Taney managed to do away with an unpopular monopoly without challenging its property rights. Story, however, like Kent, recognized that public progress frequently came at private expense, and he believed that justice dictated that persons should be compensated for all losses caused by public actions.

Finally in 1848 in the case of West River Bridge v. Dix, the Supreme Court squarely faced the issue of eminent

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[87]Charles River Bridge Company v. Warren Bridge Company, 11 Peters (U.S.: 1837) 420.

[88]Supra note 77, Terrett v. Taylor; supra note 78, Dartmouth College v. Woodward.

domain. In 1839 Vermont had authorized local governments to condemn any monopoly which they deemed inimical to the public good. Consequently the West River Bridge Company had its charter revoked, but with compensation. Daniel Webster argued on behalf of the company that such action violated the Federal Constitution by impairing the company's charter contract. Justice Peter Daniel, in speaking for the court, dismissed Webster's argument. Daniel pointed out that Webster had made the assertion "that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of a citizen." However, Daniel did recognize the right of both corporate privilege or individuals to compensation.[89]

Pre-Civil War jurists, in their interpretation of property rights managed to preserve the natural rights assumptions of the early colonists and the nation's founders in the context of rapid economic change while at the same time furthering development of traditional property rights in an American context. Following Marshall's example, American jurists shied away from any direct confrontation between their natural law assumptions and legislative power, preferring to protect property with the "contract" and "due process" clauses of the Federal Constitution. And by resisting any serious undermining of government's inherent right to eminent domain, set the stage for government to steadily

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[89]West River Bridge v. Dix, 6 Howard (U.S.: 1848) 507; Kutler, supra note 80, Creative Destruction, pp.145-146.

extend its public use and police powers up to the present day.

Latter Nineteenth and Early Twentieth Century

Following the Civil War, issues over the nature and limits of private rights versus governmental powers of eminent domain continued to generate debate. The right of the individual to use and enjoy his possessions seemed an essential part of the idea of liberty. During the latter half of the nineteenth century a number of persons came to view governmental economic intervention as a threat to liberty and property. Such persons frequently invoked the "inalienable right of property" to check what they considered unwise public policy.[90]

In the nineteenth century, Americans used public power to foster enterprise as state and federal governments regularly granted private groups corporate privileges, tax exemptions, tariff protection, and land.[91] In response to such practices several states in the 1870s and 1880s passed legislation designed to insure that private enterprises which affected the public interest also served the public interest. Legislatures drastically amended corporate charters, imposed confiscatory rate schedules on privately-

[90]Sidney Fine, Laissez Faire and the General Welfare State (Ann Arbor: University of Michigan Press, 1956).

[91]James W. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison: University of Wisconsin Press, 1956).

owned public utilities, and revoked franchises without compensation. Legislators defended their actions by claiming that since the property in question "affected the public interest" the sanctions of private property did not apply.[92]

Stephen Field, a justice of the United States Supreme Court viewed the situation as an open invitation to corruption and legislative tyranny and sought to establish clear distinctions between private property rights and governmental power.[93] Field based his definition of legitimate property rights on a "substantive" interpretation of the Fourteenth Amendment which stipulated that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." The phrase had been taken directly from an 1823 Supreme Court decision, Cornfield v. Coryell, in which the court had used the phrase "fundamental privileges and immunities" in a natural rights sense to mean citizens under any free government enjoyed the "right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[94]

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[92]Benjamin F. Wright, American Interpretations of Natural Law (Cambridge: Harvard University Press, 1931).

[93]Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897," Journal of American History (1975), LXI, pp.970-1005.

[94]Cornfield v. Coryell, Cir. Ct. (U.S.: 1823) 371; Howard Jay Grahm, Everyman's Constitution (Madison: State Historical Society of Wisconsin, 1968), pp.23-97.

In 1873 the Supreme Court in the Slaughter House Cases first faced the issue of whether or not the Fourteenth Amendment placed natural rights limitations on state's power and ability to regulate private economic and property interests. In 1869 the Louisiana legislature had granted to the Crescent City Livestock Landing Company a twenty-year monopoly for all butchering in and around New Orleans. The legislature had justified the monopoly as a health measure, although in fact it was a reward from the Republican-dominated legislature to some of its political friends.[95] A number of excluded butchers sued on the basis that the monopoly violated their Fourteenth Amendment rights. The Supreme Court upheld the monopoly on the grounds that the monopoly was a legitimate exercise of the state's police powers. Field dissented from the majority opinion, pointing out that the "privileges and immunities" clause had derived from Cornfield v. Coryell and therefore implied natural rights sanctions. Consequently, the Fourteenth Amendment prohibited states from abridging any citizen's "natural and inalienable" rights to life, liberty, and property. "The fundamental rights and privileges," wrote Field, "which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and not dependent upon his citizenship of any state. There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a rightful manner. It is nothing more

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[95]Slaughter House Cases, 16 Wallace (U.S.: 1873) 461.

or less than the sacred right to labor [property]." Field acknowledged that states could and should regulate any occupation that endangered the public health, good order, and general prosperity, but he refused to condone the use of state police powers to grant special property privileges to some and not to others.[96]

Field reaffirmed this interpretation of private rights in his dissent to the Supreme Court's decision in Munn v. Illinois (1877). In 1873 the Illinois legislature, in response to charges of monopolistic abuse, enacted rate schedules for Chicago grain elevators. The elevator operators sued the state on the grounds that such regulation deprived them of their property in the form of earnings without "due process." Chief Justice Morrison Waite in the majority opinion conceded that some regulation might be confiscatory and in violation of the Fourteenth Amendment, but he insisted that regulation of private enterprise in itself did not violate property rights. Waite declared that any operation which impinged on the public interest lost its private character. At that point, private property became subject to public control.[97]

Justice Field disagreed, stating that for property to be "clothed in the public interest" it must have either been given to the public or have resulted from a public grant. The majority's definition of "public interest" destroyed any

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[96]Ibid.

[97]Munn v. Illinois, 94 (U.S.: 1877) 113.

distinction between public and private property. Field declared that if the legislature, for reasons of public policy, insisted on regulating the grain elevators, it should condemn the property and compensate the owners.

The Supreme Court denied Field's claim that "use" was an essential and constitutionally protected aspect of private ownership. In a series of decisions in 1887 over the constitutionality of state legislation prohibiting the manufacture and sale of intoxicating beverages and oleomargarine, the Supreme Court continued to define state police powers broadly. Justice Harlan, speaking for the court, denied that a prohibition to "use" property in the manufacture of intoxicating beverages qualified as "taking." In a similar decision, and on the same grounds, the Supreme Court also in 1887 disallowed the suit of a manufacturer of oleomargarine whose enterprise had been prohibited by the Pennsylvania legislature.[98]

Field dissented vigorously to both decisions. He did agree with Harlan that states had the right to regulate or prohibit the use of property which it deemed socially harmful, but he nevertheless insisted that the state was obligated to compensate owners for their property. In the oleomargarine case, Field declared that "Under the guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the

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[98]Mugler v. Kansas, 123 (U.S.: 1887) 623; Powell v. Pennsylvania, 127 (U.S.: 1887) 678.

legislature is not final and conclusive." Field hoped to halt the legislative practice of exercising power arbitrarily under the cloak of police powers. Unless the courts limited legislatures' use of police power to its legitimate and intended purposes, argued Field, it placed all liberty and property at the sufferance of legislative majorities.[99]

Field did not address the issue of corporate property rights until the 1880s. When he did so, he chose to use the "due process" clause of the Constitution rather than the "privileges and immunities" clause. The significance of the shift was that the drafters of the Fourteenth Amendment choose the word "citizen" in the "privileges and immunities" clause, while in the "due process" clause the substituted the word "person."[100] In 1882 Roscoe Conkling suggested to the Supreme Court the significance of the change. Conkling had been a member of the Joint Committee of Congress which drafted the Fourteenth Amendment. He told the court that the Joint Committee intentionally substituted the word "persons" for "citizens" in order to include corporations under the protection of the Fourteenth Amendment. This gave Field the constitutional justification he required to protect investment property from state legislatures. In 1884 on the circuit bench, in Santa Clara County v. Southern Pacific Railroad, Field accepted Conkling's assertion and

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[99]Ibid, Powell v. Pennsylvania, pp.691-692, 696.

[100]Bartmyer v. Iowa, 18 Wallace (U.S.: 1873) 129; Loan Association v. Topeka, 20 Wallace (U.S.: 1875) 655; Graham, supra note 39, Everyman's, pp.98-151.

used it to strike down Santa Clara County's railroad taxes which discriminated against Southern Pacific Railroad. Field said that corporate property, which had not been created by the state, enjoyed all the sanctions of individual property. In 1866 the Supreme Court heard the Santa Clara case on appeal and accepted Field's opinion without comment or dissent.[101] For the next fifty years the Santa Clara decision determined the court's policy toward state regulation of corporate property. In a long series of decisions the Supreme Court held that while states could regulate corporate activities, states could not regulate to the point of confiscation of property. The court's determination of "reasonable regulation" meant that stockholders' assets were legally protected. Anything less violated stockholder's rights to property.[102] According to William Scott, the significance of the decision lay in Field's association of the rights of corporations with those of the natural rights of citizens, marking an important change in attitude towards investment property.[103]

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[101]Graham, supra note 39, Everyman's, pp. 98-151; San Mateo County v. Southern Pacific Railroad, 116 (U.S.: 1882) 138; Santa Clara County v. Southern Pacific Railroad, 18 Cir. Ct. (U.S.: 1884) 345.

[102]Railroad Commission Cases, 116 (U.S.: 1886) 307; Chicago, Milwaukee, and St, Paul v. Minnesota, 134 (U.S.: 1890) 418; Symth v. Ames, 169 (U.S.: 1898) 466; ICC v. Cincinnati, New Orleans, and Texas Pacific Ry, 167 (U.S.: 1897) 479; Icc v. Illinois Central Ry, 215 (U.S.: 1910 452; Minnesota Rate Case, 230 (U.S.: 1913) 352; Northern Pacific Ry v. No. Dakota, 236 (U.S.: 1915) 585.

[103]Scott, supra note 86, p.146.

William Graham Sumner, like Field, accepted the transformation of the American economy as necessary and desirable, and yet hoped to preserve individual liberty and private property.[104] Sumner, who was a political and social scientist and America's best-known social darwinist, received an appointment to Yale in 1872. Sumner believed that government should restrict itself to protecting private property. He said that, for the time being, governments could best serve mankind if they limited themselves to the maintenance of civil order and the protection of laborers in their wages and capitalists in their savings. Sumner concluded that the most successful societies were those which allowed liberty and therefore protected property.[105] Sumner included under the label of "property" anything which an individual acquired through his own labors and self-denial. Although his arguments did not become universally accepted, as governmental controls increased in the last decades of the nineteenth century some Americans turned to the arguments of Sumner and Field to defend a free market economy and the protection of private property. According to Benjamin Wright and Roscoe Pound, Field's ideas towards government and private property became embodied in American

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[104]William Graham Sumner, What the Social Classes Owe to Each Other (Caldwell, Idaho: Caxton Printers, 1952).

[105]William Graham Sumner, Social Darwinism: Selected Essays of William Graham Sumner, ed. Stow Persons (Englewood Cliffs, N.J.: Prentice-Hall, 1963), p.75.

Law.[106]

Not all persons of this era shared the view that private property was sacred in one sense or another, but rather espoused property concepts that were closer to collectivism and socialism. While the courts generally held to the traditional views of private property rights, a discussion of certain nineteenth and early twentieth century dissenters will illustrate the point that the debate over property rights and governmental authority has tended to remain continuous. The discussion also serves to illustrate the beginning of a trend toward concern over social welfare issues that the court ultimately adopted to the detriment of private property rights in the twentieth century.

Henry George, managing editor of the San Francisco Times published his theories in 1879 with his work on political economy Progress and Poverty. Borrowing from David Ricardo's theories of land, labor, and capital, George believed in redistribution of land on a national scale to allow the poor opportunity to earn a living from their own labor.[107] To put an end to what George saw as injustice, he

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[106]Benjamin F. Wright, The Growth of American Law (Chicago: University of Chicago Press, 1970); Roscoe Pound, "Liberty of Contract,' Yale Law Journal, XVIII (1909), pp.454-487.

[107]John L. Thomas, "Utopia for an Urban Age: Henry George, Henry Demorest Lloyd, Edward Bellamy," Perspective in American History, VI (1972), pp.135-136; Charles Barker, Henry George (New York: Oxford University Press, 1955); Henry George, Progress and Poverty (New York: Robert Schlakenbach Foundation, 1937), pp.6-12, 167, 188, 242-252, 294, 296.

proposed abolishing all forms of taxation except a single ad valorem tax on land. This "single tax" would be equal to the sums a landowner otherwise would have charged for the use of his land and would force landowners to either utilize their land or rent it to someone who would.[108] This was a proposed tax on the land only, since George believed that improvements of land were fruits of an individual's labor which he owned through natural law. George was convinced that his "single tax" would lower rents and allow more people the opportunity to acquire property, insuring that all wealth that accrued from community enterprise would redound to the public.[109] Unfortunately, from an economic perspective, there is no reason to suppose this tax would lower land rents unless government provided a subsidy to the land renters.

In addition, four individuals expressed much of the consensus of American collectivists, viewing the traditional reverence for private property rights as a primary cause of much of the nation's social problems. Edward Bellamy published Looking Backward in 1888, which sold over 160,000 volumes in the first two years after publication and continued to be widely read through the 1920s.[110] Bellamy's

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[108]Ibid, George, Progress and Poverty, pp.81-162, 242-252.

[109]Ibid, pp.397-453.

[110]Edward Bellamy, Looking Backward 2000-1887, ed. John L. Thomas, (Cambridge: Harvard University Press, 1967); Equality, (New York: Appleton, 1897).

ideal society allowed no private ownership of productive property. He considered such property inconsistent with justice, with all moral claims to property accruing to society rather that the individual.[111]

Thorstein Veblen, educated at Carleton, Johns Hopkins, Yale, and Cornell, accepted the idea of progress and its desirability, yet discounted the economic factors in favor of what he termed "man's need to obtain self-respect."[112] In Veblen's opinion, contemporary property rights were nothing more than legalized stealing, inciting that natural rights claims to property was an effort by "nonproducers" to justify their exploitation of others. Unlike Bellamy, Veblen rarely offered any remedies for what he considered gross injustices of modern property rights in the United States.[113]

Herbert Croly and John Dewey agreed that a more just and personally fulfilling society requires a radical new attitude toward the individual and private property, but the two disagreed over the role of the individual in economic and political decision making.[114]

Croly, a reformer and editor, apparently influenced both Theodore Roosevelt and Woodrow Wilson through his The Promise of American Life which was published in 1909.

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[111]Ibid, p.88.

[112]Veblen, The Theory of the Leisure Class (New York: Washington Square Press, 1964).

[113]Veblen, "Beginnings of Ownership," American Journal of Sociology, VI (1898), pp.352-365.

[114]Scott, supra note 86, p.170.

Roosevelt, for example, adopted Croly's term "new nationalism" as the theme of his 1912 presidential campaign.[115] To Croly, American's commitment to the concepts of individualism, equal rights, and private property threatened to pull society apart, with such ideas discouraging the adoption of policies he considered necessary to the national welfare. By insisting that government honor claims to private property, present property owners were driving the nation to the brink of economic and social chaos. He even urged the government to use its police and taxing powers to eliminate small property owners and entrepreneurs, believing that all claims to ownership and production should be based on efficiency.[116]

John Dewey shared some, but not all, of Croly's ideas. Educated at the University of Vermont and Johns Hopkins, Dewey dominated much of American intellectual life in the first half of the twentieth century according to Paul Conkin.[117] Dewey agreed with Croly upon the need for a "new nationalism" and the necessity for some type of welfare state, but Dewey did not discount the importance of material well-being to individual happiness. Dewey though that to speak of individual liberty and property was misleading and foolish. and that Americans must accept the communal reality

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[115]Paul K. Conkling, Puritans and Pragmatists (New York: Dodd, Mead, 1968), pp.345-404.

[116]Ibid.

[117]Ibid.

of modern life. To Dewey, individual ownership of property and production foreclosed all chance of creating a personally fulfilling society.[118]

Despite the writings and work of persons such as George, Bellamy Veblen, Croly, and Dewey, American tradition remained essentially true to natural rights concepts of private property. The concept of eminent domain and government's police powers continually grew as did the national economy, while the concept of what constituted "persons" and "property" certainly grew as well as the nation progressed, with the property rights ideas of Sumner and Field remaining important to the American legal system up until the time of the Great Depression of the 1930s.

During the depression of the 1930s, the United States Supreme Court abandoned "substantive due precess" as a defense of certain property rights, particularly for large corporations, as noted in the first chapter. The change was a direct consequence of Franklin Roosevelt's appointment of several justices who choose to defend the welfare state. Ironically, one of the most consistent critics of Roosevelt's New Deal and its various successors was one of Roosevelt's early advisors, Raymond Moley. Moley used much of Sumner's writings as the basis for his defense of free enterprise and private property.[119] After leaving the Roose-

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[118]John Dewey, Individualism Old and New (New York: Capricorn Books, 1962).

[119]Wright, supra note 106.

velt administration, Moley insisted that Roosevelt had abandoned the true tenets of "progressivism" and adopted "statist" policies. Moley described "statism" as a political philosophy that advocated ever-expanding governmental intervention into individual's economic liberties. Moley accepted the necessity of some governmental regulation but remained committed to free enterprise and private property.[120]

Moley offered several policies he thought would curb the worst governmental abuses. First, government should avoid ownership and management of any economic enterprise, other than those related to strictly public goods such as public schools and roadbuilding. Secondly, government should impose regulations only when necessity dictated, while reducing existing regulation over private property.[121] Finally, Moley wanted Americans to honor the constitutional division between state and federal government. Whenever possible, states should assume responsibility, checking a potentially tyrannically federal government.

Conclusion

American's general commitment to private property

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[120]Raymond Moley, After Seven Years (New York: Harper and Row, 1939) and How to Keep Our Liberty: a Program for Political Action (New York: Alfred A. Knopf, 1952), pp.1-12.

[121]Ibid, Moley, How to Keep Our Liberty, p.19.

rights has, in many ways, become almost ritualistic since the nation's founding over two centuries ago. Americans in the past, as well as today, do seem to have supported some notion of private ownership as well as certain rights to that ownership.

Yet, as this discussion shows, despite general agreement, Americans have not all agreed as to the exact meaning of property rights or the ends they should serve. Jefferson and Hamilton, for instance, both endorsed private property ownership, but each defined property rights differently. Early jurists, in their interpretation of property rights, managed to preserve the natural rights assumptions of the nation's founders while promoting a rapidly expanding national economy. Using the "contract" and "due process" clauses of the Federal Constitution, and by resisting any serious undermining of government's inherent right to eminent domain, these early jurists set the stage for the steady expansion of government's public use and police powers.

In the latter half of the nineteenth century, the doctrine of substantive due process allowed for protection of property in the form of takings without just compensation, while at the same time acknowledging the right of government to regulate property, especially corporate property. Again, during this period, Americans were faced with the dilemma of how to protect property and allow for the increasing transformation of the national economy into an industrialized state. As noted, like in many other times in

American history, there was substantial debate during this period over property rights versus public interest and the interests of society as a whole. That debate continues to this day.

This discussion has pointed to the various meanings Americans, up until the middle twentieth century, have attached to the image of property and how these images change as economic and historical circumstances change. Additionally, in the late nineteenth and early twentieth century viewpoints began to emerge voicing concern over social needs, health, safety, and welfare that contributed to the decline of substantive due process and the eventual movement by the court away from its previous concern over private property rights.

Finally, this discussion provides important background for a discussion of the United States Supreme Court and eminent domain decisions that, over the years have contributed to modern eminent domain law in this nation and the current judicial perspective regarding private property rights and governmental power, a concern that now seems to place priority on process and judicial deference over substance.

CHAPTER III

AMERICAN LAW, THE SUPREME COURT, AND EMINENT DOMAIN

Historical concepts of private property rights provide an important perspective for viewing the American court's treatment of eminent domain issues over time. But, in order to fully understand the court's current position regarding these issues, it becomes just as important to view the court's own interpretation of eminent domain concepts, legal rules, and procedures. The court's treatment of eminent domain has nearly always included the balancing of perceived public needs against private property rights expressed, or implied, in the United States Constitution. However, as this discussion will show, the court's original concern over fundamental issues has slowly diminished over time.

Concern Over Just Compensation

The Fifth Amendment to the Federal Constitution, specifically the eminent domain clause, undertakes to redistribute certain economic losses inflicted by public projects and improvements so that they will fall upon the tax-paying public at large rather than wholly upon private property owners who happen to lie in the path of the project.[122] As

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[122]United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

an attribute of sovereignty, this power of eminent domain inheres in every independent state and cannot be surrendered. Even if a state attempts to remove it by contract, it may be resumed at will.[123] As the court explained in Pennsylvania Hospital v. Philadelphia (1917), the "power of eminent domain was so inherently governmental in character and so essential for the public welfare that it was not susceptible of being abridged by agreement."[124]

The American courts have taken a pragmatic view as to the genesis of the power of eminent domain, reasoning that the state can enact any law affecting persons or property within its jurisdiction that is not prohibited by some clause of the Federal Constitution. The court's reason that as the taking of any property within the jurisdiction of a state for the public use upon payment of compensation is not prohibited by the Federal Constitution, it necessarily follows that it is within the sovereign power of a state.[125]

The early cases were not so much concerned with the existence of the power of eminent domain as they were with the right to compensation after the power was exercised. The Federal government was prevented from exercising the power of eminent domain without making compensation by the

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[123]Georgia v. Chattanooga, 264 U.S. 472, 480 (1924); United States v. Village of Highland Falls, 154 F.2d 224, 226 (2d Cir.), cert. denied, 329 U.S. 720 (1946).

[124]Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917); The Constitution of the United States of America, Analysis and Interpretation (GPO, 1964), p.397.

[125]Supra note 56, section 1.14.

Fifth Amendment, but the states did not always have such a provision in their constitutions, and it was not until the 1876 Munn v. Illinois decision that the Supreme Court conceded that, under the Fourteenth Amendment, some regulations enacted by states might be confiscatory and thus declared unconstitutional.[126] The earlier approach of the courts was to find the requirement in the natural law. In the 1810 Fletcher v. Peck decision, Chief Justice Marshall said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any by prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation...."[127] Justice Johnson, under his own separate opinion in the case wrote:

> I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.[128]

In Monongahela Navigation Co. v. United States (1893), the Supreme Court considered efforts of Congress to set parameters for "just compensation."[129] By Act of August 11, 1888, the Secretary of War was authorized to purchase a lock and dam on the Monongahela River near Pittsburgh from the

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[126]Chicago B.&O.R.R. v. Chicago, 166 U.S. 226 (1897).

[127]Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

[128]Ibid, p.143.

[129]Monongahela Navigation Co. v. U.S., 148 U.S. 312 (1893).

Monongahela Navigation Company. In the event a voluntary purchase could not be made, condemnation proceedings were authorized; "Provided, that estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated."[130]

The court decided that the franchise that Congress attempted to exclude in connection with arriving at a price for just compensation "was as much a vested right of property as the ownership of the tangible property... and that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property." As to the respective functions of the legislative and judicial branches, the court, again in Monongahela Navigation Co. v. United States, said:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes - that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[131]

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[130]Congressional Act of August 11, 1888, 25 Stat. 480.

[131]Supra note 129.

Vestiture of Eminent Domain

Exercising the power of eminent domain usually involves more than one branch of government. Congress, within its range of powers set out in the Constitution, decides on a particular course of action. If, to accomplish this course of action, it is necessary to infringe upon, or to take away from, property rights of others, acquisition of these property rights must be accomplished by negotiation or by seizure. In either event, the implementation of the congressional program is normally carried out by the executive branch of the government. Usually, the actual taking of the property will occur when the executive branch acts to deprive the property owner of his property rights. However, this is not always the case. In certain instances Congress has used a legislative approach to acquisition; by Act of Congress, title is vested in the United States at the time of enactment of the law.[132] For example, Congress took this approach in establishing the Redwood National Park in the state of California under the Act of October 2, 1968. The rationale was to expedite establishment of the park and to avoid serious changes in the cost of acquiring the land that might occur after passage of the legislation.[133]

Whether property is being taken for a "public use" is almost entirely a legislative question according to the

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[132]Miller v. United States, 620 F.2d 812 (Ct. Cl. 1980).

[133]Congressional Act of October 2, 1968, Pub. L. No. 90-545, 82 Stat. 931.

court's rationale. The only inquiry a court can make is whether it is within the constitutional power of Congress to enact the legislation that authorized the taking of the particular property.[134] However, the determination of what is just compensation under the Fifth Amendment is the function of the judicial branch.[135]

The decision to take is essentially legislative. This was the message conveyed in 1952 to President Truman in Youngstown Sheet & Tube Co. v. Sawyer. In the Youngstown case, a dispute between the steel companies and their employees led to a notice by the employee's union that a strike would begin on April 9, 1952. President Truman concluded that work stoppage would immediately jeopardize the national defence during the time the United States was involved in the Korean War. Truman ordered the Secretary of Commerce to seize the mills and keep them running. The President sent two messages to Congress advising of his decision, but at the time of the Supreme Court decision, Congress had not acted. The steel companies brought suit against the Secretary of Commerce, charging that the seizure was not authorized by Congress and therefore was unconstitutional.[136] The court agreed, with Justice Black writing for the majority:

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[134]Supra Note 129, supra note 132.

[135]Supra note 129.

[136]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which a power can fairly be implied.
>
> and
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> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces...[We] cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.
>
> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the Framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks is bad...The power of Congress to adopt such public policies as those proclaimed by the order is beyond question.[137]

Justice Douglas, in a concurring opinion, reasoned that the President's action was a legislative act which was a condemnation of property; since the Fifth Amendment places a duty of payment on the government when it condemns property, the power to condemn must lie with the branch of government having the right to raise revenues, that is, Congress.[138]

However, in another instance nearly thirty years later, the court agreed with presidential action. As part of the agreement for release of the American hostages taken by Iran in 1979, President Carter nullified court attachments of

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[137]Ibid, pp.585, 587-589.

[138]Ibid, pp.630-632.

Iranian property located in the United States and transferred those assets out of the United States. The First Circuit reasoned that there was no taking of property because the Presidency was acting within the purview of an act of Congress and the President would lack authority "only if the Federal Government as an undivided whole lacks [such] power." Since the asserted property interest was limited by this same act of Congress, there was no taking of property.[139]

Constitutional Limitations on the Legislature

In determining whether the legislative body has acted within its authority in providing for the use of power of eminent domain, a basic difference exists between acts of Congress of the United States and acts of the various state legislatures. The federal government is one of delegated powers, whereas the state governments are sovereigns in the traditional sense, according to the Supreme Court in Munn v. Illinois which was decided in 1876.[140] Consequently, state constitutions are limitations upon an otherwise absolute legislative power and not grants of authority to the legislature. An example of this is that the Supreme Court has held that states be required to be admitted with powers

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[139]Chas. T. Main International v. Kluzestan Water, 651 F.2d 800, 808-809 (1981).

[140]Munn v. Illinois, 94 U.S. 113, 124 (1876).

possessed by the original states that adopted the Constitution. Therefore, new states come into the Union as equals.[141] The basic legal inquiry in eminent domain as to the authority of state legislatures is whether the constitution (be it federal or state) prohibits what is sought to be done.

On the other hand, when inquiry is made into the authority of the federal legislature, the authorization must be found to have been granted in the United States Constitution.[142] As a practical matter the federal government probably has as extensive powers as the states, since the general welfare clause of the Constitution has been construed as an outward limit of those powers, according to the 1936 Supreme Court ruling in United States v. Butler.[143]

This discussion is largely academic for the restrictions in the United States Constitution, and those normally found in state constitutions, limit the exercise of the power of eminent domain to cases where the property is taken for a public use. There are two approaches to the "public use" limitation. First, the Fifth Amendment restriction against taking "private property... for public use, without just compensation" is considered to imply the public use

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[141]Coyle v. Oklahoma, 221 U.S. 559 (1911); Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892).

[142]Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890).

[143]United States v. Butler, 297 U.S. 1, 65-67 (1936); United States Constitution, Article I, Section 8, cl. 1.

limitation addressed by the court in the 1885 Cole v. LaGrange decision.[144] And second, the due process clause of the Fourteenth Amendment providing that "No person shall be deprived of... property, without due process of law" includes the same restriction as held by the court in 1896 in Fallbrook Irrigation Dist. v. Bradley[145]. Although the Fifth Amendment only applies to the federal government, the states, either by adoption of a similar constitutional provision or by the force of the Fourteenth Amendment, are subject to the same limitation.[146] The applicability of the Fourteenth Amendment to the states in such cases was established in the 1897 Supreme Court decision in Chicago, Burlington, and Quincy Railroad Co. v. Chicago. In this decision, the court held that the Fourteenth Amendment due process clause prohibits states from taking property for public use without compensation.[147] It is difficult to envision a situation where property might be taken for a public use and the government body would not have the power to accomplish the object of the public project under current legal interpretations (a matter which will be discussed further into this study). The phrase "public use" is so flexible that the courts and legislatures are able to make

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[144]Cole v. LaGrange, 113 U.S. 1, 7-8 (1885).

[145]Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 157-158 (1896).

[146]Olson v. United States, 292 U.S. 246, 254 (1934).

[147]Chicago, Burlington, and Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

it correspond with the court's ideas of the constitutional powers of the sovereign.

The rationale for protecting private property from unwarranted interference is firmly rooted in our nation's concept as to how society should function as discussed previously. This was recognized in Wilkinson v. Leland (1829), when Justice Story said, "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without restraint."[148]

The Supreme Court said much the same in 1972 in Lynch v. Household Finance Corp.:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental inter-dependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.[149]

This does not detract from the fact that condemnation is an action taken against property rather than against the owner. The Fifth Amendment states, "[N]or shall private property be taken for public use without just compensation." So, in Monongahela Navigation Co. v. United States the court wrote: "And this just compensation, it will be noticed, is

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[148]Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

[149]Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

for the property, and not to the owner. Every other clause in the Fifth Amendment is personal.... Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken."[150]

Public Use

The phrase "public use" is vague enough to permit widely divergent results from equally honest attempts at objective analysis, and yet is a key to the issues surrounding private property rights just as fair compensation is another key. What, in fact, constitutes taking of property for "public use"? At one end of the spectrum is the rule that a taking by the government of property for a "private" use, or the taking of property for no particular use, would be so inimical to the basic concepts of our Constitution as to be a taking without due process of law.[151] Consistent with this limitation was the early concept that "public use" as used in the Constitution meant "used by the public."[152]

This narrow interpretation does not harmonize with decisions upholding the use of the eminent domain power to

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[150]Supra note 129, p.329.

[151]O'Neil v. Leamer, 239 U.S. 244 (1915).

[152]Supra Note 56, p.506-507.

take property from one private ownership for transfer to another private ownership. For example, consider the dictum in Highland v. Russell Car & Snow Plow Co. (1929) where the court was considering a claim that compensation should be paid to a coal supplier who was required to deliver coal to a manufacturer at a price set by the government. The court said:

> Unquestionably, the production of such equipment was, in the state of war then prevailing, a public use for which coal and other private property might have been taken by exertion of the power of eminent domain [that is, if it had not been delivered voluntarily at the price set by the government - the equipment was snowplows for railroads].[153]

In several wartime cases, decisions consonant with the Supreme Court's dictum were made. For example, United States v. 243.22 Acres sustained the condemnation of land by the United States that it, in turn made available to the Republic Aviation Corporation under a lease, with option to buy, agreement. Republic was manufacturing airplanes for the United States.[154]

Another group of cases inconsistent with the "used by the public" concept are those involving a taking of property to substitute for property taken by government action. An example is when the United States takes land to relocate a railroad's right-of-way. United States v. Miller (1943) and Woodville v United States (1946) are both examples of such

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[153]United States v. 243.22 Acres, 129 F.2d 678 (2d Cir. 1942), cert. denied, 317 U.S. 698 (1943).

[154]Ibid.

decisions.[155] The case of Brown v. United States (1923) illustrates this principle well. The United States took most of a town along the Snake River and, as partial compensation, made available a new town site, which new town site was purchases in part and condemned in part. The Court considered this a "reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted."[156]

It might be reasoned that the "public use" limitation in the Fifth Amendment is the reasonable relationship between the need to acquire the specific property and the purpose of the constitutional project; the actual use to be made of the private property being of no importance. A general statement of the rule applied is found in Swan Lake Hunting Club v. United States (1967): "Where both public and private use are to be made of property sought to be condemned, the exercise of the power will not be defeated if the private use is sufficiently subordinate to the public use as to be incidental to it."[157]

As these cases indicate, the trend has been toward a liberal interpretation of "public use," culminating in United States v. Welch (1946), Berman v. Parker (1954), and

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[155]United States v. Miller, 317 U.S. 369 (1943); Woodville v. United States, 152 F.2d 735 (10th Cir.), cert. denied, 328 U.S. 842 (1946); Brown v. United States, 263 U.S. 78 (1923).

[156]Ibid, Brown, p.82.

[157]Swan Lake Hunting Club v. United States, 381 F.2d 238, 242 (5th Cir. 1967).

Hawaii Housing Authority v. Midkiff (1984).[158]

Roger P. Marquis, then Chief, Appellate Section, Lands Division, U. S. Department of Justice, analyzed the first two cases, Welch and Berman, in an article entitled, "Constitutional and Statutory Authority to Condemn" in 1958, and stated, "The issue of public use thus raises the question not of constitutionality of the condemnation as such, but of constitutionality of the program or project for which acquisition of the land is sought."[159]

In short, if the government is acquiring the property for a constitutional purpose, the acquisition is for a public use without regard as to whether the property being acquired is actually to be used by the public. Justice Reed states this succinctly in Welch: "Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, a political or judicially non-reviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property..."[160]

In the Welch case, the court held that T. V. A. was authorized to acquire excess lands beyond those actually needed for a dam and reservoir in order to save money by

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[158]United States v. Welch, 327 U.S. 546 (1946); Berman v. Parker, 348 U.S. 26 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[159]Roger P. Marquis, "Constitutional and Statutory Authority to Condemn," 43 Iowa Law Review (University of Iowa, 1958), pp.170-173.

[160]Supra note 158, Welch, p.557.

eliminating the need to replace a washed-out road giving access to a few families living on isolated tracts to a national park. As to the practical aspects of the situation, the court explained:

> Neither the fact that the Authority wanted to prevent a waste of government funds, not that it intended to cooperate with the National Park Service detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost. Cf. Old Dominion Co. v. United States, supra. And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public. Brown v. United States, 263 U.S. 78.[161]

In Berman v. Parker, a landmark case noted in the first chapter, the owner of a department store within an area slated for urban renewal within the District of Columbia attacked the constitutionality of taking his nonslum, nonblighted property. Two aspects of the Act of Congress were highlighted in the opinion: (1) the land, once condemned, was to be sold to private interests, and in fact preference was to be given to private enterprise; and (2) the renewal project covered an area larger than the slum or blighted property.

As to the use of private enterprise to accomplish a public purpose, Justice Douglas wrote for the court: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.

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[161]Ibid, p.554.

For the power of eminent domain is merely the means to the end." Respecting the area-wide planning approach, Justice Douglas continued:

> It is not for the courts to oversee the choice of the boundary line nor sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.[162]

The 1984 case of Hawaii Housing Authority v. Midkiff is perhaps a culmination of this policy, since no further landmark cases have been closed by the courts bewteen 1984 and today. As discussed at length in the first chapter, the court upheld a Hawaii statute that permits the state to condemn private land so that the tenants who occupy the land can then purchase it. The court sanctioned the taking of private land from large landowners for resale to current leaseholders, justifying its actions under the "public use" doctrine. The fact the Hawaiian legislature deemed it in the public interest to reduce the concentration of land holdings was justification in the eyes of the court for upholding the statute.[163]

Furthermore, the United States may condemn any land within the nation, regardless of ownership or current use. There is no doctrine of comparative best use in federal eminent domain. Thus, the fact the land is owned by the

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[162]Supra note 158, Berman, pp.33-34.

[163]Supra note 158, Hawaii, p.230.

state is no barrier to its condemnation by the United States.[164] It also does not matter, according to the court in United States v. Carmack (1946), if the state is putting it to a public use of its own.[165] On the other hand, the state may not condemn property held by the United States, whether held in a proprietary or governmental capacity.[166]

What if various subdivisions of a state have conflicts among themselves as to which public use a particular property will be devoted? In general, the state is supreme and has the right to take property of one of its subdivision.[167] As to the priority of one subdivision vis-a-vis another, a study of the enabling legislation is necessary to see which agency the legislature intended to have the superior right.

Delegation of Power

The inherent power of eminent domain is only vested in the state and federal governments; it is not possessed by municipalities, counties, or other political subdivisions, according to the court in Cincinnati v. Vester (1930) and P.

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[164]Oklahoma v. Atkinson Co. 313 U.S. 508, 534 (1941).

[165]United States v. Carmack, 329 U.S. 230, 237 (1946).

[166]Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

[167]35 A.L.R. 3d 1293.

Nichols in his 1971 work, Eminent Domain.[168] The use of eminent domain by these subsidiary political bodies, and by private parties, is the result of the delegation of the power by the legislatures.

Under our nation's system of three separate branches of government, one branch cannot abdicate its function to another branch: otherwise, we would lose our system of checks and balances. Congress may not delegate its legislative powers. The nondelegable legislative powers include the right to decide what the law should be. However, according to the Supreme Court in Panama Refining Co. v. Ryan (1935), the functions to be performed in administering a law may be delegated.[169] Therefore, the legislature may decide that a highway, for example, should be built, but it need not decide it exact location; or, Congress may decide that a post office should be built in a community, but it need not decide the precise location.[170]

Very seldom does the court find the delegation of the eminent domain power to be excessive for lack of identification of the property to be taken.[171] There is no constitutional requirement that affected parties have notice of a

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[168]Cincinnati v. Vester, 281 U.S. 439, 448 (1930); Supra note 56, Section 3.22.

[169]Panama Refining Co. v. Ryan 293 U.S. 388, 420-433 (1935).

[170]Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

[171]Ibid, p.106.

contemplated delegation, so long as they can ultimately test the constitutionality of the taking in court, according to the 1919 decision in Bragg v. Weaver.[172]

There is no limitation on the entity to which the delegation may be made so long as the power is exercised for public use. According to P. Nichols in Eminent Domain, delegations have been made to all sorts of public corporations and bodies.[173] In addition, the court has also upheld delegations that have been made to private corporations and individuals, as seen in Boom Co. v. Patterson (1878), Cherokee Nation v. Southern Kansas Railway (1890), and Clark v. Nash (1905).[174]

The United States v. Carmack decision in 1946 illustrates the broad delegation often involved in federal condemnation. There the United States was seeking to condemn a site for a post office and customhouse in Cape Girardeau, Missouri. The site selected was part of a public park and was selected by the Federal Works Administrator and the Postmaster General acting jointly. Their authority was based on the general Condemnation Act of August 1, 1888, which authorized condemnation by officers of the government when they were authorized to procure real estate for public uses, and the Public Buildings Act of May 25, 1926, which

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[172]Bragg v. Weaver, 251 U.S. 57 (1919).

[173]Supra note 56, Section 3.22.

[174]Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); Cherokee Nation v. Southern Kansas Railway, 135 U.S. 641 (1890); Clark v. Nash, 198 U.S. 361 (1905).

authorized the Federal Works Administrator and the Postmaster General to select cities and sites for post office buildings. As the Supreme Court noted, "Neither Act imposed expressly any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions."[175] Continuing in the Carmack decision, the court said:

> The Government here contends that the officials designated by Congress have been authorized by Congress to use their best judgement in selecting post office sites. It contends also that if the officials so designated have used such judgement, in good faith, in selecting the proposed park site in spite of its conflicting local public uses, the Federal Works Administrator has express authority to direct the condemnation of that site. We agree with those contentions.... It was within the legislative power to exclude from consideration of its representatives this or other sites, the selection of which might interfere with local governmental functions. Such an exclusion would have been an act of legislative policy. We find no such express language or necessarily implied exclusion in the broad language of these Acts.[176]

The court, however, distinguished between the statutes in the Carmack case and situations where the power of eminent domain is granted to others, such as public utilities. In these grants to others, no powers greater than those expressed or necessarily implied would be included. In contrast, grants of the sovereign to its own agents carry the sovereign's full powers except those excluded expressly

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[175]Supra note 165, p.236.

[176]Ibid, p.243.

or by necessary implication.[177]

The United States Claims Court and the United Court of Appeals for the Federal Circuit (which, since 1982, include the now defunct United States Court of Claims) attempts to be careful regarding condemnation cases to be sure the taking "if not expressly authorized or directed by Congress, at least is a natural consequence of Congressionally approved measures," according to the opinion in NHB Land Co. v. United States (1978).[178] Otherwise, the court would, in its words, "strike a blow at the power of the purse" which it stated is exclusively assigned to Congress. The presence or lack of delegation may be clear when Congress only gives the executive branch authority to acquire property after specific action is taken vis-a-vis Congress.[179]

Judicial Review of Implementation of Legislative Programs

Although the legislative branch of government has the right to exercise the power of eminent domain, any attempted exercise of the power is always subject to four types of judicial review, according to P. Nichols in Eminent Domain.[180] First, a determination of whether the power is

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[177]Ibid.

[178]NHB Land Co. v. United States, 576 F.2d 317, 319 (1978).

[179]Armijo v. United States, 663 F.2d 90 (Ct. Cl. 1981).

[180]Supra note 56.

being exercised for a "public use." Second, a determination of whether the legislature could constitutionally delegate, or divest itself of, it constitutional responsibility in the manner in which it has proported to do so. Third, whether the executive branch is acting within the terms of the delegation. And, fourth, if the executive branch is acting within the scope of the delegation, whether its selection of the manner of implementation is so arbitrary that it should be judicially thwarted. Having already discussed the first two areas of potential review, this discussion will concentrate on the third and fourth areas of judicial review.

Involved in any exercise of the eminent domain power are determinations of which property should be taken, when it should be taken, and the precise dimensions of the property in quantity and quality. Justice Reed in his concurring opinion in United States v. Welch, indicated that the fourth type of review listed above might not exist. He said: "Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, a political or judicially non-reviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property."[181] However, there are circuit court cases indicating that if the executive branch acts "arbitrarily or capriciously" or uses "bad faith" in exercising the delegated powers, the

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[181]Supra note 158, Welch, p.557.

judiciary will intercede.[182] Such language is admittedly ambiguous, but nevertheless allows for a potential legal argument against government actions. An examination of cases such as United States v. Agee (1963), Patton & Co. v. United States (1932), City of Norton v. Public Utility District No.1 (1941), and United States v. Meyer (1940) indicates support for these limitations but lists no examples where the limitations have actually been imposed.

The Supreme Court reviewed a circuit court case that held that the selection of the site for a post office was "arbitrary," and reversed the lower court's ruling.[183] The court did not say such a limitation on the executive branch does not exist, but following the decision, certain courts of appeals have questioned whether the judiciary can review such questions, such as in United States v. New York (1947) and United States v. Willis (1954).[184]

The Fifth Circuit indicated in 1970 there are limitations: "if the delegated official so overstepped his authority that no reasonable man could conclude that the land sought to be condemned had some association with the authorized project.... There must be basic to the project per-

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[182]United States v. Agee, 322 F.2d 139 (6th Cir. 1963); Patton and Co. v. United States, 61 F.2d 970 (10th Cir. 1932); United States v. Meyer, 1134 F.2d 387 (7th Cir.), cert. denied, 311 U.S. 706 (1940).

[183]Supra note 165.

[184]United States v. New York, 160 F.2d 479 (2nd Cir.), cert. denied, 331 U.S. 832 (1947); United States v. Willis, 211 F.2d 1 (8th Cir.), cert. denied, 347 U.S. 1015 (1954).

vasive deception, unreasoned decision, or will-of-the-wisp determination."[185]

As a practical matter it is not feasible for the judicial branch to review all executive branch decisions of this nature (although a certain amount of judicial review is certainly appropriate). For example, many policy decisions respecting national defense can be involved in deciding how much land, and at what locations, should be taken for military reasons. However, in United States v. 15.38 Acres (1945), the United States sought to acquire land for a permanent easement for a railroad spur that would connect the railroad with an air base that was leased to the United States on a year-to-year basis and not renewable beyond 1967. Similar instances of the acquisition of permanent rights to complement property in which the United States only had a temporary interest are found in United States v. Kansas City (1946) and United States v. Certain Interests in Land (1945). In the latter case a perpetual easement was acquired for a pipeline, which was to be transferred to a private plant that was involved in making war materials.[186]

Another case in which the practical problems would not seem to dictate restraint is United States v. South Dakota (1954), in which the issue was the need for mineral rights

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[185]United States v. 2,606.84 Acres of Land, F.2d 1286, 1290, cert. denied, 402 U.S. 916 (1970).

[186]United States v. 15.38 Acres, 61 F.Supp. 937 (D. Del. 1945); United States v. Kansas City, 159 F.2d 125 (10th Cir. 1946); United States v. Certain Interests in Land, 58 F.Supp. 739 (E.D. Ill. 1945).

in some 230 acres being acquired by the United States for use in connection with the Rapid City Air Force Base. In none of these cases did the court undertake to review the executive branch decision; but none of them indicated that they were absolutely precluded from doing so.[187]

It would not be a healthy situation if the courts were to take an absolute stand that provides for continued deference to the legislative branches. There may be cases that are so arbitrary or so prompted by bad faith that the court will feel compelled to overturn the decision of the executive branch to take certain property.

There are several ways in which a property owner can challenge the decision to take his property, but usually he will do so by interjecting a defense under Rule 71A of the Federal Rules of Civil Procedure in the condemnation suit brought by the United States. Rule 71A sets out basic procedural rules and guidelines for federal condemnation actions, including required notice the federal government must give in such cases.[188] Defenses by property owners under this rule will generally attempt to show that the government failed to follow prescribed procedures. Regardless of the procedural method employed to make the challenge, in essence the property owner is seeking to enjoin the taking or the exercise of the power of eminent domain.

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[187]United States v. South Dakota, 212 F.2d 14 (8th Cir. 1954).

[188]Federal Revised Civil Procedures 71A.

Since it is well established that injunctive relief is not permissible against the United States unless Congress has consented under the Belknap v. Schild 1896 Supreme Court decision, the legal rationale must be that the property owner is seeking to enjoin the "representatives" of the United States, who, in their individual capacities, have exceeded their official authority. Therefore, no matter what the context of the challenge, the rules respecting government representatives or purported government representatives should indicate how the court will treat the challenge to the right to exercise eminent domain. In other words, the court have apparently moved away from the position that governmental authority involving eminent domain may be questioned from a property rights perspective to a position that is merely process-oriented.

The Supreme Court has set out guidelines for cases seeking to enjoin "government representatives"; in Larson v. Domestic & Foreign Corp. (1949), it said:

> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not appear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is valid or fact, if the officer making the decision was empowered to do so. Adams v. Nagel, 303 U.S. 532, 542 (1938). We therefore reject the contentions here. We hold that if the actions of an officer do not conflict with the terms of his statutory authority, then they are the actions of the sovereign, whether or not they are tortious

> under general law, if they would be regarded as the actions of a private principle under the normal rules of agency.[189]

The rationale of the Larson decision supports the conclusion that there is in fact no judicial review in the terms of the fourth type set out above; that is, there is no judicial review as to whether the "manner of implementation" is arbitrary. Rather, the judicial review is always in the context of the third type set out above - whether the executive branch is acting within the terms of its delegation. The Larson decision makes this clear with the court's statement that an action will lie against the individual officer "only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."[190]

The court explained in the Larson decision why this had to be the rule:

> For, it is one thing to provide a method by which a citizen may be compensated for a wrong done on him by the government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from action, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "the interference of the Courts with the performance of ordinary duties of the executive department of the Government would be productive of nothing but

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[189]Larson v. Domestic & Foreign Corp., 337 U.S. 682, 695 (1949).

[190]Ibid, p.702.

mischief."[191]

It may be concluded that the court is not going to stop the exercise of eminent domain with respect to any particular property unless it determines that the overall project is not one involving a "public use" or that the executive branch has not acted within the scope of its delegation. Therefore, the most probable way of stopping the taking of any particular property is to find a shortcoming in the implementation vis-a-vis the delegation. Congress, of course, can make room for judicial review by conditioning the exercise of the right upon particular determinations by the executive. Judicial review of these determinations will then be undertaken within the traditional rules of administrative law, not constitutional law.

To the extent that the executive branch stays within the delegation of its power there is precedent concluding that the exercise of "bad faith" in the selection of particular property is nonreviewable, as set out in the Barenblatt v. United States decision of 1959. The court said, "So long as Congress acts in pursuance of its constitutional power, the judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[192]

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[191]Ibid, p.704.

[192]Barenblatt v. United States, 360 U.S. 190 (1959).

In 1969, Congress imposed a set of conditions relating to the environment that has had a significant impact upon the government and federal eminent domain projects. The conditions are set out in the National Environmental Policy Act of 1969, commonly called NEPA.

NEPA was signed into law on January 1, 1970.[193] It does two things: it states the federal policy respecting the environment; and it requires federal agencies to evaluate their actions that will significantly affect the environment to see if the act is really needed, and, if so, how it can best be done in relation to the environment.

Section 101 of the Act states that Congress recognizes the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," and that it is the policy of the federal government "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[194]

Section 102 of the Act requires all agencies of the federal government to include, in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human

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[193]83 Stat. 852, 42 U.S.C. 4321.

[194]Ibid.

environment, a detailed statement on:

> -The environmental impact of the proposed action.
> -Any adverse environmental effects which cannot be avoided should the proposal be implemented.
> -Alternatives to the proposed action.
> -The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
> -And, any irreversible ind irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA has spawned a great deal of litigation and has enabled the courts and citizen groups to become more involved in the governmental decision-making process according to P. Nichols in Eminent Domain.[195] The courts have been explicit in disclaiming any right to substitute their judgement for that of the executive branch as to whether or not a particular course of action should be taken, such as in Natural Resources Defense Council v. Morton (1972).[196] However, the courts have been equally explicit ion requiring complete compliance with the procedural steps required by NEPA before these ultimate project decisions are made, such as in Calvert Cliffs' Coordinating Committee v. AEC (1971).[197]

The enactment of NEPA, as well as liberalization of the law of standing, has greatly increased the number of parties who can seek to stop eminent domain proceedings. A prac-

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[195]Supra Note 56.

[196]National Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

[197]Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

tical result is that even if the property owner is anxious for the sovereign to take his property, the taking may be contested and halted by third parties.

The Supreme Court, starting in 1968 in Flast v. Cohen, has made it easier for one to have standing to bring federal lawsuits. Standing is an issue as to whether the person bringing the lawsuit is a proper party to request an adjudication of a particular issue.[198]

By 1975, the Supreme Court placed both constitutional and prudential limitations on federal-court jurisdiction, each dimension being "founded in concern about the proper - and properly limited - role of the courts in a democratic society":

> Constitutional: For the exercise of judicial power, Article III of the United States Constitution requires that a case or controversy be involved. In the Constitutional context, "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[199]
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> Prudential: "Generalized grievances alone, shared in substantially equal measure by all or a large class of citizens, do not warrant exercise of jurisdiction; the plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights of interests of third parties."[200]

In Sierra Club v. Morton (1972), the Sierra Club was seeking to enjoin the development of a $35,000,000 recrea-

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[198]Flast v. Cohen, 392 U.S. 83 (1968).

[199]Ibid, p.107.

[200]Warth v. Seldon, 422 U.S. 490, 498 (1975).

tion and ski resort facility by Walt Disney Enterprises in the Mineral King Valley within the Sequoia National Forest. The government challenged the Sierra Club's standing to sue. The Supreme Court elaborated on the "injury in fact" test, which is apart of both the constitutional and prudential guidelines, as follows:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather then the few does not make them less deserving of legal protection through the judicial process. But the injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.[201]

An interesting suggestion made by the Supreme Court in the Sierra Club decision is the scope of review once the complainant gains standing before the court. The court said: "[T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."[202] Relying upon this language, it appears that once a plaintiff has obtained standing by showing an injury in fact, he can assert interests of the public that are different from those that conferred the standing for judicial review. For example, in National Helium Corp. v. Morton (1971) the company, whose

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[201]Sierra Club v. Morton, 405 F.2d 727, 733-734 (1972).

[202]Ibid, p.737.

primary interest was financial, was allowed to oppose the termination of government contracts to purchase helium by objecting to a violation of NEPA.[203]

Another case showing the interaction between NEPA and condemnation was Arlington Coalition on Transportation v. Volpe (1972), involving highway construction.[204] The court enjoined further acquisition of rights-of-way by the state until NEPA was complied with. The argument of the state that it was not subject to federal jurisdiction and had the right to condemn rights-of-way in its own right was rejected because the highway was being built with federal funds.

While NEPA has substantially changed the manner in which eminent domain may be challenged in court over the last twenty years, two facts remain: guidelines for gaining standing before the court in order to challenge the government remain essentially the same as prior to the National Environmental Policy Act of 1969; and, the influence of NEPA statutes have not been fully resolved by the courts.[205]

Conclusion

This discussion serves to augment the earlier dis-

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[203]National Helium Corp. Morton, 455 F.2d 650 (10th Cir. 1971).

[204]Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir.), cert. denied, 409 U.S. 1000 (1972).

[205]United States v. 178.15 Acres of Land, 543 F.2d 1391 (1976).

cussion in chapter two of American's historical concepts of private property rights by outlining what is essentially the current position held by American courts regarding private property rights and eminent domain, a position that has become increasingly process-oriented to the exclusion of private property rights themselves as the court defers issues that it once reviewed to legislative branches. Other than stipulations laid down by NEPA statutes, as interpreted by the Supreme Court, American eminent domain law reads much like the court's opinions in the Berman v. Parker (1954) and Hawaii Housing Authority v. Midkiff (1984) cases. In brief, property is not given to the ststus of a fundamental right.

There were, and are, valid problems that the court has attempted to address by taking a hands-off approach to private property rights. Problems such as the development of monopolies and cartels, and problems in balancing a due process rationale against public demands regarding health, safety, and welfare were issues faced by the American court system.

But what this discussion points to is the fact that the courts through a rational-basis approach have diminished private property rights, rather than attempting to balance those rights with other social concerns. Federal and state legislatures have acquired over time what appears to be substantial control over economic liberties concerning private property owned by this nation's citizens. Today, for all practical purposes the only justification required

of legislatures by our courts is that of "public use" for the "public good."

As such, this discussion serves as a point of reference for the argument to be considered further in the final chapter - the means by which the court can re-address private property rights through the judicial review process.

CHAPTER IV

A PRINCIPLED APPROACH FOR JUDICIAL REVIEW TO BALANCE PRIVATE PROPERTY RIGHTS AND SOCIAL POLICY

During roughly the first one hundred and fifty years of this nation's existence, rights to private property appear to have been regarded as fundamental. Throughout that time, the role of the judiciary had been one that attempted to balance private property rights with needs relating to the expansion of government as the nation as a whole expanded. Over time, increasing political and private pressures forced the court to balance the rights and needs of property owners with the needs and concerns relating to social issues, such as health, safety, social welfare, and civil rights.

However, while the courts began to focus their attention increasingly upon these social issues, governmental expansion and legislative activism has continued at a substantial rate, with the judiciary electing to defer certain issues relating to private property rights to other governmental branches.

Several important issues and themes have been raised concerning private property rights and eminent domain with the court's rationale in the Hawaii and Berman cases. It seems the court no longer attempts to balance private property rights with social concerns or the need for government expansion. This is not an argument against social concerns or issues. Nor is this an argument for protection of priva-

te property rights of individuals at the expense of all other needs and rights. Rather this is an argument that perceives a need for the judiciary to once again provide judicial review in this arena rather than maintaining judicial deference to an expanding and active legislature.

The Supreme Court's current position regarding private property rights and eminent domain in the third chapter clearly demonstrates that the judiciary has consciously chosen not to review the motives or constitutionality of legislative action concerning public use concepts and issues over just compensation. What remains is the property owner's "right" to question the process by which property is taken or compensated, which serves to reduce property rights to something less than fundamental.

What about the just compensation requirement found in the Fifth Amendment? Under current law, property owners must be compensated for property seized under eminent domain proceedings. But the issues are far more complicated and have potentially far-reaching effects. Is it really "just compensation" if business values goes uncompensated and only buildings and land are reimbursed? There are other questions that are just as difficult. Certainly the rule of just compensation, as discussed earlier, plays an important role. Many, but not nearly all, argue that compensation for the real property alone is all that is required when that property is condemned. However, in many cases property owners would have chosen not to part with their property

regardless of the amount of compensation, or perhaps could not afford to lose their property even with compensation paid.

Government takings for private use remain especially sensitive and highly debated. Legislative policies and eminent domain condemnations may also affect citizen's lives and lifestyles, as well as having the potential to affect entire neighborhoods, communities, or groups of people. As was discussed in earlier chapters, even though the courts were not always consistent, historically there has been considerable amount of judicial oversight of legislative enactments that might impair property interests.[206] With continued government expansion, and, court sanctioning of legislative policies, it seems time for the judiciary, and specifically the Supreme Court, to re-think its current position concerning private property rights and legislative activism through modification of the judicial review process in this arena.

In many ways, these concerns have contributed to a movement that seeks a reappraisal of the role of the judiciary as it affects private property rights, a movement known as constitutional economics. As a school of thought, constitutional economics may not provide specific answers to specific legal cases, but it does seem to facilitate the raising of questions and issues that the judiciary now

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[206]Bernard Seigan, Economic Liberties and the Constitution (Chicago: University of Chicago Press, 1980).

appears to ignore. Furthermore, insights provided by constitutional economics illustrate that the judiciary, more so than the legislative or executive branches, has the ability to balance social concerns and an expanding government with fundamental rights surrounding private property.

Constitutional Economics

The question of whether the judiciary should extend the same scrutiny to cases involving private property rights and liberties as it has to personal freedoms such as speech, press, and assembly, is a question of whether the court should actively uphold constitutional protection of persons and property or whether it will continue to defer to the will of the political branches. Basic rights, including economic rights to property are important. They formed the foundation of our view of government for over a century and a half, only to be diminished by legislatures and the judiciary over roughly the last sixty years. Constitutional economics, which is in many ways a part and parcel of the law and economics school of thought found in the United States, emerged out of the need to reach a consensus among clearly divergent perspectives as to how government should respond to the question of economic liberties, including rights to property.

Since most schools of thought, especially legal schools, develop from a variety of sources, it is usually difficult to identify any individual writer or work as

laying the foundation for the school. The economic approach is an exception to this generalization, for its origins can be pinpointed in Professor Ronald Coase's article, "The Problem of Social Cost," which appeared in 1960.[207]

Coase's article examines the impact of the distribution of legal entitlements such as property rights on the production of certain costs known to economists as externalities. An external cost is a cost generated by the activity of one economic agent that must be borne by another agent. Additionally, an externality may also be a cost borne by third parties arising from an economic activity involving two or more individuals. Generally there are two types of externalities - those involving external costs and those involving external benefits.

Consider the example discussed by Coase himself relating to external costs. Imagine that a rancher and a farmer own adjacent tracts of land, and assume that there is no fence dividing them. The rancher's cattle are free to roam onto the farmer's property, where they will destroy some of the farmer's crop. Every unit of crop destroyed by the cattle represents a potential loss to the farmer. Since this loss is produced -inadvertently , although it might as well be deliberately -by the rancher's cattle-raising activity, and since the loss will be borne by the farmer (in the absence of adjudication by the legal system), it is an

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[207]R.H. Coase, "The Problem of Social Cost," Journal of Law and Economics (Chicago: University of Chicago Press, 1960).

external cost of ranching.[208] Furthermore, in the absence of legal remedies, the rancher has no incentive to alter his cattle's behavior.

However, Coase argues that, under certain special circumstances, no governmental intervention is necessary to produce a socially optimal outcome. Moreover, Coase argues that it makes no difference with regard to efficiency how the law distributes property rights. A more precise version of the proposition has come to be known as Coase's Theorem: in a competitive economy with zero transaction costs and perfect information, the allocation of resources will be efficient however the law distributes initial entitlements. Coase's reasoning is that in a competitive economy, such as the United States, the one party will buy the other's entitlement (property), and at a cost that is less than the current cost of an unsatisfactory relationship.

The significance of Coase's theorem is twofold. First, the theorem illustrates how the basic concepts of microeconomics can be employed to analyze the consequences for allocative efficiency of alternate legal rulings, at least under ideal conditions. Secondly, the theorem had normative significance because it shows that the distribution of entitlements does not matter from the point of view of allocative efficiency, again under the optimal conditions set forth by Coase.

Most writers have seen a third kind of significance in

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[208]Ibid.

Coase's theorem. Writers such as Judge Richard Posner have inferred from it a distinct principle of judicial decision-making that is called the efficiency principle: when bargaining is difficult or impossible due to lack of information or high transaction costs, courts should assign entitlements (or property rights) so as to produce an efficient allocation of resources.[209]

Professor Guido Calabresi of the Yale Law School is among the foremost proponents of the economic approach, although Calabresi does not regard efficiency as the only goal that judges should try to pursue in their decisions. Calabresi's book, The Costs of Accidents (1970), remains a leading example of how the approach may be applied to both property as well as other forms of legal cases.[210] This is a much more unified approach that describes the kinds of problems that judges often confront in hard cases involving both property and torts (civil wrongs).

Calabresi and his co-author A. Douglas Melamed, in "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," explicitly endorse the criterion of Pareto efficiency: one allocation of resources is preferable to another if, under the first allocation, at least one person is better off than under the second while no one else

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[209]Richard a. Posner, Economic Analysis of Law, 2d ed. (Boston: Little, Brown & Co., 1977), pp.17-19.

[210]Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," Harvard Law Review 85 (1972).

is worse off. However, their discussions also suggest concern of another idea, usually referred to as Kaldor-Hicks efficiency, which means: one allocation of resources if preferable to another if and only if the winners could compensate the losers so that no one would be worse off than before a reallocation of resources and at least one person is better off than before the reallocation.[211]

A fundamental question , according to authors such as Mark Kuperberg and Charles Beitz, in their Law, Economics, and Philosophy (1983), is why efficiency should be given any independent weight in judicial decision making.[212]

In "The Economic Analysis of Law," Jules Coleman advances the discussion. Coleman calls attention to a distinction between two aspects of Pareto efficiency - Pareto optimality and Pareto superiority.[213] Pareto optimality describes the state of affairs such that it is impossible by any reallocation of resources (property) to make anyone better off without making someone else worse off. Pareto superiority is a situation, by contrast, described by Calabresi which allows for an improvement in efficiency by a reallocation of property.

Another contribution by Coleman is his distinction

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[211]Ibid.

[212]Mark Kuperberg and Charles Beitz, Law, Economics, and Philosophy (Totowa, N.J.: Rowan & Allenhald, 1983).

[213]Jules L. Coleman, "The Economic Analysis of Law," Ethics, Economics, and the Law: NOMOS XXIV, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1982).

between efficiency and utility. The standard view, especially from economists, is that efficiency is preferable to inefficiency because it yields greater social utility. Coleman recognizes problems with this standard view, as it is a controversial question whether social utility should be identified with market value. Philosophical utilitarianism regards utility as a function of happiness - the greater the happiness in a state of affairs, the greater the utility.[214] But the economic state measures efficiency by its dollar value. Coleman further explains that in utilitarian terms, efficiency is ambiguous, with utility properties of efficiency varying according to which conception of efficiency is adopted.

Judge Richard Posner has addressed nonutilitarian reasons for valuing efficiency in at least two articles.[215] Posner contends that wealth maximization should be a judge's first concern for the same reasons that Pareto efficiency is supposedly morally appealing. His justifications for such judicial policy is that, first, Pareto-improving moves are consensual from the points of view of all concerned, or at least, they do not require anyone to do what he or she does not want to do. Secondly, under the circumstances, no one

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[214]J.J.C. Smart, "An Outline of a System of Utilitarian Ethics," Utilitarianism: For and Against (New York: Cambridge University Press, 1970, pp.3-74.

[215]Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," Journal of Legal Studies 8, no. 1 (1979); and, "The Value of Wealth: A Reply to Dworkin and Kronman," Journal of Legal Studies 9, no. 2 (1980).

has any reason to complain; no one's position is worsened, and at least someone's position is improved. Posner does note that other emotions may, and in many cases do, play a role in how decisions are viewed, but from a purely economic perspective, no one should complain. This may be true in an absolute sense but perhaps not in the relative sense of actual decision making.

Additionally, Posner does not see a Kaldor-Hicks policy decision (involving winners and losers but with overall efficiency improved) by the judiciary as morally objectionable. Interpreting welfare to mean economic wealth Posner sees the Kaldor-Hicks solution as a principle by which overall social wealth can be maximized. As a justification for this argument, Posner says that losses seemingly imposed on people without their consent have often been compensated in advance. For example, Posner might argue that property prices take into consideration the possibility of condemnation. The greater the risk, the larger the discount given to the purchaser.

Ronald Dworkin, in his article "Why Efficiency?" criticizes Posner's claims.[216] Dworkin claims that it is not true in most actual cases that people consent in advance to losses imposed upon them, either by the judiciary or by any other form of government, in the name of social wealth maximization. Furthermore, Dworkin questions whether it is

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[216]Ronald Dworkin, "Why Efficiency?," Hofstra Law Review 8 (1980).

realistic to think that property prices always accurately account for all of the risks associated with ownership.

Professor F.M. Scherer in "The Welfare Economics of Competition and Monopoly" has taken this issue of property and pricing a step further.[217] According to Scherer, just as the price system affects the rights that are ultimately obtained by property holders, so to the nature of the property system affects the way prices are determined.

It is out of the work of these and many other scholars that the field of law and economics arose. To many however, the greatest danger involved in the use of economic efficiency is the belief that efficiency is sufficiently embracing to provide a comprehensive touchstone for judicial policy judgements in regards to economic liberties and private property rights.

Constitutional economics arose out of works that include Milton Friedman's Free To Choose: A Personal Statement, Buchanan and Tullock's The Calculus of Consent: The Logical Foundations of Constitutional Democracy, F.A. Hayek's The Constitution of Liberty, Bernard Siegan's Economic Liberties and the Constitution, and Buchanan's The Limits of Liberty, among many works in the field.[218]

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[217]F.M. Scherer, "The Welfare Economics of Competition and Monopoly," Industrial Market Structure and Economic Performance (Chicago: Rand McNally and Co., 1970), pp.8-26.

[218]Milton and Rose Friedman, Free To Choose (New York: Harcourt, Brace, Jovanovich, 1980); James Buchanan and Gordon Tullock, The Calculus of Consent: The Logical Foundations of Constitutional Democracy (Ann Arbor:

Proponents of this approach, such as Richard Epstein and Bernard Siegan, see the Constitution as a charter for limited government and individual rights. In their opinion, the function of the judiciary is to act as the final arbiter in protecting fundamental rights to "life, liberty, and property."[219] According to Stephen Macedo, another advocate of a constitutional approach to economic rights - including property rights - this approach seeks to avoid the judicial overreaching of many modern liberals, but also seeks to avoid the dangers seen in a purely economic approach to justice as espoused by Judge Richard Posner.[220]

Constitutional economics, sometimes spoken of as principled judicial activism, places individual rights and limited government at the forefront of the debate and seeks to restore property rights to the central position they held with the framers of the Constitution. From this perspective, according to James Dorn and Henry Manne in their Economic Liberties and the Judiciary, emphasis is placed on the text and framework of the Constitution rather than on

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University of Michigan Press, 1962); F.A. Hayek, The Constitution of Liberty, vols.1-3 (Chicago: University of Chicago Press, 1960); Bernard Siegan, Economic Liberties and the Constitution (Chicago: University of Chicago Press, 1980); James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan (Chicago: University of Chicago Press, 1975).

[219]Bernard Siegan, "The Supreme Court: The Final Arbiter," Beyond the Status Quo: Policy Proposals for America, ed. David Boaz and Edward H. Crane (Washington, D.C.: Cato Institute, 1985), p.287.

[220]Stephen Macedo, The New Right v. The Constitution (Washington, D.C.: Cato Institute, 1986), p.1.

the preferences of judges or the power of majority rule.[221] Furthermore, under such an approach, the dichotomy between economic rights and other fundamental rights (such as freedom of speech) would come to an end.[222] Both economic and fundamental rights would be protected from legislative or executive abuse by the judiciary. This does not mean the court would begin to make the law, but it does mean the court would actively review the law for its consistency regarding the rights of persons and property.

The judicial activism proposed by Epstein, Dorn, Macedo, Siegan, Manne, and others differs fundamentally from the activism proposed by modern liberals. It rejects the liberal's assumption of a benevolent government and tends to see the political branches as constantly threatening property rights. Constitutional economic activists argue that if the judiciary stands still in the face of substantial government takings - ranging from abuses of eminent domain proceedings to regulation of property - no one's rights will be safe and justice will not be served.[223] Originally, the suspicion of unrestrained governmental powers, and the excesses to which it could lead, created a heavy presumption against laws that restricted rights concerning property. Even though the courts were not always consistent, Bernard

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[221]James A. Dorn and Henry G. Manne, Economic Liberties and the Judiciary (Fairfax, Va.: George Mason University Press, 1987), p.1-4.

[222]Ibid, p.20.

[223]Ibid.

Siegan demonstrated that for the first one hundred and fifty years after ratification of the Constitution, there was a considerable amount of judicial oversight of legislative enactments that might impair property interests.[224] It is exactly this perspective that constitutional economists, through principled judicial activism, hope to restore.

Constitutional economics is fundamentally concerned with the framework for political and social processes, and specifically Congress and the judiciary. In other words, the structure and interrelationships among political and economic institutions, all of which should be designed to allow citizens certain economic liberties, including rights surrounding private property.

The underlying theory of constitutional economics is a theory of the rules by which political and economic processes are, or will be, allowed to operate through time. In the case of the United States, these rules are found primarily in the Constitution of the United States and its amendments.

From this author's perspective, constitutional economics provides a structural framework that may allow the judiciary to recognize and raise certain fundamental questions and issues during the judicial review process. The judiciary may encounter problems in applying strict economic principles and theorems to specific court decisions. After all, it seems one would be naive to assert that efficiency

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[224]Supra note 221, Siegan.

equates to justice in all instances.

However, this does not detract from the fact that certain general principles raised by the constitutional economics school have merit. This is especially true if these principles may be used in two basic respects - as a tool to facilitate the raising of appropriate questions and issues for the judicial review process, and, as a means of critically analyzing court decisions, legislative action, and institutions. As discussed previously, the constitutional economics school suggests that private property rights were originally considered fundamental, and that this perspective should be restored, or at least balanced against social legislation. Thus, in may ways, this approach seems to suggest a means to revitalize of the doctrine of strict judicial scrutiny, which requires the legislature to justify its actions relating to private property rights by demonstrating that there exists a compelling state interest, and that its actions involve the least restrictive means available.

Of fundamental importance is a question central to the study of constitutional economics - should the judiciary, and specifically the Supreme Court of the United States, strive for a more balanced protection of private property rights through the judicial review process relative to social legislation and promote governmental restraint regarding economic regulation? To members of the law and economics school of thought, it seems the answer must be

yes. This was the original role for the judiciary envisioned by the constitutional framers, and it seems the judiciary, of the various means available, is best equipped to restore at least portions those private property rights to a more fundamental level.

The Regulatory Problem and Economic Costs

Discontent over regulation has been present since the beginning of representative systems of government generally. For example, over sixty years ago, the President's Committee on Administrative Management, the Brownlow Committee, asserted that regulatory agencies are a "headless fourth branch of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers."[225] Since the Brownlow Committee's report, a series of studies have emanated from private and public institutions and individual scholars, consistently complaining about regulation.[226] In many ways, this is a factor that led to the constitutional economics movement and is a reason why regulatory agencies cannot be counted upon to begin protection of private property rights. So many dollars and so much power is controlled by these agencies that it would be naive to assume

[225]President's Committee on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government (Washington, D.C.: Government Printing Office, 1937), pp.39-42.

[226]Commission on Law and Economics, Federal Regulation: Roads to Reform (Washington, D.C.: American Bar Association, 1979), chp.2.

they would voluntarily abandon their current course of regulation, and attempts at such would only provide short-term solutions to long-term problems. Criticisms of regulation usually fall into one of three categories and highlight just how much power is controlled by these groups.

The first category, direct costs of regulation, consist of the actual cost of staffing and running the regulatory agencies. In fiscal year 1983, these were estimated to be roughly $6.3 billion.[227] However, these numbers plainly underestimate the direct costs of regulation, because all state and local governments have regulatory agencies that duplicate many federal functions. State and local governments also regulate substantial areas of the private sector that federal actions largely ignore. Regulation of professions, trades, and zoning are obvious examples.

The costs of compliance with government regulations form one of the central political issues in public-policy debates regarding regulation. Arguably, there are good or useful regulations regarding business, such as certain health and welfare regulations. But the cost of compliance has grown enormously in recent years. Fifteen years ago, Murray Weidenbaum estimated that, conservatively, annual compliance costs of federal regulation totaled roughly $100

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[227]Arnold J. Penoyer, Directory of Federal Regulatory Agencies-1982 Update (St. Louis: Washington University Center for the Study of American Business, 1982), p.4.

billion.[228] Weidenbaum's estimates do not cover the compliance costs of state and local regulations, making his figure seem conservative to all but those who advocate increased governmental regulation.

While direct costs of regulation are diffused through the tax system, compliance costs fall on specific industries, firms, and consumers. Because of this fact, such costs usually provide the political source of discontent with regulation, especially within the private business sector. Unfortunately, the problem with responding solely to the compliance costs of regulation, as a matter of public policy, is that such a response provides merely a short-term solution for long-term economic and rights problems. Attention to such costs, to the exclusion of their deeper causes, is at best a short-term political response to the sources of discontent with regulation.

The most severe costs of regulation may be those that we cannot measure directly. These involve businesses foregone, products not brought to market, innovation and invention foregone, and other anti-competitive effects on property and economic advance.[229] These kinds of costs do not form the basis for political opposition to regulation,

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[228]Murray L. Weidenbaum, Government Mandated Price Increases: A Neglected Aspect of Inflation (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1975).

[229]Israel M. Kirzner, The Perils of Regulation: A Market-Process Approach (Miami: Law and Economics Center Occasional Paper, 1979).

although they are described as a major cost associated with overregulation of economic and property rights.[230]

This discussion serves to highlight three major points associated with regulatory agencies as they relate to private property rights: first, it reveals the enormous growth agencies have undergone over the last roughly sixty years stemming from overactive legislation; secondly, it implies the extent that regulation touches all of this nation's citizens and that governmental takings are not simply limited to far-removed court cases; and, finally, it shows that it would be naive in the extreme to imagine regulatory agencies abandoning such power voluntarily order to protect private property rights.

The Legislature and Political Perspective

It seems clear that the legislature, Congress, is not the appropriate institution to seek restoration of private property rights and relief from overregulation that affect those rights. It is Congress' propensity to create new laws and regulations, and its indiscriminate use of eminent domain powers that have contributed the most to the erosion of private property rights. It would be unlikely under the circumstances that one could look to Congress for protec-

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[230]Sam Poltzman, "An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments," Journal of Political Economy (September-October, 1973), pp.1049-1091.

tion, especially considering its short-term political perspective.

An inherent inconsistency exists between the demands of our nation's political system and the needs related to protecting its citizen's rights. The political system forces politicians to look to the near term and the next election and to seek a quick-fix policy. The same is argued of this nation's business leaders as well, who obviously must operate in an arena that is in many ways defined by the political leaders of the nation. The rights of the nation's citizens need a policy course that reflects a long-term perspective, when many of today's politicians will not be around.

An explanation of legislature's short-term perspective can be seen using an economic model. Economists James Buchanan and Dwight Lee have shown this to be true through the use of the "Laffer" curve, a circumstance that is to no one's advantage.[231] Buchanan and Lee explain how the economy can be operating on the upper half of the Laffer curve, which means that citizens are enduring higher taxes and receiving lower incomes than they could receive if tax rates were lower. Similarly, on the upper half of the Laffer curve government revenues are less than they could be at lower tax rates, meaning politicians have less to spend on constituencies than they could have if tax rates were lower-

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[231]James M. Buchanan and Dwight R. Lee, "Politics and the Laffer Curve," Journal of Political Economy (August, 1982), pp.816-819.

ed.

Today, there are questions concerning whether the Laffer curve is relevant to the U.S. economy. This is not the proper forum for such a debate. What is important to this discussion are Buchanan and Lee's insights concerning the perspectives of legislatures. Buchanan and Lee argue that the perspective of legislators is inherently short-term.[232] Politicians must evaluate their taxing, spending, and other policy decisions in terms of elections two, four, or at most six years away. These politicians, seeking the funds to provide benefits to constituencies, may be inclined to take advantage of the people's inability in the short run. The authors were specifically referring to tax rates and spending, but the same outlook and motivation appears true for other policy decisions, including the infringement of economic liberties and private property rights.

Buchanan and Lee properly noted that any benefits from long-term modifications of current policy will be reaped by future politicians, not those who currently hold office. Unfortunately, those future politicians will also be tempted to take short-term solutions, taking advantage of the same inconsistencies of our political system.[233] As noted, although Buchanan and Lee's analysis of the Laffer curve and the shortsightedness of Congress was based on tax rates, their work is analogous to the discussion at hand. Their

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[232]Ibid.

[233]Ibid.

underlying reasoning dramatically reveals the short-term political perspective of legislatures in our nation's political system and explains why Congress cannot be counted upon to restore protection of private property rights and restrain related economic regulation. The legislature, with the aid of a passive judiciary, is the branch of government that has actively diminished rights surrounding property and regulated other property rights. With politicians always looking to the next election, it appears unlikely they will undertake an longer-term activist role aimed at balancing private property rights with social legislation that may help future politicians rather than themselves.

Constitutional Amendments to Address Private Property Rights

Should protection of private property rights and related economic liberties be restored through constitutional amendments rather than through the judicial review process? It seem this option would be less than desirable. Even when we are willing to grant that the proponents of new constitutional proposals are trying to deal with an authentic problem, we are not obliged to agree with their proposals. No matter how serious the problem to which these proposals are addressed, such as private property rights and economic liberties, there is no case for them unless it can be shown that they work. For example, there is no case for constitutional prohibitions against federal budget deficits or the extent of public spending unless these prohibitions would in

fact achieve their goals. And, from an economic perspective, there is another argument against, specifically, a balanced budget amendment. A government budget balanced every year would have a negative impact upon the economy. Taxes would be required to go up during recessions and down during times of economic prosperity. Any economic stability built into the current system would tend to dissappear. Fiscal restraint may be desirable, but that may not require a balanced budget every year. Technically, a zero structural deficit may be desirable, but not a zero cyclical budget. In other words, no constitutional amendment should be adopted unless it would eliminate or alleviate the problem it is supposed to solve, and do so without bringing other, perhaps more serious problems to the forefront.

Economist Mancur Olson argued that there is an instructive analogy between the constitutional experiment with prohibition and the proposals for constitutional rules against government budget deficits or against public expenditures in excess of some specified percentage of national income.[234] Alcoholism is certainly a problem, and a fairly widespread problem. It's quite understandable that people should want to deal with the problem by passing a law or passing a constitutional amendment against it. Similarly, when we as a nation have inflation, the high prices that we have to pay trouble us. Again, there are demands for laws

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[234]Mancur Olson, "Specificity in Constitutional Amendments," Journal of Political Economy (December, 1982), p.252.

against price and wage increases - wage and price control laws. We know that Prohibition was not successful. Most who have given any serious consideration to theories of wage and price controls know they are almost never an appropriate device for dealing with inflation. The same lesson is being learned today regarding the minimum wage legislation that, in 1990, increased the nation's minimum wage to $3.80 per hour. Such legislation will have little effect upon the economy because the market wage for labor is, on average, higher than the minimum wage standards. It does not follow, because something is a problem, that passing a law against it will solve the problem. Along the same vein, it does not follow that constitutional amendments concerning protection of private property rights would work, let alone achieve their goals.

Perhaps a much stronger argument against unnecessary constitutional amendments for protection of these rights lies in the Constitution itself. The provisions for protection of private property are already found in the Constitution, as has been discussed throughout this paper. Article I, section 9 of the Constitution prohibits the federal government from passing ex post facto laws, important to the protection of property rights. The "taking" clause of the Fifth Amendment provides that private property shall not be taken except for public use, and then only with just compensation to the owner. The Fifth Amendment also provides that no person shall be deprived of life, liberty or property

without due process of law, as does the Fourteenth Amendment, which, together, limit both the federal and state governments. These constitutional provisions provide ample protection for private property rights as long as they are enforced by the judiciary.

Procedural limitations to direct constitutional reform also lend credence to the assertion that constitutional amendments are not necessarily the best avenue for protection of these rights. Procedural limits determine what constitutional reforms could be enacted in our society, and these limitations are fundamentally of two types, explicit and implicit.

The United States Constitution provides a number of explicit limits to constitutional change. One example is enumerated at the end of Article V:

> Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no state without its consent shall be deprived of its equal suffrage in the Senate.[235]

If this passage does not amount to an outright prohibition of a change in the formula of representation in the Senate, it at least requires that there be two steps in any amendment effort. Before representation in the Senate can be changed, an amendment must first alter Article V of the Constitution.

Any attempt for an amendment along those lines would

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[235]U.S. Constitution, Article V.

bump up against an implicit procedural limit as well. It would require a substantial number of individuals to behave unselfishly; the very individuals whose permission would be needed to achieve the amendment would be those whose interests most likely would be harmed if the amendment took effect. To pass an amendment to Article V (or any other amendment) through the Senate would require two-thirds of the senators to vote for a procedure that might eliminate their jobs or reduce their power. To bring a constitutional convention into play would require two-thirds of the state legislatures to support a change that could reduce their state's representation or power in Washington, D.C.

The implicit procedural limits to altering the Constitution extend much further than the preservation of the current formula of representation in the Senate. In fact, they extend to almost any point where the powers and prerequisites of Congress, and to a lesser extent the ratifying bodies, are at stake. Congress must be mentioned first in this regard because it has the option of submitting amendments, which mights displease the state legislatures, to ratifying conventions. The states, while they cannot threaten the Congress with convention calls, cannot bypass it procedurally. Congress retains the power to set the terms under which a constitutional convention would meet (although it has not been tested in the courts). It also has the ability to preempt a state initiative by proposing its own amendment. The undesirability of a constitutional amendment

discussion points out the proximate reason why it has proven so difficult for proponents to achieve a constitutional amendment mandating a balanced budget, limiting taxes, or otherwise restraining the fiscal powers of Congress.[236] As long as any amendment proposes to enforce an outcome on the Congress that its own members would not choose, the prospect of seeing that proposal become constitutional law remains slight.

These procedural limitations remain true for potential constitutional proposals that relate to protection of private property rights or diminution of government's powers of eminent domain or legislative regulation. What this discussion reveals, much like discussions involving regulatory agencies and legislatures, is that amendments to the Constitution are not a desirable nor efficient means to restore protection of private property rights and instill government restraint. Procedural limitations make passage of such amendments difficult at best. And, constitutional provisions are already in place to ensure protection of these rights. What is needed is a judiciary that will enforce those existing provisions through the judicial review process, balancing private property rights against social legislation.

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[236]Supra note 236.

The Judiciary as a Means to Safeguard Private Property Rights

Whether the courts should restore protection of private property rights is essentially a question of whether the role of the judiciary should be protection of property rights and economic liberties, or whether the court should continue to defer those rights to Congress and the executive branch. The court must strike a balance between restraint and activism that is guided by some principle of justice.

According to James Dorn in Economic Liberties and the Judiciary, the principle of justice that guided the constitutional framers was that the right to property is fundamental and consistent with other individual freedoms, and that justice is best served by protecting this right.[237] The court's present "rule of reason" - the rational-basis test - is not really a test of the framer's concept of justice; it submits legislation neither to the moral test of the theory of private property rights nor to the efficiency test of the theory of economics espoused by many present-day scholars herein discussed. Instead of actively securing rights to property, the judiciary under the rational-basis test has yielded to the will of the legislatures, resulting in court decisions such as Hawaii Housing Authority v. Midkiff.[238] With a renewed appreciation of the prominence private property rights held in the Constitution and in the minds of the constitutional framers, the judiciary may permit itself to

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[237]Supra note 223, p.13.

[238]Supra note 208.

protect those rights through the judicial review process. Several means to achieve this goal have been proposed by proponents of the constitutional economics movement and seem to deserve the attention of the court.

One possible solution, according to Peter Aranson, is based on the reinvigoration of the delegation doctrine in constitutional law.[239] The delegation doctrine grew out of an ancient principle of the law of agency: a delegated power cannot be delegated. A closely related corollary of the delegation doctrine is that a delegate cannot avoid responsibility for his acts, or for his negligence, by arguing that the subdelegate performed inadequately. In this, the notion of respondeat superior prevails.

The first challenged delegation occurred in The Brig Aurora case in 1803. Congress had imposed trade embargoes on Britain and France, who had violated the neutrality of U.S. shipping while making war on one another. Congress had then left it to the President to decide when to resume trade, based on his judgement concerning when the violation of U.S. neutrality had ceased. Following a challenge in the Supreme Court, on the grounds of a supposed impermissible delegation by Congress of legislative authority to the President, the justices upheld the delegation, because the President's discretion rested only on applying a "named-

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[239]Peter H. Aranson, "Constitutionalizing the Regulatory Process," ed. Richard B. McKenzie, Constitutional Economics (Lexington, Mass.: D.C. Heath and Company, 1984), p.196.

contingency" standard.[240]

Toward the end of the nineteenth century and the early twentieth century, the extent of the delegations that the court would allow grew, as did government itself. Cases such as New York Central Securities Co. v. United States (1932), Radio Communication v. Nelson Bros. Co. (1933), and R.F. Keppel & Bro. Co. (1934) far exceeded the bounds of the "named-contingency" standard outlined in The Brig Aurora.[241]

This expanding permissiveness toward delegations came to a halt with Panama Refining Co. v. Ryan (1935), which struck down section 9(c) of the National Industrial Recovery Act (NIRA) on the grounds that it was an over-broad delegation of legislative authority.[242] Shortly thereafter, the court invalidated the NIRA's central provisions on the same grounds in A.L.A. Schechter Poultry Corp. v. United States (1935), and, following the Schechter decision, Carter v. Carter Coal Company (1936) struck down provisions of the Coal Conservation Act of 1935 on similar grounds.[243]

The court soon backed away from its application of the delegation doctrine in decisions such as the Schechter

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[240]The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813).

[241]New York Central Securities Co. v. United States, 287 U.S. 12 (1932); Radio Communication v. Nelson Bros. Co., 289 U.S. 266 (1933); FTC v. R.F. Keppel & Bro. Co., 291 U.S. 304 (1934).

[242]Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[243]A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Company, 298 U.S. 238 (1936).

Poultry case.[244] One reason why the court did change its position after 1936 is because people forced the political branches to nominate justices who would not be activists, as the conservatives had been, in protecting rights of property against health, safety, and economic regulation. That same pressure was applied by Franklin Roosevelt in order to see major portions his "New Deal" agenda declared unconstitutional. Unfortunately, the court went too far in their modifications concerning delegation doctrine interpretation.

Since that time, the court has occasionally used the delegation doctrine to limit the interpretation of a statute, for example interpreting FCC charges to licensees as "fees," rather than "taxes," on the grounds that the FCC cannot take unto itself the right to tax.[245] Similarly, individual justices have used the doctrine to bolster particular concurring or dissenting opinions.[246]

The manner in which the reinvigoration of the delegation doctrine, according to Aranson, would suppress the legislature and regulatory agencies of further infringement upon private property rights, involves the court specifying in detail the public policies that the agencies are to

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[244]United States v. Rock Royal Coop, 307 U.S. 533 (1939).

[245]N.T.C.A. v. United States, 415 U.S. 336 (1974).

[246]Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 100 S.Ct. 2844, 2878 (1980), Rehnquist, J., concurring in part; American Textiles Mfrs. v. Donovan, 101 S.Ct. 2748, 2587 (1981), Rehnquist, J., dissenting.

follow as provided by Congress, or, by striking down congressional legislation as too ambiguous, forcing Congress to specify their intent in new legislation.[247] For example, a rigorous application of the delegation doctrine would prevent an agency from extending its control to new industries or newly developed forms of supply unless specific additions to its authority were approved and passed by the legislature - a process requiring additional public scrutiny. Aranson, furthermore, argues that various "protected" industries, over the long run, would lobby for deregulation in order to protect their markets, even though some regulation currently exists at the request of industry (such as is the case with the hospital industry). Nevertheless, regardless of long-term industry moves, private property rights would be protected from overregulation, agency policies would receive greater public scrutiny, and Congress would be forced to pass less ambiguous legislation. In addition, not only would the use of the delegation doctrine help to protect corporate property, but these same benefits of such a judicial review process would aid individuals as they are affected by legislation and regulatory agencies.[248]

Another means to potentially restore protection of private property rights through the judicial review process is to re-institute the 1871 Supreme Court ruling in Pumpbelly v. Green Bay Co., which makes use of certain private

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[247]Supra note 241.

[248]Ibid.

law principles and an interpretation of the Fifth Amendment's "takings" clause to mean "property, taken or damaged," rather than separating the issues between takings and damages allowable under the Federal Tort Claims Act.[249] In the Pumpbelly case, the plaintiff sought compensation from the defendant, a private company acting under government authority, for damages occasioned when the plaintiff's land was flooded by waters backed up by a dam the defendant had constructed. The defendant argued that compensation was not required because the plaintiff had remained in possession of his land even after the flooding. The court rejected that argument quickly, as follows:

> The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> It would be a curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, and make it an authority for

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[249]Pumpbelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

> invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[250]

In many ways, the court's decision was based on the principle of strict liability, combined with an interpretation of the Fifth Amendment to mean "taken or damaged." The concept of strict liability is one that is espoused by many in the law and economics school of thought and appears to have viable applications in restoring private property rights. As Richard Epstein noted in "Causation and Corrective Justice: A Reply to Two Critics," if strict liability affords the proper basis for injunctions against a threatened taking of property, then it governs when the lesser remedy, damages in the form of compensation, is sought when harm can no longer be prevented.[251] Epstein believes the "takings" clause of the Fifth Amendment confirms this view in the plain language of its words and that private law liability rules, much like those applied to the Pumpbelly decision, should be considered in many of today's eminent domain court cases.[252] According to Epstein, this process would do away with much of the negligence rule patterned after the famous Hand formula that was adopted in United States v. Carroll Towing Co. (1947), which states that harm

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[250]Ibid, pp.177-178.

[251]Richard A. Epstein, "Causation and Corrective Justice: A Reply to Two Critics,", 8 Journal of Legal Studies 477 (1979), pp.500-501.

[252]Richard A. Epstein, Takings (Cambridge, Mass.: Harvard University Press, 1985), p.40.

to a person or property otherwise tortious shall be excused if the benefits of not preventing harm are greater than the expected costs of the harm itself.[253] The problem with this current general negligence rule is that it refuses to recognize that the government, or its representatives, at the very least, should be required to pay for the harm its conduct has caused to the person or property of private citizens and others.

Had this process been used in the eminent domain case of Laird v. Nelms discussed in chapter one, the court should have upheld standing in the case even though the plaintiff did not show "the negligent or wrongful act or omission" that was required by the court.[254] As espoused by Epstein in 1985, this course of action suggested for the judiciary relates nicely to the natural rights theory behind the Constitution and its Fifth Amendment.[255] If the state obtains its authority only from the rights of those whom it represents under a limited grant of authority such as the Constitution, it can never claim exemption from the duty to compensate on the grounds that it is the source of all rights, such as the government currently implies and the judiciary upholds.

What this means to the restoration of private property

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[253]United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

[254]Laird v. Nelms, 406 U.S. 797 (1972).

[255]Supra note 254, p.42.

rights by the judiciary is that, should the court decide again to follow decisions such as Pumpbelly v. Green Bay Co., the government's right of eminent domain would still exist but, at the same time, government would not be immune from actions to insure that "just compensation" was included to owners of property. Furthermore, government would be required to compensate property owners for inadvertent takings and partial takings of property much like individuals in private law under strict liability concepts, not just where negligence or wrongful acts can be proven under the Federal Torts Claims Act. Rights of action would be regarded as constitutionally mandated under the "takings" clause, rather than by legislative grace as in the Laird v. Nelms decision.

Heightened Judicial Scrutiny

Throughout these sections the constitutional economics movement has provided a general means of evaluating either the ability or inability of certain institutions to restore protection of private property rights. This approach has discounted regulatory agencies, legislatures, and constitutional amendments as potential avenues for restoration of private property rights and economic liberties. This same approach has proved helpful in considering general principles related to the delegation doctrine and strict liability, as noted above, as ways in which the judiciary may seek

to restore private property rights to a more fundamental level.

Finally, on a more specific level, the arguments provided by the constitutional economics movement calls for enacting the doctrine of heightened judicial scrutiny in matters relating to private property rights and governmental takings. This has been an argument throughout this paper, and, the case of Hawaii Housing Authority v. Midkiff provides a clear example of how heightened judicial scrutiny might be implemented - through the use of suspect classifications which would require the court's review.

The United States has never technically outlined discriminatory classifications in the law. However, the American legal system does recognize suspect classifications such as sex, race, religion, and national origin. Actions or laws that appear to discriminate on the basis of any of these and other classifications are presumed inherently wrong, or unjust, according to our legal system. When such a presumption is made, the burden of proof automatically shifts. The presumption then assumes that the act is illegal, or, the law is unconstitutional. The doctrine of heightened judicial scrutiny is automatically put in motion.

A case exists for adding another suspect category, one that relates to private property rights and the Hawaii case. That category is takings for private use. In other words, any given situation that involves both a governmental taking through the government's eminent domain powers and a subse-

quent private use or benefit of the property in question should automatically become suspect.

This assertion does not imply that every case involving eminent domain and subsequent private use or benefit should necessarily require a decision in favor of the original property owner. Rather, what this suspect classification assertion does argue is that, under these specific circumstances, the court should automatically review the case to determine that a compelling state interest exists for the eminent domain action, and, that the action undertaken is the least restrictive means available to achieve the legislature's goals.

This method seems to provide a more balanced approach to the issue of private property rights and economic liberties versus social and legislative policy considerations. This balance is achieved through the heightened judicial review process. Although some may argue an inherent advantage is owned by the government in court proceedings, under this scenario, neither the legislature nor the individual private property owner is guaranteed a court decision in its favor. The benefit provided by the doctrine of heightened judicial scrutiny is that the burden of proof does, in fact, shift to the government to establish its actions as the least restrictive means available to meet a legitimate compelling state interest. It is this doctrine that achieves the balance between competing interests - society, the state, and private property owners. At the

very least, the court would be required to raise certain questions, such as the issues relating to the Hawaii case discussed at length in the first chapter - issues which the court seemed to discount.

Of the questions that the Supreme Court failed to raise in the 1984 Hawaii Housing Authority v. Midkiff decision, at least two must be given greater consideration in future court cases by the judiciary in order to protect private property rights from the abuses of eminent domain proceedings.[256] These questions are closely related. The first question to which the court failed to give proper consideration is what constitutes takings for public use versus takings for private use, in violation of the Fifth Amendment. This question is especially relevant to the Hawaii case considering the relationship between the land owners and their tenants.

As discussed in chapter one, Hawaii had passed a land reform statute that allowed a local commission to designate certain properties in which residents under long-term leases were allowed to purchase the fee simple their landlord without his consent, notwithstanding any contrary term in the lease. The compensation payable was in an amount not less than the sum of: (1) the present value of the remaining lease payments under the lease, and; (2) the discounted market value of the reversion.[257] The Supreme Court noted

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[256]Supra note 208.

[257]Hawaii Revised Statutes, Section 516-1(14) (1976).

that land in Hawaii was concentrated in the hands of a relatively few individuals, although the state was and is the largest single landowner, and said: "The [Hawaii] legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[258] Furthermore, simply because a large number of tenants is involved, these takings do not become something else altogether. In no individual case is the property used for pure public good, and in none is there anything close to the concept of universal right of access.

As noted previously, the Ninth Circuit had struck down the act as "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit."[259] However, the Supreme Court reversed the Ninth Circuit's decision because the taking was "rationally related to any conceivable public purpose."[260] This is the rational-basis test seemingly taken past extremes by the Supreme Court. There is no reason to find market failure in the simple inability of a landlord and a tenant to agree upon a price for the renewal of a lease, often long before its expiration. The negotiation of problems concerning only two parties in a private market does not call for government intervention, especially th-

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[258]Supra note 208.

[259]Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

[260]Ibid.

rough the abuse of eminent domain proceedings for the benefit of private parties. Furthermore, advocates of Pareto-superiority principles would tend to ask if the court's decision was, in fact, an allocation of resources that involved no losses to the land owners. It would seem difficult to argue that the land owners were no less worse off than before considering the fact that they were forced to sell property against their wishes, and perhaps more important from a legal view, that compensation was determined through the use of set formulas rather than negotiation.

A second question for the judiciary concerns whether the land owners were, in fact, responsible for any market malfunctions. The better place to look for land shortages and high prices in Hawaii may be in the extensive network of state and local land use regulations - in other words previous legislative action. As noted by the New York Times, "Since Hawaii has one of the strictest land use statutes in the nation and holds most of the 4.1 million acres of land in the state for agricultural or conservation purposes, the impact of the ... [land owner's] leasing policy is magnified."[261] This is not simply an argument relating to the Hawaii case, but is rather a much broader argument in favor of increased judicial scrutiny through the judicial review process. There may very well be any number of instances where previous legislative action contributed to what are

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[261]"Hawaiians Foresee Change in Homeowner's Status," New York Times, May 31, 1984, p.7.

now perceived to be "malfunctions" in the market, or, at least contributed to societal problems that current legislation is attempting to correct. It seems that these questions are best answered by the judiciary.

The Supreme Court, in Hawaii Housing Authority v. Midkiff, did not fully consider the traditional tenants of the public use theory of eminent domain found in the Fifth Amendment. Neither did the court question previous legislative action as having a potentially causal relationship to the presumed market failure. Yet to restore protection of private property rights, the judiciary must insist on more exacting standards of legislatures by questioning cases involving public takings for private use. Otherwise, the state can obtain protection under its police and eminent domain powers in every circumstance. Currently, the Supreme Court has diminished a key structural distinction by holding that the "scope of the 'public use' requirement of the Taking Clause is 'coterminous with the scope of a sovereign's police powers.'"[262] The court must soften its position in this regard and question legislative decisions in light of the Constitution and the Fifth Amendment rather than showing apparent unquestioning deference to legislature's justifications of "public use." Without such judicial review, the restoration of private property rights , or the balancing of those rights against societal necessity,

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[262]Ruckelhaus v. Monsanto Co., 104 S.Ct. 2862 (1984), quoting Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321, 2329 (1984).

will not take occur.

Conclusion

Certainly there is a case for modification of the court's current position regarding private property rights to achieve a proper balance between private property rights and social necessities through the judicial review process. It seems that few persons, other than ardent conservatives or persons who benefit from current eminent domain law, would argue that rights to private property have not been greatly diminished since this nation's founding. Numerous examples of government's infringement and abuse of private property rights have been cited in this paper, the culmination of legislative abuse of eminent domain powers being used to transfer private property from one set of private individuals to others, to effect cures for previous legislative action.

Regulatory agencies and legislatures do not appear to be the arena in which these rights to property can be restored as they are the very institutions which have pushed for greater and greater infringement upon private property rights, with the passive sanctioning of the judiciary. Neither should additional constitutional amendments be counted upon to solve the problem and restore property rights to their original fundamental level. Additional constitutional constraints may or may not be required, depending upon the future role of the judiciary. One thing

does appear certain. Changes made to our nation's basic structure and documents, such as the Constitution, if and when they are made, should be reserved for fundamental structural adjustments. Concurrently, provisions for the protection of private property rights are already found in the Constitution, which should preclude further adjustments.

The judiciary appears to be the best-equipped branch of government to restore protection of private property rights and help curb overregulation of those rights. This was one of the original functions as envisioned by the constitutional framers and discussed at some length. The judiciary can achieve this goal and a better balance between private property rights and societal goals through the judicial review process. Examples of means available to the judiciary may include a reinvigoration of the delegation doctrine, use of strict liability principles, and perhaps most importantly, through the use of suspect classifications and of heightened judicial scrutiny in areas involving private takings. Yet, those means of increased judicial scrutiny are not the only means available. What is important is that the courts realize the distance they have moved away from the original concept of property rights and the constitutional framer's intentions found in the Fifth Amendment through their deference to legislative branches. Several possible means are available, and additional means are being discussed every day by proponents of law and economics and the constitutional economics school of thought. As these

schools of thought develop, it appears that potential methods for achieving greater balance might be discovered, a balance between traditionally conservative and liberal forces. In summary, a need seems to legitimately exist for additional judicial review to balance protection of private property rights and economic liberties with the need for social legislation and policy, both from an historical perspective and a law and economics perspective.

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