# THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL PROPERTY RIGHTS

Jan G. Laitos

Technical Services Report No. 4
Rocky Mountain Land Use Institute


College of Law
University of Denver

# THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL PROPERTY RIGHTS

## *AN EVOLUTIONARY HISTORY AND CRITIQUE*

**Jan G. Laitos**
**John A. Carver, Jr., Professor of Law**
**University of Denver College of Law**

Technical Service Report No. 4

# ABOUT THE INSTITUTE

The Rocky Mountain Land Use Institute at the University of Denver College of Law engages in a variety of educational and research activities related to public interest aspects of land use and development. In addition to providing educational opportunities for students at the College of Law through internships and research projects, the Institute sponsors workshops and symposia for land use practitioners and citizen groups on specific land use topics. The Institute, working closely with both the public and private sector, also undertakes and supports research and service projects related to land use and development in the Rocky Mountain Region. The Institute operates in affiliation with both regional and national advisory boards, the members of which are among the leading practitioners and academics in the field. The Institute is entirely financially self-sustaining with funds generated by its activities and publications and by gifts from Institute sponsors.


College of Law, Unversity of Denver
1900 Olive Street, Denver, Colorado 80220
Phone (303) 871-6275, Fax (303) 871-6711

# TABLE OF CONTENTS

# THE POLICE POWER AND PRIVATE PROPERTY*

One important tension in the development of private property is caused by government regulation. The developer wishes to have free rein about resource decisions, while government often seeks to limit the scope of these decisions in order to protect some public interest. A legal relationship is thereby created which controls the extent of property development. That relationship is between private property interests and the police power.

The private property interest is what is owned by the would-be developer and user of the resource; the police power is the inherent authority of the government to affect and limit the developer-owner's use of that resource for the public good (the exercise of the police power often takes the form of a "land use" regulation, which is when the police power restricts private uses of land, natural resources, and property). The private property right in the resource may stem from federal or state law (including common law or statutory law). The police power restriction on that right may originate in federal statutory law, or state or local law. The ultimate source of the restriction is the legislature (the Congress, a state legislature, a board of county commissioners, or a city council), although the restriction may be an implementation of legislative policy by an administrative agency.

The private property interest may take one of many forms. It may be a fee interest, or some interest less than a fee, such as a lease or an unpatented mining claim. When the property interest is created, the interest itself has identifiable boundaries which can be measured in terms of location, acceptable uses, and opportunities for sale and transfer. It may either stand alone or relate to another private interest (e.g., one private party may own a subsurface mineral estate and a different private party may own the surface agricultural interest; if the interest is in water, an owner of a water right has property defined in large part by how other water rights holders use the water).

The exercise of the police power affecting this property interest may also assume several forms. The law may deny any use of the property, it may halt development of the property for a fixed but temporary period of time (a moratorium), or it may impose some limitation on the property. The limitation may be in the nature of a general land use restriction, such as a zoning use classification (specifying the kinds and numbers of uses allowable in an area). Or the limitation may be in the form of a condition, which must be satisfied before the private property owner is granted permission to develop the resource. Such a condition is usually property-specific, relating just to the particular use made of the resource by the property owner.

---

* JAN G. LAITOS John A. Carver, Jr., Professor of Law, University of Denver College of Law.

The author would like to acknowledge the assistance provided by Mary Kay DiStefano, Monica Woods, and Robin Whitinger, law students at the University of Denver College of Law.

There is an obvious conflict between private property interests and the police power. The owner of the property interest wishes to use and develop it without interference from the government, while the government wants to regulate and restrict the property interest if its use and development has any negative consequences for others. William Blackstone noted this conflict when he conceded that while an individual's property right includes "the free use, enjoyment and disposition of all the owner's acquisitions," this powerful right is subject to "the laws of the land." This dynamic between government and private property is often refereed by two legal institutions - the United States Constitution and the judiciary. If the private property owner believes that a police power limitation has "gone too far," the owner can turn to the Constitution or principles of equity to seek protection. The judiciary determines whether equitable principles or specific phrases and clauses in the Constitution provide protection to property owners assaulted by the police power.

Judicial consideration of equitable doctrine and the Constitution may or may not be protective of private property interests. The critical variable is whether courts defer to legislative judgments about how the police power should be exercised. If courts are inclined to be deferential to legislative exercises of the police power, then property interests in resources will be less protected. Conversely, if courts are willing to make an independent assessment of the wisdom, rationality, and fairness of a legislative decision about property (using the Constitution and equity as standards), then property interests are more likely to be protected.

Judicial restraint or activism in protecting property rights is often a function of prevailing views of private property and the police power. If private property is considered subservient to the public good, then the police power will be dominant, even if its exercise is at the expense of private property interests. On the other hand, if use and development of private property is seen as a primary means of advancing the public welfare, then courts will be inclined to apply equitable and constitutional principles so as to insulate property from excessive exercises of the police power. Courts will be particularly sympathetic to private property concerns when an exercise of the police power seems heavy-handed, discriminatory, or oppressive with respect to the private property interest, or to yield marginal gain with respect to the public interest.

If one wishes to assess if police power regulations are more or less likely to withstand a resource owner's legal arguments, a relevant threshold inquiry is whether the attack has been mounted at a time when the judiciary is favoring private property interests or deferring to legislative exercises of the police power. For example, throughout the last half of the 20th Century, courts have classified private property rights (particularly rights to natural resources) as a subset of private "economic rights." As such, when police power or land use restrictions have burdened or interfered with the acquisition, use, development, or disposition of

property, especially property interests in minerals, oil and gas, or energy resources, these restrictions have usually been sustained. This is because, beginning sometime in the mid -1930s, the courts began to defer to legislative determinations regarding economic rights. Ironically, this period of judicial deference to the police power with respect to economic rights coincided with another period of focused judicial activism, when courts were inclined to overturn police power exercises affecting other, non-economic constitutional rights, such as freedom of expression, criminal procedural safeguards, rights of equal treatment by race or gender, and the right of reproductive privacy.

This deferential attitude towards police power restrictions affecting private property has not always been predominant. At times in the past the courts have protected private property interests, while at other times the courts have worked to largely immunize the police power when it has imposed regulatory burdens on property. This paper examines this alternating ebb and flow of judicial restraint and activism regarding the police power and private property.

It will be seen that there have been three distinct eras in the career of the police power's relationship with private property. In the first era, during most of the pre-Colonial and Colonial period, republicanism was the dominant political philosophy. Republicanism was characterized by faith in the legislature, and a perception of private property as being inferior to the general welfare of society. In the second era, which lasted from the early 19th Century until the mid-1930s, the idea of property underwent a fundamental transformation. Property was no longer a static agrarian concept entitling an owner to only undisturbed enjoyment; rather, property was a means of ensuring the growth of the country's markets. This could occur only if property could be put to productive use, largely free from regulation. During this era, courts protected private property interests (and general economic interests) from the police power through a variety of constitutional and equitable doctrines. With the rise of the New Deal in the 1930s, a third era again reversed the power relationship between property and the police power. Centralized government regulation of private property became the norm, strengthened by judicial deference to the legislature in matters involving property and economic issues.

The United States may be on the verge of a fourth era as the 20th Century comes to a close. The modern regulatory state (i.e., one dominated by land and resource use restrictions) is under siege, and unrestrained private property is again seen as an instrument of general economic and social growth. The courts are reflecting this transition to a new era by their ever-increasing willingness to find constitutional or equitable defects in police power regulations. State and federal legislators are supplementing this judge-made reaffirmation of the role of private property by enacting or calling for the passage of "Private Property Protection Acts."

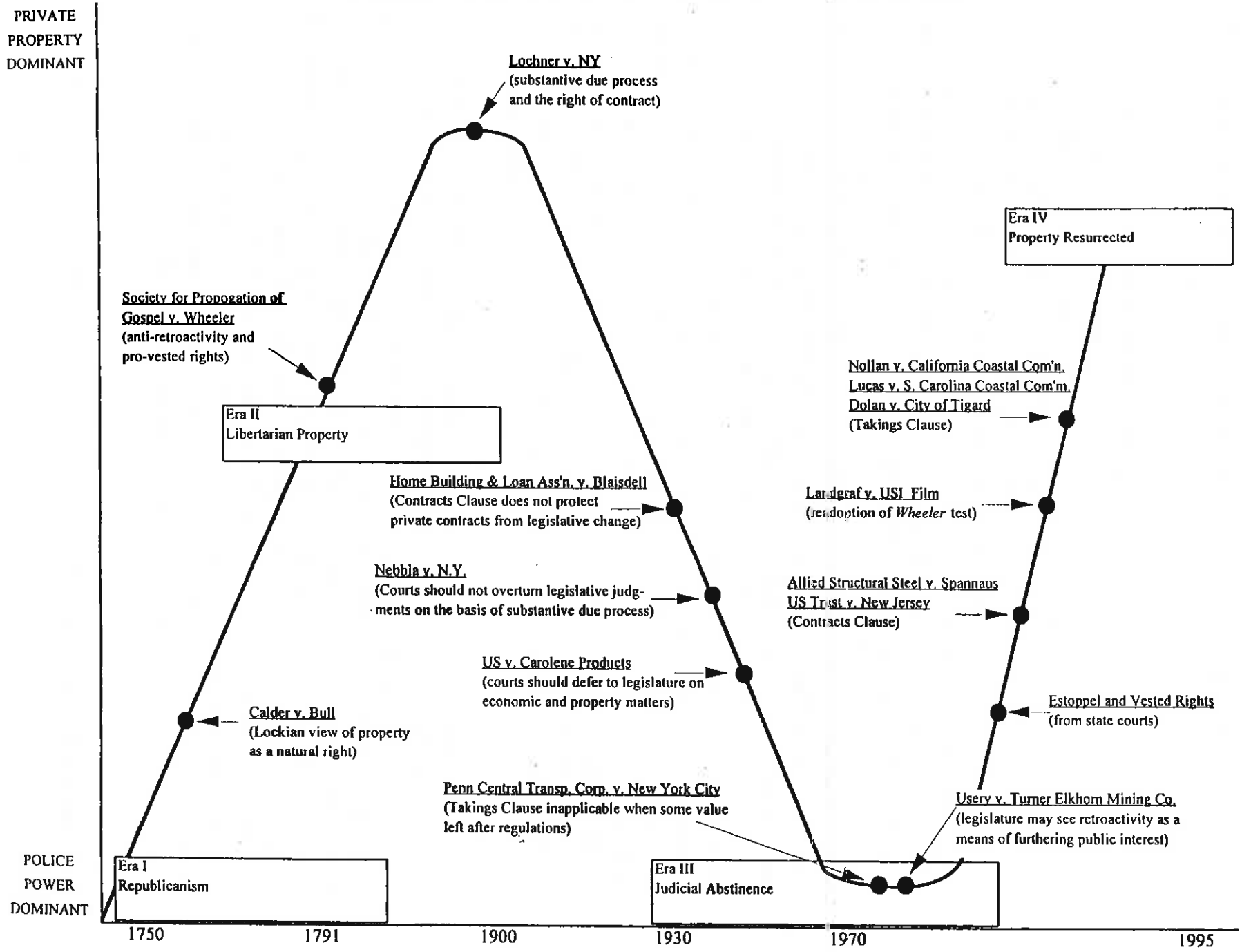
A new age of private property may be near, where police power exercises will be closely scrutinized, and private development of resources protected.

This article considers the philosophical underpinnings of these four eras. It also critiques the justifications advanced for either enhancing or diminishing the level of judicial review. The article in particular criticizes a chief assumption that has been made by courts during the third era (when courts exhibited great reluctance to seriously review or check burdensome regulations). The assumption of the judicial branch throughout this era has been that the legislature knows what is in the public interest, and that therefore police power exercises should largely be immunized from vigorous judicial review, seemingly regardless of their effect on property rights. The result has been deferential judicial review called "minimum rationality." It will be seen that minimum rationality in the context of property rights protection may be fundamentally flawed, because across-the-board judicial abstinence in the face of police power assaults on private property is inappropriate. A gradual realization about the deficiencies of minimum rationality has helped usher in Era IV (the current era), where courts are more inclined to overturn police power exercises that adversely affect private property.

As judicial willingness to overturn exercises of the police power has waxed or waned over the four eras, private property rights in natural resources have been more or less protected from the legislative branch. The evolutionary history of the relationship between private property and the police power is an alternating sequence of judicial deferral to legislature and then protection of private property from the legislature. This relationship is graphically represented in Figure 1. This article explores the reasons for these changes in judicial attitudes about property.

**FIGURE 1**

**JUDICIAL PROTECTION OF PRIVATE PROPERTY OVER FOUR ERAS**



## ERA I: REPUBLICANISM, FAITH IN THE LEGISLATURE, AND SUBSERVIENT PRIVATE PROPERTY

The United States was founded on a political philosophy termed republicanism. A republicanism philosophy elevates the public good, reflected in legislative judgments, over private property. Thomas Paine defined "republic" as meaning "the public good, or the good of the whole," as opposed to "the despotic form which makes the good of the Sovereign, or one man, the only object of government."[1] In a republic, the individual was expected to sacrifice any personal interests to the interests of society. American colonists throughout Era I presumed collective, not just individual, opposition to the Crown. Republicanism was consistent with this notion, and was appealing as a means of fostering a prosperous, independent nation. Although the catch-word of the colonial era was "liberty," republicanism promoted a public, rather than an individual sense of liberty.

### *Faith in Legislatures*

Public liberty meant freedom from tyranny. In contrast to England, the colonists established a representative form of government in which popularly elected assemblymen were to enact legislation for the good of all the people. Pursuant to republicanism, all individuals were to have a common goal: the good of the whole. It was thought that the people's representatives would not stray from their popular mandate, for they shared the same interests as the electorate. Common sentiment towards this system was summed up by Tory William Smith when he stated that it "is not to be imagined [that] the great body of the people can have any interest separate from their country, or pursue any other."[2] A government whose interests deviated from the public good would become tyrannical. It was this concept of tyranny that the colonists had fought to suppress when they broke away from the British Crown.

The colonists were united against tyranny, and people had faith that their legislatures would not replicate the tyranny they had experienced under crown rule. They believed that their representatives would act in their best interests. They embraced republicanism because it represented the opposite of the old order they had experienced under British rule. As one colonist wrote,

> Here Governments their last perfection take,
> Erected only for the People's sake;
> Founded no more on conquest or in blood,
> But on the basis of the Public Good.[3]

---

[1] GRANT WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 55 (1969) (hereinafter *Wood*).

[2] *Id.* at 56.

[3] *Id.* at 55.

The colonists believed that their new government would behave in the best interests of the entire polity (for the "Public Good") because their representatives were elected from among themselves. This was during a period when the nation was geographically condensed, and most people farmed for a living. Since the nation seemed to be a truly homogeneous body, it followed that the rulers and the ruled would have the same needs and pursue the same goals. This popular faith in government was crucial to the survival of a republican society. Without it, citizens would have no reason to subordinate their personal interests in pursuit of the public good.

Republicanism represented an attempt by many Americans to realize the traditional Commonwealth ideal of a society grounded in virtue. Without virtue, individuals would not be motivated to look beyond their selfish interests to see the interests of the whole. Since the goal of republicanism was the realization of a moral good that transcended individual interests, those possessing this virtue assumed that what was good for the collective was in turn good for the individual.

***Republicanism and Property***

In a republican society, personal liberty and security depended on collective power, acting for the general interest. Consistent with this reliance on the wisdom of the whole, republicanism assumed that individual property rights were subject to the demands of society. The government was to protect the interests of the community, not the individual's property interest. Land and private property were merely creatures of the state, subject to the demands of the collective whole.[4] Thomas Paine argued that, "all property is safe under [the people's] protection."[5]

Uncompensated takings of private property by colonial legislatures for the "public good" were not rare. For example, in situations where private land was taken for public roadways, the takings were justified as being for the public good, because they reduced the costs of constructing a public improvement.[6] Land was frequently taken under this same guise for military purposes. A republican society accepted these intrusions on private property through the idea that a state could abridge one person's property right in order to promote many persons' common interests.

Republicans perceived wealth (whether in the form of real property, personal property, or money) as a significant threat to the public good because of its propensity to lead to the non-virtuous quality of selfishness. This posed a significant dilemma for colonial governments. As Continental Congressman William Moore Smith explained, "there can be no true liberty without security of property; [but]

---

[4]Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 699 (1985) (hereinafter *Treanor*).

[5]*Id.* at 700.

[6]*Id.* at 695.

where property is secure, industry begets wealth; and wealth is often productive of a train of evils naturally destructive to virtue."[7] By punishing wealth and security of property, however, the nation's economy could not grow.

This problem may have been the ultimate downfall of republicanism. As the United States began to change from a predominately agrarian to a growing industrial nation, people began to put property to more profitable use. Natural resources became commodities, subject to individual ownership and exploitation for profit. In an agrarian society, property rights were mainly usufructuary. There were few conflicts over the use of land, because most people used it to the same ends. Static agrarian land use was easy to control, and the public good was easier to define because of a (1) common use of land, and (2) common demand placed on the government with respect to that common use of land.

Republicanism thus depended on a unity of interests in a society. But industrialization resulted in the diversification of the common good. America was no longer homogeneous; nor was the nation still united against a common enemy. People began to generate wealth from their property, and eventually longed for increased protection from government interference with the use of their land. Soon, republicanism was replaced by libertarianism, which emphasized individual rights, economic progress, natural resources use and development, and minimal governmental intervention.

## ERA II: LOCKIAN LIBERTARIAN PRIVATE PROPERTY, JUDICIAL PROTECTION OF VESTED RIGHTS, AND LAISSEZ-FAIRE LEGISLATURES

When the Bill of Rights was being considered, state legislatures exercised significant power over private property within their borders. One manifestation of this phenomenon was the incidence of uncompensated takings of property. By the turn of the 19th Century, only Vermont, Massachusetts and Pennsylvania had the equivalent of a just compensation clause written into their State Constitutions. James Madison was aware of this situation when he drafted the Takings Clause of the Fifth Amendment to the United States Constitution. Although the clause was intended only to apply to federal action, Madison hoped its influence would have a "far reaching educative function" and serve as a "statement of national intent [to] impress on the people the sanctity of property."[8]

Madison justified the constitutional bar on uncompensated takings as a means of "protecting the individual from the grabbing hands of government."[9] It

---

[7] *Wood, supra* note 1 at 65.

[8] *Treanor, supra* note 4 at 704.

[9] Frietag, Takings '92: Scalia's Jurisprudence and the Fifth Amendment Doctrine to Avoid Lochner Redivius, 28 Val.U.L.Rev. 743 (1994).

was during Madison's time that the law began to embrace a new respect for private property. In particular, "dynamic property" received protection.[10] Dynamic property was productive property. It was the result of a shift that was occurring from land used exclusively for agricultural purposes to land used for commercial and industrial uses. As the law began to recognize the value of dynamic property and its relation to America's economic prosperity and national survival, private property gained more respect from the legislatures and more protection from the courts.

***Philosophies Influencing Libertarian View of Property***

Madison contended that property rights depend on positive law. "Government" he believed, "is instituted no less for the protection of the property, than of the persons of individuals." Other philosophers went further and argued that property was a natural right. The most influential of these political thinkers was John Locke. In his Two Treatises on Government, Locke argued that the protection of property is the ultimate object of a civil society.[11]

Locke believed that when humans leave the state of nature and enter into society, they give up certain liberties. These liberties are "to be disposed of by the legislature, as the good of society shall require," but man only enters into society "with an intention ...to better preserve himself, his liberty and property."[12] Under Lockian theory, the legislature is "obliged to secure every man's property. [It] cannot take from any man part of his property without his own consent. For the preservation of property [is] the end of Government, and that for which men enter into society."[13]

When Madison drafted the Fifth Amendment, he incorporated Locke's theory of government acting as a protector of property rights, along with Blackstone's definition of individual property rights (which recognizes a ban on uses of property that hurt others). The amendment's ratification represented the translation of libertarian pro-property ideology into a Constitutional principle. The libertarian view of property had two components. First, it conceptually severed property rights into discrete segments. This reflected an individualistic, almost atomistic view of a person's role with respect to property. It was thought that the release of individual initiative through uses of property would better both the individual and the society in which the individual lived. Libertarians regarded natural resource exploitation as

---

[10]L. FRIEDMAN, A HISTORY OF AMERICAN LAW 2d ed. 235 (1985); M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 31 (1977).

[11]J. LOCKE, TWO TREATIES ON GOVERNMENT, BOOK III, PARAGRAPH 881 (1963).

[12]Schultz, Political Theory and Legal History: Conflicting Depictions of Property in the American Founding, 37 Am.J. Legal Hist. 464, 472 (1993).

[13]*Id.*

a desirable consequence of individual freedom and creativity.[14] Second, libertarians urged government (i.e., the legislature) and focused dispute resolvers (i.e., the courts) to actively use the law to further an individual's use of property.

### *The Active Approach to Property Protection*

The American 19th Century is in part a product of legislative and judicial efforts to actively promote the economic growth of the United States. Nineteenth Century legislatures valued property (including energy and mineral resources) for its productive potential, and were anxious to make affirmative use of the law to maintain such conditions as thought necessary to stimulate development. There was a preference for dynamic rather than static property, and the law provided a foundation upon which these productive pursuits could take place.

Examples of the positive use of statutes to encourage economic development included the imposition of protective tariffs and the granting of special tax status for certain investors. Such policies are thought to have underwritten economic stability in the 19th Century by protecting individuals and corporations in their contractual arrangements, and by "lending legal power and force to fulfill private expectations."[15]

Law was seen as a tool to help commit to the private sector "legally protected control over the bulk of economic resources."[16] This does not entail heavy regulation of the marketplace; rather, a primary function of government was to provide legal support of market transactions. The existence of this legislative protection encouraged resource development, and created a legal framework of reasonable expectations within which rational decisions could be taken for the future. The law served to release creative, economic, enterprise energy. Government used its power to help the economy to grow by unleashing the individual's power to own and use the resource free from interference by other private parties. When law discouraged other individuals from preventing resource development, the owner could produce goods and services from the resource. Courts ensured that government interference would be minimal.

### *Judicial Protection of Property to Further Libertarian Values*

The judiciary was enlisted to protect property from government action that conflicted with its productive potential. Courts considered property valuable not merely for what the land or resource happened to be used for at the time. Courts were inclined to protect development ventures, not just passive property holdings.

---

[14]Coyle, Takings Jurisprudence and the Political Cultures of American Politics, 42 CATL.U.L.REV. 817, 844 (1993).

[15]J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE 19TH CENTURY 7 (1956) (HEREINAFTER *HURST*).

[16]Laitos, Continuities from the Past Affecting Resource Use and Conservation Patterns, 28 OLKA. L. REV. 60, 65 (1975).

Individual owners were afforded the right to do something with property in the future, which in the aggregate would stimulate economic productivity and growth.

Nineteenth and early 20th Century courts used four theories to shield property owners from legislative actions that were inconsistent with the libertarian notion of individual economic initiative. First, protection from legislative retroactivity played a central role in the support of property and contract rights. Courts guarded the rights of individuals against the consequences of retroactive legislation. This anti-retroactivity stance was perhaps best articulated by Justice Story in the influential case of Society for the Propagation of the Gospel v. Wheeler (*Wheeler*).[17] Story explicitly rejected a definition of retroactivity which was limited to statutes enacted to take effect from a time anterior to their passage. He instead embraced the view that an impermissible retroactive law was one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past."[18]

Under Story's perception of retroactivity announced in *Wheeler*, laws were not retroactively invalid just because they purported to take effect before their enactment. Such laws were, in fact, rare. Rather, Story expanded the definition of retroactivity to encompass future legislation which in some way altered a pre-existing legal interest. As a result, courts could invalidate laws even if they became effective only after their passage, if these laws had a negative effect in the future on existing, established property and contract rights.

Second, courts were particularly concerned about legislation that interfered with "vested rights." Non-vested property rights could be altered and affected (and sometimes extinguished) by subsequent legislation. Vested property and contract rights, by contrast, were largely immunized from legal change. Property rights became vested when they were independently protected by federal or state constitutional provisions designed to prohibit legislative deprivations of certain common law interests (e.g., interests vested by contract, or immunized from the police power under due process of law).[19]

Third, the Contracts Clause of the Constitution was interpreted so as to restrain state laws affecting property transactions embodied in private contracts (contracts formed between private parties). Sir Henry Maine believed that the Contracts Clause was "the bulwark of American individualism against democratic impatience and socialistic fantasy."[20] The Supreme Court was willing to strike down state statutes which interfered with private contractual arrangements

---

[17]22 F.Cas. 756 (C.C.D.N.Y. 1814).

[18]*Id.* at 767.

[19]See Watson v. Mercer, 33 U.S. (8 Pet.) 88 (1834); Calder v. Bull 3 Dall. (3 U.S.) 386 (1798).

[20]H. Maine, Popular Government 247-48 (1885).

regarding property.[21] This judicial protection of private contracts was in part because a contract was a type of property right explicitly set out in the Constitution as deserving of special treatment whenever it was "impaired" by an exercise of the police power by the state. As such, a contract subject to protection under the Contracts Clause was also one of the most prominent of vested rights.

Fourth, during the so-called "Lochner" era,[22] the Court used the concept of substantive due process to strike legislation that interfered with an individual's right to enter into contracts involving economic and property issues. From the Lochner decision in 1905 to the mid-1930's, the Court invalidated a number of laws on substantive due process grounds. The majority of the justices on the Court read "liberty" in the Due Process Clause quite broadly. The liberty to make decisions with others about one's property, one's business , or one's economic assets was considered to be a fundamental right. The *Lochner* era in many ways adopted the John Locke - James Madison libertarian view that an individual's proper role with respect to property was to be unencumbered by police power regulations.

***Laissez-Faire Legislatures***

A "laissez-faire" interpretation of this second era begins with the assumption that legislatures believed that private sector competition in the marketplace, without governmental interference, would best produce economic efficiency. This is because unrestrained individual action was thought to produce voluntary transfers, which would maximize gains from trade. Law was to facilitate individuals to "express freedom, because freedom is defined as free choices of the person."[23] With free choices, private owners of resources would inevitably develop the resource, and not keep it in a natural state where it would not benefit others.

Many modern historians believe that 19th Century "laissez-faire" legislatures may be a misnomer. The legislature was not inactive. According to this revisionist perspective, statutes were aggressively employed to "define and guarantee a wider dispersion of legislative powers of decision in the community; this it did by committing to private hands legally protected control [over economic decisions]"[24] What the law did was affirmatively to put decision-making power into the hands of the individual, and then to protect those private transactions. "The legal conditions favoring private property in land, labor, capital and liberty of contract . . . would work only when there was 'ease of movement' for both labor and business, because this forces people's attention toward the future rather than the present."[25]

---

[21]Sturges v. Crowninshield, 4 Wheat. (17 U.S.) 122 (1819); Green v. Biddle, 8 Wheat. (21 U.S.) 1 (1821); Seibert v. United States ex.rel. Lews, 122 U.S. 284 (1887).

[22]Lochner v. United States, 198 U.S. 45 (1905).

[23]Radin, Market Inalienability, 100 Harv.L.Rev. 1849, 1961 (1987).

[24]***Hurst, supra*** note 15, at 8.

[25]A. SCHLESINGER, THE AGE OF JACKSON 314 (1945).

Legislatures promoted the building of railroads, imposed protective tariffs, and permitted private exploitation of natural resources, primarily timber and minerals. State statutes and common law cases helped to protect private property interests by giving individuals leverage in their development decisions. Legislation was not hostile to private investment; it promoted it. Unlike Era III, which was characterized by heavy regulation of private property, 19th Century property law did not exert great control over the individual; it instead released the individual to deploy resources, and thereby stimulate economic growth.

This legislative policy allowed for monopolies and manipulation of the market by an influential minority of business interests, because it denied government the ability to regulate this type of activity. When the absence of regulation, coupled with the eagerness of the courts to invalidate regulation, produced economic dislocations (e.g., the Great Depression of the 1930s), a rethinking of the role of the police power and private property was in order.

## ERA III: A RETURN TO REPUBLICANISM – THE MODERN REGULATORY STATE, JUDICIAL DEFERENCE TO SOCIAL AND ECONOMIC LEGISLATION, AND PROPERTY AS AN INFERIOR INDIVIDUAL RIGHT

The post-New Deal response to the evils of unconstrained market forces led to a general reliance on police power regulation. When this regulation restricted private uses of property or resources, it was generally unchecked by the courts. As a result, judicial protection of economic rights has been practically non-existent throughout the past fifty years.[26] This lack of protection by courts is due to the low level of judicial review which has been exercised when private parties have attacked legislation affecting economic rights. The judicial deference to the legislature is based upon the theory that the judicial branch is an inappropriate agency to overturn much wiser legislative decisions regarding economic matters. As a result, the government defendant need only show that the restriction being challenged is reasonably related to some conceivable legitimate purpose. If the law in question addresses some economic or property matter, and if there is some possible connection between it and an arguable public goal, then the law may survive judicial review.[27]

This theory of judicial restraint relies in part upon the separation of powers doctrine of the Constitution.[28] The doctrine provides that each branch of government is limited in its duties, and should not infringe upon the duties of

---

[26]Note, Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered, 103 HARV. L. REV. 1363, 1363 (1990) (hereinafter ***Resurrecting Economic Rights***).

[27]See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).

[28]McCaskey, Thesis and Antithesis of Liberty of Contract: Excess in Lochner and Johnson Controls, 3 SETON HALL CONST. L. J. 409, 467 (1993) (hereinafter *McCaskey*).

another branch. The judiciary is such a branch, and as a separate branch subject to the doctrine, it must lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former.[29]

It follows from this premise a court should act only as a court and not as a "superlegislature" in matters involving property. To do so would be to invade the realm reserved to the political branches of government.[30]

A hands' off judicial policy when the legislative branch regulated property led to a superior police power position that dominated from the 1930s to the 1990s. This time period is Era III, which in many ways is simply a return to the Colonial Period republicanism faith in the legislature, the police power, and regulations affecting private property. Parallel to the emergence of the regulatory state has come a judicial disinterest in using the power of the courts to overturn police power exercises that interfere with private economic and property rights. Courts have attempted to dismantle each of the theories that once protected private property from the police power – retroactivity, vested rights, substantive due process, the Contracts Clause, and the Takings Clause.

***Retroactivity***

Throughout much of the third era, when a statute attached future legal consequences to past events, this form of retroactivity was not impermissible. The only form of retroactivity that was improper was when a statute changed the past legal consequences of past action. In the former kind of "secondary" retroactivity, the validity of the retroactive law is determined according to whether future legal consequences are arbitrary and irrational. That issue is assessed by courts pursuant to the judicial review standard of minimum rationality, where judges only nominally consider (1) the reasons for the legislature proceeding retroactively, (2) its likely effect on existing legal interests, and (3) the efficacy of attaining legislative ends through non-retroactive means. The Supreme Court has justified retroactive legislation, especially the imposition of retroactive liability, as simply a way of creating appropriate economic incentives for property owners to invest in discovering currently unanticipated dangers.[31]

***Vested Rights***

Throughout much of Era III, the vested rights doctrine fell into legal disfavor. The notion of dividing property interests into two classes - those that were vested

---

[29]United States v. Butler, 297 U.S. 1, 62-63 (1936). See also J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 4-5 (1980).

[30]***Resurrecting Economic Rights, supra*** note 26, at 1373. See also Monaghan, Our Perfect Constitution, 56 N. Y. U. L. REV. 353 (1981).

[31]Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976) (hereinafter *Usery*); Concrete Pipe and Products of California v. Constr. Laborers Pension Trust, 113 S. Ct. 2264 (1993) (hereinafter *Concrete Pipe*); Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 511, 565 (1986).

and those that were not vested - became inconsistent with the prevailing view of property, which encompassed virtually any legally defined interest that had any value.[32] The term "vested" also seemed more conclusory than predictive or descriptive. Commentators believed that a judicial determination that a property right was "vested" seemed not driven by some intrinsic quality of that right. Instead, if a right was vested, this was due to the fact that the property interest was protected by some property-protective clause in the Constitution.[33] "Vested right" became more of a label, which was only attached after independent constitutional or equitable analysis.

***Substantive Due Process***

For the 30 years following Lochner, the Court invalidated many acts of legislation of the grounds of substantive due process.[34] However, in 1934, the Court introduced a lenient constitutional standard which required only that the law in question have a reasonable relation to a proper legislative purpose.[35] By 1937, substantive due process was a dead doctrine.[36]

The demise of Lochner jurisprudence was the result of widespread criticism that the judiciary was improperly asserting its own political and social beliefs in its judicial review of economic legislation.[37] The level of review exercised by the court in reviewing cases under substantive due process was thought to involve a second guessing of a democratically-elected, representative body. This was considered unwarranted judicial fact finding, which infringed upon the legislative role. Throughout Era III, economic legislation needed only to bear a "reasonable relation" to a "legitimate purpose," where the courts were willing to supply both the purpose, and the law's relation to it.

One problem with this test was that it was (and is) applied so leniently by the courts that no law could ever likely fail it.[38] A typical example of how the judiciary

---

[32]See, e.g., Comment, The Variable Quality of a Vested Right, 34 YALE L. S. 303 (1925).

[33]J. Scurlock, Retroactive Legislation Affecting Interests in Land 6 (1953); Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, 79 Cornell L. Rev. 87, 118-119 (1993).

[34]See Phillips, Another Look at Economic Substantive Due Process, 1987 WIS. L. REV.8 265, 275; Wonnell, Economic Due Process and the Preservation of Competition, 11 HASTINGS CONST. L. Q. 91, 93-96 (1983).

[35]See Nebbia v. New York, 291 U.S. 502 (1934) (5-4 decision).

[36]See West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (5-4 decision).

[37]Oakes, "Property Rights" in Constitutional Analysis Today, 56 WASH. L. REV. 583, 593 (1981) (hereinafter *Oakes*).

[38]McClosky, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 39 (hereinafter *McCloskey*); Karlin, Back to the Future: From Nollan to Lochner, 17 SW. U. L. REV. 627, 660 (1988).

treated a substantive due process challenge to economic legislation is found in a 1995 case from the United States Seventh Circuit Court of Appeals:

> Plaintiffs . . . assert (and the district court held) that the ordinance is a violation of substantive due process. Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it. The Fourteenth Amendment contains an equal protection clause and a due process clause, but no "due substance" clause. The word that follows "due" is "process." . . . [E]conomic regulation . . . supported by a rational basis [is] within the power of the elected branches of government.[39]

The demise of substantive due process also produced a sharp dichotomy between legislation or regulatory exercises of the police power deemed to address economic, social, or property matters, and legislation affecting so-called non-property "fundamental rights." In the former case, particularly when property was the subject of the police power regulation, the Supreme Court was quite cautious in the use of substantive due process.[40] This hesitation was due in part to a reaction against the *Lochner* approach of excessive judicial activism, and in part to the fact that the substantive due process doctrine owed its existence to constitutional structure rather than a specified grant of power.

In the latter situation, when non-property, non-economic rights were involved, the judiciary assumed a more aggressive posture, particularly when the interest asserted by the affected party was deemed a "personal" non-economic fundamental right.[41] The right to own, use, and develop private property was not considered a fundamental right deserving of heightened judicial protection.[42]

### *The Contracts Clause*

In 1934, when the Court upheld a state regulation which had interfered with a contract, it stated that implied into all contracts is a reservation of the essential attributes of sovereign power, where one of those attributes is the police power.[43] Essentially, this implied condition has allowed the Court to uphold state impairment of contracts by interpreting the interference to be a valid exercise of the police

---

[39]National Paint & Coating Assoc. v. City of Chicago, 45 F.3d 1124, 1129 (7th Cir. 1995).

[40]Albright v. Oliver, 114 S. Ct. 807, 812-13 (1994); Collins v. Harker Heights, 112 S. Ct. 1061, 1068 (1992).

[41]See Reno v. Flores, 113 S. Ct. 1439, 1447 (1993).

[42]United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); Sax, Some Thoughts on the Decline of Private Property, 58 Wash. L. Rev. 481 (1983).

[43]See Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

power of the state.[44] A state regulation which interferes with freedom of contract, but which is labeled as an exercise of the police power, is subject only to the rational relation test. This test has created a police power exception to the Contracts Clause which has, in effect, engulfed the entire Clause, leaving it with little if any meaning. In Era III, the Contracts Clause proved to be a fairly ineffective tool for the protection of economic and property rights.[45]

***The Takings Clause***

When legislation retroactively affects private property interests, including property interests in the form of contract rights, the legislation can be challenged for "taking" property without just compensation. Takings Clause cases have identified three factors which have "particular significance" for assessing whether a law (usually in regulatory form) has unconstitutionally taken pre-existing property rights: (1) the character of the governmental action; (2) the economic impact of the regulation; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.[46] Throughout Era III, courts have interpreted these factors narrowly to avoid finding that the police power has taken private property.

Inquiry into the nature of the government action asks whether the law under challenge has physically invaded or permanently appropriated private property, or whether it arises from a public program that adjusts the benefits and burdens of economic life to promote the common good. If the former, it is likely a taking; if the latter, it usually is not. If the character of the government action is regulatory, and designed to benefit the public, then the private property holder is not protected, even if the government action incidentally benefits other private parties by applying the regulation to the plaintiff's property. This is particularly true if the property holder voluntarily chose to participate in an earlier version of the regulatory scheme now under attack.[47]

The second factor bearing on the taking determination, the severity of the economic impact, has been largely eviscerated by the Supreme Court's determination that "mere diminution in the value of property, however serious, is

---

[44]Epstein, Toward a Revitalization of the Contracts Clause, 51 U. CHI. L. REV. 703, 732 (1984); Keystone Bituminous Coal Ass'n. v. DeBenedicitis, 480 U.S. 470, 502-06 (1987) (hereinafter *Keystone*).

[45]*Epstein, id.* at 741. See also Exxon Corp. v. Eagerton, 462 U.S. 176, 187-94 (1983); Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 416-19 (1983); General Motors Co. v. Romein, 112 S Ct. 1105, 1111-1112 (1992) (hereinafter *Romein*). But see Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (hereinafter *United States Trust*).

[46]Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) [hereinafter ***Penn Central***]; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980); Connolly v. Pension Benefit Corp., 475 U.S. 211 225 (1986) [hereinafter ***Connolly***]; ***Concrete Pipe, supra*** note 31 at 2290.

[47]***Concrete Pipe, id.*** at 2291. See also M. & J. Coal Co. v. United States., 47 F.3d 1148 (Fed. Cir. 1995); Third Catalina v. City of Phoenix, 895 P.2d 115, 120 (Ariz. App. 1994).

insufficient to demonstrate a taking."[48] This result is particularly likely when the mere diminution occurs after the property owner has received the benefits of the challenged regulation, such that an "average reciprocity of advantage" results from it.[49] Indeed, only a total taking, where all value is removed, is usually a certain taking, and even when the economic impact of legislation is severe, courts are reluctant to find a taking if the law attempts to moderate and mitigate its economic impact.[50]

When courts consider the impact of a law on private property that predates the law, it must ascertain what portion of the property right when considered in its entirety has been affected by the law.[51] Since it is necessary to compare the value that has been taken from the property with the value that remains, a critical task is to define the contours of the property interest allegedly taken. If the property affected by the police power is a small fraction of a larger property unit, then there is less chance of a taking.[52]

The property affected by the regulation is also sometimes likened to a "bundle of rights," where each right is like a stick in the bundle.[53] Interference with just one of the sticks in the bundle typically is not a taking. There is a taking only if a regulation retroactively destroys one of the few "essential" sticks in the bundle, such as the right to exclude others,[54] or the right to pass on a certain type of property to one's heirs.[55] If the regulation impacts a stick in the bundle deemed

---

[48]*Concrete Pipe, id.* See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)(75% diminution in value not a taking); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915)(92.5% diminution in value not a taking). See also Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Tabb Lakes, Ltd. v. U.S., 10 F.3d 796, 801 (Fed. Cir. 1993); Morris v. Runyon, 870 F. Supp. 362, 371-2 (D.D.C. 1994); Pinnock v. International House of Pancakes, 844 F. Supp. 574, 587 (S.D. Cal. 1993). But see Florida Rock Industries, Inc. v. U.S., 18 F. 3d 1560, 1570 (Fed. Cir. 1994)(Nothing in the Fifth Amendment limits its protection to only 'categorical' [total] regulatory takings . . . ."); Moroney v. Mayor and Council of the Borough of Old Tappan, 633 A.2d 1045, 1049 (N.Y. App. 1993) (failure to realize a profit sufficient to support takings claim).

[49]Lucas v. So. Carolina Coastal Council, 112 S.Ct. 2886, 2893-94 (1992) [hereinafter *Lucas*]; Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994).

[50]*Lucas, id.*; *Connolly, supra* note 46 at 225.

[51]*Penn Central, supra* note 46 at 130-31; *Concrete Pipe, supra* note 31 at 2290; Cox Cable Commun., Inc. v. United States, 866 F. Supp. 553, 559 (M.D. Ga. 1994).

[52]Keystone Bituminous Cal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987). See also *Lucas, supra* note 49 at 289, n.7 ("uncertainty regarding the denominator in our... fraction has produced inconsistent pronouncements by the Court*"); Concrete Pipe, supra* note 31 at 2290 ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question...is whether the property taken is all, or only a portion of the property in question.").

[53]Kaiser Aetna v. United States, 444 U.S. 164, 176 (1949); Andrus v. Allard, 444 U.S. 51 (1979); Morris v. Runyon, 870 F. Supp. 362, 372 (D.D.C. 1994). See also 520 East 81st Street Assoc. v. Lenox Hill Hospital, 555 N.Y.S. 2d 697, 704 (N.Y. App. 1990) (deprivation of residual/revisionary interest in leasehold is deprivation of "important single element in the bundle of property rights" sufficient to be a taking).

[54]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[55]Hodel v. Irving, 481 U.S. 704 (1987).

non-essential for takings purposes (i.e., the right of use, or the right of sale, or the right to make a profit), the regulation is not a taking.

The third and final factor is the degree of interference with the private property owner's "reasonable investment-backed expectations." Most private parties affected by legislation focus on the degree to which the new law has interfered in the future with past economic investments. Most courts, on the other hand, because of their disinclination to find takings, instead concentrate their attention on (1) whether a private party's expectations are "reasonable," and (2) the nature of the "expectation" that allegedly has been interfered with by the law.

An expectation that an existing law will not change is not "reasonable" when the party affected by the change has some notice of the likelihood of some future change.[56] This notice can be constructive, and will be implied if those subject to the new law operate in a heavily regulated field.[57] Nor is an expectation reasonable if the party asserting its interference has, prior to the changed law, voluntarily assumed the risk of some subsequent change.[58] An expectation also may not be reasonable if it is held by someone other than the party alleging the taking.[59] When an expectation is not reasonable, the party whose property is injured by the law has no protected legal status under the Takings Clause immunizing it from application of the law.

---

[56]See United States v. Locke, 471 U.S. 84, 106 n.15 (1985) [hereinafter ***Locke***] (As long as proper notice of these rules exists, . . . the burden imposed is a reasonable restriction"); ***Concrete Pipe, supra*** note 31 at 2292 ("there [is] no reasonable basis [for the affected employer] to expect that the legislative ceiling [on liability in the old law] would never be lifted"); ***Connolly, supra*** note 46 at 227 ("Prudent employers then had more than sufficient notice . . . that [their] withdrawal might trigger additional financial obligation."); Cox Cable Commun., v. United States, 866 F. Supp. 553, 559 (M.D. Ga. 1994); North Arkansas Medical Center v. Barrett, 962 F.2d 780, 789-90 (8th Cir. 1992); Federal Savings & Loan Ins. Corp. v. Griffin, 935 F.2d 691 (5th Cir. 1991); Resolution Trust Corp. v. Townsend Assoc., 840 F. Supp. 1127, 1140 (E.D. Mich. 1993); Muller v. Resolution Trust Corp., 148 B.R. 650, 658-9 (S.D. Ga. 1992).

[57]FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); Golden Pacific Bancorp. v. U.S. 15 F.3d 1066, 1074 (Fed. Cir, 1994); Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F. 3d 1384, 1389 (11th Cir. 1994) ("Given the highly regulated nature of the banking industry, [the plaintiff] could not have had a historically rooted expectation of compensation"); Matagorda County v. Russell Law, 19 F.3d 215 224 (5th Cir. 1994).

[58]See ***Connolly, supra*** note 46 at 227 and ***Concrete Pipe, supra*** note 31 at 2292 ("The employee[r] in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of [the statute subsequently changed by Congress]" Yee v. City of Escondido, California, 112 S.Ct. 1522, 1531 (1992) (no taking when party complaining about law retroactively imposing limits on lease terms had previously "voluntarily" entered into the leasing arrangement); In re Chateaugay Corp., 53 F.3d 478, 495 (2d Cir. 1995) (the property owner "was familiar with the federal government's involvement in the regulation of [the owner's business]"); Resolution Trust Corp. v. Daddonna , 9 F.3d 312, 321 (3rd Cir. 1993) ("prudent investors are aware of the risks these doctrines pose when they arrange for loans"); Parkridge Investors Ltd. v. Farmers Home Admin., 13 F. 3d 1192, 1199 (8th Cir. 1994) ("it was foreseeable that the government might impair . . . contractual obligations").

[59]Hodel v. Irving, 481 U.S. 704, 715 (1987) (no specific investment-backed expectations in the fact that plaintiff's ancestors agreed to accept allotment of land rights only after ceding to the United States large parts of an Indian reservation).

Nor does a private party have an "expectation" if that party's prior legal relationship with a government entity belies any reliance on the unlikelihood of future legislative amendments. Two aspects of a prior legal relationship produce a presumption that the expectation should be one of future change. First, if the party alleging a taking has "long been subject to federal regulation, [then] [t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[60] Second, if the complaining party has a contract with the government, whose consequences are then altered by subsequent legislation, there is no taking if the terms of the contract have provided notice that future change is possible.[61] Even if a private party has a reasonable expectation of no change, there is still not a taking if that party's investment-backed expectation "can continue to be realized as long as he complies with reasonable regulatory restrictions . . . ."[62]

## RETHINKING THE NATURE OF PRIVATE PROPERTY, THE PROPER ROLE OF THE POLICE POWER, AND JUDICIAL RELUCTANCE TO OVERTURN LEGISLATIVE DECISIONS AFFECTING ECONOMIC RIGHTS

By the close of the 20th Century, more and more commentators and judges are beginning to rethink the Era III jurisprudence of economic and property rights. Instead of property being a poor second cousin to other, more protected rights (such as the right to have an abortion, or the right to not be discriminated against on the basis of gender), private property is increasingly being viewed as the centerpiece of the American market economy. Also, instead of assuming that the legislative process inevitably leads to judgments in the public interest, evidence is mounting that legislation (and exercises of the police power) may often be antithetical to the public good. Perhaps most importantly, the traditional Era III reluctance by the judiciary to protect private property is being challenged. Judges are beginning to believe that their function should not be merely to ratify legislative and administrative police power decisions. This shift to a more activistic stance is due in large part to a recognition (first articulated in the Lockean-Libertarian Era II) of the appropriate role of property and economic interests in a jurisprudence of constitutional rights.

---

[60] *Concrete Pipe, supra* note 31 at 2291. See also McMahan v. Intern. Ass'n of Iron Workers, 858 F. Supp. 529, 544 (D.S.C. 1994).

[61] *Locke, supra* note 56 at 107; Parkridge Investors, Ltd. v. Farmers Home Admin. 13 F. 3d 1192, 1199 (8th Cir. 1994).

[62] Cisneros v. Alpine Ridge Group, 113 S. Ct. 1898, 1902-03 (1993).

### *Reevaluating the Importance of Private Property*

There are several sound reasons why economic rights, particularly property rights, should be accorded more protection from the courts than has been provided throughout Era III. First, it is obvious that the framers of the Constitution were interested in the protection of property rights. The language of the Contracts, Due Process and Takings Clauses explicitly prohibits certain exercises of government power that affect private property rights. The intent of the drafters of the Bill of Rights was in part to reflect a Lockian concern for maintaining the stature and integrity of marketplace transactions involving property. The framers (particularly James Madison) believed that the societal benefits that flowed from safeguarding a person's ownership and use of private property was a primary reason for ensuring that the Constitution preserved "liberty."

Besides property's prominent role in the text of the Constitution, it has also had a long tradition in the common law. The common law of property precedes the formation of this country, and one of the basic tenets of the common law was the protection of individual interests in property. This was because a classic market depends upon ownership of property, development of property, and exchange of property. A well-functioning Adam Smith-like economic market has as its central ingredient the relatively free use and disposal of property interests. If this aspect of the market is thwarted (e.g., by excessive exercises of the police power), the market becomes dysfunctional, and societal well-being is harmed.[63]

### *Doubts About Continued Deference to the Legislature and the Police Power*

#### *The Basis for Judicial Abstinence During Era III*

Era III was characterized by judicial restraint and almost complete deference to the legislature in matters involving property and economic rights.[64] The standard of review dropped to mere rationality, which meant that a statute (or police power exercise) may be "wrong-headed, misguided, based on ignorance, or perhaps even mistaken" and a court would still uphold its constitutionality if there was any

---

[63]See, e.g., Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State, (1990); Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73 (1985); Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 WASH. U.L.Q. 667 (1986); Note, Justice Rehnquist's Theory of Property, 93 YALE L. J. 541 (1984).

[64]See, e.g., Willaim H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, 74 VA. L. REV. 373, 375-7 (1988) (hereinafter *Riker and Weingast*); Herman Schwartz, Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?, 37 AM. U. L. REV. 9, 27-8 (1987) (hereinafter *Schwartz*); James D. Gwartney & Richard E. Wagner, Public Choice and the Conduct of Representative Government, in POLITICAL ECONOMY AND PUBLIC POLICY 6 (James D. Gwartney & Richard E. Wagner eds., 1988) (hereinafter *Gwartney and Wagner*); Richard E. Levy, Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. REV. 329, 342 (1995) (hereinafter *Levy*).

rational basis for the law.[65] Even if the legislature did not expressly articulate a rational basis for a statute, courts could presume one if any (even hypothetical) facts would support it. As a result, property and economic rights became inferior rights, and were virtually unprotected by the courts.

The weighing of the advantages and disadvantages of a statute affecting property was viewed as the duty of the legislature, not the courts.[66] The legislature balanced property rights and exercises of the state's police power. Courts did not judge the wisdom or desirability of legislative policy determinations in the area of economic rights.[67] The appropriate remedy for an abuse by the legislature was thought to be through the polls, not through the courts.[68] It was by the electoral process, not judicial review, that the public could alter the laws that did not reflect their interests.

The courts believed the legislature to be better suited to judge economic issues because of the assumption that the legislature had an inherent ability to voice the interests of the American public. As was the case during Era I, the legislature was viewed as the champion of the public interest,[69] and it was not the place of the courts to question legislators' judgment on economic matters involving the public good. In part such judicial reticence was because the concept of public good is very intangible. The public good or public interest is not something legislatures simply discover. It is created through the dynamic action of the political process, which of course is what all legislators must experience before and after election to office.[70] Public good is a combination of the utilitarian efficiency principle of "the greatest good for the greatest number," [71] and the revered totem of protection of individual rights (including rights in property) which is so fundamental to American society.[72] In theory, when legislation reflects a balance of the two factors of economic efficiency and individual rights, it reflects the public good.[73]

---

[65]***Schwartz, id.*** at 29; ***Riker, id.*** at 376-7; Leonard W. Levy, Property as a Human Right, 5 CONST. COMMENT. 169, 170 (1988) (hereinafter *Levy*). See also, e.g., Nebbia v. New York, 291 U.S. 502 (1934); United States v. Carolene Products Co., 304 U.S. 144 (1938); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[66]See, e.g., Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985).

[67]City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 423 (1952); ***Levy, supra*** note 65 at 170.

[68]McCart v. Indianapolis Water Co., 302 U.S. 419, 428 (1938).

[69]Berman v. Parker, 348 U.S. 26, 32 (1954); ***Gwartney & Wagner, supra*** note 64 at 3.

[70]Daniel A. Farber & Philip P. Frickey, Law and Public Chioce 59 (1991) (hereinafter *Farber & Frickey - Public Choice).*

[71]David Lyons, Ethics and the Rule of Law 156-7 (1984).

[72]Robert C. Solomon, A Passion For Justice: Emotions and the Origins of the Social Contract 95-7 (1991).

[73]***Solomon, id.*** at 97.

***The Costs of Deferential Judicial Review When Legislation Affects Property***

The realities of the political process sometimes inhibit the furtherance of the public good. Commentators have become increasingly unsure of the legislature's ability to protect the public interest.[74] This skepticism has penetrated modern legal theory through two arguments. The first, called Public Choice Theory, explains why and how the legislative process does not produce decisions consistent with the public interest.[75] The second identifies some of the negative consequences that follow from excessive reliance on the wisdom of police power regulation of, and restrictions on, private marketplace decisions regarding property.

1. Public Choice Theory

Public Choice Theory is a creation of both political scientists and economists. It encompasses a number of theories which stand for the proposition that legislatures represent interests of specific parties, but not necessarily those of the public. Public Choice Theory has twin components. "Decisional theory" attacks the assumption that an elected body's decisions are a collective choice that represent a majority view. The other branch of Public Choice Theory, "motivational theory," argues that the motivations of legislators during voting cause outcomes that do not always (or even rarely) reflect the public interest. If either strand of Public Choice Theory is correct, then what may be grossly incorrect is this central premise of deferential judicial review – the legislature usually knows best when it unleashes the police power to limit private property.

---

[74]Marty Jezer & Ellen Miller, Money Politics: Campaign Finance and the Subversion of American Democracy, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 467-8 (1994) (hereinafter *Jezer and Miller*); William Greider, Who Will Tell The People: The Betrayal of American Democracy 11 (1992).

[75]Frank H. Easterbrook, Statutes Domains, 50 U. CHI.L. REV. 533 (1983; Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223 (1986) (hereinafter *Macey*); Nicholas S. Zeppos, Deference to Political Decisionmakers and the Preferred Scope of Judicial Review, 88 NW. U. L. REV. 296 (1993); See also, e.g., discussions in Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873 (1987); Edward L. Rubin, Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes, 66 N.Y.U. L. REV. 1 (1991) (hereinafter *Rubin*); Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 YALE L.J. 31 (1991) (hereinafter *Elhauge*); Marc R. Poirier, Takings and Natural Hazards Policy: Public Choice on the Beachfront, 46 RUTGERS L. REV. 2U43 (1993) (hereinafter *Poirer*); Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423 (1988) (hereinafter *Farber & Frickey*); Anthony S. McCaskey, Thesis and Antithesis of Liberty of Contract: Excess in Lochner and Johnson Controls, 3 SETON HALL CONST. L.J. 409 (1993); Richard A. Epstein, Toward a Revitalization of the Contract Clause, 51 U. CHI. L. REV. 703 (1984); Willaim N. Eskridge, Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275 (1988) (hereinafter *Eskridge*); Daniel A. Farber, Public Choice and Just Compensation, 9 CONST. COMMENT. 279 (1992).

## Decisional Theory

Decisional theory demonstrates the difficulties inherent in forming collective social choices. The predominate argument, Arrow's Impossibility Theory, shows it is impossible to create a process of collective decision-making truly representing the majority in all circumstances.[76] For example, if there are three or more different options for an individual voter to choose from, each individual will rank them in order of their preference. Voters will rank their options in order as preference one, preference two, and preference three, with one being the most preferred and three the least.

But, if voting is by majority rule, legislators are not asked to order their preferences in this manner; majority rule asks them to choose the better of <u>two</u> options placed before them. Individual legislators will then have to rank their options between these two choices. A legislator will choose one over two or three, and two over three. If the choice is between one and three, the legislator will choose one; and if the choice is between two and three, the legislator will choose two. Since the decision is always binary, the observable preference of the legislator will vary with the options being voted on, which in turn affects the preference of the majority. Because of this phenomenon, the overall group preference can shift depending on what options are being voted on. These constantly shifting majority opinions are called cycling majorities, and they change as the options placed before the group change.

This consequence, initially explained by Arrow's Impossibility Theory, means that the voting process under majority rule relies heavily on the order in which issues are placed before legislators.[77] Options of lower rank and preference can receive a majority vote if they are placed before the legislature first, even if very few legislators actually rank them as their first preference. The ultimate outcome (which deferential courts have assumed to always be in the public interest) can be effectively altered according to two variables: the nature of the option placed before the legislature, and the order the options are voted upon. As a result, those who control what options are before the legislature, and when they are presented to the legislature (i.e., those who control the voting agenda) can effectively control voting outcomes.

This problem is compounded by the agenda setting process in legislatures. Agendas are typically determined within legislative committees by an elite, senior group of legislators with a high interest in the outcome of the legislative agenda. Consistent with Arrow's Theory, these legislators can format the itinerary and manipulate the majority to best serve their own interests, at a cost of the larger public interest. Since legislative decisions may disproportionately reflect the

---

[76]See Kenneth Arrow, Social Choice and Individual Values (2d ed. 1963).

[77]***Elhauge, supra*** note 75 at 104; ***Farber & Frickey, supra*** note 75, at 427-8; ***Riker & Weingast, supra*** note 64 at 384-5.

interests of legislators who use cycling majorities in order to maneuver the voting agenda to reflect their own interests, it is dangerous to assume (as have courts during Era III) that legislative judgments affecting private property necessarily reflect the public interest.

### Motivational Theory

The other branch of Public Choice Theory explains legislative results by focusing on the voting motivations of the legislators. Motivational theory assumes that the participants in the political process act to advance a particular self-interest, instead of advancing the public good.[78] Legislators are motivated to gain power or wealth, to enhance their political position, or to persuade their constituency to reelect them. As a result, legislation more often mirrors the legislator's desire to be reelected and to acquire political power. Legislation is not necessarily what is in the best interest of the public.

Interest groups and the public also work to increase their own well-being by lobbying for legislative action in their own interest. Large groups with diffuse interests, such as the general public (or the poor), enjoy less political clout because of their unwillingness or inability to spend extensive time and money to further their interests.[79] The smaller, more focused groups can thereby exercise a disproportionate amount of influence within the legislature. These powerful groups influence legislation by appealing to the legislator's self-interest with contributions of time and money. The legislator is happy to help further the group's interests because doing so will further the legislator's own interests.

The most definitive factor determining an interest group's level of political influence is its willingness to spend time and money.[80] Small groups with focused interests typically have the time and money to further their interests. They therefore quickly become the most politically powerful groups, and the single most influential factor affecting legislation. The legislation which often emerges from this lobbying effort benefits the interest group, not the general public. When a court defers to a legislative judgment regulating the use of private property, the court may be deferring to the wishes of a narrow, focused, special interest group.

While the benefits of lobbying are concentrated within one group, the costs of implementation or maintenance of the legislation are widespread.[81] This is called "rent seeking" legislation, because the "rent" for a small group's benefits is paid by

---

[78]Edward L. Rubin, Public Choice in Practice and Theory, 81 CALIF. L. REV. 1657, 1658 (1993) (reviewing Daniel A. Farber & Philip Frickey, Law and Public Choice (1991)); ***Farber & Frickey-Public Choice, supra*** note 70 at 25-6; ***Gwartney & Wagner, supra*** note 64 at 7.

[79]***Rubin, supra*** note 75 at 11; ***Elhauge, supra*** note 75 at 37-8; ***Poirier, supra*** note 75 at 261; ***Macey, supra*** note 75 at 229-30; ***Eskridge, supra*** note 75 at 286-7.

[80]***Elhauge, supra*** note 75 at 36.

[81]***Elhauge, id.*** at 43; ***Poirier, supra*** note 75 at 262; ***Farber & Frickey, supra*** note 75 at 892; ***Macey, supra*** note 75 at 231-2.

many others outside the group. This rent may be in the form of higher taxes for administrative or program costs. Alternatively, the rent may be manifested as a social cost, such as increased discrimination or diminished public health. Rent-seeking legislation may be efficient for special interest lobbyists, but it is economically inefficient, because the general population bears a cost to create a benefit felt primarily by a powerful minority.

Another method used by these small, focused groups to influence legislation is to satisfy the legislator's need for campaign funds.[82] Access to campaign funds is a decisive factor in the election process. If a legislator wish to be reelected, financial contributions are the central motivating factor. Individual legislators who are not independently wealthy must rely on interest groups or PACs for their election funds. Interest groups seek to maximize their self-interest, so they contribute money to candidates or incumbents who are most compatible with their interests. In essence, interest groups and PACs initially screen members of the legislature to ensure that their support only goes to those who reflect the groups' concerns. Upon election, the incumbent will be unduly influenced by these groups, both because the legislator feels a need to pay back for the financial support (the most appropriate payback is a vote furthering the groups' interest) and because the legislator must again rely on campaign money donated by the groups for reelection.

2. The Unintended Consequences of Police Power Exercises Unchecked by Meaningful Judicial Review

Judicial deference to the legislature in the area of economic and property rights legislation has produced several unwanted negative consequences. Chief among them is that unrestrained government has yielded a condition of over-regulation. This condition has deprived individuals of resources that otherwise might be available to them. Excessive regulation smothers the creativity of marketplace actors whose decisions fuel economic growth. Nor does regulation enhance personal liberty; rather, the police power inhibits it. Regulation limits a person's ability to make fundamental choices about how best to deploy resources productively.[83] Regulation also entails high administrative costs.

Another harm resulting from the lack of meaningful review of economic legislation is that the economically disadvantaged often bear the brunt of any

---

[82]*Rubin, supra* note 75 at 14; *Jezer & Miller, supra* note 74 at 470; *Eskridge, supra* note 75 at 289.

[83]See generally STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); SUSAN-ROSE ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE (1992); Kailin, Substantive Due Process: A Doctine for Regulatory Control, 13 SW. U. L. REV. 479, 480 (1983).

attendant harm.[84] When regulation creates costs or conditions of scarcity, the poor suffer the most. These distributional consequences are worsened because the poor are the least able to alter the legislative decisions that produce over-regulation.[85] As noted above, the legislators enacting police power rules are often influenced by interest group politics. The economically disadvantaged have neither the funds nor the expertise to access the lobbyists that have the greatest sway with legislators.[86]

### *The Courts, the Constitution, Equity, and the Protection of Private Property From the Police Power*

Despite the hesitation throughout Era III to use courts, the Constitution, and equitable principles as property-protective tools, there are several sound reasons why the judiciary should limit legislative power affecting property interests, whenever that legislative power is exercised inconsistent with the Constitution or notions of fundamental fairness. One should begin with the text of the Constitution, where there are four clauses that explicitly forbid use of the police power which interferes with private property–the Contracts Clause, two Due Process Clauses, and the Takings Clause. These clauses protect private property and economic rights. They are designed to be legislature-limiting, and the judiciary has a responsibility to strike down police power regulations which violate them.[87] Indeed, it is the duty of courts to say "what the law is," and if a statute is inconsistent with the Constitution, the applicable law is not the statue but the Constitution.

Apart from the text of the Constitution, the intent of the Framers further supports the idea that the judiciary should act as a check on police power exercises that adversely affect economic and property rights. Compelling evidence exists that the Framers of the Constitution expected economic rights to be protected.[88] They viewed property rights as a cornerstone of just government. James Madison believed that the preservation of property was an essential object of the law.[89] Another drafter stated that the primary objective of the social compact was to be the preservation of property; otherwise, property would be vulnerable to the whim of a powerful legislature, which could take property from one citizen in order to give it to another.[90]

---

[84]***McCaskey, supra*** note 28 at 459; ***Resurrecting Economic Rights, supra*** note 26 at 1371; ***Oakes, supra*** note 37 at 624; Houle, Eminent Domain, Police Power and Business Regulation: Economic Liberty and the Constitution, 92 W. Va. L. Rev. 51, 61 (1989) (hereinafter *Houle*).

[85]***Houle, id.*** at 59, 98.

[86]M. Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 165-67 (1971).

[87]See The Federalist No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 537-38, 543, 552 (1969).

[88]***Resurrecting Economic Rights, supra*** note 26 at 1368.

[89]See 3 THE RECORDS OF THE FEDERALIST CONVENTION OF 1787, AT 450 (M. FARRAND REV. ED. 1966); see also THE FEDERALIST NO. 10, AT 78 (J. MADISON) (C. ROSSITER ED. 1961).

[90]See Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (1795).

The authors of the Constitution sought to perpetuate a system of government based in large part on property and private enterprise.[91] The Framers would expect the judiciary to protect a person's liberty to use property so as to maintain such a system. Since the Framers certainly intended that private property be protected from excessive use of the police power, stricter judicial review of police power restrictions on property is not judicial activism, but simply a reasonable response to the intent of the written Constitution.[92]

Another problem with the argument that the judiciary is not the proper branch to make substantive judgments regarding legislation affecting property is that the courts do in fact practice substantive review in areas of legislation not affecting economic rights.[93] It is questionable how a court can review and overturn regulations affecting non-economic rights, but then become paralyzed when regulations threaten the viability of economic rights. In reality, courts do act as a superlegislature when testing law against the Constitution, and no exception should be made for economic rights.

There is simply no justification for the distinction between personal rights and economic rights, first articulated in United States v. Carolene Products Co.[94] The Court itself has denied that such a distinction exists: "The dichotomy between personal liberties and property rights is a false one. . . . 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 . . . ."[95] Furthermore, the potential for oppression or illegitimacy is as strong in the area of economic rights as in the area of personal rights.

There is also a fundamental interdependence between the rights to liberty over one's person and rights to liberty with respect to one's property.[96] Therefore, to not protect economic rights, is to not protect rights involving personal liberty. Justice Scalia's comment on the fallacies underlying the economic/personal rights dichotomy is enlightening:

---

[91]See SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 4, 12 (1980).

[92]See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 17 (1985).

[93]***McCaskey, supra*** note 28 at 468; ***Resurrecting Economic Rights, supra*** note 26 at 1374; Easterbrook, The Constitution of Business, 11 Geo. Mason U. L. Rev. 53, 53 (1988).

[94]304 U.S. 144 (1938). These personal or "fundamental" rights include the right to travel, the right to privacy, the right to vote, the right to be free from discrimination based on race or gender, and all First Amendment rights. See also ***Epstein, supra*** note 92 at 138; MILTON FRIEDMAN, THE RELATION BETWEEN ECONOMIC FREEDOM AND POLITICAL FREEDOM, IN ECONOMIC FOUNDATION OF PROPERTY LAW 77-91 (Bruce A. Ackerman ed., 1975); Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 Iowa L. Rev. 1319, 1329 (1987).

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

[96]***Houle, supra*** note 84 at 61; ***Resurrecting Economic Rights, supra*** note 26 at 1376; ***McCloskey, supra*** note 38 at 45; ***Oakes, supra*** note 37 at 585; H. MCCLOSKY & J. ZALLER, THE AMERICAN ETHOS 140 (1984); Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982); L. BECKER, PROPERTY RIGHTS 102, 105 (1977).

> "[C]ontrasting economic affairs with human affairs as though economics is a science developed for the benefit of dogs or trees, something that has nothing to do with human beings, with their welfare, aspirations, or freedoms . . . is a pernicious notion, . . . that characterizes much of American political thought. It leads to the conclusion that economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called civil rights, about which we should be more generous. . . . Few of us, I suspect, would have much difficulty choosing between the right to own property and the right to receive a Miranda warning . . . . Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others. . . . As a practical matter, he who controls my economic destiny controls . . . my life as well."[97]

If the judiciary were to become more actively involved in the review of police power regulations affecting economic and property rights, many positive consequences might follow. The judicial protection of economic rights might be entirely consistent with the general public interest, even when this intervention results in the overturning of decisions made by an elective body. To the extent the larger public good may not be furthered by legislative decisions influenced in large part by special interests, judicial invalidation of special interest legislation would be neither counter-majoritarian nor contrary to the purposes of the Constitution.[98] If there is loss of faith in the integrity of elected officials, who too often appear more interested in their own re-election than protecting the public welfare, then meaningful judicial review of police power regulations interfering with private economic autonomy would tend to support democratic institutions.[99] In addition, the poor and disadvantaged might ultimately be better off by energetic judicial review, because the termination of excessive government control over private marketplace decisions could free up individual initiative, increase the amount of goods, resources, and services available for all, and benefit private charity.[100]

---

[97]Scalia, Economic Affairs as Human Affairs, 4 CATO J. 703, 703-04 (1985).

[98]See Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985); Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review? 100 Yale L. J. 31 (1991); DAVID BARNES & LYNN STOUT, THE ECONOMICS OF CONSTITUTIONAL LAW AND PUBLIC CHOICE (1992).

[99]Levy, Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C.L. Rev. 329, 417 (1995).

[100]*Epstein, supra* note 92 at 344-46.

## PROPERTY RISING: THE RESURRECTION OF JUDICIAL PROTECTION OF ECONOMIC INTERESTS

The difficulties discussed above emerged under a regime which deferred to the wisdom of the legislature in economic matters, while frowning on judicial invalidation of laws which seemed to interfere with private property rights. There has since arisen a new respect for private property, and a corollary skepticism about the police power's traditional heavy-handed treatment of private property. One consequence of this changing attitude is that the United States may be entering a fourth era, one in which private property is no longer an inferior right, but one deserving of protection from certain exercises of the police power.

This protection is occurring in three general ways. First, courts are beginning to strike laws whose primary defect is that they have *unfairly* affected private property interests. The main theories used by courts to defend property against police power exercises that are fundamentally unfair are: (1) presumptions against retroactivity; (2) vested rights; and (3) equitable estoppel. Second, certain property-protective clauses in the *Constitution* are being activated by courts (particularly the United States Supreme Court and the Federal Circuit Court of Appeals) to resist government regulations of land and property. These clauses are (1) the Takings Clause; (2) the Contracts Clause; and (3) the Due Process Clause. Third, the United States Congress has proposed legislation that would require federal agencies to pay compensation to landowners whose property value has been diminished by police power exercises. Many states have already passed similar "statutory takings" laws. In a perfect reflection of the nation's newly discovered interest in the role of private property, many of these bills are entitled simply "The Private Property Owners Bill of Rights."

### *Police Power Vulnerable Because Its Impact on Private Property is Unfair*

#### *Retroactivity*

Retroactive laws affecting property seem particularly unfair because they may interfere with legal relationships that have arisen under existing law, as well as decisions made by private property holders in reliance on existing law. In 1994, in Landgraf v. USI Film Products [*Landgraf*],[101] the Supreme Court decided that statutes should have only presumptively prospective effect in the absence of explicit legislative guidance to the contrary. *Landgraf* also concluded that a presumption against statutory retroactivity is not overcome by the fact that the conduct preceding the statute has resulted in a judicial case pending on appeal on the effective date of

---

[101] 114 S. Ct. 1483 (1994) (hereinafter *Landgraf*). The companion case to *Landgraf*, Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994), concluded that Congress could alter a rule of law established by a Supreme Court interpretation of an earlier statute (i.e., "legislative overrule" a case), as long as the Congress expresses its intent to do so.

the new statute. Perhaps more importantly, the *Landgraf* opinion readopts the broader definition of retroactivity originally set forth by Justice Story in the *Wheeler* case during Era II.[102]

The *Landgraf* case presumes that legislation is to apply prospectively, especially when a later statute or amendment would deprive a party of existing legal rights, impose greater liability on it, or render previously lawful conduct unlawful. In these situations the new law would otherwise have a "true retroactive effect."[103] The temporal event which controls the prospective application of the new law is private party conduct occurring before the new law takes effect; prospectivity is not rebutted by the filing of a lawsuit in court or the tendency of an appeal at the time of the new law's adoption.[104] The two most common ways to rebut the presumption are either to discover "clear" legislative intent to have the law apply retroactively,[105] or to classify the change as non-substantive.[106] However, even if there is intent that the law is to apply retroactively, a court will not give effect to that intent if the interest affected by retroactivity is constitutionally protected against such laws.[107]

The presumption of prospectivity is more fair than retroactivity. When legislative changes are presumably prospective, several benefits follow. Parties are held accountable for only those acts that were in violation of the law at the time the acts were performed. Persons contemplating transactions regarding private property are allowed to know, before they act, what the likely legal consequences of those

---

[102]See notes 17-18, ***supra*** and accompanying text.

[103]A true retroactive effect is what the ***Landgraf*** opinion referred to as a "truly 'retrospective' application of a statute." ***Landgraf***, ***id.*** at 1504 (using the ***Wheeler*** test for ascertaining if a law is retroactive). See e.g., Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384, 1388 (11th Cir. 1994); Hook v. Ernst & Young, 28 F.3d 366, 373 (3d Cir. 1994); Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988); Gilbert v. Milliken & Co., 836 F. Supp. 856, 858 (N.D. Ga. 1992); Kluver v. Weatherford Hosp. Auth., 859 P.2d 1081, 1083 (Okla. 1993).

[104]Mojica v. Gannett Company, 7 F.3d 552, 558 (7th Cir. 1993); Bradley v. Pizzaro of Nebraska, 7 F.3d 795, 797 (8th Cir. 1993).

[105]Mayes v. Chrysler Credit Corp., 37 F.3d 9, 12 (1st Cir. 1994) (the presumption against retroactive statutes can be overcome when Congress explicitly provides for retroactivity); Petropoulos v. Columbia Gas of Ohio, 840 F. Supp. 511, 515 (S.D. Ohio 1993). If the legislature intends provisions of a law to apply to pending trials, then courts must abide by this intent, especially if the law involves non-substantive changes. See ex parte Collett, 337 U.S. 55, 77 (1949) (new rule defining forum non conveniens); Bonet v. Texas Co., 308 U.S. 463, 467 (1940) (new method of enforcing awards).

[106]OSI Ind. v. Utah State Tax Com'r, 860 P.2d 381, 383 (Utah App. 1993). Statutes of limitations might not be applied retroactively to bar accrued-but-not-yet-filed claims when such retroactive application would work to remove liability. Vesicol Chemical Corp. v. Enenco, Inc., 9 F.3d 524, 529 (6th Cir. 1993); United States v. United Nuclear Corp., 814 F. Supp. 1552, 1561-62 (D.N.M. 1992).

[107]Maitland v. Univ. of Minn., 43 F.3d 357 (8th Cir. 1994) (if a statute reveals Congress's intent that a statute is to be retroactive, that intent governs unless such an application would violate the Constitution); In re Workers' Compensation Refund, 46 F. 3d 813 (8th Cir. 1995) (statute intended to be retroactive invalid if it violates Contracts Clause).

actions will be. They can then either avoid conduct that is unlawful, or readjust their conduct in light of legislative changes before the consequences of the change are imposed on them. Conversely, retroactivity may impose additional and unforeseeable obligations on good faith private behavior, while defeating reasonable and substantial reliance interests.

Just as the *Wheeler* opinion 180 years earlier had rejected the notion that retroactivity only refers to retroactivity which changes the past legal consequences of past private actions, so too does the *Landgraf* opinion concur that retroactivity sufficient to trigger the presumption of prospectivity is not limited to "statutes . . . enacted to take effect from a time anterior to their passage."[108] Limiting the *Landgraf* rule to this kind of retroactivity would be to limit the rule to only "primary" retroactivity. Rather, the *Landgraf* definition of retroactivity encompasses "secondary" retroactivity: "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment."[109] Primary retroactivity is when a new law alters only the past legal consequences of past private behavior. Secondary retroactivity is when a new law alters just the future (post-enactment) legal consequences of past private behavior.

*Landgraf* then implies that there are two classes of secondary retroactivity. Only the first kind is valid and then only when the legislature expressly rebuts the presumption of prospectivity. This first class of retroactivity acknowledged by *Landgraf* includes laws deemed to be retroactive either because they arise from conduct antedating the law's adoption, or upset expectations based on prior law.[110] These kinds of retroactive laws are not impermissible, although they may adversely affect existing property rights. If legislative intent to proceed retroactively is explicit, such a law may affect past private actions in the future.

The second class of retroactivity is where a law which is intended by the legislature to be secondarily retroactive may *not* operate in the future to adversely affect the earlier private actions. *Landgraf* suggests that the characterization of a law as being retroactive is not determinative of its validity. Rather, the Court implies that a combination of *Wheeler* case equitable factors (e.g., if property is "vested") and constitutional law defenses (e.g., if the law works a taking) might make certain legislative changes invalid if they apply in the future to protected pre-enactment conduct. Such conduct would then have protected legal status, which would immunize the conduct from secondarily retroactive laws.[111]

---

[108] *Landgraf, supra* note 101 at 1498 (citing and quoting from *Wheeler*).

[109] *Id.* at 1499; Pic-A-State Pa., Inc., v. Com. of Pa., 42 F.3d 175, 178 (3d Cir. 1994). This definition is similar to Justice Story's, in *Wheeler*, where he defined a retroactive statute as one which "though operating only from [its] passage, affect[s past] vested rights and transactions." *Wheeler*, 22 F. Cas. at 766.

[110] *Landgraf, id.* at 1499 n.24. See also *id.* at 1501 ("the constitutional impediments to retroactive and legislation are now modest").

[111] *Id.* at 1499. *In accord*, Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447, 1462 (1995).

***Vested Rights***

The *Landgraf* opinion returns to the test for retroactivity used in the *Wheeler* case,[112] which declared as impermissible retroactive laws "which take away or impair vested rights acquired under existing laws."[113] A vested right is usually defined as one which has so completely and definitively accrued that it is not subject to defeat by a subsequent legislative act; it must have become an entitlement, legal or equitable, to the present or future enjoyment of property.[114] It must also be something more than a mere expectation based upon continuation of existing law.[115] No one has a vested right in the hope that a law will not change, or that private property will be free from subsequent government interference.[116] Nor may a right be vested if qualified by contingencies or subject to a condition precedent. It is vested when neither expectant nor contingent, and when the right to present or future enjoyment is an interest, valid, existing, and perfected at the time of the change in the law.[117]

In determining whether a statute impairs or destroys vested rights, the most important inquiries often do not focus on the nature of the right held, but on the consequences of applying the statute to the legal interest. It may be important for a court to consider whether the public's general welfare is advanced or retarded by the law affecting the right, whether the new provision gives effect to or defeats bona fide intentions or reasonable expectations of affected persons, and whether the statute surprises persons who have long relied on a contrary state of the law.[118] The term vested right may, in effect, be a shorthand description of a judicial determination that the facts before it make it *inequitable* that a law-making body

---

[112]See note 102, ***supra*** (*Wheeler* vested rights test cited with approval in ***Landgraf*** at 1499); Centrigram Commun. Corp. v. Lehman, 862 F. Supp. 113, 119 (E.D. Va. 1994).

[113]22 Fed. Cas. at 767.

[114]See e.g., Blue Chip Properties v. Permanent Rent Control Bd., 216 Cal. Rptr. 492, 497 (Cal. App. 1985); Caritas Services v. State, 869 P.2d 28, 41 (Wash. 1994); Manchester Envtl. Coalition v. Stockton, 441 A.2d 68, 80 (Conn. 1981).

[115]NYE v. Indus. Claim Appeals Office, 883 P.2d 607, 609 (Colo. App. 1994); Phillips v. Curiale, 608 A.2d 895, 901 (N.J. 1992); County of Kendall v. Aurora National Bank Trust, 579 N.E. 2d 1283, 1289 (Ill. App. 1991); Griffin v. City of North Chicago, 445 N.E. 2d 827, 830 (Ill. App. 1983); Spindler Realty Corp. v. Morring, 53 Cal. Rptr. 7, 12-13 (Cal App. 1966).

[116]Smart v. Dane County Bd. of Adj., 501 N.W. 2d 782, 787 (Wis. 1993); Rainey v. City of Norfolk, 421 S.E. 2d 210, 214 (Va. App. 1992).

[117]In re Marriage of Hilke, 14 Cal Rptr. 371, 376 (Cal. 1992); S & R Properties v. Maricopa County, 875 P.2d 150, 157 (Ariz. App 1993); Steinfeld v. Nielsen, 139 P. 879, 896 (1913); Dunham Lumber Co. v. Gresz, 2 N.W.2d 175, 179 (N.D. 1942).

[118]See Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Nw. U.L Rev. 540, 561 (1956); Southwestern Bell Tel. Co. v, Public Util. Comm'n of Tex., 615 S.W.2d 947, 956-57 (Tex. Civ. App. 1981); Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Assoc., 384 N.Y.S.2d 923, 928 (N.Y. Sup. Ct. 1976).

impede a private party from taking certain action with respect to the property that is vested.

If a private party is able to successfully prove the existence of a vested right, two important consequences follow. First, a new law which is secondarily retroactive may not be applied so as to impair the right or deprive the party of it.[119] Second, the owner of the right is entitled to the benefits that would normally flow from it but for the operation of the new law.[120]

The vested rights doctrine began in Era II, and has had a long tradition in this country.[121] It was founded upon both non-constitutional and constitutional rationales. Throughout the latter part of the 20th Century, states have increasingly turned to the vested rights doctrine to protect private property interests, where the protection is based on equitable grounds, primarily estoppel and notions of fundamental fairness.[122] Estoppel is triggered when government action encourages private behavior which is retroactively thwarted by new law. Fairness is implicated when private parties reasonably rely on existing law, and when unanticipated changes in that law prevent such parties from planning their conduct with reasonable certainty of the legal consequences.[123]

---

[119]Plaut v. Spendthrift Farms, Inc., 115 S. Ct. 1447, 1462 (1995) ("Takings Clause invalidates a bankruptcy law that abrogates a vested property interest"); Estate of Ridenour v. C.I.R., 36 F.3d 332, 335 (4th Cir. 1994); Saint Vincent Hospital v. Blue Cross, 862 P.2d 6, 9 (Mont. 1993); Griffin v. City of North Chicago, 445 N.E.2d 827, 830 (Ill. App. 1983); Pardee Constr. Co. v. California Coastal Comm'n. 157 Cal. Rptr. 184, 189 (Cal. App. 1979).

[120]Rio Rico Properties v. Santa Cruz County, 834 P.2d 166, 177 (Ariz. Tax.1992) (right to a tax refund); Elam v. Albers, 616 P.2d 168 (Colo. App. 1980) (right to continue use); Blu Chip Properties v. Permanent Rent Control Bd., 216 Cal. Rptr. 492, 499 (Cal. App. 1985) (right to benefits under building permit).

[121]See note 19 and accompanying text, ***supra***.

[122]See e.g., Lake Shore Estates v. Denville Township Planning Bd., 605 A.2d 1106, 1110 (N.J. App. 1991) (vested rights doctrine has equitable underpinnings); The Pantry, Inc. v. Stop-N-Go Foods, 777 F. Supp. 713, 719 (S.D. Ind. 1991) (retroactivity permissible if it does not impair a vested right or a constitutional guarantee); Monterey Sand Co. v. California Coastal Com'n, 236 Cal. Rptr. 315, 320 (Cal. App. 1987) (the foundation of the vested rights doctrine is estoppel); Blue Chip Properties v. Permanent Rent Control Bd., 216 Cal. Rptr. 492, 498 (Cal. App. 1985) (the vested rights doctrine is predicated upon estoppel of the governing body); S & R Properties v. Maricopa County, 875 P.2d 150, 157 (Ariz. App. 1993) (a right vests when it is so substantially relied upon that retroactive divestiture would be manifestly unjust); Underwood v. State, 881 P.2d 322 (Alaska 1994) (fairness underlies vested rights analysis); Iazetti v. Village of Tuxedo Park, 546 N.Y.S.2d 295 (N.Y. S. Ct. 1989) (a vested right is based on consideration of fairness); West Main Assoc. v. City of Bellevue, 720 P.2d 782, 785 (Wash. 1986) (the vested rights doctrine is supported by notions of fundamental fairness).

[123]Erickson & Assoc. v. McLerran, 872 P.2d 1090, 1095 (Wash. 1994); Underwood v. State, 881 P.2d 322, 327 (Alaska 1994).

***Equitable Estoppel***

Equitable estoppel is, like the presumption against retroactivity and the vested rights doctrine, grounded in principles of fair dealing.[124] It assumes that when the government's affirmative acts have created a condition where a private action is allowable, it may be inequitable and unjust to permit the government to deny what it had earlier approved.[125] Estoppel is an equitable doctrine addressed to the discretion of the court; it is intended to prevent government (1) from taking unconscionable advantage of its own wrong, and (2) from asserting legal rights where such an assertion would work a fraud or injustice on a private party acting in good faith.[126] If a government is equitably estopped, the effect of the estoppel is to deny the government the right to impose a new rule on pre-existing private conduct, especially where that conduct involves private property. Instead, the private party is usually subject to the law in effect at the time it relied on the government's earlier representations.[127]

Although the elements of equitable estoppel vary by state, and according to whether estoppel is asserted against state or federal action, there are generally six factual conditions that must be present before the doctrine can be invoked. Three involve the actions by the government, and three involve the response by the private party: Governmental Action - (1) a representation (often in the form of a promise); (2) a representation made with knowledge of the true facts; and (3) a representation made with the intention that the other (private) party should act upon it. Private Action - (1) the party to whom the representation is made must be ignorant of the true nature of the government action; (2) there must be reliance; and (3) the private party must have been induced to act because of the representation, and suffer some injury as a result.[128]

Local and state agencies are most likely to be equitably estopped from applying new rules retroactively when there has been (1) some promise that an

---

[124]Department of Commerce v. Casey, 624 A.2d 247, 254 (Pa. Commw. 1993) ("Equitable estoppel is a doctrine of fundamental fairness designed to preclude a party of depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known that the other party would rely."); Jafay v. Bd. of County Comm'rs of Boulder County, 848 P.2d 892, 903 (Colo. 1993) (the doctrine is founded upon principles of fair dealing).

[125]East Peoria Community High School v. Grand Stage Lighting Co., 601 N.E.2d 972 (Ill. App. 1992).

[126]Board of Trustees v. Stamp, 608 N.E.2d 1274, 1280 (Ill. App. 1993; Application of Q Petroleum, 498 N.W.2d 772, 778 (Minn. App. 1993).

[127]See, e.g., Faymor Development Co. v. Bd. of Standards and Appeals, 383 N.E.2d 100, 102-03 (N.Y. 1978); Amsterdam-Manhattan Assocs. v. Joy, 366 N.E.2d 1354, 1355 (N.Y. 1977); Offen v. County Council, 625 A.2d 424, 446-47 (Md. App. 1993).

[128]National Salvage & Service Corp. v. Comm'r, 571 N.E.2d 548, 556 (Ind. App. 1991); Orton v. Utah State Tax Comm'n, 864 P.2d 904, 909 (Utah App. 1993); Petrelli v. City of Mount Vernon, 9 F.3d 250, 256 (2d Cir. 1993); Reich v. Youghiogheny and Ohio Coal Co., 858 F. Supp. 1381, 1386 (S.D. Ohio 1994); Helwig v. Kelsey-Hayes Co., 857 F. Supp. 1168, 1179 (E.D. Mich. 1994).

earlier rule will control private conduct, and (2) reasonable reliance by private parties on that promise. The first of these conditions, the promise, can take the form of representations, assurances, instructions, or even public statements by government officials.[129] If the promise takes the form of an official approval of private action (e.g., if a building permit is issued), and if there is substantial change in position in reliance thereon, the private party may have a vested right in the promise.[130] The private property holder is then protected under either a vested rights or estoppel theory.

The second condition, reasonable reliance, is not satisfied unless two requirements are met: these must be past private conduct resulting from the promise ("reliance"), and this conduct must be undertaken in good faith ("reasonable").[131] An act of reliance typically entails the expenditure of money or the incurrence of an obligation.[132] The reliance is reasonable and in good faith if there was no ready or convenient way for the private party to ascertain that the government promise or representation was false or unreliable.[133]

## *Police Power Vulnerable Because its Impact on Private Property May be Unconstitutional*

### *Takings Clause Violation*

In a series of decisions handed down in the late 1980s, and throughout the 1990s, the Supreme Court and an influential lower court, the United States Court of Federal Claims, reinvigorated the Takings Clause as a first-line defense against excessive exercises of the police power affecting private property. The combined

---

[129]See, e.g., Florida Dept. of Transportation v. Dardashti Properties, 605 So.2d 120, 123 (Fla. App. 1992) (representations); Steven v. Dept. of Social Welfare, 620 A.2d 737 (Vt. 1992) (representations); Bourne v. Tahoe Regional Planning Agency, 829 F. Supp. 1203, 1209 (D. Nev. 1993) (assurances); Hagee v. City of Evanston, 414 N.E.2d 1184, 1187 (Ill. App. 1980) (assurances); State ex rel. Dept. of Revenue v. Driggs, 873 P.2d 1311, 1313 (Ariz. Tax 1994) (instructions); State ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205, 1214 (D. Neb. 1993) (public statements). Some jurisdictions require that the promise must rise to a certain level of culpability, which is most easily demonstrated if the promissor (i.e., the government official) had knowledge (or imputed knowledge) of the false nature of the promise, making the representation a misrepresentation. See Miller v. State Employees' Retirement System, 626 A.2d 679, 682 (Pa. Commw. 1993); City of Long Beach v. Mansell, 476 P.2d 423, 444-45 (Cal. 1970).

[130]See, e.g., The Reserve v. Town of Longboat Key, 17 F.3d 1374, 1380 (11th Cir. 1994); Bankoff v. Board of Adjustment, 875 P.2d 1138, 1141-2 (Okl. 1994); Brazos Land, Inc. v. Bd. of County Comm'rs, 848 P.2d 1095, 1097 (N.M. App. 1993).

[131]See Dept. of Commerce v. Casey, 624 A.2d 247, 254-5 (Pa. Commw. 1993); Daniels v. City of Goose Creek, 431 S.E.2d 256, 259 (S.C. App. 1993).

[132]El Dorado at Santa Fe v. Bd. of County Comm'rs, 551 P.2d 1360 (N.M. 1976); Hagee v. City of Evanston, 414 N.E.2d 1184, 1187 (Ill. App. 1980).

[133]City of Long Beach v. Mansell, 476 P.2d 423, 444 (Cal. 1970); Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1550 (11th Cir. 1994).

impact of these cases has been to constitutionally red flag certain land use restrictions on the development and use of private property.

*Conditions and Exactions-* In Nollan v. California Coastal Comm'n (*Nollan*),[134] and Dolan v. City of Tigard (*Dolan*),[135] the Supreme Court considered the ubiquitous problem of state and local governments which impose conditions on permits to use private property. These permits are usually necessary before property owners can build upon, change, or develop their property. The conditions often impose an exaction on the property owner, in that they "exact" land, fees, or some other form of property from the owner in exchange for the government's permission. *Nollan* concluded that if there is no essential nexus between the permit condition exacted and some legitimate state interest, the condition is a taking.[136] *Dolan* empowered reviewing courts even more. It required that the exactions demanded by the government's permit conditions bear a significant relationship to the projected impact of the property owner's proposed development.[137] Otherwise the exactions would be a taking.

*Total Takings-* In Lucas v. South Carolina Coastal Council (*Lucas*), [138] the Court acknowledged that there is a per se taking where an exercise of the police denies all economically beneficial or productive use of land.[139] The only exception to this categorical rule is when the nature of the property affected is such that the proscribed use interests are not part of the title.[140] This inquiry asks whether the police power restriction inheres in the title through background principles of the State's common law of property and nuisance. If not, a restriction denying all economically viable use has worked a compensable taking. The *Lucas* opinion clarifies why this judicial activation of the Takings Clause is proper: "[O]ur prior takings cases evince an abiding concern for the productive use of, and economic investment in, land . . . ."[141] Lockean notions of libertarian property (first articulated in Era II) are finding new life with the current Supreme Court.

*Partial Takings-* The *Lucas* case is also significant because the Court explicitly rejected the argument that a "landowner whose deprivation is one step short of

---

[134]483 U.S. 825 (1987).

[135]114 S. Ct. 2309 (1994).

[136]***Nollan, supra*** note 134 at 837.

[137]***Dolan, supra*** note 135 at 2319.

[138]112 S. Ct. 2886 (1992).

[139]***Id.*** at 2893.

[140]***Id.*** at 2899. See, e.g., M. & J. Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995); State, Dept. of Health v. The Mill, 887 P.2d 993, 1001-1002 (Colo. 1994).

[141]***Id.*** at 2895 n. 8.

complete is not entitled to compensation."[142] Lower courts have subsequently expanded upon this go-ahead signal in *Lucas* to acknowledge the applicability of the Takings Clause to partial takings. The leading case is Florida Rock Industries, Inc. v. United States,[143] decided by the Federal Circuit. The court there answered in the affirmative this important, frequently occurring question: "[D]oes a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use of value of the property, constitute a partial taking, and is it compensable as such?"[144]

This partial takings doctrine could authorize payment of just compensation for all exercises of the police power that diminish property value, regardless of the public purpose served by the regulation. If this were to happen, the Takings Clause could operate as a constitutional tort.[145] The primary limitation on the doctrine is when the police power causes a "mere diminution in value."[146] However, the Federal Circuit defined this exception narrowly to encompass only land use regulations which create "direct compensating benefits" such that there is "a reciprocity of advantage."[147] Judges, not legislators, will determine whether the required reciprocity exists,[148] which suggests that the Era III deference to legislative decisions involving private property may be coming to a close.

*The Segmentation Doctrine*- One critical threshold issue for takings cases is ascertaining the size of the property affected by the police power. If a property owner has only a fraction of the property affected by the regulation, a reviewing court might conclude that there is no taking because the remainder of the property still provides the owner with some value. On the other hand, if the owner is able to segment the property so that only the affected parcel is the relevant property unit, then the police power restriction could adversely affect 100% of the value of that parcel and be a total takings under *Lucas*.

In earlier cases,[149] the Supreme Court seemed to reject the segmentation doctrine, holding instead that "the aggregate must be viewed in its entirety."[150]

---

[142] ***Id.*** The ***Lucas*** opinion suggests that such a partial taking could be compensable when a reviewing court considers the police power regulation and the extent to which it interferes with investment backed expectations.

[143] 18 F.3d 1560 (Fed. Cir. 1994).

[144] Id. at 1568.

[145] Blumm, The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 Envtl. L. 171, 192 (1995).

[146] ***Concrete Pipe, supra*** 31 at 2291.

[147] ***Florida Rock, supra*** note 143 at 1570-1.

[148] See, e.g., Peterman v. State, Dept. of Natural Resources, 521 N.W.2d 499, 506-07 (Mich. 1994).

[149] ***Keystone, supra*** note 44 at 497-99; ***Penn Central, supra*** note 46 at 130-31; ***Concrete Pipe, supra*** note 31 at 2290.

However, the *Lucas* case seemed to call into question this "tract as a whole - no segmentation" presumption.[151] The Federal Circuit also ignored the no segmentation rule in Loveladies Harbor, Inc. v. United States (*Loveladies*).[152] There the court excluded from the applicable property affected by a regulation all land which had been either sold or conveyed by the owner prior to the regulation. In *Loveladies*, this left a relatively small parcel which was subject to the regulation. The court concluded that this land had been deprived of all economic value, which meant that there had been a total taking under *Lucas*. Use of the segmentation doctrine applied in *Loveladies* will allow courts to avoid the partial takings doctrine, and find takings of smaller parcels under the *Lucas* total takings rule.

*The Nuisance Exception*- The *Lucas* case seemed to hold that an owner of property whose intended use of the property was already proscribed by state common law nuisance principles could be denied all economically viable use of that property without triggering the total takings rule.[153] The *Loveladies* case limits this nuisance exception in two ways. First, it concludes that property uses cannot be a nuisance if they have received any form of official state authorization. Second, it suggests that to trigger the nuisance exception, the property use must be "so [extraordinarily] offensive to the public sensibility as to warrant no Constitutional protection."[154] If followed elsewhere, these rulings effectively eliminate the nuisance exception whenever a government agency has issued a permit to the landowner. Even when no permit has been granted, these cases from the Federal Circuit constrict the kinds of deleterious effects that warrant applicability of the nuisance exception to offensive "noxious" nuisances. Judges, not legislators, will decide whether the property use is so noxious as to deny the owner a right under the Takings Clause. Reliance on judges to make this crucial determination suggests further that the Era III distrust of judicial activism in property matters may be over.

*The Singling Out Prohibition*- In one early 1960 case, Armstrong v. United States,[155] the Supreme Court explained that the principal purpose of the Takings Clause was "to bar Government from forcing some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[156] Other courts have since decided that the essence of a takings claim, particularly a partial takings claim, is the extent to which a police power regulation has "singled out" one or a few property owners to bear burdens, while benefits are

---

[150]Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

[151]***Lucas, supra*** note 49 at 2894 n.7.

[152]28 F.3d 1171, 1180-1181 (Fed. Cir. 1994).

[153]See note 140 and accompanying text, ***supra***.

[154]***Loveladies***, supra note 152 at 1182-83. See also 4 Restatement (2d) of Torts §821 B (2)(b) (statutory compliance is a factor in determining whether a land use is a public nuisance).

[155]364 U.S. 40 (1960).

[156]***Id.*** at 44. See also ***Nollan, supra*** note 134 at 835 n.4.

spread widely across the community.[157] When property owners have been picked on unfairly, when they have not contributed more to the problem that is the object of the police power than other property owners, then it is a taking for a regulation to make them disproportionately bear the burden of the government's attempt to remedy the problem. Thus, even though the police power goal may be worthy, it may not be constitutional to single out particular property owners when seeking to accomplish this goal. Again, judges, not legislators, will determine whether the police power has fairly allocated burdens.

***Contracts Clause Violation***

Contracts are a kind of property interest. They may be immunized from the application of the police power if they are protected by operation of the Contracts Clause of the United States Constitution. The Contracts Clause is triggered only when certain factual predicates are present and these vary depending upon whether the retroactive law affects private or public contracts. Constitutional protection is much less likely when the state is not a party to the contract. This is because courts will generally defer to legislative judgments which retroactively impair contracts between private parties.[158] Nonetheless, in recent years courts have been inclined to protect even private contractual arrangements under certain conditions.[159]

First, there must be a bona fide contractual relationship between private actors containing terms that are affected by the new law.[160] Second, application of the new law must substantially impair the terms of the contract. In measuring an impairment's substantiality, significance is accorded to whether the retroactive law has restricted the gains the contracting parties reasonably expected from the contract.[161] An impairment might also be substantial if application of the new law works a change in the remedies under a contract, thereby converting an otherwise enforceable agreement into a "mere promise," and impairing the contract's obligatory force.[162] Some jurisdictions presume a substantial impairment if

---

[157]See e.g., Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); Christopher Lake Develop. Co. v. St. Louis County, 35 F.3d 1269, 1275 (8th Cir. 1994).

[158]Keystone, supra note 44 at 505, Energy Reserves Group, Inc. v. Kansas Power & Light, 454 U.S. 400, 412-13 (1983).

[159]See, e.g., Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978).

[160]***Romein, supra*** note 45 at 1110-1112.

[161]In re Workers Compensation Refund, 46 F.3d 813, 817-19 (8th Cir. 1995); West End Tenants Assoc. v. George Washington University, 640 A.2d 718, 733 (D.C. App. 1994).

[162]See Sturges v. Crowninshield, 4 Wheat. 122, 197-98 (1819); Edwards v. Kearzey, 96 U.S. 595, 601 (1878); Van Hoffman v. City of Quincy, 4 Wall. 535 (1867); Bronson v. Kinzei, 1 How. 311, 316 (1843). See also ***Romein, supra*** note 45 at 1111 ("changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts"). But see ***United States Trust, supra*** note 45 at 1516-17 (indicating that the "remedy/obligation distinction" may be an "outdated formalism").

retroactive application of the new law to an existing contract would create a new and unforeseen obligation or duty.[163]

Third, a retroactive law impairing private contracts is void under the Contracts Clause if not justified by a significant and legitimate public purpose, such as the remedying of a general social or economic problem. Conversely, if the State is unable to articulate an urgent social need for the new law, or if its intent is to create a windfall for one private group at the expense of another, or if it retroactively redistributes assets to benefit only a selected few, then the private contract affected by the new law is more likely to have protected legal status under the Contracts Clause.[164] Similarly, if the impairment is not reasonably necessary to solve some general societal problems, but is instead designed to promote a more profitable private use of property, there may be a Contracts Clause violation.[165]

Fourth, courts often ask whether the contracting parties had any reason to anticipate that the legislature might retroactively alter contract terms, or whether the change was completely unexpected. "The idea, evidently, is that if the party to the contract who is complaining could have seen it coming, it cannot claim that its expectations were disappointed."[166] One consideration here is whether the industry the complaining party has entered has been regulated in the past. If a new law retroactively upsets contractual expectations, and does so in a field regulated neither previously, nor "pervasively," then the positive law encompassing the contract at the time of its execution is said to not provide sufficient notice of the possibility of future regulation.[167]

In 1977, in the case of United States Trust Co. v. New Jersey, [168] the Supreme Court announced that it would apply a more strict standard when reviewing a state law which modifies its own contracts with private parties. As with laws which affect private contracts, public contracts are protected from the police power when

---

[163]Dale Baker Oldsmobile, Inc. v. FIAT Motors, 794 F.2d 213, 215-16 (6th Cir. 1984); In re Certified Question, 331 N.W.2d 456 (Mich. 1982).

[164]Western National Mutual Ins. Co. v. Lennes, 46 F.3d 813(8th Cir. 1995) (goal not legitimate if achieved by retroactive means); Earthworks Contracting, Ltd. v. Mendel-Allison Construction, 804 P.2d 831, 837 (Ariz. App. 1990); In re Workers Compensation Refund, 842 F. Supp. 1211, 1217 (D. Minn. 1994).

[165]Pulos v. James, 302 N.E.2d 768 (Ind. 1973); Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459, 464-65 (Ind. App. 1987); Barrett v. Lipscomb, 194 Cal. App.3d 1525 (Cal. App. 1987).

[166]Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383, 385 (8th Cir. 1994).

[167]Western National Mutual Ins. Co. v. Lennes, 46 F.3d 813 (8th Cir. 1995) (Contracts Clause violation when regulation of the contract has not been sufficiently pervasive so as to destroy reasonable contractual expectations); Ross v. City of Berkeley, 655 F. Supp. 820 (N.D. Cal. 1987); Energy Reserve Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 411 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247 (1978).

[168]*Supra* note 53.

(1) there is an enforceable contract with a public entity,[169] (2) the extent of retroactive impairment is substantial,[170] and the (3) new law does not serve an important public purpose.[171] In addition, in the case of public contracts, a law impairing such contracts is violative of the Contracts Clause when such an effect is neither "reasonable" nor "necessary" to serve the purposes claimed by the state.[172]

***Due Process Violation***

Although it is rare for a law affecting property to violate due process, such a law may be successfully attacked if it fails in one of several ways to satisfy the substantive due process requirements. First, and most importantly, application of the new rule must not be arbitrary or irrational.[173] A law is "arbitrary" if there is absolutely no evidence to justify imposition of a new rule, or no reason whatsoever for a decision to proceed retroactively.[174] A law may be "irrational" if the government's actions are motivated by bad faith or some improper motive, such as a desire to accomplish punitive ends.[175] It is more common for legislation to be

---

[169]There must be a "contract" in the usual sense of that word, that is "an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts." Crane v. Hahlo, 258 U.S. 142, 146 (1922). See also Spradling v. Colorado Dept. of Revenue, 870 P.2d 521 523 (Colo. App. 1993).

[170]A contract is impaired by a statute which alters its terms, imposes new conditions, or lessens its value. Federated Am. Ins. Co. v. Marquardt, 741 P.2d 18 (Wash. 1987). Substantial impairment occurs when legitimate reliance interests and expectation are defeated by the new law. See Ass'n of Surrogates v. State of New York, 940 F.2d 766, 772 (2d Cir. 1991); Arriaga v. Members of Bd. of Regents, 825 F. Supp. 1, 6 (D. Mass. 1992); Opinion of the Justices, 609 A.2d 1204, 1210 (N.H. 1992); Peppers v. Beier, 599 N.E. 2d 793, 795 (Ohio App. 1991).

[171]Carlstrom v. State, 694 P.2d 1, 5 (Wash. 1985) (financial necessity not sufficient justification); Tyrpak v. Daniels, 874 P.2d 1374, 1380 (Wash. 1994) ("weak justification" when law seeks to accommodate a uniquely parochial desire); Ross v. City of Berkeley, 655 F. Supp. 820 (N.D. Cal. 1987) (promoting a particular ambiance in a neighborhood shopping district is a public purpose of limited significance); Peppers v. Beier, 599 N.E.2d 793, 795-6 (Ohio App. 1991) (invalid when record silent and absent of any evidence setting forth public purpose).

[172]***United States Trust, supra*** note 45 at 27-29.

[173]Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (calling the protection of the individual from arbitrary government action the "touchstone" of due process); Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984).

[174]United States v. Carmack, 329 U.S. 230, 243 (1946) (an arbitrary decision is one made "without adequate determining principle or was unreasoned"); Shelton v. College Station, 780 F.2d 475, 485 (5th Cir. 1985) (arbitrary if "the government could have no legitimate reason for its decision"); Brady v. Colchester, 863 F.2d 205, 216 (2d Cir. 1988) (arbitrary when government acts with indefensible reason); Adamson Companies v. City of Malibu, 854 F. Supp. 1476, 1491 (C.D. Cal. 1994) (arbitrary when no evidence); TLC Dev., Inc. v. Town of Branford, 855 F. Supp. 555, 559 (D. Conn. 1994) (arbitrary when without reason).

[175]***Landgraf, supra*** note 101 at 1505 (retroactive imposition of punitive damages would raise a serious constitutional question); ***Usery, supra*** note 31 at 17 (courts would "hesitate to approve the retrospective imposition of liability on any theory of deterrence"); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 410 (Neb. 1994); Cohan v. City of Thousand Oaks, 35 Cal. Rptr. 782, 786-788 (Cal. App. 1994); Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 692-3 (3d. Cir. 1993); Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989); Adamson Companies v. City of Malibu, 854 F. Supp. 1476 (C.D. Cal 1994).

deemed irrational if application of a new rule will not advance the government's goal. In such a case, when there is an absence of connection between the new law and relevant past event, there is no reasonable nexus and this defect usually violates due process.[176] Second, the police power may be unconstitutionally unfair if it severely impacts in the future the effects of the conduct occurring prior to the change in the law (the relevant past event). This may occur if the impact of the law is considered "unduly oppressive" or "overly burdensome."[177] While these cases do not signal a return to the *Lochner* era, they suggest that substantive due process may still be used to void irrational and unfair legislation affecting property.

***Legislative Restrictions on the Police Power***

Although the judiciary seems inclined to protect private property from police power exercises that are either unfair or unconstitutional, the ultimate source of the police power itself, the legislature, may be prepared to statutorily restrict agencies operating under previously-enacted legislation. The United States Congress and several state legislatures are considering (or have already passed) legislation often titled "The Private Property Owners Bill of Rights."[178] If enacted, these bills would guarantee compensation for landowners whose property was devalued by some percentage (e.g., 20% of the fair market value) as a result of government action pursuant to the police power. These are, in effect, partial takings bills, in that they would provide a statutory takings cause of action against government action which had the effect of partially reducing the value of private property. The effect of these bills is uncertain. What is certain is that the legislature, in addition to the judiciary, is now aware of the importance of private property in American society. This country could soon experience a new era where property is no longer an inferior right, and where courts will no longer defer to police power exercises which adversely affect this property.

---

[176]Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 694 (3d Cir. 1993); National Paint & Coatings Ass'n v. City of Chicago, 835 F. Supp. 421, 434 (N.D. Ill. 1993); Robinson v. Seattle, 830 P.2d 318 (Wash. 1991); Cox v. City of Lynnwood, 863 P.2d 578, 583 (Wash. App. 1993); Joint Ventures, Inc. v. Dept. of Transp., 563 So.2d 622, 625-6 (Fla. 1990).

[177]Welch v. Henry, 305 U.S. 134, 147 (1938); Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995); City of Tacoma v. Gundermann, 870 P.2d 299, 303 (Wash. 1994); Priddy v. City of Tulsa, 882 P.2d 81, 84 (Okl. Cr. 1994).

[178]See, e.g., HR 9, passed by the U.S. House of Representatives in early 1995, and S 605, under consideration by the U.S. Senate. See also Nancie Manzulla, State Private Property Rights Initiatives as a Response to "Environmental Takings," 46 So. Car. L. Rev. 613 (1995).