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# 'THE SACREDNESS OF PRIVATE PROPERTY:' STATE CONSTITUTIONAL LAW AND THE PROTECTION OF ECONOMIC RIGHTS BEFORE THE CIVIL WAR

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The study of constitutional history has long focused on developments at the national level, with emphasis on the United States Supreme Court. While this is understandable at first glance, such a concentration threatens to distort our comprehension of the constitutional past. This is particularly true in the field of economic rights. State constitutions of the Revolutionary Era anticipated provisions incorporated into the federal Bill of Rights. Yet under the ruling in *Barron v. Baltimore* (1833) the Bill of Rights applied only to the actions

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of the national government.[1] Consequently, before the adoption of the Fourteenth Amendment most constitutional questions relating to property were handled in state courts. They were frequently called upon to define property and contractual rights and paved the way for subsequent Supreme Court decisions. The infrequent study of state constitutional history, however, reflecting the fashionable attitude of current constitutional scholarship, gives little attention to the rights of property owners.[2] Seeking to fill this gap in the literature, this article explores state constitutionalism before the Civil War as it pertains to economic rights. It argues that antebellum state courts played a crucial and underappreciated, if at times imperfect, role in defending property and contractual rights from legislative assault. Articulating a broadly shared judicial commitment to the rights of owners, the Supreme Court of Georgia emphatically proclaimed in 1851: "The sacredness of private property ought not to be confided to the uncertain virtue of those who govern."[3]

## I. REVOLUTIONARY ERA

In English constitutional thought there had long been a close affinity between political liberty and a high regard for the rights of property owners. John Locke famously posited that the ownership of property was a natural right antecedent to government, and that governments were organized to protect "Lives, Liberties, and Estates." The Lockean concept of property was profoundly influential in both

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[1] 32 U.S. 243 (1883). For *Barron*, see James W. Ely, Jr, *The Marshall Court and Property Rights: A Reappraisal*, 33 JOHN MARSHALL L. REV. 1023, 1055-1057 (2000).

[2] *See, e.g.*, PAUL FINKELMAN AND STEPHEN E. GOTTLIEB, EDS., TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (1991).

[3] Parham v. Justices of the Inferior Court of Decatur County, 9 Ga. 341, 348 (1851).

England and the American colonies.[4] William Blackstone, for example, built upon Locke's theory in his *Commentaries on the Laws of England* (1765-1769). 'The third absolute right, inherent in every Englishman," he wrote, "is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[5] As John Phillip Reid observed: "In the eighteenth-century pantheon of English liberty there was no right more changeless and timeless than the right to property."[6] He added:

> There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property. Like their British contemporaries, Americans believed that just as private rights in property could not exist without constitutional procedures, liberty could be lost if private rights in property were not protected.[7]

This widely shared philosophical commitment to private property was reinforced by the political struggles during the decade before the Revolution. Recall that economic issues—Parliament's authority to tax the colonies and tightened imperial control over

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[4] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 87 (1997) ("By the late eighteenth century "Lockean" ideas on government and revolution were accepted everywhere in America: they seemed, in fact, a statement of principles built into English constitutional tradition.); *see also* Ellen Frankel Paul, *Freedom of Contract and the 'Political Economy' of Lochner v. New York*, 1 N.Y.U. J.L. & LIBERTY 515, 528-537 (2005) (discussing influence of Locke on drafting of U.S. Constitution and state constitutions of the Revolutionary era).

[5] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *134.

[6] JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 27 (1986).

[7] *Id.* at 33.

trade—were at the forefront of the move for independence. The Revolutionary debates sparked a heightened awareness of the need to safeguard property and Revolutionary rhetoric frequently linked liberty and property ownership. "The right of property," Arthur Lee of Virginia proclaimed in 1775, "is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty."[8]

The break with England inaugurated a period of innovation and constitutional experimentation by the states.[9] Not surprisingly, a number of the first state constitutions contained provisions to protect property rights. Several constitutions affirmed the right to obtain property. The Pennsylvania Constitution of 1776, for example, proclaimed: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."[10] These right-to-acquire clauses were important in two respects. First, consistent with the Lockean philosophy, they identified property as a pre-existing natural right. Second, they promised protection not only to existing property arrangements but

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[8] ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775)*; see also* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 188 (1980) ("The twin theme of threatened liberty and property therefore recurred in hundreds of public statements made between 1764 and 1776.").

[9] For the framing of the state constitutions of the Revolutionary era, see JACKSON TURNER MAIN, THE SOVEREIGN STATES, 1775-1783 186-221 (1973).

[10] PA. CONST. of 1776, Declaration of Rights, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS 3082 (Francis Newton Thorpe, ed. 1909). Similar language appeared in the Virginia Constitution of 1776, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784. Although Vermont was not recognized as an independent state until 1791, the Vermont Constitution of 1777 also contained such language.

also for the opportunity to gain ownership of property.[11] In the spirit of promoting a widespread distribution of property, all states, by either constitutional provision or statute, abolished primogeniture and entail, devices that restricted the inheritance of land to a single family heir. In practice this step encouraged more broad-based land ownership among descendants.[12]

Several states also adopted specific provisions to safeguard the security of private property. In language derived from Magna Carta, the Revolutionary constitutions of a number of states, including Maryland, Massachusetts, North Carolina, and South Carolina, declared that no person could be "deprived of his life, liberty, or property but by the law of the land."[13] Although this formulation still appears in some state constitutions, the phrase "law of the land" was treated as the equivalent of "due process of law," and thus these provisions were forerunners of the due process norm.[14] In addition, states took steps to curtail the power of eminent domain. The need to provide compensation when private property was taken by the government was a settled common law principle.[15] In 1780 the Massachusetts

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11 ADAMS, *supra* note 8, at 194 ("The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property.").

12 Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 9-15 (1977).

13 *See, e.g.*, N.C. CONST. art I, § 19.

14 James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 324-25 (1999). *See also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351-353 (photo. reprint 1999) (1868) (noting that despite verbal differences in these provisions "the meaning is the same in every case").

15 *See* 1 BLACKSTONE, *supra* note, at *134-35.

Constitution elevated that common law norm to constitutional status, mandating that "whenever the public exigencies require that the property of any individual should be appropriated to the public use, he shall receive a reasonable compensation therefore."[16] This trailblazing provision set the stage for general acceptance of the compensation principle at both the state and national level. Even absent a constitutional mandate, state lawmakers in the Revolutionary era increasingly acknowledged the right of property owners to receive compensation when their property was taken.[17]

The deep commitment to private property was underscored by a proposal debated and rejected during the framing of the Pennsylvania Constitution of 1776. Historians generally picture this document as the most radical and democratic of the Revolutionary period. Mirroring this egalitarian spirit, a preliminary draft of the Bill of Rights included language to deter the acquisition of extensive property holdings. The provision stated: "An enormous Proportion of Property rested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property." This proposal directly contradicted the right of individuals to the unlimited acquisition of property, and was too much for the drafters of the Pennsylvania Constitution. They dropped the proposal.[18] No other state even considered such a restriction on property ownership. In sharp contrast, there was no evidence of any

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[16] MASS. CONST. of 1780, art. X. (The Vermont Constitution of 1777 was the first to include the compensation principle, but Vermont was not recognized as a state at that point in time).

[17] James W. Ely Jr., "*That due satisfaction may be made:*" *the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 11-15 (1992).

[18] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 88-89 (1969); ADAMS, *supra* note 8, at 192.

dispute over the inclusion of provisions protecting the rights of owners in the Revolutionary state constitutions. This suggests that the security of private property was a widely shared value.[19]

The Northwest Ordinance of 1787 was the most significant achievement of Congress under the Articles of Confederation.[20] This measure created a system of government for the territory north of the Ohio River, and has many of the characteristics of a constitutional document.[21] Containing several provisions pertaining to property, the Ordinance well illustrates popular attitudes toward property rights in the early republic. Breaking new ground, the Ordinance set forth a pioneering provision to bar governmental interference with private contracts: ". . . in the Just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said Territory, that shall in any manner whatever interfere with, or effect private contracts, bona fide and without fraud previously formed." Unlike the due process and just compensation norms, this novel clause did not have deep roots in English common law or colonial practice. Rather, as discussed below, it was designed to address the wave of state legislative interference with agreements which characterized the post-Revolutionary years. The other property clauses were in harmony with the trend in state constitutionalism. The Ordinance endorsed the due process principle, providing that "[n]o man shall be deprived of his liberty or property but by the Judgment of his peers or the law of the land." It also adopted the just compensation principle, declaring that "should the

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[19] *Supra* note 8, at 311.

[20] NORTHWEST ORDINANCE OF 1787, *reprinted in* 32 J. CONT'L CONG. 334 [hereinafter NORTHWEST ORDINANCE] (An Ordinance for the Government of the Territory of the United States North West of the River Ohio passed on Jul. 13, 1787).

[21] Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

public exigencies make it necessary for the common preservation to take any persons property or to demand his particular services, full compensation shall be made therefor."[22] Significantly, the Ordinance was the first national legislation to affirm these standards. Moreover, it was the precursor of constitutional developments at the national level. Within a few years the contract clause, the due process clause, and the takings clause would be incorporated into the Constitution and Bill of Rights. Indeed, the Northwest Ordinance, taken together with the state constitutions of the Revolutionary period, demonstrate that the security of private property was a keystone of the political and social order in the newly independent United States.

## II. IMPACT OF THE FEDERAL CONSTITUTION ON STATE PROTECTION OF PROPERTY RIGHTS

Notwithstanding these constitutional documents, the years following the break with Great Britain witnessed a gap between the philosophical dedication to private property as a fundamental value and the willingness of state legislators to respect such rights in practice. In fact, the Revolution produced widespread abridgments of property and contractual rights. The various challenges to the security of property can be only briefly noted here, but they were important in the drive to create a new national government that could afford greater protection for property rights. State lawmakers targeted Loyalist property for confiscation by passing bills of attainder which declared named persons guilty of treason. Debts owed to British creditors were sequestered and made payable to the states. The depressed economic circumstances of post-Revolutionary America caused state legislatures to pass an array of debt-relief measures to

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[22] NORTHWEST ORDINANCE, art. II. For a perceptive analysis of the property clauses of the Northwest Ordinance, *see* Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 447-57 (2013).

assist debtors at the expense of creditors. Such laws included stays on the collection of debts, statutes authorizing the payment of obligations in installments, and measures permitting the payment of debts with commodities. In addition, state legislators issued large quantities of paper money and made such currency legal tender for the payment of debts. To many these laws both discouraged commerce by frustrating the enforcement of contracts, and threatened the security of property generally. Further, the Pennsylvania legislature annulled the corporate charter of the Bank of North America, the first incorporated bank in the United States. This called into question the stability of corporate charters.[23]

The property rights provisions of state constitutions were unable to halt this legislative assault. Fledgling state courts in the 1780's occasionally sought to uphold the interests of property owners and creditors against hostile legislation, but the concept of judicial review was unsettled and contentious. Consequently, state courts treaded carefully when challenging legislative authority.[24] The limited success of state courts was made clear in *Trevett v. Weeden* (1786), a case arising from Rhode Island's controversial paper money scheme. A private party, acting on behalf of the state, brought suit against a butcher who refused to sell meat for depreciated paper money. This rejection violated a penal law imposing a fine on persons who did not accept paper money at face value. The Supreme Court of Rhode Island unanimously dismissed the complaint, in effect vindicating the butcher. Although the court rendered no formal opinion about

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[23] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 34-38 (3rd ed. 2008). *See generally* Janet Wilson, *The Bank of North America and Pennsylvania Politics, 1781-1787*, 66 PENN. MAGA. HIST. AND BIO. 3-13 (1942).

[24] KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 66 (2d ed. 2009).

the constitutionality of the penal law, several judges expressed the view that the measure violated property rights guarantees and the right to trial by jury under the colonial charter and was therefore unconstitutional. Unhappy legislators censured the court, and debated impeachment of the judges.[25]

The assaults on the rights of property owners during the 1780s convinced many political leaders of the need for a more energetic national government that could provide enhanced protection for private property. Since this article focuses on state constitutional law, I will not rehash the well-known events of the constitutional convention of 1787 and the ensuring ratification campaign. Suffice it to say that many clauses of the United States Constitution and the Bill of Rights pertain to economic interests. For our purposes, however, three provisions warrant particular emphasis. Among various limitations on state authority was the provision barring the states from passing any law "impairing the obligation of contracts." It is noteworthy that the framers included the contract clause in the original Constitution at the very time that they were arguing that a Bill of Rights was unnecessary. They saw contractual rights as sufficiently vital to justify a specific ban on state abridgment. [26] The Fifth Amendment in the Bill of Rights contained two important property guarantees, declaring in part that no person "shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." As we

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[25] CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926); ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 90 (7th ed. 1991).

[26] Bruce Ackerman, *Constitutional Politics/ Constitutional Law*, 99 YALE L.J. 453, 537 (1989) ("Thus, the Federalists valued market 'freedom' so highly that they forbade the states from 'impairing the obligation of Contract' in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary.").

have seen, each of these stipulations was anticipated by state constitutions and the Northwest Ordinance. Yet aside from the contract clause which expressly applied solely to the states, the Bill of Rights was only binding on the new national government.[27] In many respects, therefore, property owners still had to look to their state constitutions and state courts to safeguard their rights.

Just as the framers of the federal Constitution drew upon previous state constitutions and the Northwest Ordinance, so the Constitution and Bill of Rights became in turn an influential model for subsequent state constitutions. As some of older states revised their constitutions they drew upon the property clauses of the federal documents. For example, Pennsylvania adopted a law of the land clause, a just compensation requirement, and a contract clause as part of its 1790 Constitution. In the same year South Carolina adopted a law of the land provision and a contract clause in its revised fundamental law, but no just compensation provision. The Delaware Constitution of 1792 incorporated a just compensation mandate and a law of the land clause. New York adopted due process and just compensation guarantees with its 1821 Constitution. The Rhode Island Constitution of 1842 paralleled the property clauses of the federal Constitution and Bill of Rights. Two years later New Jersey adopted a right to acquire clause, a just compensation mandate, and a contract clause as part of its constitution. Newer states commonly followed this pattern. Thus, the Kentucky Constitution of 1792, the Tennessee Constitution of 1796, the Mississippi Constitution of 1817, the Illinois Constitution of 1818, the Texas Constitution of 1836, and the Florida Constitution of 1838 each contained a contract clause, protected persons

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[27] For an exploration of why the contract clause was applied only to state governments and the takings clause of the Fifth Amendment only to the national government, see Michael W. McConnell, *Contract Rights and Property Rights: A Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 269 (1988).

against deprivation of property except in accordance with the law of the land, and imposed a just compensation requirement when private property was taken by the state. The Ohio Constitution of 1802 included a contract clause and a takings clause. Moreover, the California Constitution of 1849, as well as the Delaware, Ohio, Illinois and Florida documents asserted that the acquisition and possession of property were among the natural rights of all persons. These jurisdictions were broadly representative of the trend in constitution-making across the United States.

As might be expected, the pattern of placing property clauses in state constitutions was uneven. A number of the older states proved reluctant to embrace explicit constitutional protection of property rights. The Virginia Constitutions of 1776 and 1850, for instance, lacked any of the specific guarantees of private property. Likewise, the New Hampshire Constitution, as substantially amended in 1792, remained in effect throughout the antebellum years without any concrete property-conscious provisions. None of Georgia's three first constitutions – 1777, 1789, 1798 – made any reference to the rights of property owners, an omission not remedied until after the Civil War.[28] Not until its 1851 Constitution did Maryland have a takings clause.

Although not all states in the antebellum period placed property rights clauses in their constitutions, a large majority did so. This development was noteworthy in two respects. First, it served to strengthen the high rank of property and contractual rights in the constitutional culture. Second, throughout the antebellum years state governments were the primary loci of both promotive policies and regulatory authority with respect to economic activity. Yet only the

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[28] *See* J.A.C. Grant, *The 'Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 69-70 (1931) (discussing the eminent domain provisions in antebellum state constitutions).

federal contract clause furnished a basis for federal judicial review of state legislation. Accordingly, the state constitutions represented an important and independent safeguard for property owners. In fact, most of the litigation challenging the validity of state legislation turned upon state constitutional law and was heard in the state courts. Thus, state judges were at the forefront of the drive to fashion judicial doctrines protective of private property and the sanctity of agreements.

## III. STATE COURTS AND TAKINGS JURISPRUDENCE

Issues pertaining to the exercise of eminent domain did not bulk large in the work of the federal courts until late in the nineteenth century. In part this reflected the practice of the federal government of relying on state eminent domain proceedings to acquire property when necessary.[29] There was no need for federal court involvement. Recall also the Supreme Court ruled that the Bill of Rights, including the Fifth Amendment takings clause, did not bind the states. Under this reasoning, the rights of property owners and the range of state regulatory authority were governed by state constitutional provisions. This meant that there was ample room for state courts to take

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[29] William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559 (1972) (observing that "federal officials had apparently had state governments condemn land for federal purposes"). It was not until Kohl v. United States, 91 U.S. 367 (1876) that the Supreme Court held that the power of eminent domain was an incident of sovereignty inherent in the federal government. The Court upheld the exercise of eminent domain to acquire land for a post office, noted that such power had not been previously used by the federal government, and pointed out that before this the states had condemned land for use by the federal government. *See* William Baude, *Rethinking the Eminent Domain Power*, 122 YALE L. J. 1738 (2013) (arguing that the federal government was not originally understood to have any general eminent domain power, pointing out that historically the federal government relied on the states to condemn needed land, and asserting that *Kohl* was inconsistent with the original understanding of the takings clause).

the lead in shaping the contours of takings jurisprudence. Although no state constitution affirmatively granted the eminent domain power to legislatures, courts universally held that such authority was an inherent incident of sovereignty.[30] State judges were the first to address what governmental actions amounted to a taking of property, the scope of "public use," and the amount of "just compensation."

### A. COMPENSATION AS A FUNDAMENTAL PRINCIPLE

One knotty question was whether, in the absence of a compensation requirement in a state constitution, states were bound to pay compensation when private property was appropriated for public use. On the whole state judges proved receptive to the argument that compensation was necessary even without an express provision in the state constitution. At issue in *Lindsay v. Commissioners* (1796) was the practice in South Carolina of appointing commissioners to lay off public roads and appropriate privately-owned land for such purpose without the payment of compensation.[31] The four judges of the Constitutional Court split evenly, with two sustaining this practice based on customary usage. Two judges, however, insisted that compensation be made. Judge Thomas Waties reasoned that the "law of the land" clause in the South Carolina Constitution made reference to the common law of England. He then invoked William Blackstone to demonstrate that the common law mandated compensation. Waties asserted that the right of property ownership existed under the constitution and not at the will of the legislature. Although the *Lindsay*

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[30] *See, e.g.*, *Ex parte* Martin, 13 Ark. 198, 206 (1853); Brown v. Beatty, 34 Miss. 227, 239 (1857); Sinnickson v. Johnson, 17 N.J.L. 129, 145 (N.J. 1839); *see also* JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 20-21 (3rd ed. 1909).

[31] 2 S.C.L. 38 (S.C. 1796).

case ended inconclusively, Judge Waties anticipated future development in other jurisdictions.

In the early decades of the nineteenth century several state courts invoked unwritten fundamental principles to mandate the payment of compensation when private property was taken for public use even if the state constitution was silent on the point. The landmark decision in this regard was *Gardner v. Trustees of Village of Newburgh* (1816) by New York Chancellor James Kent.[32] Seeking to establish a water supply, the Village of Newburgh planned to divert a steam away from the plaintiff's farm. The authorizing statute, as well as the New York Constitution at the time, made no mention of compensation, and the landowner sought an injunction to stop the diversion. Affirming that a riparian owner was entitled to utilize a watercourse flowing through his land, Kent asserted that an owner could not be deprived of property without compensation. He concluded that the payment of compensation was "a necessary qualification accompanying the exercise of executive power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice."[33] Noting that the constitutions of the federal government and several other states contained an express just compensation requirement, Kent added: "Until, then, it would be unjust, and contrary to the first principles of government . . . to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water."[34] He granted the injunction.

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[32] 2 Johns. Ch. 162 (N.Y. Ch. 1816).
[33] *Id.* at 166.
[34] *Id.* at 168.

A decade later the Court of Appeals of Virginia blended tenets of natural law with vague references to written constitutions in reaching a similar result.[35] It held that a river improvement statute unconstitutionally deprived mill owners of compensation when their mills were removed to make the river navigable. Without citing any specific constitutional language, the court declared that "whether we judge this Law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void."[36] A concurring judge pictured the denial of just compensation when property was taken as a violation of the right to acquire and possess property clause in the state constitution.[37]

In a case arising from the construction of a bridge by a private corporation, the Supreme Court of Georgia in 1847 strongly endorsed the compensation norm notwithstanding its absence in the state constitution. The court reasoned that the takings clause of the Fifth Amendment "does not create or declare any *new principle of restriction*, either upon the legislation of the National or State government, but simply recognized the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments, and which derived no additional force as a principle, from being incorporated into the Constitution of the United States." It treated the Fifth Amendment as simply declaratory "of a great constitutional principle of universal application."[38] The

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[35] Crenshaw & Crenshaw v. Slate River Co., 27 Va. 245 (1828).

[36] *Id.* at 264.

[37] *Id.* at 276.

[38] Young v. McKenzie, 3 Ga. 31, 44 (1847); *see also Ex parte* Martin, 13 Ark. 198, 205 (1853) ("The constitution of this State contains no provisions that private property shall not be taken for public use, without just compensation; yet we hold that this prohibition upon the legislature, is implied from the nature and structure of our government, even if it were not embraced by necessary implication in other provisions of the bill of rights. . . .The duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the

court concluded that this same principle equally governed state governments although not explicitly embodied in state constitutions.

### B. Public Use

State judges played a key role in establishing the cardinal principle of just compensation during the antebellum years. Other issues proved more vexing, but here as well state courts sought to shelter property owners even as they facilitated changes in the economy. Consider the requirement that private property could be taken under eminent domain for "public use" as spelled out in the Fifth Amendment and many state constitutions. Pointing to this language, state courts universally ruled that private property could not be taken for the private use of another even with the payment of compensation. As the Supreme Judicial Court of Maine succinctly put it in 1855: "The private property of one citizen cannot be taken and given to another citizen, for private uses."[39] But this left open the task of dis-

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most arbitrary governments."); Town of Bristol v. Town of New Chester, 3 N.H. 524, 532 (1826) ("There is no doubt, that when this power [eminent domain] is exercised, a just compensation is to be made. The constitutions of some of the states expressly declare, that such compensation shall be made. And natural justice speaks on this point, where our constitution is silent."); Sinnickson v. Johnson, 17 N.J.L. 129, 145-146 (1839) (treating the just compensation norm as "a settled principle of universal law," and asserting that "the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made a part of its State Constitution"); State v. Glen, 7 Jones Law 321, 331-33 (N.C. 1859) ( private property can only be taken under eminent domain for just compensation); Raleigh and Gaston R.R. Co. v. Davis, 19 N.C. 451 (1837) (assuming but not deciding that the right to receive compensation was grounded on the law of the land clause in the North Carolina Constitution).

[39] Jordan v. Woodward, 40 Me. 317, 323 (1855). *See, e.g.*, Sadler v. Langham, 34 Ala. 311, 319 (1859) ("No instance has been found, in which an act of the legislature, taking private property, has been sustained, unless it was disclosed upon the face, and by the terms of the act, that the use was public, and not a private one."); Dickey v. Tennison,

tinguishing between public and private usages, without clear guidelines. State courts were the first to wrestle with what amounted to "public use."

There was certainly considerable variation among jurisdictions, and some state courts adopted a latitudinous understanding of the scope of "public use." Still, the view that eminent domain was confined to acquisitions for the government or private entities under a legal obligation to serve the public gained ascendancy.[40]

Early eminent domain cases involved the condemnation of land for mills and private roads. During the eighteenth and early nineteenth centuries the harnessing of water power was a vital source of energy. Consequently, most of the original colonies passed mill acts which authorized grist mill operators to erect a dam across a river or stream and overflow adjacent land to create a mill pond. The mill owner was required to pay compensation for the land taken. Grist mills were treated as an early type of public utility, subject to a high

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27 Mo. 373, 374 (1858) ( "While this provision recognized the right of eminent domain in the state for the public use, there is nothing which sanctions the doctrine that the property of individuals may be taken for private use with or without compensation. Such a right would be hostile to the existence of private property."); *In re* Albany Street, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834) ( "The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private shall not be taken from one and applied to the use of another. It is in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported."); Clack v. White, 32 Tenn. 540, 548-49 (1852) (legislature has no power to take private property "for any mere private purpose or to transfer it from one person to another, against the will of the owner, whether an indemnity be provided for it or not"); Thien v. Voegtlander, 3 Wis. 461, 465 (1854) (" . . . no one can claim that the property of one person can, without his consent, be given to another, even if compensation is made.").

[40] COOLEY, *supra* note 14, at 531 ("The *public use* implies a possession, occupation, and enjoyment of the land by the public, or public agencies."). For a comprehensive survey of cases exploring the meaning of 'public use" during the nineteenth century, *see* ILYA SOMIN, THE GRASPING HAND: CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN 35-73 (2015) (concluding that the prevailing approach restricted eminent domain to takings for government or public utilities).

degree of public control. Charges were regulated and mill operators were obligated to serve the community at the set rate.[41] There can be little doubt that grist mills qualified as a public use.[42] The constitutionality of the mill acts was not called into question until the 1830s. At that point the construction of dams and works to generate water power for textile mills and manufacturing purposes presented the issue of "public use" in a new light since these enterprises had no obvious public character. Courts divided on this matter, with some holding that the taking of land for water power amounted to public use, and others reluctantly upholding the practice based on longstanding acquiescence.[43] In contrast, a number of jurisdictions found

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[41] HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, 94-98 (1938).

[42] Crenshaw & Crenshaw v. Slate River Co., 27 Va. 245, 266 (1828) (Green, J., concurring) ("Mills have always been treated as public establishments, subject to public controls in various ways; and the building of them has been encouraged by condemning the property the property of others, for the use of one wishing to build, and allowing him to overflow the lands of others, upon making just compensation."); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 172 (1985).

[43] JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN 546-53 (3d ed. 1997). In the mid-nineteenth century courts in Maine and Wisconsin upheld the validity of mill acts with respect to manufacturing on the basis of settled practice, but indicated that if the question was being presented for the first time the acts might well run afoul of the "public use" mandate. Jordan v. Woodward, 40 Me. 317, 323 (1855); Fisher v. Horicon Iron and Mfg. Co., 10 Wis. 351, 353 (1860). COOLEY, *supra* note 40, at 534 (declaring that whether eminent domain can be exercised to condemn land for manufacturing "is a question upon which the authorities are at variance," and opining that if the issue was novel courts might well find taking land for manufacturing could not be sustained).

In *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 20-21 (1885) the Supreme Court sustained a statute authorizing the acquisition of mills for manufacturing purposes, but evaded addressing the "public use" limitation).

that the exercise of eminent domain to create water power for manufacturing was an unconstitutional taking of property for private use.[44]

Legislation authorizing the building of private roads on the application of a particular individual was also contentious. State courts were split on the validity of such laws, with the outcome often turning on the extent to which the general public could use the private road.[45] For example, The Delaware Court of Oyer and Terminer took the position that private roads established upon private petition were part of the public road system open to the public.[46] This understanding obviously satisfied the "public use" norm. To be sure, some state courts sustained private road laws on grounds that they made landlocked parcels productive by enabling owners to reach public highways, or facilitated the ability of owners to perform public duties

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[44] Sadler v. Langham, 34 Ala. 311, 333-34 (1859); Harding v. Goodlett, 11 Tenn. 40, 52-4 (1832) (differentiating between grist mills and other mills, and declaring that mill act would be unconstitutional if construed to encompass takings except for grist mills); *see also* Hay v. Cohoes Co., 3 Barb. 42, 47 (N.Y. Sup. Ct. 1848), aff'd 2 N.Y. 159 (1849) ("The legislature of this state, it is believed, has never exercised the right of eminent domain in favor of mills of any kind. . . . Sites for steam engines, hotels, churches, and any other public conveniences might as well be taken, by the exercise of this extraordinary power.").

[45] Lewis, *supra* note 30, at 515-22 (pointing out that the notion of private roads varied widely among jurisdictions).

[46] Petition of Hickman, 4 Harr. 580, 581 (Del. 1847); *see also* Roberts v. Williams, 15 Ark. 43, 49 (1854) (holding that private roads were available for use by the public at large, and declaring that upon "no other ground can the constitutionality of the private road law be sustained").

such as voting.[47] It bears emphasis, however, that courts in Alabama,[48] New York,[49] and Tennessee[50] struck down private road statutes as an unconstitutional taking of property for private benefit. Given the many variables, it is difficult to identify a preponderate approach to the constitutionality of private road statutes in the antebellum era, but clearly a number of jurists were convinced that such roads did not satisfy the "public use" requirement under state constitutional law.

The widespread desire to improve transportation facilities in the early nineteenth century gave rise to litigation further testing the extent of "public use." Legislators regularly delegated the power of eminent domain to privately-owned turnpike, canal, and railroad companies. Anxious to promote economic growth, state courts repeatedly sustained acts authorizing these entities to acquire private property against constitutional challenge.[51] In particular, the delegation of eminent domain to railroads forced courts to give systematic attention to what constituted "public use" in the context of large government-sponsored projects carried out by private enterprises. State judges stressed that the concept of public use was not the equivalent

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[47] *See, e.g.,* Brewer v. Bowman, 9 Ga. 37, 41 (1850) (finding that "the *public* are also interested in every citizen having a right of way to and from his lands or residence," but finding private road act unconstitutional for making no provision for payment of just compensation).

[48] Sadler v. Langham, 34 Ala. 311, 332 (1859).

[49] Taylor v. Porter, 4 Hill 140, 143-48 (N.Y. Sup Ct. 1843). It should be noted that the New York Constitution of 1846 provided that private roads could be opened in the manner prescribed by law upon the payment of compensation, in effect overturning *Taylor*.

[50] Clack v. White, 32 Tenn. 540, 548-50 (1852).

[51] *See, e.g.*, Whiteman v. Wilmington and Susquehanna R.R. Co., 2 Del. 514, 522 (1839) (pointing out that roads constructed by private turnpike companies were public roads, and characterizing turnpike, canal, and railroad companies as a "union of private property with public use"); Tide Water Canal Co. v. Archer, 9 G. & J. 479 (Md. 1839) (affirming exercise of eminent domain by canal company).

of public ownership, and that railroad companies were effectuating a public use by upgrading transportation. They pointed out that lawmakers had broad discretion to determine the best vehicle to carry out the legislative objectives to benefit the public. Courts likened railroads to a type of enhanced public highway, and emphasized that the railroads, as common carriers, had a legal obligation to transport passengers and freight at a reasonable rate. [52]

Although railroads as common carriers performing certain public duties would readily fit even a strict definition of "public use," courts sometimes muddied the analysis of this issue by describing the exercise of eminent domain in unnecessarily sweeping terms. In 1831 the Chancellor of New York, for instance, observed that "if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*."[53] Not only does this language minimize the judicial role, but it also sets forth an open-ended definition of "public use." In another railroad case, the Mississippi Court of Errors and Appeals broadly affirmed the authority of the legislature to condemn property for "public works, intended to promote the interests of the community."[54] By conflating the constitutional norm of 'public use" with the more expansive concept of "public interest" or "public purpose," antebellum

[52] *See, e.g.*, Whitman v. Wilmington & Susquehanna R.R. Co., 2 Del. 514, 521-23 (Del. Super. Ct. 1839); Raleigh and Gaston R.R. Co. v. Davis, 19 N.C. 451, 468-9 (1837); Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45, 72-5 (N.Y. Ch. 1831); *see also* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 35-6 (2001) (discussing judicial decisions upholding the exercise of eminent domain by railroads); TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 138-41(1999) (stressing importance of *Davis* opinion in developing the law of eminent domain).

[53] Beekman v. Saratoga and Schenectady R.R. Co., 3 Paige Ch. 45, 73 (N.Y. 1831).

[54] Brown v. Beatty, 34 Miss. 227, 240 (1857).

courts opened the door for subsequent developments which weakened the "public use" limitation as a restraint on eminent domain.

The erosion of "public use," however, occurred later. For the most part, state courts in the antebellum era adhered to a narrow reading of the scope of eminent domain. The Supreme Judicial Court of Maine aptly summarized the prevailing view:

> Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use.[55]

C. JUST COMPENSATION

State courts also took the lead in defining "just compensation."[56] The federal and state constitutions did not specify what form compensation was to take. The governing norm was that just compensation required the payment of market value for property taken.[57] But difficulties abounded in applying that deceptively simple standard. Railroads and canals, as was often the situation, were at the forefront

[55] Jordan v. Woodward, 40 Me. 317, 324 (1855).

[56] *See* Tuckahoe Canal Co. v. Tuckahoe & James River R.R. Co., 38 Va. 42, 78 (1840) (declaring that "the question of compensation is a judicial question, and it is not in the power of the legislature to settle it, since this would be to unite judicial and legislative power, and to enable the government to decide in its own cause").

[57] Harrison v. Young, 9 Ga. 359, 364 (1851) (Lumpkin, J.) ("When land or any other property is taken for public use, the owner is entitled to compensation for its whole value; not for this or that particular object, but for all purposes to which it may be appropriated. . . . The value of land or any thing else, id its price in the market"); Troy & Boston R.R. Co. v Lee, 13 Barb. 169, 172 (N.Y. 1852).

of this matter in the antebellum era. They typically acquired a strip of land through a larger parcel. Obviously railroads and canals had to pay for the land actually taken, but they could in addition be liable for injury to the remaining land and inconvenience to the owner. In a case involving the construction of a canal, the Superior Court of New Hampshire opined that "the full value of the land to the owner, in every point of view, may be recovered. The damages should be estimated liberally, and every inconvenience to which the owner of the land may be subjected considered and compensated."[58] This generous understanding of the compensation principle, however, did not always prevail.

Notwithstanding the constitutional mandate, cash-scarce states and undercapitalized private entities often sought to promote enterprise by curtailing the amount of compensation awarded in eminent domain proceedings. The Supreme Court of Wisconsin struck down a state law which authorized the taking of private property for a railroad but made no provision for compensation or provided a means to determine compensation.[59] Perhaps the most controversial technique was the practice of requiring the offset of supposed benefits against the loss suffered by the individual owner. These represented a kind of implicit in-kind compensation. Both early railroad charters and general railroad acts adopted the practice of offsets, raising the distinct possibility of systematic undercompensation of landowners.[60] Some state courts endorsed this scheme, even asserting that the increased value to the owner's remaining land might fully satisfy the just compensation norm, and hence there would be no need for any

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[58] Woods v. Nashua Mfg. Co., 5 N.H. 467, 474-5 (1831).

[59] Shepardson v. Milwaukee & Beloit R.R. Co., 6 Wis. 578 (1857).

[60] *See* JAMES W. ELY, RAILROADS AND AMERICAN LAW 190-93 (discussing the offsets in the context of takings by railroads)

monetary payment.[61] Such a crabbed understanding of just compensation threatened to undermine the protection function of the takings clauses in state constitutions. In effect land could be taken for free.

This use of offsets to reduce compensation awards was open to several objections. In the first place, the anticipated advantages for particular projects were speculative and might well never be realized. In fact, a number of canal and railroads companies became bankrupt, leaving the landowner with no advantages and no effective redress. Second, attempts to offset general benefits to the community at large were highly inequitable. Neighboring owners would also enjoy enhanced land values, but did not have to bear any of the cost by having a portion of their land taken. This troublesome result led courts to draw a somewhat hazy distinction between general community benefits and special benefits to a particular owner.

Both legislators and constitution-makers began to strengthen the rights of owners by rejecting or curtailing the offset of imputed benefits.[62] For example, the Iowa Constitution of 1842 and the Ohio Constitution of 1851 barred the consideration of benefits in calculating compensation, and other states followed suit after the Civil War. Some states enacted statutes that excluded consideration of benefits in estimating the damages for property taken under eminent domain. Equally significant, a number of state courts increasingly cast a skeptical eye at offsets. In 1858 the Supreme Court of Mississippi lambasted "prospective railroad benefits, which may never occur" as a "moonshine standard of value." It emphasized that the legislature

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[61] Alston & Sangamon R.R. Co. v. Carpenter, 14 Ill. 190 (1852); Pennsylvania R.R. v. Heister, 8 Barr. 445,450 (Pa. 1848).

[62] Peter Karsten, *Supervising the 'Spoiled Children of Legislation': Judicial Judgments Involving Quasi-Public Corporations in the Nineteenth Century U.S.*, 41 AM. J. LEGAL HIST. 315, 340-342 (1997) (discussing trend to tighten or bar offsets for benefits).

was not competent to prescribe the method of determining just compensation, and that the state constitution required compensation in money not uncertain benefits.[63] Likewise, the New Jersey Chancery Court, in a case growing out of a creek improvement project, ruled that compensation must be made in money. "Any other construction," it added, "would make this provision of the constitution utterly meaningless. A means of legislation could soon be devised to substitute an imaginary benefit for that just compensation which was intended to be provided."[64]

Other courts limited but did not rule out all consideration of benefits. There was wide variation among jurisdictions, however, and generalization is difficult.[65] The full complexity of benefit offsets cannot be reviewed in detail here—a few examples must suffice. Some courts allowed only special benefits accruing to a particular parcel to be set off, and then only in connection with damage to the remainder of the parcel, not the land taken.[66] Others took the position that both general and special benefits could be considered with respect to injury to the remainder but not with respect to the land actually taken.[67] There were still other variations.

Having stressed the importance of just compensation as a constitutional principle, some state courts were more vigilant than others in giving meaningful enforcement to this norm. The record was decidedly mixed, and some state courts seemed more concerned to hold

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[63] Isom v. Mississippi Central R.R. Co., 36 Miss. 300, 312-315 (1858).

[64] Carson v. Coleman, 11 N.J. Eq. 106, 108 (N.J. Ch.1856).

[65] JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN 1174-1204 (3rd ed. 1909).

[66] Woodfolk v. Nashville & Chattanooga R.R. Co., 32 Tenn. 421 (1852); James River & Kanawha Co., 36 Va. 313 (1838).

[67] Rice v. Danville, Lancaster and Nicholson Turnpike R.R. Co., 37 Ky. 81, 87 (1838) (declaring that value of land taken cannot "be swallowed up in conjectural estimates of the future advantages which he might derive from the construction of the road").

down the cost of improvement projects than with effectuating the principle of compensation. Too many lost sight of the need to interpret "just compensation" in light of the very purpose of the takings clauses to safeguard individuals against being compelled to carry more than their share of the burden to secure public goods. Still, state courts were grappling on a fresh slate with the difficult question of when in-kind compensation was the equivalent of a monetary award. Moreover, the trend was to constrict application of benefit offsets. The issue of in-kind benefits, of course, continues to vex eminent domain law to the present.[68]

### D. Actions Constituting a Taking

Although less frequently litigated than the scope of "public use" and the meaning of "just compensation," the question of what actions amounted to a taking of property also received judicial attention. One recurring problem was physical injury to an owner's property caused by an adjacent public works. The prevailing antebellum view was aptly summarized by Theodore Sedgwick: "It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damages, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain." [69] As this indicates, courts early began to disallow claims for so-called consequential damages from the calculation of

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[68] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 195-215 (1985).

[69] THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 519-20 (1857).

just compensation, reasoning that such injuries did not result from a taking of property.

Thus, courts commonly ruled that there was no recovery for damages to abutting land resulting from changes in the grade of fronting streets. In the leading case of *Callender v. Marsh* (1823) the highway surveyor lowered the grade in front of the plaintiff's house in Boston, thereby laying bare the foundation walls and creating a danger of collapse.[70] The Supreme Judicial Court of Massachusetts brushed aside the contention that the owner's property had been taken within the meaning of the state constitution, observing that the provision did not extend protection "to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government."[71] Other jurisdictions adopted the same position with respect to injury caused by street improvements.[72]

This narrow definition of a taking allowed railroads to escape liability for damages to adjacent land caused by their operations. Courts repeatedly held, for example, that rail companies were not responsible for consequential damages sustained by persons owning land on public streets occasioned by railroad use of the streets.[73] In

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[70] Callender v. Marsh, 18 Mass. 418 (1823).

[71] *Id.* at 437.

[72] *See e.g.,* Keasy v. City of Louisville, 34 Ky. 154, 154 (1836) (stating that an individual may be injured by public improvements "yet, unless his property, real or personal, or the use of it . . . is taken from him, or directly interfered with, he has no claim to indemnity"); Radcliff's Ex'rs v. Mayor of Brooklyn, 4 N.Y. 195, 206 (1850) (observing that "the constitution does not apply where damages are merely consequential").

[73] *See, e. g.*, New Albany & Salem R.R. Co. v. O'Daily, 12 Ind. 551 (1859); Drake v. Hudson River R.R. Co., 7 Barb. 508 (N.Y. 1849); Chapman v. Albany & Schenectady R.R. Co., 10 Barb. 360 (N.Y. 1851).

*New York and Erie Railroad Company v. Young* (1859) a mill owner attempted to recover for injury suffered when railroad construction along a river partially obstructed the river and diverted water from his mill.[74] The Supreme Court of Pennsylvania found that the damage did not constitute a taking but was a consequential injury resulting from the building of the railroad. Absent a legislative direction, it continued, consequential damages were not recoverable.

To be sure, the picture regarding liability for consequential injury was somewhat more complicated than these cases suggest. A physical invasion of property, although incidental to public improvement projects, was treated as a compensable taking. In the important case of *Hooker v. New Haven and Northampton Company* (1841), for instance, the Supreme Court of Connecticut ruled that a canal company was liable for discharging surplus water upon neighboring land. It likened the company's action to the appropriation of private property for public use.[75] In the same vein, the construction of embankments by railroad companies which caused water to back up onto private property was treated as a taking.[76]

Other invasions of private property also ran afoul of the takings clauses. Thus, courts struck down regulations that effectively destroyed a landowner's right of exclusive possession. At issue in *Woodruff v. Neal* (1859) was a state law authorizing towns to permit cattle to run at large in the area of public highways.[77] The town licensed an individual to pasture his cow on privately-owned land

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[74] N.Y. & E.R. Co. v. Young, 33 Pa. 175, 180-81 (1859).

[75] Hooker v. New-Haven & Northampton Co., 14 Conn. 146 (1841).

[76] *See* Evansville & Crawfordsville R.R. Co. v. Dick, 9 Ind. 412 (1857); Fletcher v. Auburn & Syracuse R.R. Co., 25 Wend. 462 (N.Y. Sup. Ct. 1841). These cases were forerunners of Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (physical invasion by flooding constituted a taking although formal title remained with the owner).

[77] Woodruff v. Neal, 28 Conn. 165, 169-170 (1859).

which was subject to a highway easement. The Supreme Court of Connecticut found that a law authorizing grazing on the land of another person deprived the owner of exclusive possession and amounted to a taking of the property. The court explained that this could only be done with payment of compensation.

This line of cases manifested a physical understanding of property which minimized the obligation of the state, as well as state-sponsored private entities, to pay compensation for damages negatively impacting the value of private property. The state courts failed to compel full compensation in line with the constitutional guarantee. This restrictive understanding of when a taking had occurred may have been driven, at least in part, by a desire to encourage enterprise by holding down costs. Sedgwick advanced this explanation: "The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes."[78] He attributed the unwillingness to accept a more complete understanding of a taking to "a general disposition . . . not to cramp these enterprises by a too sweeping or extensive compensation."[79]

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[78] THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 524 (1857).

[79] *Id*. at 525. Building on Sedgwick's concern, the doctrine that consequential damages were not compensable has been pictured as part of a larger pattern of subsidizing public projects by limiting the payment of just compensation and placing the loss on individual owners. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 71-74 (1977). This subsidy thesis has been sharply challenged. *See* Peter Karsten, *Supervising the "Spoiled Children of Legislation"*, 41 AM. J. LEGAL HIST. 315, 334-40 (1997).

## IV. DUE PROCESS

State courts were also at the forefront of exploring the contested meaning of the due process norm because they heard most of the cases which raised the issue.[80] Recall that many state constitutions and the Northwest Ordinance contained protection against being deprived of life, liberty, or property except by the "law of the land." Both federal and state courts agreed that such clauses in state constitutions were identical to due process. The scope of due process protection has long been disputed. Did due process pertain solely to procedural matters? Or did the concept of due process also serve as a guarantee of certain substantive rights? If the latter, did due process safeguard property rights? Antebellum state courts did not draw a sharp distinction between substantive and procedural due process.[81] In fact, courts and commentators did not differentiate between the substantive and procedural due process until the 1940's, and then coined the phrase *substantive due process* as a label to isolate and stigmatize a line of economic rights cases.[82]

The historical record demonstrates that a unitary understanding of due process prevailed throughout the antebellum era, and a number of state courts fashioned this norm into a substantive guarantee of the rights of owners. We have already seen that several courts con-

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[80] For an overview of the due process principle in the antebellum era, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315 (1999).

[81] Wayne McCormack, *Economic Substantive Due Process and the Right to Livelihood*, 82 KY. L.J. REV. 397, 404 (1993) ("No recognized distinction between procedural and substantive due process existed until the New Deal eliminated the substantive protections.").

[82] G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 241-68 (2000) (dismissing the standard narrative about substantive due process as a myth "which had taken on the elements of a morality play").

strued the law of the land clauses in state constitutions to forbid uncompensated takings of property for public use. As a corollary, courts ruled that a legislative attempt to transfer the property of one individual to another constituted a deprivation of property without due process. This principle found expression in the often repeated maxim the lawmakers could not take the property of A and transfer it to B.[83]

Another far-reaching invocation of due process to protect property rights by a state court grew out of the antebellum prohibition movement. In 1855 the New York legislature declared alcoholic beverages to be a nuisance, restricted possession of alcohol, banned the sale of liquor, and authorized summary destruction of such beverages. In *Wynehamer v. People* (1856) the New York Court of Appeals struck down this measure as a deprivation of property without due process as applied to liquor already owned when the law took effect.[84] Writing separate opinions, the judges in the majority maintained that alcoholic beverages had long been treated as property and considered an important item of commerce. They defined property broadly, stressing that ownership encompassed more than physical possession. Judge Alexander S. Johnson cogently observed: "Property is the right of any person to possess, use, enjoy and dispose of a thing . . . . A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession."[85] Judge George F. Comstock agreed that the notion of property included the power of disposition and sale, and insisted: "Where rights of property are admitted to exist, the legislature cannot say they shall no longer exist." He significantly added: "Property

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[83] John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMM. 337 (1997).

[84] Wynehamer v. People, 13 N.Y. 378 (1856).

[85] *Id.* at 433-434.

is placed by the constitution in the same category with liberty and life."[86] It bears emphasis that the *Wynehamer* court moved away from physical conception of property which prevailed in most of the takings cases discussed above.

*Wynehamer* was the most important invocation of the due process norm by a state court to protect property rights before the Civil War. "This decision" one scholar noted, "was recognized as epoch-making almost as soon as it was rendered."[87] It was the first time that a court invalidated a general regulatory statute on grounds that the law regulated the beneficial enjoyment of property in such a manner as to virtually annihilate a species of property by legislative fiat. I do not contend that all antebellum courts embraced this expansive view of due process. The key point is that state courts were wrestling with the use of due process to impose restraints on lawmaking. As Earl M. Maltz has concluded, "A substantial number of states . . . also imbued their respective due process clauses with a substantive content."[88] In his landmark 1868 treatise Thomas M. Cooley drew upon the due process jurisprudence in the state courts to insist that due process protected owners against unreasonable and arbitrary deprivations of their property.[89] Cooley's work was enormously influential in the late nineteenth century, and thus the often overlooked antebellum state court due process cases helped set the stage for a capacious reading of the Fourteenth Amendment.

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[86] *Id.* at 393.

[87] RODNEY L. MOTT, DUE PROCESS OF LAW 318 (1926).

[88] Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEG. HIST. 305, 317 (1988).

[89] COOLEY, *supra* note 14, at 351-357.

## V. CONTRACT CLAUSE

In contrast to the constitutional law governing the taking of property and the scope of due process protection, where state courts were the trailblazers, the Supreme Court in the antebellum era assumed the pivotal role in developing contract clause jurisprudence. As is well known, the Court under the leadership of John Marshall construed the clause to embrace both public and private contracts.[90] In a famous line of cases Marshall ruled that the provision applied to state land grants,[91] tax exemptions,[92] and grants of corporate charters.[93] The court also limited the application of state bankruptcy laws to debts incurred after passage of the statute, holding that the contract clause was directed against retroactive legislation that impaired existing agreements.[94] Roger B. Taney, his successor as chief justice, extolled the contract clause in expansive terms[95] and rendered opinions which strengthened its reach.[96] These prominent cases will not be examined here.

Instead, I wish to emphasize that state courts played a significant, if secondary part, in fleshing out contract clause jurisprudence. The state courts, of course, heard far more cases than the Supreme

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[90] James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1033-47 (2000).

[91] Fletcher v. Peck, 10 U.S. 87 (1810).

[92] New Jersey v. Wilson, 11 U.S. 164 (1812).

[93] Trs. of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

[94] Sturges v. Crowinshield, 17 U.S. 122 (1819); Ogden v. Saunders, 25 U.S. 213 (1827).

[95] Bronson v. Kinzie, 42 U.S. 311, 318 (1843) (declaring that the contract clause "was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States").

[96] BENJAMIN FLETCHER WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 62 (noting that "the simple fact is that the contract clause was a more secure and broader base for the defense of property rights in 1864 than it had been in 1835").

Court, and consequently had ample opportunity to impact the formation of law in this field. Yet the numerous state court decisions giving force to the contract clause are largely ignored in studies of the provision. One simply cannot understand the emergence of a muscular contract clause without considering the work of the state courts. Their contributions, however, can only be sketched here.

On occasion, for instance, developments at the state level foreshadowed later rulings by the Supreme Court. As early as 1799 the Supreme Judicial Court of Massachusetts became the first state court to strike down a state law as a violation of the contract clause of the federal Constitution. It ruled that a Georgia law repealing the 1795 Yazoo land grant impaired the obligation of contract, and that the title to the land was legally conveyed by the original Georgia grant.[97] This was a forerunner of Marshall's opinion in *Fletcher v. Peck* (1810).[98] In *Wales v. Stetson* (1806) Chief Justice Theophilus Parsons, writing for the same court, determined that under common law principles the legislature could not alter or revoke the charter of a turnpike company unless such power was reserved in the act of incorporation.[99] This stress on the sanctity of corporate charters made it an easy step for the judiciary to treat charters as contracts within the shelter of Constitution. In the same vein, state courts early took the position that an exercise of eminent domain did not impair the obligation of an existing contract in the form of a corporate franchise.[100]

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[97] Derby v. Blake, 226 Mass. 618-25 (1799). For the background of the Yazoo litigation and a brief discussion of the *Derby* case, *see* C. PETER MAGRATH, YAZOO: THE CASE OF FLETCHER V. PECK 1- 67 (1966).

[98] Fletcher v. Peck, 10 U.S. 87 (1810).

[99] Wales v. Stetson, 2 Mass. 143 (1806).

[100] Bos. Water Power Co. v. Bos. & Worcester R.R., 40 Mass. 360 (1839); Armington v. Barnet, 15 Vt. 742 (1843).

These rulings prefigured a decision to the same effect by the Supreme Court.[101]

State courts also addressed the constitutionality of debt relief laws before such measures were considered by the Supreme Court. In *Jones v. Crittenden* (1814) the Supreme Court of North Carolina invalidated a stay law enacted in the wake of the War of 1812 as a violation of the contract clause.[102] It maintained that a law which released a contracting party from a stipulation or compelled a party to do more than promised amounted to an impairment. Echoing the framers, the court pictured dire economic results from stay laws. "The right to suspend the recovery of a debt for one period," it observed, "implies the right of suspending it for another; and as the state of things which called for the first delay, may continue for a series of years, the consequence may be a total stagnation of the business of society, by destroying confidence and credit amongst the citizens."[103]

As might be expected, most challenges to the validity of debt relief measures were handled in state court. They frequently voided laws that delayed the collection of debts.[104] Similarly, they struck down a variety of laws that hampered the foreclosure of mortgages. Thus, statutes that barred sales of foreclosed land for less than an appraised figure,[105] or that enlarged the redemption period were found to run afoul of the contract clause.[106] This is not to say that these

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101 W. River Bridge Co. v. Dix, 47 U.S. 507 (1848).

102 Jones v. Crittenden, 4 N.C. 55 (1814).

103 *Id.* at 58-59.

104 *See e.g.*, Blair v. Williams, 14 Ky. 34 (1823); Baily v. Gentry, 1 Mo. 165 (1822); Jones v. Crittenden, 4 N.C. 55 (1814); Townsend v. Townsend, 7 Tenn. 1 (1821).

105 Sheets v. Peabody, 7 Ind. 613 (1845); Rosier v. Hale, 10 Iowa 470 (1860).

106 People *ex rel.* Thorne v. Hays, 4 Cal. 127 (1854); *see also* Mundy v. Monroe, 1 Mich. 68 (1843) (invalidating law delaying mortgagee's right to possession under defaulted mortgage until redemption period had expired).

courts were all of one mind or invariably sustained the contractual rights of creditors in the face of state legislation. Some upheld relief laws, asserting that they pertained only to the available remedy and did not abridge the contract itself.[107] The elusive distinction between contractual rights and remedies, suggested by John Marshall in *Sturges*,[108] opened the door to confusion and evasion. It would plague contract clause jurisprudence throughout the nineteenth century.[109] On the whole, however, the state courts turned in a credible performance in upholding the rights of contracting parties in private agreements. This is particularly true when one considers the considerable political pressure behind the enactment of debt relief laws during periods of economic distress. The easy course would have been for judges, many of whom were popularly elected, to simply uphold the often widely accepted legislation.

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[107] Iverson v. Shorter, 9 Ala. 713 (1846); Chadwick v. Moore, 8 Watts & Serg. 49 (Pa. 1844).

[108] 17 U.S. 122, 200 ("The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."). For criticism of Marshall's attempted distinction, *see* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 455 (4th ed. 1844).

[109] *See, e.g.*, W. Sav. Fund Soc'y v. Philadelphia, 31 Pa. 175, 182 (1858) ("Plain common sense, responding to the demands of justice, has scattered to the winds the flimsy distinction between the *right* and *remedy*, so far as to declare that any change of the nature or extent of the latter, so far as to impair the former, is just as much a violation of the compact as if the right itself was destroyed.").

Dissatisfaction with the right-remedy distinction found expression in one state constitution. The New Jersey Constitution of 1844 provided: "The legislature shall not pass . . .or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." It appears that New Jersey courts had no opportunity to consider this provision before the Civil War.

The record regarding public contracts to which states themselves were a party is somewhat different. Several state courts voiced concern that the contract clause was being employed as a shield to prevent regulation of business corporations.[110] Not surprisingly, therefore, they generally followed the Supreme Court's decision in *Charles River Bridge v. Warren Bridge* (1837) and readily endorsed the doctrine of strict construction of corporate charters.[111] Thus, state courts invoked strict construction to reject contract clause claims arising from subsequent legislation authorizing competing modes of transportation.[112]

Of even greater long-range significance was the emergence of the concept of an alienable police power. State courts began to wrestle with the notion that lawmakers could not relinquish by contract their authority to regulate for the health, safety, and morals of the public. In *Thorpe v. Rutland and Burlington Railroad Company* (1855), for instance, the Supreme Court of Vermont brushed aside a contract clause claim and upheld the power of the legislature to require that railroads fence their tracks as a safety measure.[113] In articulating this position they were once again in advance of the Supreme Court. Not until the 1870's did the Supreme Court gravitate to the view that an alienable police power could trump any rights expressed in a corporate charter.[114] So long as the understanding of the police power was

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[110] *E.g.*, Dart v. Houston, 22 Ga. 506, 535-36 (1857).

[111] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837).

[112] *E.g.*, Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210 (1860); Illinois & Michigan Canal v. Chicago & Rock Island R.R. Co., 14 Ill. 315 (1853); Thompson v. N.Y. & Harlem R.R. Co., 3 Sand. Ch. 625 (N.Y. 1846).

[113] Thorpe v. Rutland & B. R. Co., 27 Vt. 140 (1855); *see also* Ohio & Mississippi R.R. Co. v. McClellan, 26 Ill. 140 (1860); COOLEY, *supra* note 14, at 283 (citing state court opinions).

[114] James W. Ely, Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371, 381-82 (2010).

confined to health, safety and morals there was little danger that it would make major inroads on the function of the contract clause to safeguard the stability of agreements. By the early twentieth century, however, an all-encompassing interpretation of the police power threatened to eviscerate the protection of both public and private contracts under the Constitution.[115]

As we have seen, state courts enjoyed a largely free hand in shaping takings and due process jurisprudence because there were no federal guarantees binding on the states. The existence of a federal contract clause, coupled with Supreme Court decisions interpreting that provision, raided issues pertaining to the relationship between the federal and state contract clauses. In addressing contract clause claims the state courts often relied solely on the federal provision,[116] but at times invoked both the federal and state clauses.[117] Obviously in jurisdictions which had not adopted a contract guarantee clause the federal provision was the only source of protection.[118] Otherwise there appeared to be little rhyme or reason in the pattern of citation. One might speculate that reliance on the parallel state clause as well as the federal provision was calculated to bolster local acceptance of controversial outcomes. The tendency was to treat the scope of protection afforded agreements by state and federal clauses as identical. There was no exploration of the possibility that the state contract clause might be construed to provide greater protection to contractual arrangements.

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[115] *Id*. at 387-90.

[116] Blair v. Williams, 14 Ky. 34 (1823); Chadwick v. Moore, 8 Watts & Serg. 49 (Pa. 1844).

[117] For decisions mentioning both clauses, see State v. Crittenden County Court, 19 Ark. 360 (1858); Bumgardner v. Howard County Circuit Court, 4 Mo. 50 (1835); Townsend v. Townsend, 7 Tenn. 1 (1821).

[118] *E.g.*, Winter v. Jones, 10 Ga. 190 (1851).

## VI. CONCLUSION

State courts rarely probed the philosophical underpinnings of the constitutional protection of property rights On occasion, however, they expressed the property-conscious values embedded in the Constitution and Bill of Rights. In perhaps the most complete analysis of the importance of private property in the polity, the Supreme Court of Georgia wove together both political liberty and the enhancement of commerce. It proclaimed in 1851:

> The right of accumulating, holding and transmitting property, lies at the foundation of civil liberty. Without it, man nowhere rises to the dignity of a freeman. It is the incentive to industry, and the means of independent action. It is in vain that life and liberty are protected – that we are entitled to trial by jury, and the freedom of the press, and the writ of habeas corpus – that we have unfettered entails, and have abolished primogeniture – that suffrage is free, and that all men stand equal under the law, if property be held at the will of the Legislature.[119]

A Virginia judge noted the historic link between liberty and property. "Liberty itself," he observed, "consists essentially, as well in the security of private property, as of the persons of individuals; and the security of private property is one of the primary objects of Civil Government, which our ancestors, in framing the Constitution, intended to secure to themselves and their posterity, effectually, and for ever."[120] State courts also pointed to the link between respect for property and contractual rights and economic growth. Stressing that

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[119] Parham v. Justices, 9 Ga. 341, 355 (1851).

[120] Crenshaw & Crenshaw v. Slate River Co., 27 Va. 245, 276 (1828) (Green, J., concurring).

the exercise of eminent domain was limited to acquisitions for public use, the Supreme Court of Missouri characterized private property as "a great stimulant to the acquisition of wealth, which contributes so much to the prosperity of the state."[121] Likewise, Joseph Henry Lumpkin, chief justice of Georgia between 1846 and 1867, tied a dynamic understanding of property with a commitment to market principles in an effort to encourage economic development and technological advance.[122]

Even recognizing that there was a degree of disconnect between such pro-property language and the reality of state judicial behavior in the antebellum years, the fact remains that these courts endeavored to vindicate property and contractual rights in the face of contrary political pressures. Their contribution to fashioning takings law and the meaning of due process was considerable. Moreover, they were called upon to adjust the widespread desire for public facilities, such as improved transportation, with the guarantees of existing private property rights. Here, in Willard Hurst's words, state courts tended to prefer "property in motion or at risk rather than property secure and at rest."[123] It is open to question whether they struck the correct balance, but they deserve credit for tackling difficult questions in an unchartered field of constitutional law. The importance of state constitutionalism to the development of property rights simply cannot be ignored. It provided a platform upon which the Supreme

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[121] Dickey v. Tennison, 27 Mo. 373, 374 (1858).

[122] TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS 81-86 (1999).

[123] JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 24 (1956).

Court would build a jurisprudence of economic liberty later in the nineteenth century.[124]

[124] James W. Ely, Jr., *'To Pursue Any Lawful Trade or Avocation': The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 929-49 (2006).