

# INCORPORATION OF THE RIGHT TO JUST COMPENSATION: THE FOURTEENTH AMENDMENT VS. THE TAKINGS CLAUSE

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## INTRODUCTION

The Fourteenth Amendment, the most litigated and arguably important amendment to the U.S. Constitution, was drafted during Reconstruction by a select committee of six senators and nine representatives called the Committee of Fifteen.<sup>1</sup> While the Committee's secret meetings were not transcribed, a record of their proposals and their votes survived in a clerk's journal.<sup>2</sup> Before the Committee approved the final version of the Fourteenth Amendment as it stands today,<sup>3</sup> Representative John Bingham of Ohio offered an addition,<sup>4</sup> which mirrored the Fifth Amendment's Takings Clause<sup>5</sup>:

[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.<sup>6</sup>

The Committee rejected this construction by a seven-to-five vote.<sup>7</sup> Notably, Bingham offered this amendment by itself, not as part of a larger provision, which the Committee may have rejected for other

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1. See BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867* 134 (1914).

2. *Id.*

3. *Id.* at 82.

4. *Id.* at 82, 85.

5. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

6. KENDRICK, *supra* note 1, at 82–85.

7. *Id.* at 106.

reasons.<sup>8</sup> The Committee then adopted the Fourteenth Amendment as it stands today, without a specific “takings clause.”<sup>9</sup>

What does this rejected addition say about the Fourteenth Amendment and eminent domain jurisprudence? Does the Committee’s rejection indicate its belief that the right to just compensation did not bind the states? Or did the Committee assume that since the Fourteenth Amendment incorporated the entire Bill of Rights, the Fifth Amendment’s taking clause would have applied to the states anyway, making a separate clause in the Fourteenth redundant? Many still debate whether the framers of the Fourteenth Amendment adhered to this “total incorporation” theory.<sup>10</sup> Perhaps the Committee believed that because the right to just compensation was so fundamental, it was part of “natural rights” that need not be enumerated.

Unfortunately, we can only speculate as to the true mindsets of these framers. Nonetheless, while the rejection of the Bingham Amendment seems like a curious historical footnote, it warrants re-examining. Confusion over the framers’ intentions and the Supreme Court’s interpretation of the Fifth and Fourteenth Amendments has caused a “muddling”<sup>11</sup> of substantive due process and the Takings Clause, leading to confusing Supreme Court precedent. In modern eminent domain cases, most courts cite the Takings Clause, the part of the Fifth Amendment which reads: “[N]or shall private property be taken for public use, without just compensation.”<sup>12</sup> However, the Fifth and Fourteenth Amendments’ Due Process Clauses also mention “property,” stating, that no person shall be deprived of “life, liberty, or *property*, without due process of law.”<sup>13</sup> Which of these two clauses governs eminent domain? Are they reconcilable?

Over the years, the Supreme and inferior courts have produced a confusing eminent domain doctrine that draws on substantive due

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8. *Id.*

9. *Id.*

10. For a variety of views on the issue, see RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN L. REV.* 5 (1949); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 *AM. J. LEGAL HIST.* 305 (1988).

11. See Bradley C. Karkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 *MINN. L. REV.* 826 (2006).

12. U.S. CONST. amend. V.

13. U.S. CONST. amends. V, XIV (emphasis added).

process in some situations and the just compensation principle in others. The simplest interpretation is that the Due Process Clause requires *process*, i.e., notice and hearing, while the Takings Clause requires *just compensation*, even after adequate notice and a fair hearing.<sup>14</sup> However, after the ratification of the Fourteenth Amendment, the Supreme Court began to enforce “substantive due process,” which enforces substantive rights, not merely the right to notice and hearing. Professor Kanner, factoring in substantive due process, believes a proper reading of these provisions is that the Due Process Clause restricts the police power, which is “regulatory and noncompensable,” while the Takings Clause restricts eminent domain, which is “acquisitory and compensable.”<sup>15</sup> However, this has not been the Court’s practice. The Due Process Clause was used in its substantive form to enforce the right to compensation against state action, at least until 1978. The Bill of Rights originally restricted only the federal government, as stated in the 1833 case *Barron v. City of Baltimore*.<sup>16</sup> As Professor Bradley C. Karkainen aptly points out,<sup>17</sup> until the 1978 decision in *Penn Central Transportation Co. v. City of New York*,<sup>18</sup> most Supreme Court cases striking down state “takings” actions cited the Due Process Clause, not mentioning the Takings Clause. Citing an 1897 case, *Chicago, B. & Q. Railroad Co. v. City of Chicago*,<sup>19</sup> the Supreme Court held that the Takings Clause was “of course” applicable to the states.<sup>20</sup> The trouble with this statement is that *Chicago, B. & Q.* did not even mention the Takings Clause. It relied on the Fourteenth Amendment’s Due Process Clause, as did most cases until *Penn Central*’s definitive incorporation. The Fourteenth Amendment’s Due Process Clause served as the vehicle through which the “natural right” protecting property was enforced, at least until 1978, when *Penn Central* definitively incorporated the Takings Clause against the states. Additionally, the fact that the public use component of the Takings Clause “was originally understood to be

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14. See Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 210–11 (2006) (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 546–47 (1904)).

15. *Id.* at 211.

16. 32 U.S. (7 Pet.) 243 (1833).

17. Lawrence Berger, *Public Use, Substantive Due Process and Takings—An Integration*, 74 NEB. L. REV. 843 (1995); Karkainen, *supra* note 11.

18. 438 U.S. 104 (1978).

19. 166 U.S. 226 (1897).

20. 438 U.S. at 122.

merely descriptive and impose no independent limit on legislative authority”<sup>21</sup> also indicates that until the late twentieth century, American courts primarily applied the natural right to just compensation through substantive due process. The public use clause—the one element that sets the Takings Clause apart from due process—has never been substantive in eminent domain jurisprudence. Recently, in *Kelo v. City of New London*, the Supreme Court confirmed the public use clause as nullity. While many criticize this ruling, it merely comports with centuries under which only the common law right to just compensation applied to the states.

Adding to the confusion, the Court has recently breathed new life into the Takings Clause, allowing it to fill the void left when the Court retreated from “economic” substantive due process in the wake of the New Deal.<sup>22</sup> The Takings Clause has been used to restrict the police power since *Pennsylvania Coal Co. v. Mahon*<sup>23</sup> in 1922, the first “regulatory takings” case. “Regulatory takings” are regulations that limit use of land, but do not take title from the original owners.<sup>24</sup> This contrasts with occupations of land, which are per se takings no matter how small the impact.<sup>25</sup> Today, the Takings Clause has a broad scope, encompassing takings of land, zoning, wetlands, and other land use and environmental restrictions, and even regulations affecting non-real property, such as intellectual property<sup>26</sup> and a law compelling

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21. Shaun A. Goho, *Process-Oriented Review and the Original Understanding of the Public Use Requirement*, 38 SW. L. REV. 37, 39 (2008) (citing Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1249 (2002)).

22. See discussion of substantive due process and *Lochner v. New York*, 198 U.S. 45 (1905), at *infra* Part III.

23. 260 U.S. 393 (1922).

24. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); 438 U.S. 104; *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

25. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (even a de minimis physical occupation is still a “taking” under the Fifth Amendment). However, this rule is not as clear-cut as it seems. In *Yee v. City of Escondido, California*, 503 U.S. 519 (1992), the Court refined the line between physical invasions and regulatory takings. The petitioner was a mobile home park who argued a rent control ordinance was a “physical occupation” because it prevented them from evicting delinquent tenants. *Id.* at 523. However, the Court wrote: “The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. This element of required acquiescence is at the heart of the concept of occupation.” *Id.* at 527 (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)).

26. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

corporations to pay into a pension fund (which was found to constitute a taking).<sup>27</sup> Some call for the Supreme Court to reconcile the two clauses and form a unified doctrine;<sup>28</sup> others call for a “decoupling.”<sup>29</sup> Indeed, the Court’s willingness to strike down almost any regulation of “property,” real or otherwise, as an uncompensated “taking,” is almost a resurrection of the infamous *Lochner v. New York* era, in which the Court used the Fourteenth Amendment’s due process clause to strike down virtually any state regulation of economic activity.<sup>30</sup>

Considering that the Court’s modern Takings Clause jurisprudence stems from substantive due process, it is unsurprising that after the repudiation of *Lochner*, the Court now applies the Takings Clause to so wide a swath of police power actions. When the Supreme Court interprets the Takings Clause against state action, it is really applying substantive due process to restrict police power. The Court should begin viewing its eminent domain jurisprudence through this lens, to avoid making the Takings Clause something it is not. It is impossible to “decouple”<sup>31</sup> the condemnation aspects of the Takings and Due Process Clauses because they both originated from common law “natural rights” principles dating back centuries before the framing of the Fifth and Fourteenth Amendments.

While many scholars have generated vigorous discussion about the implications of the Supreme Court’s mingling of due process and the Takings Clause,<sup>32</sup> this paper examines the historical context that allowed this muddling to happen. In pre-colonial America and in England, the right to just compensation when property was taken was a fundamental “natural right,” predating both the Fourteenth Amendment and the Bill of Rights. No doubt this fact influenced the framers of the Fourteenth Amendment, who may not have adhered to the “total incorporation” theory of the Bill of Rights but at least recognized a fundamental right to just compensation when property was taken. So fundamental was the right that enumerating it separately in the Fourteenth Amendment was unnecessary. Bingham’s

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27. See *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998).

28. Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379 (2001).

29. Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885 (2001).

30. Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002).

31. See Tunick, *supra* note 29.

32. See Karkkainen, *supra* note 11; Krotoszynski, *supra* note 30; Tunick, *supra* note 29.

proposal to include the takings analogue may have been simply a misstep from a man whose thoughts on the Fourteenth Amendment were often unclear and jumbled. Another interpretation is that regulation of property had always been an issue of state police power, and the framers of the Fourteenth Amendment did not want to disturb this precept. However, considering how willing the framers were to restrict state power after the Civil War, it may be they recognized the right to compensation as a fundamental natural right.

This article will examine the pre-colonial and antebellum period in Part I, to determine the genesis of the just compensation principle in American law, and to determine what may have inspired the framers of the Fourteenth Amendment. Part II will analyze the drafting of the Fourteenth Amendment itself, and exactly what the framers had on their minds when they considered a takings clause analogue. Part III will examine takings cases following the Fourteenth Amendment up to *Penn Central* in 1978, and will conclude that until that case, natural rights principles were predominant. Finally, Part IV will analyze the impact of the *Penn Central* decision and its progeny, and whether they accord with what the framers may have intended.

#### I. JUST COMPENSATION BEFORE THE CIVIL WAR: INFLUENCES ON THE COMMITTEE OF FIFTEEN

From the founding of the country, the right to just compensation was woven into the fabric of natural law. It is hard to believe this fact did not influence John Bingham and his colleagues on the Committee of Fifteen. Prior to the ratification of the Fourteenth Amendment, two broad themes emerged in American law. First, the Takings Clause of the federal constitution was not a source to restrict state infringements on property rights. Second, the common law “natural right” to just compensation was a justification to restrain state exercises of eminent domain. The prevailing force in restricting state condemnations in the nineteenth century was substantive due process. However, whether “natural rights” or the specific language of the Takings Clause should govern eminent domain has been the subject of debate. In fact, the importance of natural rights in constitutional law has been questioned since early American legal history. The debate on the significance of “natural rights” in

constitutional law dates back at least to *Calder v. Bull*,<sup>33</sup> in which Justices Chase and Iredell famously debated whether the Court had the power to overturn a statute based on “natural justice.” Referring to the Social Compact, Justice Chase stated,

There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.<sup>34</sup>

Justice Iredell responded that

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.<sup>35</sup>

Nonetheless, Iredell agreed that a legislative act violating the Constitution would be void.<sup>36</sup> In essence, the debate between Chase and Iredell continues to this day, especially in the context of eminent domain. Since *Calder v. Bull*, the Supreme Court has struck down state and federal exercises of eminent domain under both natural law principles and with specific reference to the Fifth Amendment’s Takings Clause.

To examine this issue, it is necessary to explore the historical origins of “natural rights” and limitations on eminent domain. The power of eminent domain emerged in the Roman Empire, possibly earlier.<sup>37</sup> In early history, the sovereign had ultimate dominion over

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33. 3 U.S. (3 Dall.) 386 (1798).

34. *Id.* at 388.

35. *Id.* at 399 (Iredell, J., dissenting).

36. *Id.*

37. Glen H. Sturtevant, Jr., Note, *Economic Development as Public Use: Why Justice*

all property. Aristotle believed the State was “the highest form of community, existing to achieve the highest good for its citizens.”<sup>38</sup> His republican ideas migrated to England, where scholars such as Grotius argued that sovereign states had original and absolute ownership of property, prior to possession by citizens.<sup>39</sup> Grotius coined the term *dominium eminens*.<sup>40</sup> As England colonized America in the seventeenth century, republican ideals prevailed. Individual possession of property came only by grants from the State, which implicitly reserved the right to resume ownership of property.<sup>41</sup>

The principle of just compensation for eminent domain emerged with the philosophy of John Locke, a contemporary of Grotius Locke, whose liberal theories advocated individual property rights. However, the idea of an individual, “natural” right to property ownership saw its genesis much earlier. In 1215, the Magna Carta limited the sovereign’s power by granting inalienable individual rights, among them the right to possess property:

NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.<sup>42</sup>

This clause, the genesis of “substantive” due process, influenced the legal philosophers Blackstone and Coke. They recognized the existence of certain “natural rights” that limited the power of government whenever its actions conflicted with the common law or the laws of “the Creator.”<sup>43</sup> Notions of unwritten “natural” or “universal”

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*Ryan’s Poletown Dissent Provides a Better Way to Decide Kelo and Future Public Use Cases*, 15 FED. CIR. B.J. 201, 204 & n.21 (2005) (citing Harrington, *supra* note 21, at 1249 & nn.9–10).

38. Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 861 (2000); see also BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 186 (1945) (quoting ARISTOTLE, *POLITICS*, para. 1280b).

39. Sturtevant, *supra* note 37, at 204 & n. 22.

40. *Id.* (citing Harrington, *supra* note 21, at 1249).

41. *Id.*

42. Magna Carta art. 29 (1297).

43. See, e.g., *Dr. Bonham’s Case*, in 4 THE REPORTS OF SIR EDWARD COKE, KNT. 355, 375 (John Henry Thomas & John Farquhar Fraser eds., London, Joseph Butterworth & Son 1826) (“And it appears in our books, that in many cases, the common law will controul acts of



rights would form the basis for “substantive” due process in American constitutional law.<sup>44</sup> John Locke expanded “natural rights” to protect an individual’s right to hold property. He rejected the notion that all property ultimately belonged to the sovereign,<sup>45</sup> postulating that individuals had an absolute right to hold property; governments could only take land with the owner’s consent.<sup>46</sup>

Scholars debate the degree to which Locke’s liberalism usurped traditional republicanism in the minds of the Founding Fathers and post-Revolution American states. William Michael Treanor argues that two competing schools of thought both contributed to the development of early American law. He summarized the two schools:

Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest. Whereas liberals are comfortable with economic self-interest, republicans have a profoundly ambivalent stance toward private property.<sup>47</sup>

English eminent domain law split the difference between the liberal and republican approaches. Customarily, courts awarded compensation for total takings of property, though not for property *damaged*

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parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void”); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES \*39–41 (“Man . . . must necessarily be subject to the laws of his Creator . . . . This will of his Maker is called the law of nature . . . . This law of nature . . . is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.”).

44. See discussion of substantive due process and *Lochner v. New York*, 198 U.S. 45 (1905), at *infra* Part III.

45. DAVID ANDREW SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 24 (1992).

46. *Id.*; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 567 (1972).

47. William Michael Treanor, *The Original Understanding of the Takings Clause and The Political Process*, 95 COLUM. L. REV. 782, 821 (1995) [hereinafter Treanor, *The Original Understanding*].

by state activities.<sup>48</sup> Further, litigants could not challenge the government's determination that property was needed for a "public use."<sup>49</sup> Thus, while the law protected the individual right to property to some extent (liberalism), the law also forced individuals to sacrifice to the greater good (republicanism).

In contrast, American colonial and early state governments drifted more toward republicanism. No pre-Revolution colonial charter or document included any compensation for takings, except John Locke's 1669 Fundamental Constitutions of Carolina, which the state never fully implemented.<sup>50</sup> Some colonial laws required a judicial or administrative procedure, but without guaranteed compensation.<sup>51</sup> These trends continued after the Revolution. Only a handful of state documents mandated compensation requirements: The Vermont Constitution (1777), Massachusetts Constitution (1780), and Northwest Ordinance (1787).<sup>52</sup> In one scholar's words, "The first round of state constitutions had given legislatures virtually absolute power. The corollary was that the executive branch was left with very little power. In the context of takings, most state constitutions required only legislative consent—a limit on the executive, not the legislature."<sup>53</sup> States confiscated and redistributed the estates of loyalists, expropriated goods and services without payment, and upset "commercial relationships through paper money schemes and debtor-relief legislation."<sup>54</sup> Undeveloped property was taken and transferred to other private properties, or private, unimproved property was simply taken to build roads or to otherwise promote economic growth.<sup>55</sup> Use of property was not always reserved for the "public." Private property was taken to build private "mills, private roads, and [for] the drainage of private lands."<sup>56</sup> One historian estimates divestment acts and bills

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48. SCHULTZ, *supra* note 45, at 25–26; see William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698–99 (1985) [hereinafter Treanor, *The Origins and Original Significance*].

49. *Id.*

50. Treanor, *The Original Understanding*, *supra* note 47, at 785–86.

51. *Id.*

52. SCHULTZ, *supra* note 45, at 25–27; Treanor, *The Original Understanding*, *supra* note 47, at 790–91.

53. Goho, *supra* note 21, at 64.

54. Michael B. Kent, Jr., *From "Preferred Position" to "Poor Relation": History, Wilkie v. Robbins, and the Status of Property Rights Under the Takings Clause*, 39 N.M. L. REV. 89, 94 (2009).

55. Treanor, *The Origins and Original Significance*, *supra* note 48, at 695–96.

56. Sturtevant, *supra* note 37, at 206 & n.37 (citing 2A NICHOLS ON EMINENT DOMAIN § 7.01[3], at 7–17).

of attainder confiscated twenty million dollars of real estate, which was ten percent of the total real estate in the country.<sup>57</sup> State legislatures and courts made clear that it was the state's right to seize land.<sup>58</sup> Citizens "were bound to contribute as much [land], as by the laws of the country, were deemed necessary for the public convenience."<sup>59</sup> Compensation was merely a "bounty given . . . by the State" out of "kindness."<sup>60</sup> Uncompensated takings were justified by "ancient rights and principles" and the "supreme authority of the state."<sup>61</sup>

The Takings Clause of the Fifth Amendment sat largely idle during the first 150 years of the United States' existence and did nothing to limit these state excesses in the antebellum period. Chiefly concerned with the federal government's tyranny, the framers of the Constitution were content leaving disputes over improper exercises of states' taking power to their internal political processes.<sup>62</sup> The Fifth Amendment restricted only the national government, as the Supreme Court made clear in the 1833 case *Barron v. City of Baltimore*.<sup>63</sup> It was the first "anti-incorporation" case, and held that the Bill of Rights applied only to the federal government. The case bolstered state autonomy by dismissing a Fifth Amendment Takings Clause challenge against the City of Baltimore, holding that the clause only applied against the federal government.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.<sup>64</sup>

Perhaps motivated by the slavery controversy, the Court in *Barron v. Baltimore* ensured that states had almost plenary power over all

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57. Treanor, *The Original Understanding*, *supra* note 47, at 790 & n.44 (citing FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 91–92 & n.71 (1985)).

58. Treanor, *The Original Understanding*, *supra* note 47, at 824.

59. *McClenachan v. Curwen*, 3 Yeates 362, 373 (Pa. 1802).

60. *Commonwealth v. Fisher*, 1 Pen. & W. 462, 465 (Pa. 1830).

61. *Lindsay v Comm'n's*, 2 S.C.L. (2 Bay) 38, 50, 57 (S.C. 1796).

62. SCHULTZ, *supra* note 45, at 25–26.

63. 32 U.S. (7 Pet.) 243 (1833).

64. *Id.* at 247–48.

property within their borders. This created a strongly federal policy on property rights, serving as a precursor to later cases upholding slavery and segregation such as *Dred Scott v. Sandford*.<sup>65</sup> *Barron v. Baltimore* and other “anti-incorporation” cases<sup>66</sup> reinforced the strong police powers guaranteed by States under the Constitution and Tenth Amendment of the Bill of Rights. Kent points out that *Barron v. Baltimore* and other reasons meant the Takings Clause had little impact on states in the nineteenth century.

Unfortunately, there is little direct application of the Takings Clause by the courts of this era for two reasons. First, in *Barron v. Baltimore*, the Supreme Court held that the Clause applied only to the federal government, and not to the states. Second, until the late nineteenth century, the federal government normally had the states condemn on its behalf or else paid compensation by private-bill legislation. As such, there was little opportunity to develop a body of thorough precedent regarding the Takings Clause.<sup>67</sup>

Thus, the Takings Clause sat largely unused, and states were relatively free to abuse the power of eminent domain. It was equally unused against the federal government. Treanor identifies only a handful of Supreme Court cases (besides *Barron v. Baltimore*) involving Takings Clause claims, all against the property owner’s interest.<sup>68</sup>

Indeed, the Takings Clause appears to have been a low priority, and the reason for its inclusion in the Bill of Rights is a mystery. Neither the framers of the Constitution nor state legislatures seemed concerned that the federal government would unjustly seize property:

So far as we know, no delegate to the Constitutional Convention in 1787 made any mention of the need for protecting against the government’s taking power. Similarly, although the state ratifying conventions proposed over eighty different amendments to be incorporated into the Bill of Rights, not a single request was made for the Takings Clause or any equivalent measure. In light of

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65. 60 U.S. 393 (1856).

66. See *Livingston’s Lessee v. Moore*, 32 U.S. 469 (1833); *Gibbons v. Ogden*, 22 U.S. 1, 53–54 (1824).

67. Kent, *supra* note 54, at 93.

68. Treanor, *The Original Understanding*, *supra* note 47, at 794–97 & nn.69–81 (citing *Gibson v. United States*, 166 U.S. 269 (1897); *Transportation Company v. Chicago*, 99 U.S. 635 (1879); *Smith v. Corporation of Washington*, 61 U.S. (20 How.) 135 (1858)).

these facts, one scholar famously has wondered “how [the Clause] got into our constitutions at all.”<sup>69</sup>

Kent notes that the Takings Clause “seems entirely to have been the product of James Madison . . . . But Madison left no documentary evidence to explain his reasons for the provision, nor did the provision produce any meaningful discussion in Congress or the state legislatures.”<sup>70</sup> It seems that Revolution-era lawmakers believed that a specific enumerated right to just compensation was unnecessary, or at least not a high priority. Of course, they may have thought that at that time, the right to just compensation had become so “fundamental” and “natural” that its inclusion in the Bill of Rights warranted little discussion. Professor Richard A. Epstein argues, however, that the Founding Fathers were guided by Lockean Liberalism’s affection for property rights because “the founders shared Locke’s and Blackstone’s affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.”<sup>71</sup> Additionally, Otterstedt notes that the Declaration of Independence is essentially a Lockean document, highly protective of property rights.

Having considered Lockean rights and the Lockean theory of government, let us turn to their expression in the “central document of American history,” the Declaration of Independence:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . .

Viewed through a Lockean lens, the Declaration’s meaning seems clear: all people have equal, natural rights pre-existing the state by virtue of their common humanity; government’s purpose is to protect these pre-existing rights. Furthermore, at least two requirements must be met for a government to be just: its primary

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69. Kent, *supra* note 54, at 92 & n.33 (quoting Stoebuck, *supra* note 46, at 595).

70. *Id.*

71. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985).

function must be the protection of natural rights, and it must be a government formed by the consent of the governed.<sup>72</sup>

Nonetheless, Treanor maintains that the Takings Clause was essentially James Madison's pet project. He attributes the remaining Founders' lack of concern for property rights to the people's faith in legislatures because "[a]s the voice of the people, the legislature could be trusted to perceive the common good and to define the limits of individual rights."<sup>73</sup> Additionally, "[t]he absence of a just compensation clause in the first state constitutions accorded with the faith in legislatures that was a central element of republican thought and with the position held by many republicans that the property right could be compromised in order to advance the common good."<sup>74</sup> It is not to say that either is correct. Nathan Alexander Sales offers alternative reasons for why state legislatures were so wanton regarding private property rights.

Several possible explanations exist as to why the compensation requirement was not enshrined in early state constitutions. First, the notion that the government necessarily owed compensation when it took real property was so fundamental that it may have been thought unnecessary to express it. The absence of compensation requirements would thus be symmetrical with the lack of express constitutional grants of eminent domain power. Just as state constitutions did not enumerate the power of eminent domain because it was deemed an inherent attribute of sovereignty, neither did they provide for compensation, which was assumed due as a matter of natural law. Second, early Americans were not accustomed to relying on constitutions, charters, or other foundational legal documents to protect the people's rights. Instead, popularly elected legislatures were deemed competent to do so. Finally, the British had not abused their eminent domain power, and Americans therefore saw no need expressly to restrict that of their representatives.<sup>75</sup>

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72. Paul J. Otterstedt, *A Natural Rights Approach to Regulatory Takings*, 7 TEX. REV. L. & POL. 25, 35–36 (2002) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

73. Treanor, *The Origins and Original Significance*, *supra* note 48, at 701.

74. *Id.* at 695.

75. Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 360–61 (1999).

Thus, the inaction of state legislatures did not necessarily indicate that early Americans did not ascribe to a Lockean, liberal framework that supported a natural right to just compensation.

After a brief period of state excesses, in the early nineteenth century states began gradually adopting compensation requirements through constitutional amendments and statutes.<sup>76</sup> However, the majority of such protections came through the courts.<sup>77</sup> The Takings Clause or its state analogues were not bases for these protections. Rather, to justify these new limits on state power, judges relied on concepts of “natural” and “universal” laws—self-evident fundamental limitations on state power.<sup>78</sup> In *Gardner v. Village of Newburgh*,<sup>79</sup> for example, New York statute allowed a village to establish a water system using a spring. The statute mandated compensation for the owners of the spring and the land upon which the village laid pipes, but not for the landowners upstream who lost riparian rights. The chancellor voided the statute without citing the state constitution, which did not mandate compensation.<sup>80</sup> He merely stated that “natural equity” demanded compensation for those who sacrifice their property.<sup>81</sup> Similarly, in another eminent domain case, a New Jersey court mandated compensation despite the lack of a specific statute or constitutional provision. In *Sinnickson v. Johnson*,<sup>82</sup> the court stated:

This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist

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76. J. A. C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71, 75–77 (1930–31).

77. Treanor, *The Original Understanding*, *supra* note 47, at 792–93.

78. *See, e.g.*, *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (N.J. 1839) (“This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle”); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (even if statute authorizing taking power was constitutional, “natural equity” demanded compensation for those who lost riparian rights to state water system).

79. 2 Johns. Ch. at 162.

80. *Id.*

81. *Id.*

82. 17 N.J.L. at 129.

not as separate and distinct principles, but as parts of one and the same principle.<sup>83</sup>

None of these antebellum cases cited the Takings Clause as a direct source of law, although Treanor argues that “the Takings Clause proved immensely influential . . . . In particular, it influenced state court decisions to impose a compensation requirement on state actions in the absence of state takings provisions.”<sup>84</sup> Further, “[l]awyers representing individuals whose property had been taken by a state without payment contended that the Fifth Amendment was a national declaration of respect for property rights.”<sup>85</sup> Treanor notes that in *Gardner v. Newburgh*, the presiding chancellor quoted the Fifth Amendment:

But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States*, “that private property shall not be taken for public use, without just compensation.” I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property.<sup>86</sup>

Nevertheless, Treanor also notes that James Madison, the driving force behind the Takings Clause, “intended the clause to apply only to direct, physical taking of property by the federal government.”<sup>87</sup> Thus, while the Takings Clause was not specifically applied in state courts, it may have served as inspiration to state courts to enforce a “natural” right to just compensation, which was simply fair.

Whatever the source of their inspiration, “[b]y 1868, every state but North Carolina had a takings clause in its state constitution.”<sup>88</sup> As the Civil War approached, most states recognized a common law natural right to just compensation, either through constitutions,

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83. *Id.* at 145 (citations omitted).

84. Treanor, *The Original Understanding*, *supra* note 47, at 840.

85. Treanor, *The Origins and Original Significance*, *supra* note 48, at 714.

86. *Id.* at 715 (citing 2 Johns. Ch. at 167).

87. *Id.* at 711.

88. Treanor, *The Original Understanding*, *supra* note 47, at 840 (citing NICHOLS, *THE LAW OF EMINENT DOMAIN*, §§ 1.80–83 (3d ed. 1995)); see Grant, *supra* note 76, at 71; Treanor, *The Origins and Original Significance*, *supra* note 48, at 714–15.



statutes, or the courts. Steven G. Calabresi and Sarah E. Agudo set out to determine which rights most Americans recognized when the Fourteenth Amendment was ratified in 1868 by surveying the law in each state. They found that thirty-three of thirty-seven states had takings clauses in their constitutions, meaning ninety-one percent, a “huge supermajority,” lived in states with takings clauses.<sup>89</sup> Interestingly, they note: “Of course, the other states may just have assumed that it was obvious that takings for private use were forbidden and that there was no need to state it explicitly.”<sup>90</sup> Regarding regulatory takings, while there were no specific measures, constitutions did allow recourse to the courts. “Seventy-three percent of all Americans in 1868—slightly less than three-fourths—lived in states that had provisions of this sort in their state constitutions.”<sup>91</sup> They agree their study “suggests that the framers of the Fourteenth Amendment may have believed in natural law” rather than positive law.<sup>92</sup>

Meanwhile, the right to a judicial determination of “public use,” which the Supreme Court considers an essential part of the Takings Clause,<sup>93</sup> varied greatly from state to state.<sup>94</sup> Of course, it is not surprising that state law focused mainly on the common law right to just compensation, and not the specifically enumerated right that property only be taken for public use. The Supreme Court has described the Takings Clause as consisting of two requirements: that the state provides just compensation, and that takings are only exercised for proper “public” uses.<sup>95</sup> While the just compensation right dates back to common law England, the determination of public use was generally left to the legislative branch. As one would expect, in antebellum America courts did not enforce a right to a judicial determination of public use.

The Mills Acts, statutes for building roads and bridges,<sup>96</sup> and state constitutions all defined public use differently or not at all.<sup>97</sup> Some

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89. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 72 (2008).

90. *Id.*

91. *Id.* at 74.

92. *Id.* at 91.

93. See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

94. See Calabresi & Agudo, *supra* note 89.

95. See 545 U.S. at 477.

96. *Id.* at 480 n.8.

97. See SCHULTZ, *supra* note 45, at 27.

courts mentioned public use in the mid-nineteenth century. However, none held that “public use” was an inalienable natural right, like the right to just compensation.<sup>98</sup> Justice O’Connor’s dissent in *Kelo v. City of New London* noted that some states required public use, while other “early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads.”<sup>99</sup> Some courts implied public use for these statutes, others did not; there was significant disagreement among courts and legislatures regarding the nature and extent of “public use.”<sup>100</sup> There are few examples of state courts applying a strict “actual use by the public” test,<sup>101</sup> but generally, the presence of a valid “public benefit” justified transfers to private owners.<sup>102</sup> The Mill Acts and the private road acts, both of which delegated taking power to private individuals, were “crucial evidence that the founding generation accepted the public-benefit theory.”<sup>103</sup> Reluctant to interfere with states’ internal political processes, this test essentially reduces the “public use” inquiry to a rational basis evaluation of state action.<sup>104</sup>

One seeming exception to this trend is demonstrated by *Missouri Pacific Railway Co. v. Nebraska*,<sup>105</sup> in which the state compelled a railroad to grant a group of private individuals the right to build a grain elevator on the railroad’s right of way. The Court, referring to *Davidson’s A. to B.* language,<sup>106</sup> found that this violated the Fourteenth Amendment’s Due Process Clause because

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in

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98. *Id.* at 28–29. The debate among these courts divided two schools of thought: (1) the public or some portion of it must have a use or right of use over the property or; (2) there must be a judicial determination that they are equivalent to the public benefit, utility, advantage or what is productive of public benefit. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 221 (Chicago, Callaghan & Co. 1900).

99. 545 U.S. at 513 (Thomas, J., dissenting).

100. *Id.*

101. See Sales, *supra* note 75, at 346–47 (citing *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9 (N.Y. 1837)).

102. 545 U.S. at 480 (citing *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896)).

103. Sales, *supra* note 75, at 366.

104. SCHULTZ, *supra* note 45, at 25–26; see Treanor, *The Origins and Original Significance*, *supra* note 48, at 698–99.

105. 164 U.S. 403 (1896).

106. *Davidson v. City of New Orleans*, 96 U.S. 97, 102 (1877).

question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.<sup>107</sup>

However, the Court indicated this was an extreme situation, where there was no

taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals voluntarily associated together for their own benefit. They do not appear to have been incorporated by the state for any public purpose whatever, or to have themselves intended to establish an elevator for the use of the public.<sup>108</sup>

Overall, public use only factored in where the most extreme state actions, vastly lacking in justification, were at hand.

One can debate endlessly the degree to which the Founding Fathers were inspired by Lockean Liberalism or whether the Takings Clause was merely a pet project of James Madison. One can also debate the exact reasons why states initially seized property excessively but then gradually adopted just compensation requirements. The point of the above discussion is that, when Reconstruction congressmen set out to draft the Fourteenth Amendment, they lived in a legal world where the right to just compensation was universally accepted. At the same time, however, that legal world strongly accepted the notion that states, rather than the national government, were supreme in their domain concerning the disposition of property. This framework would guide the framers of the Fourteenth Amendment.

## II. THE AFTERMATH OF THE CIVIL WAR AND THE FOURTEENTH AMENDMENT

Fundamentally, the Civil War was fought over states' rights. The right to keep slaves was long protected by a weak federal government

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107. 164 U.S. at 417.

108. *Id.* at 416.

and a Bill of Rights that, since *Barron v. Baltimore*, did not apply to state regulation of property. The aftermath of the War saw a much more powerful federal government that limited state police power to prevent future rebellion. The Fourteenth Amendment was largely the vehicle that accomplished this goal. It also had large implications for eminent domain jurisprudence and other areas of the law. This section explores why this is so, considering that eminent domain was likely a low priority issue for the framers.

The Fourteenth Amendment is the most litigated amendment in the Constitution and has been the source of numerous famous cases, which gradually increased the body of civil liberties to which all citizens are entitled. Section 1 of the Amendment states:

[1] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; [2] nor shall any State deprive any person of life, liberty, or property, without due process of law; [3] nor deny to any person within its jurisdiction the equal protection of the laws.<sup>109</sup>

The Equal Protection Clause, though very important in integration of minorities and women's rights, is not pertinent to the present incorporation discussion.<sup>110</sup> The Privileges and Immunities Clause, as will be discussed, has largely been rendered meaningless by the Supreme Court.<sup>111</sup> This leaves the Due Process Clause an analogue of the same clause in the Fifth Amendment, which ended up standing for more than merely procedural due process (i.e., notice and a hearing). The Clause was essential to fundamental or "natural" rights in two respects. First, the Due Process Clause allowed the Supreme Court to reverse *Barron v. Baltimore* by "incorporating" provisions

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109. U.S. CONST. amend. XIV, § 1. The remaining four sections are Civil War-specific, dealing with apportionment and voting rights of freed slaves, readmission to the Union, and so forth. They are not relevant in this paper.

110. This clause, also found in U.S. CONST. amend. XIV, § 1, states "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." For a case testing the limits of the Equal Protection Clause, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4. (1938) (noting that racial and religious groups are protected, but that other "discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," and may also be subject to protection under the Clause).

111. See *Slaughter-House Cases*, 83 U.S. 36 (1872) (rejecting that the Privileges and Immunities Clause applies the Bill of Rights against the states). This case, for most purposes, is still good law today.

of the Bill of Rights. However, the Court slowly incorporated the first eight Amendments piecemeal over a long period. In fact, the Second Amendment's right to bear arms was only incorporated in 2010 in *McDonald v. City of Chicago*.<sup>112</sup> Three other provisions have not yet been incorporated: the right to a grand jury hearing (Amendment VII);<sup>113</sup> the right against housing of soldiers (Amendment III);<sup>114</sup> and the right against excessive bails and fines (Amendment VIII).<sup>115</sup> The debate on incorporation continues today. The Supreme Court admits it has not adopted one perspective on incorporation to the exclusion of any other.<sup>116</sup> The incorporation debate is discussed in detail later.

Second, the Due Process Clause limited state power through “substantive” due process, which protects “natural” or “universal” rights—unwritten but fundamental protections of the law.<sup>117</sup> Potentially, any time state activity places “life, liberty, or property” in jeopardy, substantive due process is implicated. So far, the Supreme Court has indicated that the following rights, though not explicitly protected by the Constitution, are protected through the general notion of substantive due process: the right to privacy,<sup>118</sup> the right to abortion,<sup>119</sup> and the right to marry.<sup>120</sup> Additionally, in a much-derided era of the Supreme Court's history, it also found that substantive due process protected “freedom of contract” through the “liberty” portion of the Fourteenth Amendment.<sup>121</sup> This prevented states from enacting almost any regulation of economic activity. However, *Lochner* has

112. 130 S. Ct. 3020 (2010).

113. *Hurtado v. California*, 110 U.S. 516 (1884).

114. *But see* *Engblom v. Carey*, 677 F.2d 957 (2d. Cir. 1982) (holding that the Third Amendment was indeed incorporated against the states).

115. While the portion of the Eighth Amendment dealing with excessive bail and fines has not yet been incorporated, the Court has incorporated the Amendment's prohibition of cruel and unusual punishments. *Robinson v. California*, 370 U.S. 660 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

116. 130 S. Ct. at 3033–34 & n.9 (2010) (Supreme Court has not adopted one perspective on incorporation to the exclusion of any other); *see* RAOUL BERGER, *supra* note 10; Amar, *supra* note 10; Fairman, *supra* note 10; Maltz, *supra* note 10.

117. *See* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that rights that are “of the very essence of a scheme of ordered liberty” may not be abolished because to do so is to “violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

118. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

119. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

120. *Loving v. Virginia*, 388 U.S. 1 (1967).

121. *Lochner v. New York*, 198 U.S. 45 (1905).

since been overruled and the Court is normally only strict with regulation that affects fundamental civil rights. However, as some scholars point out, the Takings Clause is now being invoked whenever property—real or otherwise—is affected, leading to decisions bearing “disturbingly close resemblance to *Lochner*-era substantive due process review.”<sup>122</sup>

This multifaceted nature of the Fourteenth Amendment led to the conflation of substantive due process and the Takings Clause that we see today. This conflation arose partially because of the Supreme Court’s reliance on the framers of the Fourteenth Amendment, primarily the Committee of Fifteen. Their uncertain position leads one today to question their intentions in passing the Fourteenth Amendment. In fact, it is unclear whether the Committee of Fifteen intended any “incorporation” of the Bill of Rights. Some evidence indicates the Committee only intended the Fourteenth Amendment to enforce “natural” rights and provide a constitutional backbone for a civil rights bill that the President had vetoed, not to directly incorporate the Bill of Rights against the states. This indicates that the Takings Clause was not properly incorporated by the Fourteenth Amendment. In addition, there is the issue of the Bingham amendment, which would have added a specific takings clause analogue to the Fourteenth Amendment. The history and deliberations of the Committee are examined in detail below.

President Andrew Johnson and his allies in Congress hoped to carry out a swift Reconstruction, requiring only that Southern states ratify the Thirteenth Amendment abolishing slavery, repudiate all war debts, and void ordinances of succession.<sup>123</sup> However, the Radical Republicans, led by the “Dictator of Congress,” Representative Thaddeus Stevens,<sup>124</sup> wanted to grant freed slaves full civil rights, both out of moral sentiment and to create a Republican power base in the South.<sup>125</sup> Apportioning votes based on the black population but not extending blacks the franchise would have given the South a disproportionate amount of Democratic seats in Congress.<sup>126</sup> Some

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122. Karkainen, *supra* note 11, at 908.

123. KENDRICK, *supra* note 1, at 134.

124. He was also the chair of the House Ways and Means Committee and a leader of the effort to impeach President Johnson. See HANS L. TREFOUSSE, THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN (1997).

125. KENDRICK, *supra* note 1, at 134.

126. *Id.*

radicals also wanted to consolidate power in Congress and limit the expansive power the President had obtained during wartime.<sup>127</sup> Southern states did not intend to welcome the newly freed black populations into their midst. They passed laws that sustained slavery in all but name. The “Black Codes” required freed blacks to enter unconscionable farm labor contracts, with imprisonment and corporal punishment as penalties for breaking them or refusing to work.<sup>128</sup> Other laws hindered the movement of freedmen and denied them entry into states.<sup>129</sup> Meanwhile, Supreme Court precedent favoring states’ rights regarding slavery and segregation still stood as good law.<sup>130</sup>

The conduct of Southern states infuriated the Radicals, especially Stevens, who felt the rebels should be punished.<sup>131</sup> However, moderates forced a more relaxed solution.<sup>132</sup> First, President Johnson rebuked even moderate Republicans by vetoing a bill in February 1866 that would have extended the life of the Freedmen’s Bureau.<sup>133</sup> Further, to combat the Black Codes, the Radicals passed a civil rights bill,<sup>134</sup> which President Johnson also swiftly vetoed.<sup>135</sup> This may have been President Johnson’s biggest blunder, as it only infuriated the

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127. *Id.* at 136–37.

128. *Id.* at 213; WILLIAM A. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC, 1865–1877 54–59 (Harper & Row 1962); ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 198–210 (Perennial 2002).

129. Philip Hamburger, *Privileges or Immunities*, 105 N.W. L. REV. 61, 83–86, 115–19 (2011).

130. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

131. FONER, *supra* note 128, at 228–39.

132. *Id.*

133. Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984).

134. An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication (Civil Rights Act of 1866), ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2006)). The Act protected “such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.” This Act would later become influential in the drafting of the Fourteenth Amendment.

135. President Johnson’s Veto of the Civil Rights Act, 1866 (Mar. 27, 1866), *available at* [http://wps.prenhall.com/wps/media/objects/107/109768/ch16\\_a2\\_d1.pdf](http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf).

Radicals and encouraged them to impeach him.<sup>136</sup> The bill passed over the President's veto.<sup>137</sup> Further, the Radicals introduced another bill<sup>138</sup> to bolster the federal government's ability to enforce the Comity Clause.<sup>139</sup> However, after Johnson's veto, it was clear that Congress would need a constitutional mandate to protect civil rights. Further, an amendment would ensure that a future Democratic Congress would not repeal any civil rights acts.<sup>140</sup> The Radicals, using a clever concurrent resolution that did not require Presidential approval, formed a joint Committee of Fifteen—nine representatives and six senators—to oversee Reconstruction.<sup>141</sup> The resolution's passage usurped control from the President and gave the Radicals significant influence on the nation's progress following the Civil War and on what would become the Fourteenth Amendment.<sup>142</sup> At this point, there was no talk of an amendment to extend the Bill of Rights to the states, nor any talk of eminent domain. Rather, the debate thus far had revolved around whether blacks would get the franchise and other issues relating to war debt and punishment of Southern states for the rebellion.

The Committee's secret meetings became public after a clerk's journal was discovered in the early twentieth century by political science professor Benjamin Kendrick of Columbia University Law School.<sup>143</sup> The clerk's minutes are terse and mostly document attendance and the language of drafts presented and their subsequent revisions. Members of the Committee offered draft constitutional amendments for an up or down vote, which the journal recorded.<sup>144</sup> Unfortunately, the journal does not record any of the debate among Committee members. Nonetheless, the proceedings still offer some useful information regarding incorporation of the Bill of Rights and the Takings Clause. It appears the Committee's initial focus was on securing rights for freed slaves, not expanding individual liberties in

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136. FONER, *supra* note 128, at 247–51.

137. *Id.*

138. H.R. 437, 39th Cong. § 1 (1866).

139. U.S. CONST. art. IV, § 2, cl. 1 (also known as the Privileges and Immunities Clause: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

140. FONER, *supra* note 128, at 251–54.

141. CONG. GLOBE, 39TH CONG., 1ST SESS. 4–6 (1865).

142. KENDRICK, *supra* note 1, at 140–41, 144–45.

143. *Id.* at 17–21.

144. *Id.* at 37–129.



general as the Fourteenth Amendment eventually would do. Rather than citing the Bill of Rights, the first drafts of the Fourteenth Amendment mirrored language in the recently passed Civil Rights Act of 1866.<sup>145</sup> Subsequent drafts spoke in terms of individual and equal rights, giving Congress the power to “make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property,”<sup>146</sup> to secure “to all citizens of the United States in any State the same immunities and also equal political rights and privileges,”<sup>147</sup> and providing that “[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color.”<sup>148</sup>

Eventually, however, the Committee then shifted its focus from “natural” rights to specific enumerated rights in the Constitution, drawing inspiration from the Bill of Rights. Representative John Bingham of Ohio offered a new draft:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).<sup>149</sup>

This draft reveals the specific constitutional protections the Drafters sought to enforce against the states. “Art. 4 Sec. 2” refers to the Comity Clause of the U.S. Constitution.<sup>150</sup> “5th Amendment” of course refers to the Fifth Amendment in the Bill of Rights. The Committee rejected this draft and went on to draft the final version of the Fourteenth Amendment on April 21, 1866.

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145. An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication (Civil Rights Act of 1866), ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981(a) (2006)) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

146. KENDRICK, *supra* note 1, at 46.

147. *Id.* at 56.

148. *Id.* at 46.

149. *Id.* at 61.

150. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”). The Privileges and Immunities Clause is also commonly known as the Comity Clause.

After the Committee drafted the final version of the Fourteenth Amendment,<sup>151</sup> Representative John Bingham of Ohio offered an addition,<sup>152</sup> which mirrored the Fifth Amendment's Takings Clause<sup>153</sup>:

[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.<sup>154</sup>

The Committee rejected this construction by a seven-to-five vote.<sup>155</sup> Notably, Bingham offered this amendment by itself, not as part of a larger provision, which the Committee may have rejected for other reasons. The Committee then adopted the Fourteenth Amendment as it stands today, without a specific "takings clause."<sup>156</sup> Thus, while the Fourteenth Amendment lacked a specific takings clause enforceable against the states, it still enforced the rights to "due process," which eventually would come to include property protections. The Supreme Court would refer specifically to the Committee's rejection of the Bingham amendment in *Davidson v. City of New Orleans*,<sup>157</sup> where the Court held the Takings Clause was not incorporated against the states.

We can only speculate as to why the Committee rejected Bingham's takings clause. With a country torn apart, it may seem eminent domain was the last issue on the minds of Reconstruction Congress. However, property rights did come into play. Treanor addressed the Committee's rejection of Bingham's analogue. He attributes the introduction of Bingham's amendment to a desire for protection of *unionist* property.

During the course of the committee meetings about the Fourteenth Amendment, Bingham proposed imposing on the states just compensation and equal protection requirements (and not due process or privileges and immunities), and the support for this unsuccessful proposal reflected this perceived need to safeguard Unionist property after former rebels returned to power.

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151. KENDRICK, *supra* note 1, at 82.

152. *Id.* at 82, 85.

153. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

154. KENDRICK, *supra* note 1, at 85.

155. *Id.* at 106.

156. *Id.*

157. 96 U.S. 97 (1877).

But, of course, this version was not passed. It was rejected by a vote of seven to five, and the committee opted instead for the broader language of Section One. Incorporationist scholarship indicates the framers adopted this language in order to subject the states to the same restraints as the federal government. Thus, passage of the Fourteenth Amendment does not reflect a separate consideration of what specific property interests needed protection from the government. Incorporationist scholarship therefore leads to the same conclusion as non-incorporationist scholarship: The period in which the Fifth Amendment's Takings Clause was proposed and ratified is the only time at which the nation considered which property rights needed protection from the government. The translator should therefore focus on the concern with process failure animating the Fifth Amendment's Takings Clause. Having determined that the Takings Clause was originally intended to remedy certain kinds of process failure, she should offer a reading of the clause that serves the same ends in today's society.<sup>158</sup>

Treanor relied heavily on Earl M. Maltz, who suggested that Bingham had the protection of unionist property in mind. Maltz notes that Bingham was the primary force behind the rejected amendment, which would have given Congress authority to “make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several States equal protection in the rights of life, liberty and property,” in addition to the takings clause analogue attached to this proposed amendment.<sup>159</sup>

The Radicals suggested confiscation of Southern property, with redistribution to freedmen or administration under the authority of the Freedmen's Bureau.<sup>160</sup> The discussion over what to do with seized property may have informed the rejected takings clause amendment to the draft Fourteenth Amendment. Perhaps the Committee felt the Fourteenth Amendment would “totally incorporate” the entire Bill of Rights, and thus an additional takings clause would have been redundant to the Fifth Amendment. On the other hand, the Committee may have assumed that because the right to just compensation was such a well-settled part of common law, it was in

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158. Treanor, *The Original Understanding*, *supra* note 47, at 862–63.

159. Maltz, *The Fourteenth Amendment*, *supra* note 133, at 945.

160. FONER, *supra* note 128, at 158–59.

inherent in the “due process” portion of the Fourteenth Amendment. A third possibility: the Committee may have been concerned with infringing upon states’ rights to control property within their borders. Bingham may have offered the takings clause in response to Radical plans to confiscate property from former Confederates.<sup>161</sup>

Equally uncertain is whether the Committee intended the Fourteenth Amendment to “incorporate” any parts of the Bill of Rights at all, or any type of “substantive” due process. However, the comments of congressmen, and John Bingham in particular, have been the source of academic controversy. There is abundant evidence that the framers intended the Fourteenth Amendment to incorporate the Bill of Rights, and evidence that they intended the Amendment only as a mechanism to enforce the Civil Rights Bill. Perhaps seeking to allay concerns of states’ rightists, some remarks indicate Congress did not intend to incorporate the Bill of Rights. Senator Lyman Trumbull of Illinois explained that Section 1 was a “reiteration of the rights set forth in the Civil Rights Bill.”<sup>162</sup> Thaddeus Stevens described Section 1 as being derived from the Declaration of Independence and organic law, not the Bill of Rights.<sup>163</sup> The bills would grant Congress power to ensure that the “law which operates upon one man shall operate *equally* upon all.”<sup>164</sup> Section 1 would not secure any new rights beyond the Civil Rights Act, but was needed to ensure that a future Democratic Congress would not repeal the statute.<sup>165</sup> On the other hand, Senator Jacob M. Howard of Michigan declared on the Senate Floor that the “privileges and immunities” in the Fourteenth Amendment would include “the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution.”<sup>166</sup> Bryan H. Wildenthal notes that there was “little doubt” that the Fourteenth Amendment, albeit through the Privileges and Immunities Clause, would incorporate the Bill of Rights, “and not a single member of either House of Congress, throughout all the debates, ever contradicted [Bingham and Howard’s] plainly

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161. *Id.* at 235–36.

162. JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 161 (Univ. of Ill. Press 1965).

163. CONG. GLOBE, 39TH CONG., 1ST SESS. 2459 (1866).

164. *Id.*

165. *Id.*

166. Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1074 (2000); see CONG. GLOBE, 39TH CONG., 1ST SESS. 2765–66 (1866).

expressed understanding.”<sup>167</sup> Wildenthal dismisses the fact that “[t]he anti-incorporationists contend that . . . applying the Bill of Rights to the states would supposedly have been shocking and inconceivable to Americans of the day.”<sup>168</sup> But it is possible that in a world where the Bill of Rights was held to clearly apply to the federal government, the widely accepted notion was that the Bill of Rights in no way bound the states.

The most contentious and often-cited source in the incorporation debate is the remarks of John Bingham. His draft became Section 1, and his rejected amendment contained the analogous takings clause.<sup>169</sup> Unfortunately, Bingham has been called a “muddled thinker”<sup>170</sup> due to the inconsistency of his statements on incorporation. Charles Fairman, writing in 1949, espouses that by “Bill of Rights” Bingham meant the Fifth Amendment and Article IV’s Privileges and Immunities Clause. Richard L. Aynes argues, however, that Fairman derived this theory from “a single speech that Bingham gave before the House of Representatives . . . the shortest of all Bingham’s speeches on the Fourteenth Amendment, barely filling one and one-half columns of the Congressional Globe.”<sup>171</sup> However, there is evidence supporting Fairman’s position. Bingham explained before Congress that Section 1 of the Fourteenth Amendment was an attempt to codify the Civil Rights Act’s assurance of interstate equality and certain natural rights that had existed for some time.<sup>172</sup> When asked what “due process” meant in Section 1, he responded without reference to the Bill of Rights, saying “courts have settled that long ago.”<sup>173</sup> Regarding property rights, Bingham clarified that Section 1 left acquisition and transmission of property to “the local law of the States.”<sup>174</sup> The Fourteenth Amendment only ensured that

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167. Wildenthal, *supra* note 166, at 1074.

168. *Id.* at 1074–75 (citing RAOUL BERGER, *supra* note 10, at 82–87; Fairman, *supra* note 10, at 68–126, 137–38; Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144, 154–55 (1954)).

169. KENDRICK, *supra* note 1, at 82–85.

170. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 145 (1977).

171. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 67 (1993) (citing Fairman, *supra* note 10, at 25–26 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 1034 (1866))).

172. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866).

173. *Id.*

174. *Id.* at 1089 (“As to real estate, every one [sic] knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the

any person who had “acquired property not contrary to the laws of the State, but in accordance with its law” should be “equally protected in the enjoyment” of his property.<sup>175</sup> Congress first debated whether the Amendment’s Privileges and Immunities Clause would incorporate the Bill of Rights. The wording eventually came to reflect the Privileges and Immunities Bill introduced earlier.<sup>176</sup> John Bingham described the clause simply as “that part of the amendment which seeks the enforcement of the second section of the fourth article [the Comity Clause] of the Constitution of the United States.”<sup>177</sup> He cited Oregon and Missouri laws, which denied entry to black citizens, and did not mention any provision of the Bill of Rights.<sup>178</sup>

Responding to Fairman’s argument, Aynes argues Bingham espoused “compact theory,” which

holds that even before the adoption of the Fourteenth Amendment, the Constitution prohibited states from abridging the first eight amendments. According to Bingham, Article IV, Section 2 applied the provisions of the Bill of Rights against the states, but the absence of an express clause granting Congress enforcement authority meant that while a compact existed that bound the states to comply with Section Two, no remedy was available when the states breached this obligation.<sup>179</sup>

Bingham did say that the Fourteenth Amendment would “arm the Congress . . . with the power to enforce the *bill of rights* as it stands in the Constitution today.”<sup>180</sup> Bingham said in a speech,

The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned, but was deemed necessary for their enforcement as an express limitation upon the powers of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were

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Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States.” The Fourteenth Amendment only ensured that any person who had “acquired property not contrary to the laws of the State, but in accordance with its law” should be “equally protected in the enjoyment” of his property).

175. *Id.* Bingham would later retract his statements and claim that the clause included the first eight Amendments.

176. Hamburger, *supra* note 129, at 61.

177. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866).

178. *Id.*

179. Aynes, *supra* note 171, at 71 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 2542 (1866)).

180. CONG. GLOBE, 39TH CONG., 1ST SESS. 1088 (1866) (emphasis added).

not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article.<sup>181</sup>

In a footnote, Aynes states “Bingham did not refer to specific ‘judicial[] determin[at]ions’ but was undoubtedly referring to *Barron v. Baltimore* . . . and *Livingston v. Moore* . . . . In his February 28, 1866, speech, Bingham cited these cases when asserting the same position.”<sup>182</sup> Further, William Crosskey, a critic of Fairman, “described Bingham as an able person whose theories were ‘the common faith’ of the Republican Party and argued that the historical evidence reveals that the framers of the Fourteenth Amendment intended the Amendment to enforce the Bill of Rights against the states.”<sup>183</sup> Further, “[p]rominent judges, lawyers, and members of Congress shared Bingham’s conviction that the Constitution prohibited the states from abridging the privileges and immunities protected by Article IV, Section 2, but that Congress could not enforce the provision.”<sup>184</sup>

Nevertheless, if Bingham truly believed the compact theory, why did he say in 1871, “These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment”?<sup>185</sup> More importantly, if he believed the Bill of Rights had always applied to the states (compact theory) or would apply through the Fourteenth Amendment (incorporation theory), why would he have proposed adding an analogue to the Takings Clause of the Fifth Amendment, which would have been redundant? Was he attempting to literally overrule *Barron* specifically? Further, if the Committee of Fifteen espoused total incorporation, the Due Process Clause of the Fourteenth Amendment would also have been redundant with the same clause in the Fifth Amendment. While it is difficult to discern exactly what the framers of the Fourteenth Amendment intended, in the eminent domain context the rejection of Bingham’s proposed takings clause analogue and statements

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181. Aynes, *supra* note 171, at 73 (quoting H.R. REP. NO. 22 (1871), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES 466–67 (Alfred Avins ed., 1967)).

182. *Id.* at 73 n.93 (citing 32 U.S. (7 Pet.) 243 (1833); 32 U.S. (7 Pet.) 469 (1833); CONG. GLOBE, 39TH CONG., 1ST SESS. 1089–90 (1866)).

183. *Id.* at 59 (citing William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954)).

184. *Id.* at 78.

185. *Id.* at 74.

espousing states' rights indicated the Committee probably did not intend to incorporate the Takings Clause against the states.

### III. POST-RECONSTRUCTION: *CHICAGO, B. & Q.* TO *LOCHNER* TO *PENN CENTRAL*

The Supreme Court quickly decided against incorporation *and* compact theory. In 1873, the *Slaughter-House Cases*<sup>186</sup> rendered the Privileges and Immunities Clause of the Fourteenth Amendment nearly a dead letter, struck down as a means of enforcing civil rights, and held that these were the province of state law. The Court held that the Clause only protected narrow "federal" rights such as the right to protection on the high seas. This five-to-four decision has been widely criticized, but the Privileges and Immunities Clause is still largely dormant to this day.<sup>187</sup> Attempts to raise these arguments through the Due Process Clause also failed.

The Court also dismissed the Due Process Clause as a means of incorporation. In fact, the Committee of Fifteen's rejection of Bingham's takings clause analogue clearly influenced the Supreme Court's interpretation of the incorporation debate. In *Davidson v. City of New Orleans*,<sup>188</sup> the Supreme Court specifically cited the Committee of Fifteen's rejection of the Bingham amendment in striking down a challenge to a state taking based on the Fourteenth Amendment.

[The taking] may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when then *fourteenth amendment* was adopted, the provision on that subject, in immediate juxtaposition in the *fifth amendment* with the one we are construing, was left out, and this was taken.<sup>189</sup>

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186. 83 U.S. 36 (1872).

187. *Saenz v. Roe*, 526 U.S. 489 (1999). *Saenz v. Roe* held that the Privileges and Immunities Clause protected a right to relocate to another state and become a citizen of that case, but besides this the Supreme Court has relied on the Due Process Clause to enforce individual rights against the States.

188. 96 U.S. 97 (1877).

189. *Id.* at 105 (emphasis added).



Rather, the Fourteenth Amendment enforced *due process* against the states, meaning

those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>190</sup>

While the Fourteenth Amendment gave courts the opportunity to enforce these “settled usages and modes” against the states, the Court made clear that the Bill of Rights was not necessarily part of these “usages and modes.” The Court ruled similarly in *Hurtado v. California*,<sup>191</sup> where it held that the Grand Jury Clause of the Fifth Amendment was not part of these “settled usages and modes.” The Court expressed frustration at the feeding frenzy of litigation stemming from the recently passed Fourteenth Amendment:

[T]here exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.<sup>192</sup>

*Davidson* seems to indicate the Court did not believe that the right to just compensation was not a “natural right.” However, the subject

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190. *Hurtado v. California*, 110 U.S. 516, 528 (1884) (citing *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855)).

191. 110 U.S. 516 (1884).

192. 96 U.S. at 104. “It is proper now to inquire whether the due process of law enjoined by the *fourteenth amendment* requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.” *Chicago, B. & Q. Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897).

matter was not a traditional taking. The Court upheld a state *tax assessment* for draining of swamplands. The Court retained fundamental due process notions, holding that a statute could not declare “that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby transferred in B.”<sup>193</sup> This “natural rights” basis would lead to the “incorporation” of the right of just compensation against the states, and this would pave the way for the Court to apply substantive due process principles to eminent domain about fourteen years later. Thus, the natural right to just compensation had survived Reconstruction and the Court’s interpretation of the Fourteenth Amendment.

In 1897 the Supreme Court decided *Chicago, B. & Q. Railroad Co. v. City of Chicago*,<sup>194</sup> which according to *Penn Central Transportation Co. v. City of New York* held the Takings Clause “of course” applicable to the states.<sup>195</sup> In reality, *Chicago, B. & Q.* did not come close to overturning *Barron v. Baltimore*, failing to even mention the Takings Clause or the Fifth Amendment. It was a purely substantive due process decision, building on the dicta of *Davidson* and the fact that the framers of the Fourteenth Amendment specifically rejected a takings clause analogue. Further, it reaffirmed that state police power is free from interference by federal courts.

Chicago passed an ordinance authorizing the opening and widening of certain streets, which required condemning a portion of land owned by the railroad upon which it operated rail tracks.<sup>196</sup> The Court upheld the jury’s nominal award of one dollar, because the difference in value had not changed; the railroad could continue operating its tracks.<sup>197</sup> On the Takings Clause issue, the Court noted,

There is no specific prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. *The fifth amendment* which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided.<sup>198</sup>

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193. 96 U.S. at 102.

194. 166 U.S. 226 (1897).

195. 438 U.S. 104, 122 (1978).

196. 166 U.S. at 230–32.

197. *Id.* at 256–58.

198. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896) (emphasis added).

The Court did state just compensation was a universal natural right, which demonstrates why substantive due process and the Takings Clause would become entangled in the future. After reviewing the decisions of state and federal courts,<sup>199</sup> and legal commentary,<sup>200</sup> that just compensation was an essential and historic due process limitation on state power.<sup>201</sup> The Court in *Chicago, B. & Q.* stated that

The requirement that the property shall not be taken for public use without just compensation is but “an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”<sup>202</sup>

However, the Court held this principle did not apply in the matter at hand, which was a legitimate exercise of state police power. The Court disregarded the railroad’s alternative arguments that Chicago should at least have to pay the cost of maintaining a required railroad crossing and flagmen, holding that the state does not need to compensate owners for losses suffered due to exercises of police power:

And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition

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199. 166 U.S. at 229, 235–39 (citing *Sweet v. Rechel*, 159 U.S. 380, 398 (1895); *Searl v. School Dist.*, 133 U.S. 553, 562 (1890); *Davidson v. City of New Orleans*, 96 U.S. 97, 102 (1877); *Mt. Hope Cemetery v. City of Boston*, 158 Mass. 509, 519 (Mass. 1893); *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (N.J. Sup. Ct. 1839); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816)).

200. *Id.* at 236 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*138–39; THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 559 (Boston, Little, Brown & Co. 1868); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1790 (Boston, Hilliard, Gray & Co. 1833)).

201. *Id.* at 241. Of course, *Chicago, B. & Q.* did cite *Scott v. City of Toledo*, 36 F. 385, 396 (C.C.N.D. Ohio 1888), which mentioned that the Fourteenth Amendment was “clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government.” 36 F. at 395. However, the breadth of both decisions is dedicated to due process.

202. *Id.* at 236 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*138–39; COOLEY, *supra* note 200, at 559).

of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. . . . The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required,—necessarily result from the maintenance of a public highway under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state.<sup>203</sup>

This comported with previous decisions such as *Mugler v. Kansas*,<sup>204</sup> which held that exercises of police power, such as nuisance abatement, do not require compensation. Indeed, *Chicago, B. & Q.* cited *Mugler* and similar cases.<sup>205</sup> *Chicago, B. & Q.* also failed to question the Court's decision one year earlier in *Fallbrook Irrigation District v. Bradley*.<sup>206</sup> There, the Court rejected landowners' due process challenges to a state irrigation tax, partly on the ground that the irrigation program would confiscate land for the benefit of private parties. The Court did find exercises of police power were compensable where they lacked a legitimate objective, such as in *Pumpelly v. Green Bay & Mississippi Canal Co.*<sup>207</sup> There, the Court held that when a state statute authorized the permanent flooding of a landowner's property so that it was unusable, this constituted a taking for which compensation had to be paid. Lawrence Berger distinguished this case from *Mugler*: "Thus *Mugler* stood for the proposition that though a value-destroying regulation could not be a taking requiring compensation, it could be a deprivation of property without due process of law if it did not have a legitimate police power objective, such as the suppression of a nuisance."<sup>208</sup>

The only link between *Chicago, B. & Q.* and the Takings Clause is tenuous at best. In *Scott v. City of Toledo*,<sup>209</sup> a case on which the

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203. *Id.* at 252–55.

204. 123 U.S. 623 (1887).

205. 166 U.S. at 255.

206. 164 U.S. 112 (1896).

207. 80 U.S. (13 Wall.) 166 (1871).

208. Lawrence Berger, *supra* note 17, at 854–55 (citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964)).

209. 36 F. 385 (C.C.N.D. Ohio 1888).

*Chicago, B. & Q.* court relied, a U.S. District Court struck down a condemnation on due process grounds.<sup>210</sup> However, the majority of Justice Jackson’s opinion reiterated the same natural law concepts rife in *Chicago, B. & Q.* itself. “In a general sense, ‘due process of law’ is identical in meaning with the phrase, ‘law of the land,’ as used in the constitutions of the several states.”<sup>211</sup> Justice Jackson called Ohio’s action a “defect in the supreme organic law of the land,” stating that<sup>212</sup>

The conclusion of the court on this question is that since the adoption of the *fourteenth amendment* compensation for private property taken for public uses constitutes an essential element in “due process of law,” and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution.<sup>213</sup>

Like *Chicago, B. & Q.*, Justice Jackson did not mention the Fifth Amendment.

Essentially, *Chicago, B. & Q.* stated that there had been no taking, merely an exercise of police power that caused the railroad to spend additional money on the crossing and flagmen. However, the Court did note that the principles of *Davidson*, taking property from A. to give to B.,<sup>214</sup> would be compensable under substantive due process—an extreme situation—as would damage to property with no legitimate objective.<sup>215</sup> As Karkainen points out,

*Chicago B & Q* thus perfectly mirrored the well-established nineteenth-century understanding that the state’s powers, as constrained by due process, were bifurcated. When it exercised the eminent domain power, it owed just compensation. When it enacted a valid police power regulation, however, there was by definition no deprivation of property because all property rights were held subject to the inherent police power limitation, and no compensation was owed. In subsequent years, *Chicago B & Q*

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210. 166 U.S. at 238–39.

211. 36 F. at 393 (citing COOLEY, *supra* note 200, at 432).

212. *Id.* at 395.

213. *Id.* at 396 (emphasis added).

214. 166 U.S. at 235.

215. *Id.*

would be cited as frequently for this latter proposition as for the companion holding that due process did require compensation in cases of eminent domain.<sup>216</sup>

This pro-states' rights logic may have been the same force behind the Committee of Fifteen's rejection of Bingham's takings clause analogue. *Chicago, B. & Q.* left the federal courts in a difficult position. The Fourteenth Amendment gave them the power to restrict state exercises of eminent domain through substantive due process, but this power was to be used sparingly. Indeed, it did not even apply in cases where the government physically and permanently occupied property and provided a single dollar in nominal compensation. Further, this power to restrict state takings did not appear to stem from the Takings Clause of the Constitution, but rather from evolving notions of natural rights, whatever those were.

The Court also showed broad deference to state police power on decisions regarding appropriate "public uses." While *Scott v. City of Toledo* stated, "the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit, or for public purposes, and that the owner must be compensated therefor,"<sup>217</sup> *Chicago, B. & Q.* did not reference this language. In the period after *Davidson*, the Court often repeated that "taking the property of one man for the benefit of another . . . is not a constitutional exercise of the right of eminent domain."<sup>218</sup> However, these cases never defined the contours of public use and nearly all of them upheld state decisions to condemn as valid public uses. While *Fallbrook* held that the Fifth Amendment applied only to the federal government,<sup>219</sup> it noted that the Due Process Clause of the Fourteenth Amendment raised "the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state, instead of the federal, government."<sup>220</sup> But the Court was chiefly concerned that citizens have access to fair procedural due process, satisfied "when the ordinary course is pursued in such proceedings . . . that has been customarily followed in the state, and

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216. Karkainen, *supra* note 11, at 850.

217. 36 F. at 394.

218. *Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254, 273 (1891).

219. 164 U.S. 112, 158 (1896).

220. *Id.*

where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one, provided by the statute.”<sup>221</sup> Nonetheless, this due process review was strictly limited, and the Court offered the agency great deference and upheld the taking.

[W]hat is a public use frequently and largely depends upon the facts and circumstances . . . [and although] the irrigation of lands in states where there is no color of necessity therefor [might be invalid], . . . in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power.<sup>222</sup>

Subsequent decisions followed *Fallbrook*'s deference to state definitions of public use, from the early twentieth century to the present.<sup>223</sup>

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221. *Id.* at 168.

222. *Id.* at 159–60.

223. *See, e.g.*, *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 678 (1923) (the necessity and expediency of taking property for public use is a legislative determination and “not a judicial question”); *Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700, 706 (1923) (upholding condemnation of land for private road and regarding “with great respect the judgments of state courts upon what should be deemed public uses in any state”); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (dicta stating that the Fifth and Fourteenth Amendments merely “presuppose” that takings are for public use, and mandate only compensation); *Green v. Frazier*, 253 U.S. 233 (1920) (rejecting Fourteenth Amendment taking challenges to taxation, which was based on the grounds that the taxes benefitted private economic development); *Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co.*, 243 U.S. 563 (1917) (rejecting public use challenge based on railroad using surplus power from condemned river to sell as electricity); *Mt. Vernon–Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (rejecting public use challenge to condemnation by power company); *Union Lime Co. v. Chicago & Nw. Ry. Co.*, 233 U.S. 211, 218 (1914) (upholding condemnation, stating: “The state, through its highest court, declares the use to be a public one, and we should accept its judgment unless it is clearly without ground.”); *Hairston v. Danville & W. R.R. Co.*, 208 U.S. 598, 606–07 (1908) (in upholding condemnation for a private spur track, the Court stated that although determining public use “is ultimately a judicial question,” recent decisions “show how greatly we have deferred to the opinions of state courts on this subject, which so closely concerns the welfare of their people”); *Offield v. New York, New Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906) (upholding condemnation of shares of railroad stock despite public use challenge); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 530–31 (1906) (rejected a public use challenge, concluding that so long as state law authorized a taking, there was no violation of due process); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (citing 164 U.S. at 159) (rejecting a public use challenge because “the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their weight with the state courts”).

This included *Wight v. Davidson*, in which the Court rejected the notion that Fifth Amendment decisions applied to Fourteenth Amendment takings analysis.<sup>224</sup> It was not until 1930, in *City of Cincinnati v. Vester*,<sup>225</sup> that the Court struck down a condemnation on public use grounds, holding “it is well established that . . . the question [of] what is a public use is a judicial one.”<sup>226</sup> However, in *Vester* the City Council’s ordinance and resolution stated *no* purpose for excess takings and thus did not comply with the authorizing statute.<sup>227</sup> The Court’s decision would violate the rational basis standard the Court uses today in economic substantive due process cases.<sup>228</sup>

While *Chicago, B. & Q.* indicated that a weak substantive due process empowered federal courts to restrict state exercises of eminent domain, other exercises of state police power were treated less leniently. The Court may not have been inclined to apply the Bill of Rights, but it went wild with substantive due process after *Chicago, B. & Q.*, taking notions of “life, liberty, and property” to extremes and turning *Davidson* on its head. In fact, in the same year *Chicago, B. & Q.* was decided, the Court held in *Allgeyer v. Louisiana*<sup>229</sup> that the Fourteenth Amendment prevented the state from interfering with “freedom of contract.” This idea was taken to an extreme in *Lochner v. New York* in 1905,<sup>230</sup> where the Court held maximum working hours law violated the “liberty of contract” as protected by the Due Process Clause of the Fourteenth Amendment. Regarding incorporation, however, the Court reaffirmed *Barron v. Baltimore* in 1908. In *Twining v. New Jersey*,<sup>231</sup> the Court *rejected* an argument that the Fourteenth Amendment incorporated the Bill of Rights, specifically the self-incrimination clause of the Fifth Amendment. In *Adkins v. Children’s Hospital of the District of Columbia*,<sup>232</sup> the Supreme Court held that minimum wage laws violated substantive due process.

Prior to 1900, there is very little mention of regulatory or inverse condemnations. After *Mugler* the Court made clear that the police

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224. 181 U.S. 371, 384 (1901).

225. 281 U.S. 439 (1930).

226. *Id.* at 446.

227. *Id.* at 449.

228. See *supra* note 110 (discussing *Carolene Products*).

229. 165 U.S. 578 (1897).

230. 198 U.S. 45 (1905).

231. 211 U.S. 78 (1908).

232. 261 U.S. 525 (1923).



power generally won over property rights, except concerning actual physical invasions of property. This began to change with *Mahon*. In 1922 the Court issued *Pennsylvania Coal Co. v. Mahon*,<sup>233</sup> in which it interestingly struck down the Commonwealth of Pennsylvania's attempt to force coal companies to shore up property under which they held easements. While it is not surprising that the Court struck down an exercise of police power during this time, it is interesting that the Court referred to the Takings Clause instead of substantive due process. Before the decision, the Takings Clause—or at least just compensation principles—had only applied to physical confiscations or invasions of land, a “taking” in the most literal sense. Once *Mahon* opened the door to *regulation* as takings, almost any government activity was subject to the Takings Clause if it involved what could be considered “property.”<sup>234</sup> This added another layer of confusion—in cases like *Chicago* and *Davidson*, which clearly involved the government taking title to real property, only substantive due process was at issue. But in cases where property was merely regulated instead of confiscated, the Takings Clause would apply.

The much-derided *Lochner* era was short-lived, ending unofficially with *Nebbia v. New York*<sup>235</sup> in 1934 and with *West Coast Hotel v. Parrish*<sup>236</sup> in 1937, which expressly overruled *Adkins*. In 1955, *Williamson v. Lee Optical*<sup>237</sup> definitively stated that the Court would not return to this era. Additionally, in 1925 in *Gitlow v. New York*<sup>238</sup> the Court definitely stated a provision of the Bill of Rights, in this case the First Amendment, applied to the states.<sup>239</sup> The Court found that “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”<sup>240</sup> A 1937 case, *Palko v. Connecticut*,<sup>241</sup> refined the standard for which rights in the Bill of

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233. 260 U.S. 393 (1922).

234. See Kent, *supra* note 54; Krotoszynski, *supra* note 30.

235. 29 U.S. 502 (1934).

236. 300 U.S. 379 (1937).

237. 348 U.S. 483 (1955).

238. 268 U.S. 652 (1925).

239. The petitioner's conviction was still upheld, as the right to free speech did not include the right to advocate violent overthrow of the government. *Id.*

240. *Id.* at 666.

241. 302 U.S. 319 (1937).

Rights would be incorporated: only those that embody “the very essence of a scheme of ordered liberty.”<sup>242</sup> The *Palko* rule contrasted with “total incorporation,” the idea that the Fourteenth Amendment incorporated the entire Bill of Rights wholesale. Today, the Supreme Court has yet to create a bright-line test for incorporation. There is little consensus on whether “total incorporation,”<sup>243</sup> Frankfurter’s “fundamental fairness and ordered liberty,”<sup>244</sup> Brennan’s “selective incorporation,”<sup>245</sup> or any other theory is correct.<sup>246</sup> The issue is largely moot, because as mentioned, nearly the entire Bill of Rights has been incorporated.<sup>247</sup>

Justice Douglas wrote,

The process of the ‘selective incorporation’ of various provisions of the Bill of Rights into the Fourteenth Amendment, although often provoking lively disagreement at large as well as among the members of this Court, has been a steady one. It started in 1897 with *Chicago, B. & Q.R. Co. v. Chicago* . . . in which the Court held that the Fourteenth Amendment precluded a State from taking private property for public use without payment of just compensation, as provided in the Fifth Amendment.<sup>248</sup>

However, clearly this is a misconception, as *Chicago, B. & Q.* did not mention incorporation or any part of the Bill of Rights. With the exception of *Mahon* and its progeny, up to 1978, the Court’s interpretation of the Fourteenth Amendment comported with long-standing natural rights theory and the likely intentions of the framers of the Fourteenth Amendment. The Court held there was a substantive due process right to just compensation, but only in the most egregious circumstances: the rest was left to states’ internal processes.

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242. *Id.* at 325.

243. See *Duncan v. La.*, 391 U.S. 145, 162–71 (1968) (Black., J., concurring); *Adamson v. Cal.*, 332 U.S. 46, 68–123 (1947) (Black., J., dissenting); *Betts v. Brady*, 316 U.S. 455, 474–75 (1942) (Black, J., dissenting).

244. See 332 U.S. at 59–68 (Frankfurter, J., concurring); Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

245. See *Malloy v. Hogan*, 378 U.S. 1 (1964); *Cohen v. Hurley*, 366 U.S. 117, 154–60 (1961) (Brennan., J., dissenting); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274–76 (1960) (separate opinion of Brennan., J.).

246. For a detailed discussion of these perspectives, see Amar, *supra* note 10.

247. See *supra* notes 110–16 and accompanying text.

248. *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 701–02 (1970) (Douglas, J., dissenting).

The Takings Clause was not incorporated, in accord with the framers' vote against the Bingham amendment.

#### IV. *PENN CENTRAL* TO PRESENT: IS THERE REALLY AN "OVERLAP"?

*Penn Central* "officially" incorporated the Takings Clause, but it did not have much effect regarding appropriation of land. The strong deference to state police power, to which the framers of the Fourteenth Amendment largely adhered, remained in place. On regulatory takings, however, the decision had a profound effect, allowing the Court to resurrect a back door *Lochnerism*, as aptly described by a number of scholars.<sup>249</sup> The vast majority of Supreme Court decisions on traditional state exercises of eminent domain, i.e., appropriations, spoke in terms of substantive due process<sup>250</sup> until *Penn Central* in 1978, a fact Justice John Paul Stevens acknowledged in a recent case.<sup>251</sup> This makes sense because as discussed above, it was never really the intent of the framers to incorporate the Takings Clause against the states. In 1978, however, *Penn Central* tersely stated,

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of

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249. See Karkainen, *supra* note 11; Tunick, *supra* note 29; Walston, *supra* note 28.

250. Interestingly, an 1894 case seems to indicate that the equal protection clause of the Fourteenth Amendment incorporated the Takings Clause. In *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1894), the Court decided a case regarding tariff rates for carriages. The Court stated that

[W]hile it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.

*Id.* at 399.

251. *Dolan v. City of Tigard*, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting) (citing *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 235, 236–41 (1897)).

the Terminal site effect a “taking” of appellants’ property for a public use within the meaning of the *Fifth Amendment*, which of course is made applicable to the States through the *Fourteenth Amendment*, see *Chicago, B. & Q. R. Co. v. Chicago*.<sup>252</sup>

Justice Rehnquist’s dissenting opinion was similarly brief on the issue of incorporation.

The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the *Fourteenth Amendment*. Although the state “legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation.”<sup>253</sup>

Justice Stevens later explained why *Penn Central* was in error, and that *Chicago, B. & Q.* was not an incorporation case, but a *Lochner* esque application of substantive due process:

The Court begins its constitutional analysis by citing *Chicago, B. & Q. R. Co. v. Chicago* . . . for the proposition that the *Takings Clause of the Fifth Amendment* is “applicable to the States through the *Fourteenth Amendment*.” That opinion, however, contains no mention of either the *Takings Clause* or the *Fifth Amendment*; it held that the protection afforded by the *Due Process Clause of the Fourteenth Amendment* extends to matters of substance as well as procedure, and that the substance of “the due process of law enjoined by the *Fourteenth Amendment* requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.” It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker’s liberty interest in working 60 hours a week and 10 hours a day. See *Lochner v. New York*.<sup>254</sup>

Interestingly, Justice Stevens does not explain how the Court came to look at *Chicago, B. & Q.* as an incorporation case, stating

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252. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 122 (emphasis added).

253. *Id.* at 142 n.3 (Rehnquist, J., dissenting) (quoting 166 U.S. at 236).

254. 512 U.S. at 406 (Stevens, J., dissenting) (emphasis added) (citing *Chicago, B. & Q.*, 166 U.S. at 235, 236–41).

only: “Later cases have interpreted the *Fourteenth Amendment’s* substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the *Fifth Amendment’s Takings Clause*.”<sup>255</sup>

Several scholars blame *Penn Central* for causing a confusing muddling of due process and the Takings Clause.<sup>256</sup> Tunick proposes a “decoupling” of due process from takings jurisprudence,<sup>257</sup> and Lawrence Berger notes that “the Court has failed to maintain clear lines of demarcation between the substantive due process and takings rules and has introduced some unnecessary overlap and confusion in their application.”<sup>258</sup> He noted that:

Had the Court never held that the Takings Clause applies to states through the Fourteenth Amendment, state regulations of private property would be permissible—even if they took property—so long as they were not arbitrary or capricious, assuming that, as economic regulations, they would be evaluated under minimal scrutiny.<sup>259</sup>

Nevertheless, despite *Penn Central’s* definitive though brief incorporation of the Takings Clause, it did not fundamentally change the Court’s analysis of appropriations of land—the “traditional” taking. The Court’s decisions continued to comport with Reconstruction-era ideas about state sovereignty and decisions after the Fourteenth Amendment, which only limited state power where egregious violations of rational basis occurred. In other words, land appropriations have been “evaluated under minimal scrutiny.” This is especially evident in the Court’s “public use” challenges. As discussed above, with the exception of *Vester*<sup>260</sup> in 1930, the Court has universally deferred to state interpretations of what uses count as “public.” This trend continued in 1984 with *Hawaii Housing Authority v. Midkiff*,<sup>261</sup> where the state of Hawaii attempted to break up a land oligopoly through its takings power. The Court upheld the program, stating

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255. *Id.* (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 481, n. 10 (1987)).

256. See Berger, *supra* note 17; Karkainen, *supra* note 11; Tunick, *supra* note 29.

257. See Tunick, *supra* note 29.

258. Lawrence Berger, *supra* note 17, at 844.

259. Tunick, *supra* note 29, at 891.

260. *City of Cincinnati v. Vester*, 281 U.S. 439 (1930).

261. 467 U.S. 229 (1984).

that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers”<sup>262</sup> and that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”<sup>263</sup> As with all exercises of state police power not concerning non-fundamental rights, the analysis was similar to that of rational basis. *Midkiff* cited a number of non-condemnation decisions relating to rational basis in holding that “whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective.”<sup>264</sup> *Midkiff* was very similar to *Vester*<sup>265</sup> and other cases of that era in its reluctance to strike down state exercises of police power based on public use.

The contentious decision *Kelo v. City of New London*<sup>266</sup> validated *Midkiff* by treating a state condemnation as any other exercise of police power not affecting fundamental rights. *Kelo* attempted to backtrack from *Midkiff*, but ultimately indicated the Takings Clause and substantive due process are redundant. Although the “question presented is whether the city’s proposed disposition of this property qualifies as a ‘public use’ within the meaning of the *Takings Clause of the Fifth Amendment to the Constitution*,”<sup>267</sup> the Court’s analysis looked suspiciously like simple rational basis.

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose”. Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field. . . . Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs . . . . For more than a century, our public use

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262. *Id.* at 240 (citing *Berman v. Parker*, 348 U.S. 26, 31–33 (1954)).

263. *Id.* at 241.

264. *Id.* at 242 (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–72 (1981) and citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Vance v. Bradley*, 440 U.S. 93, 112 (1979)) (emphasis added). The rational basis test for “public use” is the approach Justice Kennedy advocated for in his *Kelo* concurrence. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

265. 281 U.S. 439 (1930).

266. 545 U.S. 469 (2005).

267. *Id.* at 472 (citing U.S. CONST. amend. V) (emphasis added).

jurisprudence has widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.<sup>268</sup>

*Kelo* referenced *Davidson's* prohibition on transferring property from A. to B., but did not find that egregious situation present in the case.<sup>269</sup> The Court implied that it was merely applying a due process rational basis test. It cited *Vester*,<sup>270</sup> which held that a taking was invalid for lack of a reasoned explanation, and *Midkiff's* application of rational basis.<sup>271</sup>

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . . [g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review[.]<sup>272</sup>

Further, the property owners' proposed test of a "reasonable certainty" that public benefits accrue from a taking represented an

even greater departure from our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."<sup>273</sup>

This is a textbook application of substantive due process that dates back to *Davidson*. The *Kelo* majority did identify two takings that would never pass constitutional muster: "purely private" takings<sup>274</sup> and takings under the "mere pretext of a public purpose."<sup>275</sup> But these types of takings would be excludable under due process anyway.

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268. *Id.* at 480, 482–83, 483 n. 11 (citing *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Clark v. Nash*, 198 U.S. 361, at 367–68 (1905)).

269. *Id.* at 487.

270. 281 U.S. 439 (1930).

271. 545 U.S. at 487–88 (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)).

272. *Id.* at 483–84.

273. *Id.* at 487–88 (quoting 467 U.S. at 242).

274. *Id.* at 477–78, 478 n.5 (citing *Missouri Pac. Ry. Co. v. Neb.*, 164 U.S. 403 (1896); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

275. *Id.* at 478. The Court did not offer any exemplary cases regarding "pretextual" takings.

The latter situation is an example of the type of condemnation the Court struck down in *Vester*.<sup>276</sup> In other words, the Takings Clause is essentially meaningless—except perhaps for the fact that it includes the compensatory right. However, the right to just compensation, as discussed earlier in this article, was a fundamental “natural” right, which we would expect substantive due process to protect.

The *Kelo* dissenters believed the Supreme Court had reduced the Public Use Clause to “little more than hortatory fluff.”<sup>277</sup> Justice Thomas’s vigorous dissent argued that the majority’s broad deference to legislative judgment was “effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”<sup>278</sup> History seems to be on the majority’s side, however, as one struggles to find a Supreme Court case that struck down a condemnation—either state or federal—so long as the agency had a mere rational basis for its decision to condemn. Justice Thomas acknowledged that the Court had been applying this deference test since the nineteenth century, but that all such decisions were simply wrong.<sup>279</sup> Justice Thomas’s vigorous dissent, railing against cases dating back to *Fallbrook*, argued that *Kelo* was “simply the latest in a string of our cases construing the *Public Use Clause* to be a virtual nullity, without the slightest nod to its original meaning.”<sup>280</sup> Arguing that “[t]he Court adopted its modern reading blindly,”<sup>281</sup> Justice Thomas reasoned that *Fallbrook* and its progeny were simply wrong.<sup>282</sup> “*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States.”<sup>283</sup> But the ultimate federalist seems to have forgotten that even after the Fourteenth Amendment was passed, the Court retained essential federalism principles that began with *Barron v. Baltimore*. Justice Thomas’s dissent ultimately fails to point out where the Court had *not* equated eminent domain power with the police power of the states.

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276. *Id.* at 487 n.17. The Court noted this taking was invalid for “lack of a reasoned explanation” and that “[t]hese types of takings may also implicate other constitutional guarantees.” *Id.* The Court cited *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*) (taking invalid on equal protection grounds).

277. 545 U.S. at 497 (O’Connor, J., dissenting).

278. *Id.* at 494.

279. *See id.* at 505–23 (Thomas, J., dissenting).

280. *Id.* at 506 (Thomas, J., dissenting).

281. *Id.* at 515 (Thomas, J., dissenting).

282. *Id.* at 515–16 (Thomas, J., dissenting).

283. 545 U.S. at 519 (Thomas, J., dissenting) (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 32 (1954)).



Justice O'Connor, in contrast, struggled to distinguish *Midkiff* and *Berman* from the facts of *Kelo*. Like the majority, she believed the “public use” went further than normal due process limits on police power. Justice O'Connor wrote in dissent,

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.<sup>284</sup>

Looking at history, however, the *Kelo* majority was simply applying *stare decisis*, following centuries of case law in which the Supreme Courts defer to the *states* and the legislative and executive branches to determine what constitutes a valid public use. The only instances where the Court has struck down takings are where government behavior was so egregious it constituted a violation of fundamental due process, such as a taking with no stated purpose whatsoever, let alone a public purpose.<sup>285</sup> Justice O'Connor's dissent tried to find a middle ground that would not render “the *Public Use Clause* redundant with the *Due Process Clause*, which already prohibits irrational government action.”<sup>286</sup> Noting that *Midkiff* made “[t]he ‘public use’ requirement . . . coterminous with the scope of a sovereign's police powers,”<sup>287</sup> she stated:

*Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for “public use” for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and “public use” cannot always be equated.<sup>288</sup>

O'Connor tried to distinguish those cases as eliminating a harmful use of land, whereas *Kelo* was taking property from productive owners.<sup>289</sup> Ultimately, however, her opinion failed to consider that all these cases were part of a long line of precedent deferring to states

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284. *Id.* at 494 (O'Connor, J., dissenting).

285. See *City of Cincinnati v. Vester*, 281 U.S. 439, 439 (1930).

286. 545 U.S. at 503 (O'Connor, J., dissenting) (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)).

287. 467 U.S. at 240 (citing *Berman v. Parker*, 348 U.S. 26, 31–33 (1954)).

288. 545 U.S. at 501–02 (O'Connor, J., dissenting) (quoting 467 U.S. at 240; 348 U.S. at 32).

289. *Id.*

on public use, and that contrary to Justice O'Connor's opinion, *Kelo* did not "delete the words 'for public use' from the Takings Clause."<sup>290</sup> O'Connor cannot reject *Kelo* and try to uphold *Midkiff*. "While Justice O'Connor is correct that the majority removed the Public Use Clause from the Fifth Amendment, her attempt to distinguish *Berman* and *Midkiff* does not hold up under close analysis."<sup>291</sup>

The *Kelo* majority delivered an opinion that conformed to the framers' intention that the Fourteenth Amendment does not incorporate the Takings Clause against the states, leaving the power to dispose of property to states' internal processes. *Penn Central*'s fleeting incorporation did little to change the law concerning takings involving appropriation of land. Regulatory takings, on the other hand, do not fit neatly into this model. *Penn Central* was a regulatory takings case, and it merely expanded on *Mahon*'s pronouncement decades earlier. However, this citation to *Mahon* may have been misguided. In discussing the "the substantive due process origins of 'regulatory taking' theory," Patrick McGinley concludes that in *Mahon*, Justice Holmes was not in fact construing the Takings Clause.<sup>292</sup> Rather, Justice Holmes was making a "metaphoric illusion[] to the Due Process Clause."<sup>293</sup> "Commentators who support this theory suggest that the source of confusion in constitutional 'taking' analysis has been the judicially fueled doctrinal convergence and intertwining of the Due Process and Just Compensation/Eminent Domain Clauses."<sup>294</sup> "Then, like *Chicago, B. & Q.*, *Mahon* was plucked from relative obscurity and anachronistically recast as a Fifth Amendment Takings Clause precedent by *Penn Central* and its progeny. In that guise, it came to serve as one of the pillars of contemporary regulatory takings jurisprudence."<sup>295</sup>

Tunick is correct, however, that a "decoupling" is necessary where regulatory takings are involved. Notably, *Penn Central* deferred to the condemning agency, once again respecting state exercise of police power. New York was allowed to prevent the building expansion

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290. *Id.* at 494.

291. Sturtevant, *supra* note 37, at 240.

292. Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10369 (1987).

293. *Id.*

294. *Id.* (citing *Williamson Cnty Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108, 3122–23 (1985)).

295. Karkainen, *supra* note 11, at 865.

without providing just compensation. However, it set a precedent that allowed a resurrection of *Lochner*'s economic substantive due process, as well-documented by Karkainen:

Thus it fairly may be said that every major element in the Court's modern Fifth Amendment regulatory takings jurisprudence, with the possible exception of *Loretto*, was founded in whole or in part on Fourteenth Amendment substantive due process precedents, and reflects substantive due process concepts and principles. *Penn Central*'s phantom incorporation of the Fifth Amendment Takings Clause against the states effected, in fact though not in name, a "reverse incorporation" of *Lochner*-era substantive due process jurisprudence into modern Fifth Amendment takings law.<sup>296</sup>

Karkainen further argues that *Penn Central* had two major effects: (1) eliminating the "police power defense," i.e., depriving states of their right to define property; and (2) allowing "reverse incorporation' of substantive due process concepts and principles into Fifth Amendment takings law."<sup>297</sup> Both of these effects apply exclusively to regulatory takings. As an example, the Court recently struck down a federal law that required coal companies to pay medical benefits to miners in *Eastern Enterprises v. Apfel*.<sup>298</sup> Of course, this case was not exactly analogous to *Lochner* in that it involved federal law, not state police power. But the fact that the Court was willing to find an uncompensated taking in a law that required relinquishing money, not property, indicates it was willing to go far to protect property rights. *Apfel* shows that one consequence of the Court's "incorporation" is a resurrection of extreme substantive due process, in the regulatory takings context. Judging from the public use decisions cited above, however, this extreme position does not apply where more "traditional" takings, i.e., appropriation of land, are involved.

There is an indication, however, that the Court is moving toward a "decoupling." The Court recently addressed the overlap between the two clauses and attempted to make some distinctions. In *Lingle v. Chevron*,<sup>299</sup> the Court addressed whether a Hawaii statute aimed at

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296. *Id.* at 888 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982)).

297. *Id.* at 831–32.

298. 524 U.S. 498 (1998).

299. 544 U.S. 528 (2005).

protecting independent gas station owners amounted to an unconstitutional taking. The law prevented oil companies from converting independent and lessee-operated stations to corporate-owned and -operated stations. The law also limited the rent an oil company could charge lessee-operators. The lower courts held the statute failed to substantially advance a legitimate state interest and therefore was an unconstitutional taking. The Supreme Court reversed, holding the “substantially advances” test applied only to due process, and was thus not a valid test to determine the presence of a taking.<sup>300</sup> This was one of the first times when the Court clearly distinguished between the Takings and Due Process Clauses.

#### CONCLUSION

Justice Stevens, in his *Dolan* dissent, stated: “There was nothing problematic about that interpretation in cases enforcing the *Fourteenth Amendment* against state action that involved the actual physical invasion of private property.”<sup>301</sup> In other words, substantive due process against physical takings is okay, but against regulatory takings it is wrong because it risks a return to *Lochnerism*. Rather than as a muddle of substantive due process and the Takings Clause, we should think of land appropriations and regulatory takings as developing along separate tracks. The Supreme Court got everything right concerning appropriation of land by largely deferring to states and respecting their ability to regulate property. This accords with prevailing notions about state power that existed at the time the Fourteenth Amendment was adopted. In addition, the same framework would have existed had the Supreme Court not “incorporated” the Takings Clause in *Chicago, B. & Q.* or *Penn Central*. Substantive due process would have led to similar outcomes, and in fact it did until 1978. Things went awry in regulatory takings jurisprudence when the Supreme Court adopted an expansive notion of what a “taking” is. What would the Committee of Fifteen have made of this? The trouble was, there really was no such thing as a regulatory taking in the nineteenth century. Zoning and land use regulations were sparsely used. At that time, a “taking” was only the most fundamental exercise of eminent domain: the appropriation of land.

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300. *Id.*

301. *Dolan v. City of Tigard*, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting) (emphasis added).

If a taking was still defined as such, then the Court has adhered to the Reconstruction idea that substantive due process provides minimal protection to property owners, and that state law is the primary source to limit eminent domain.

On the other hand, even in land appropriations, the Takings Clause must mean something. After all, “it would be ‘incongruous’ to apply different standards ‘depending on whether [a constitutional] claim was asserted in a state or federal court.’”<sup>302</sup> In *U.S. ex rel. Tennessee Valley Authority v. Welch*,<sup>303</sup> the Court gave legislative determinations of public use “near[] immunity from judicial review”<sup>304</sup> when it held that determinations of Congress and legislatures are binding. If even “traditional” takings protections only extend to the limit of due process, why have a Takings Clause at all? Is this the fact that the Committee of Fifteen recognized when it voted against a takings clause analogue in the Fourteenth Amendment? It may simply be that the Takings Clause has always been redundant with substantive due process or “natural” rights. The truth is, we will never know. Studying the Fourteenth Amendment is much like a traditional reading of the Five Books of Moses that comprise the Torah. One can read the Five Books in so many different ways and discern so many different meanings that there is no “correct” interpretation found thus far. A reading of the Fourteenth Amendment, even through the perspective of those who were there at its drafting, does not resolve the uncertainty. The comments of individuals involved with the drafting of the Fourteenth Amendment, frequently unsupported by the written record, change our attitude about the intent and meaning of the Amendment. Reading the Fourteenth Amendment through the framers’ eyes helps to some extent, but it really does not alleviate the confusion. Was it simply to support and propagate the Republican party by granting blacks suffrage? Was it out of a genuine concern to protect freed slaves? Was it to protect scalawags and carpetbaggers who had seized power in the South? Did Congress simply want to destroy states’ rights and empower the federal government by overturning *Barron v. Baltimore*?

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302. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

303. 327 U.S. 546 (1946).

304. *Id.* at 557.

In the realm of eminent domain, it is unfortunate that a more clear meaning behind the Fourteenth Amendment cannot be discerned since it is central to protecting property rights. The fact is, natural law protection for individual property rights should form the basis of eminent domain, and protection should be much broader than what the Takings Clause itself would allow. It is likely that *Kelo* may be revisited in the future. Our society's anger toward that decision, whether well-founded or not, is heard by the courts. This will lead to a very interesting decision in the future. Whatever the case, it is clear that the Fourteenth Amendment contains a natural law limitation that protects property rights to some degree.