SCALIA, PROPERTY, AND DOLAN V. TIGARD: THE EMERGENCE OF A POST-CAROLENE PRODUCTS JURISPRUDENCE

by

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I. INTRODUCTION

Since his elevation to the Supreme Court in 1986, Antonin Scalia has been an outspoken and important defender in the Rehnquist Court’s revival of landowner rights.1 During his tenure on the Court and through the end of the 1993 Term, Scalia has participated in nine cases addressing property rights or land use questions,2 voting in favor of the property owner in eight of the nine cases, or 89% of the time. This voting record affirming property owner’s claims is by far the most supportive and consistent among all Justices sitting on the Supreme Court since 1986,3 suggesting that Scalia is perhaps the leader on the Court in its effort to limit land use regulation and affirm property claims.

The recent holding in Dolan v. City of Tigard,4 affirming property owner’s rights over government regulation, is indicative of Scalia’s and the Rehnquist Court’s effort to reinvigorate property rights.5 Yet this case also represents the confluence of several different yet overlapping lines of consti-

1. See Bernard Schwartz, The New Right and the Constitution: Turning Back the Legal Clock 73-137 (1990) (discussing the philosophical, political, and economic ideology motivating his efforts to give property rights greater protection).


3. The one possible exception to this claim is that Justice Powell voted for the property owner in all five of the cases he participated in from 1986 until his retirement.


tutional jurisprudence regarding property rights. On one level, Dolan grows out of a line of regulatory takings jurisprudence that can be traced back to Pennsylvania v. Mahon,6 where Justice Holmes sought to distinguish police power land use regulation from an eminent domain taking by saying the difference between the two was a "question of degree." 7 Dolan, like cases subsequent to Mahon, sought to clarify when the line between a regulation of property and a taking has been crossed and what level of judicial analysis should be employed when making this determination.8

On a second level, Dolan addresses one of the most enduring dichotomies in constitutional jurisprudence, i.e., the contrasting levels of judicial scrutiny given to property and civil rights (otherwise known as the property rights civil rights dichotomy).9 In the period approximately between the late nineteenth century and the New Deal (known as the Lochner Era),10 the Supreme Court decided cases such as Lochner v. New York11 and Allgeyer v. Louisiana,12 where it articulated the doctrine of substantive or economic due process.13 While the Court affirmed most economic regulatory cases during this period,14 it also demanded a greater level of legislative justification for economic regulation than would be required for legislation curtailing individual rights. Along with these cases, decisions such as Plessy v. Ferguson15 and Bradwell v. Illinois,16 among others, indicated judicial willingness and broad deference to let legislatures adopt legislation that restricted many civil rights or liberties, while the Civil Rights Cases17 suggested limits that the Court would place upon Congress' ability to protect civil rights when those rights conflict with the economic privileges of others.

Convention (1987) (discussing the revival of property rights under the Rehnquist Court).
7. Id. at 416.
9. See Schwartz, supra note 1, at 77-79.
11. 198 U.S. 45 (1905).
12. 165 U.S. 578 (1897).
17. 109 U.S. 3 (1883).
However, cases affirming New Deal legislation such as *West Coast Hotel v. Parrish*, and most importantly *United States v. Carolene Products,* brought an end to the *Lochner* Era and ushered in what could be called the *Carolene Products* Era. In *Carolene Products,* especially footnote number four, the Court stated that economic regulation would be subject to rational basis tests while legislation affecting discrete and insular minorities or otherwise impacting upon Bill of Rights protections, would be subject to a higher level of scrutiny. As a result of the *Carolene Products* logic, Warren and Brennan transformed the Court to protect individual rights more vigorously than property rights. In many ways, the *Carolene Products* Era reversed the *Lochner* Era relationship between property and individual rights.

The Reagan and Bush presidencies brought a much more conservative Supreme Court and a federal judiciary committed to limiting government regulation and addressing the “takings” issue. Their appointments produced a judiciary more sympathetic toward property rights and less supportive of individual rights than was characteristic of the Warren Court and the *Carolene Products* Era. *Dolan* provides one of the clearest indications yet that the current Supreme Court, with Scalia at the lead, is moving toward a post-*Carolene Products* approach to adjudicating property and civil rights. Under Rehnquist and Scalia, the Supreme Court has moved toward placing both property and civil rights under a level of judicial scrutiny both similar to, and different from the levels of analysis found in previous periods of the Court’s jurisprudential history.

On a third level, *Dolan* offers clarification of the direction Justice Scalia is headed when it comes to his views on property rights. Although *Dolan* was written by Rehnquist, Scalia prepared the intellectual roots and recent judicial precedents for this decision in *Nollan v. California Coastal Commission* and *Lucas v. South Carolina Coastal Council,* which were opinions Scalia authored invalidating coastal regulations limiting property owners’ rights. Overall, while nine cases may not be a large sample from which to choose,

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18. 300 U.S. 379 (1937).
19. 304 U.S. 144 (1938).
20. Id. at 152 n.4.
22. See Bruce Ackerman, *We the People* (1991) (discussing the different eras or constitutional moments in American history that roughly parallel or include the distinctions made between the *Lochner* and *Carolene Products* in this article).
Dolan and the other eight property rights cases Scalia participated in do reveal definite jurisprudential patterns and themes.

This Article proposes an analysis of Scalia’s views on property rights and shows how the Justice has been important to, if not the leader in, the current rethinking of takings and land use jurisprudence.27 Also, this Article will engage in a more comprehensive reevaluation of the jurisprudence of the Carolene Products Era that is transpiring both off and on the Court.28 While previous works have examined Rehnquist’s and his Court’s views on property,29 as well as Scalia’s views on expressive freedoms,30 criminal due process,31 and church/state issues,32 there is no comprehensive discussion addressing Scalia’s views on property rights.33 To accomplish this, the Article will first offer an examination of Scalia’s views on property rights in light of his scholarly writings and Court decisions. Next, the Article will contrast Scalia’s property rights decisions with his voting record on selected civil rights/liberties issues. The purpose of this contrast is to show how Dolan represents an effort on the part of Scalia and the Rehnquist Court to rethink the relative relationship between property and civil rights and, in the process, articulate what appears to be a post-Carolene Products jurisprudence that reconceptualizes the property rights/civil rights dichotomy. The Article will conclude by arguing that such a rethinking, while laudable, is mistaken in the

28. For examples of those scholarly works calling for a rethinking of the current levels of protection that the Court and the Constitution give to property rights, see DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION (1993); RICHARD A. EPSKIN, TAKING PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAN (1985); ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAN (1987); and MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA (1993).
form being undertaken by Scalia and the current Court because it subordinates individual political rights to market forces in a way that fails to develop links between property and civil rights that transcend class distinctions.

II. SCALIA'S PHILOSOPHICAL VIEWS ON PROPERTY RIGHTS

A. Statistical Analysis

One way to examine Scalia's support for property rights is to look at the percentage of time he has voted in favor of property owner claims. Since joining the Court in 1986, there have been nine cases that directly address land use or property owners claims.\(^{34}\) Scalia has supported the property owner in eight of these cases, or 89% of the time. Table I provides a comparison of the voting records of all the Justices on property claims since 1986.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Total Property Opinions</th>
<th>Total Votes/Percentage for Property Owner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Powell</td>
<td>5</td>
<td>5 (100%)</td>
</tr>
<tr>
<td>Scalia</td>
<td>9</td>
<td>8 (89%)</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>9</td>
<td>6 (67%)</td>
</tr>
<tr>
<td>O'Connor</td>
<td>9</td>
<td>6 (67%)</td>
</tr>
<tr>
<td>Kennedy</td>
<td>3</td>
<td>2 (67%)</td>
</tr>
<tr>
<td>Thomas</td>
<td>3</td>
<td>2 (67%)</td>
</tr>
<tr>
<td>White</td>
<td>8</td>
<td>5 (63%)</td>
</tr>
<tr>
<td>Court</td>
<td>9</td>
<td>5 (56%)</td>
</tr>
<tr>
<td>Marshall</td>
<td>6</td>
<td>2 (33%)</td>
</tr>
<tr>
<td>Brennan</td>
<td>6</td>
<td>2 (33%)</td>
</tr>
<tr>
<td>Stevens</td>
<td>9</td>
<td>2 (22%)</td>
</tr>
<tr>
<td>Blackmun</td>
<td>9</td>
<td>1 (11%)</td>
</tr>
<tr>
<td>Souter</td>
<td>3</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Ginsberg</td>
<td>1</td>
<td>0 (0%)</td>
</tr>
</tbody>
</table>

No Justice on the Court during this time period has cast more votes for property owners than Scalia and, with the exception of Powell, no Justice has a voting percentage more supportive of such claims. However, for the sake of comparison, when we examine Scalia's voting record on other Bill of Rights or civil rights/liberties issues, a different pattern emerges. For example, Table II reviews Scalia's voting pattern on First Amendment free speech, press, and association claims from 1986 to 1994.35

**Table II**

**Supreme Court Support for First Amendment**

<table>
<thead>
<tr>
<th>Free Speech, Press, and Association: 1986 through 1993 Terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Marshall</td>
</tr>
<tr>
<td>Brennan</td>
</tr>
<tr>
<td>Blackmun</td>
</tr>
<tr>
<td>Kennedy</td>
</tr>
<tr>
<td>Souter</td>
</tr>
<tr>
<td>Stevens</td>
</tr>
<tr>
<td><strong>Supreme Court</strong></td>
</tr>
<tr>
<td>Ginsburg</td>
</tr>
<tr>
<td>White</td>
</tr>
<tr>
<td>O'Connor</td>
</tr>
<tr>
<td>Scalia</td>
</tr>
<tr>
<td>Thomas</td>
</tr>
<tr>
<td>Rehnquist</td>
</tr>
</tbody>
</table>

In expressive freedom claims arising under the First or Fourteenth Amendments, Scalia has supported these claims only 41% of the time. Moreover, if we include his expressive freedom decisions from when he was an appellate court judge, then we find that he has supported these claims in only 25 of 66 decisions or 38% of the time.

Finally, in addition to expressive freedom claims, Table III36 examines Scalia's support for criminal due process issues.


Table III
Percentage of Justices' Decisions Against Individuals in Criminal Justice Cases, 1986-1993 (includes 4th Amendment, 5th Amendment, 6th Amendment, 8th Amendment, Death Penalty, and Habeas Corpus)

<table>
<thead>
<tr>
<th>Justice</th>
<th>Total Criminal Due Process Votes</th>
<th>Total Votes/Percentage For Criminal Due Process Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marshall</td>
<td>111</td>
<td>108 (97%)</td>
</tr>
<tr>
<td>Brennan</td>
<td>92</td>
<td>85 (92%)</td>
</tr>
<tr>
<td>Stevens</td>
<td>139</td>
<td>99 (78%)</td>
</tr>
<tr>
<td>Blackmun</td>
<td>138</td>
<td>90 (65%)</td>
</tr>
<tr>
<td>Souter</td>
<td>45</td>
<td>21 (44%)</td>
</tr>
<tr>
<td>White</td>
<td>139</td>
<td>38 (27%)</td>
</tr>
<tr>
<td>O'Connor</td>
<td>138</td>
<td>36 (26%)</td>
</tr>
<tr>
<td>Kennedy</td>
<td>109</td>
<td>27 (25%)</td>
</tr>
<tr>
<td>Powell</td>
<td>26</td>
<td>5 (19%)</td>
</tr>
<tr>
<td>Scalia</td>
<td><strong>139</strong></td>
<td><strong>26 (19%)</strong></td>
</tr>
<tr>
<td>Rehnquist</td>
<td>139</td>
<td>18 (13%)</td>
</tr>
<tr>
<td>Thomas</td>
<td>24</td>
<td>3 (12%)</td>
</tr>
</tbody>
</table>

Again, as with expressive freedoms, Scalia's support for criminal due process claims arising out of the Bill of Rights is weak, with him supporting such claims only 19% of the time. What we have is an interesting contrast in Scalia's voting record. While Scalia has stated that property rights are related to other human or civil rights, he appears to be more supportive of the former than the latter, supporting them 89% of the time compared to 41% and 19% for expressive freedom and criminal due process claims, respectively. Scalia treats property and civil rights differently, necessitating an explanation for this differential treatment. Analysis of Scalia's views on property rights helps clarify his legal philosophy on this subject.

B. Philosophical Views

Scattered throughout Scalia's academic writings and legal opinions are various statements regarding property rights and their relationship to other rights. His views are characteristic of the views shared by many politically conservative writers who advocate more support for property rights claims at

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the expense of environmental regulation. In "Economic Affairs as Human Affairs," the Justice advocates renewed judicial and cultural support for economic liberties. Scalia wrote, "I know of no society, today or in any era of history, in which degrees of intellectual and political freedom have flourished... with a high degree of state control over the relevant citizen's economic life." Scalia eschews contemporary distinctions that separate property and civil rights. Such a distinction for Scalia is a pernicious notion, though it represents a turn of mind that characterizes much American political thought. It leads to the conclusion that economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called civil rights, about which we should be more generous... On closer analysis, however, it seems to me that the difference between economic freedom and what are generally called civil rights turns out to be a difference of degree rather than of kind... In any case, in the real world a stark dichotomy between economic freedoms and civil rights does not exist.

According to Scalia, economic freedoms are as important as are other political freedoms and Scalia even suggests that economic freedoms are linked to, and the basis of other political freedoms.

Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others — the firmament, so to speak, upon which the high spires of the most exalted freedoms ultimately rest... The free market, which presupposes relatively broad economic freedom, has historically been the cradle of broad political freedom, and in modern times the demise of economic freedom has been the grave of political freedom as well.

For Scalia, political freedoms such as free speech and association appear to be linked to the free market and respect for economic autonomy. This suggests that the marketplace of ideas and the economic marketplace are connected, where protection of the latter is the most certain way to protect the former. Protecting our society against excessive economic regulation and defending property interests appears to be a more sure way for Scalia to support civil liberties than it would be for the Court to single out political freedoms of speech, press, and assembly alone. Constitutional protections do not

40. Id. at 32.
41. Id. at 31.
42. Id. at 31-32.
43. Id. at 32.
seem to be enough to protect political liberties. Some institutions, such as property rights, are needed to sustain these liberties.\textsuperscript{44}

In addition to viewing property rights as important to political liberties, Scalia hints that the Framers of the Constitution also thought property rights were important. For example, in "The Two Faces of Federalism,"\textsuperscript{45} Scalia stated that the Framers intended to place limits upon the ability of states to engage in economic regulation.\textsuperscript{46} In \textit{Austin v. Michigan Chamber of Commerce},\textsuperscript{47} Scalia dissented from the six-person majority holding that corporations, even some non-profit ones such as the Michigan Chamber of Commerce, could constitutionally be prohibited from using direct corporate treasury funds for independent expenditures to support or oppose candidates for office. Scalia considered the Michigan Chamber of Commerce to be more like a voluntary political association similar to what Alexis De Tocqueville describes in \textit{Democracy in America}.\textsuperscript{48} Suppressing these voluntary associations is destructive in Scalia's view because "to eliminate voluntary associations . . . especially powerful ones — from the public debate is to either augment the always dominant power of the government or to impoverish political debate."\textsuperscript{49} Thus, to burden the Chamber with a segregated political fund requirement would be to place an undue burden on its free speech rights. Therefore, Scalia concluded the Michigan law impermissibly interfered with the Chamber's First Amendment rights.

Additionally, Scalia contends even if the law correctly distinguished between voluntary associations and corporations, and "if the law were narrowly tailored to achieve its goal . . . that goal is not compelling."\textsuperscript{50} According to Scalia, the "potential danger"\textsuperscript{51} of corporate wealth is not enough of a justification for the Michigan law to establish the narrow tailoring necessary to support the State's objective of restricting corporate political speech. In effect, Scalia questions whether there could ever be enough of a compelling state interest to place a limit upon a corporation's First Amendment rights. Scalia's argument is that the Michigan law is directed at corporations qua corporations, the wealth that they have amassed, and the presumed potential for corruption such wealth has in our society.\textsuperscript{52} Such legislation, for Scalia,

\begin{itemize}
  \item[44.] However, in none of his property rights decisions has he offered these type of claims to support property owner's claims.
  \item[46.] \textit{Id.} at 20.
  \item[47.] 494 U.S. 652 (1990).
  \item[48.] \textit{Id.}
  \item[49.] \textit{Id.} at 694.
  \item[50.] \textit{Id.} at 689.
  \item[51.] \textit{Id.} at 690.
  \item[52.] \textit{Id.} at 691.
\end{itemize}
is clearly a form of censorship directed at the agent of a specific type of speech and it is inconsistent with the First Amendment, the intent of Madison and Jefferson, as well as the observations of De Tocqueville on the need of free speech and voluntary associations in society. Scalia's dicta, although not conclusive, arguably intimates that the Framers would be willing to protect property interests, even powerful ones, because of their linkage to speech and associational rights.

Despite the respect he has for appeals to the intent of the Framers when interpreting the Constitution, Scalia argues against constitutionalizing property rights for two reasons. One, constitutionalizing property rights would necessitate judicial intervention into the economy and economic policy. Involvement in these issues not only would question the competence of the courts to act, but would also lead to an activist Court violating principles of judicial restraint and separation of powers. For Scalia, the benefits of judicial restraint far outweigh any damage done to property rights by not constitutionalizing them.

Second, despite the fact that the Framers supported property rights, "the social consensus as to what the limited, 'core' economic rights does not exist today as it perhaps once did." What has happened, according to Scalia, is that the background social consensus necessary to make property rights worthy of significant legal and constitutional protection is missing. He suggests, "[I]f you are interested in economic liberties, then, the first step is to recall the society to that belief in their importance which (I have no doubt) the founders of the republic shared."

Protection of property rights necessitates that society take the lead and demand renewed support, presumably through legislative action. Even though some conservative critics call for a return to pre-New Deal legal assumptions regarding property rights, Scalia rejects a return to the Lochner doctrines that gave the Court broad authority to create and protect economic rights. His argument's tone suggests some judicial support for economic

54. Scalia, supra note 37, at 34.
55. Id. at 35.
56. Id. at 34.
57. Id. at 36.
58. Id. at 37.
60. Scalia, supra note 37, at 33-34.
rights against economic rights is important, especially if we are to maintain political liberty and limit governmental authority. For Scalia, the maintenance of property rights is an important value in our society, worthy of respect and defense. This view explains why Scalia supports property rights more often than many other constitutional claims — because he views them as more important and instrumental to the maintenance of a free society than perhaps any other types of rights.

Given Scalia’s relative support for property claims and his relative lack of sympathy for expressive freedom and criminal due process claims, the question becomes: Where is Scalia’s jurisprudence headed on this issue?

III. SCALIA’S PROPERTY RIGHTS CASES

Several of Scalia’s early cases during the 1986-1987 Term defined him both as an important defender of property rights claims and as seeking to clarify and narrow the distinction between valid land use regulation and regulatory takings.

The first case is California Coastal Commission v. Granite Rock Company. The issue was whether a company which had an unpatented mining claim of federal land in California had to obtain a state permit for mining operations in the state. More specifically, in 1981, Granite Rock Company had obtained approval from the National Forest Service for a five year mining operation. Subsequent to that approval, California contended the company needed a permit for any mining on the federal lands that Granite Rock undertook. In a majority opinion written by Justice O'Connor, the Court held that neither Forest Service regulations nor any other federal law preempted the State from mandating a permit requirement.

In dissent, Scalia argued the question whether a state environmental law is preempted is immaterial in this case. Scalia saw the permit requirement as a land use control, purporting to exercise land use authority over federal property. Instead of describing this case as a question of federal environmental preemption, he saw it as a case of federal preemption of state regulation of federal lands. Moreover, the tone of Scalia’s opinion also suggests he saw this case more as whether a governmental entity can impose land use controls upon another owner. For Scalia, the ability of the government to

61. Id. at 33 (noting that the judiciary does protect a lot of economic rights and liberties).
63. Id. at 607 (Scalia, J., dissenting).
64. Id.
65. Id. at 613.
place limits upon the ability of an owner to such an extent that the owner loses control over her property appears to be too extensive of a regulation.

_Nollan v. California Coastal Commission_ was Scalia's second Supreme Court land use decision. _Nollan_ illuminates Scalia's views on property and ownership rights, even more so than _Granite Rock_. The Nollans had a contract to purchase beach front property, tear down the existing structure, and replace it with a three bedroom house. They applied for a building permit and the California Coastal Commission granted it on the condition the Nollans provide a narrow public easement along their property allowing people to walk to the public beach. Similar easements had been required for other houses along the beach, pursuant to the California Coastal Act. The commission justified the easement as necessary to inform passersby that the beach was open to the public because the Commission thought a house obstructing the view of the water would lead the public to suspect the beach was private. The Nollans objected to the requirement and brought suit claiming the easement was an uncompensated taking.

The Supreme Court agreed. Scalia's majority opinion examined the stated purpose of the California Coastal Act and the zoning regulation, which was to prevent obstruction of the public’s view of the waterfront. The Act stated that a wall of houses would “psychologically” prevent or preclude the public from viewing and visiting a coast that they had every right to visit. Scalia argued that the vertical easement would not further this goal. The houses would still preclude a view of the beach and the public access would not rectify that problem.

Scalia also observed that the Commission required the Nollans to give up part of their property for the public good. Scalia did not see how this deprivation would further the aesthetic good mentioned above. While the access may or may not diminish the value of their property, the real question was one of the basic rights of ownership. The right to exclude others, an important “stick” in the bundle of rights associated with property ownership, was taken away from the Nollans. The building permit was not simply regulation but “leveraging” on the part of the Commission to force owners to give away part of their land in return for certain uses. This permit requirement did not serve the objectives of the Act but instead constituted an uncompensated taking.

67. _Id._ at 835.
68. _Id._ at 838-39.
69. _Id._ at 831.
70. _Id._ at 837 n.5.
Brennan’s dissent indicated Scalia’s opinion “imposed a standard of precision for the exercise of a State’s police power that has been discredited for the better part of this century.” According to Brennan, Scalia’s opinion even offered judicial notice of what constituted reasonable regulation to fulfill the stated objects. The majority did not grant wide deference to the legislature but had questioned the reasonableness and substance of the statute. Brennan, following his views in *Penn Central Company v. City of New York*, saw the California Coastal Act as furthering a substantial public purpose that did not involve a unilateral government action denying use of the property. The easement requirement only took effect when a building permit was obtained and even then the permit would only require the easement under certain conditions. No taking had occurred because no investment-backed expectations were damaged.

In *First English Evangelical Lutheran Church of Glendale v. The County of Los Angeles*, a flood destroyed some buildings the First Lutheran owned. Subsequently the County of Los Angeles declared a temporary and total construction ban on properties situated in the flood plane. As a result, First Lutheran was temporarily denied any use of its property. In a majority opinion authored by Rehnquist, Scalia, White, Brennan, Marshall, and Powell, the temporary but total ban on the use of property was ruled a taking. For the time the ban was in effect it totally enjoined the use of the property thus preventing a previous use and a return on an investment.

*Keystone Coal Association v. DeBenedictis* involved the Pennsylvania Coal Mining and Subsidence Act. Sections 4 and 6 of the Act required companies to leave 50% of the coal in the ground to preclude subsidence. The Act noted the devastating effects of subsidence on the soil and surface structures reasoning the 50% rule allowed enough remaining subsurface soil to prevent subsidence. Keystone Coal Association filed suit claiming the 50% rule was an unconstitutional taking and that it was also a violation of the Contract Clause because their leases from other private persons giving them the mining rights had been destroyed by this Act. The Association argued this

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71. Id. at 842 (Brennan, J., dissenting).
73. Nollan, 483 U.S. at 51-52 (Brennan, J., dissenting).
74. Id. at 50-51.
75. 482 U.S. 304 (1987) [hereinafter *First Lutheran*].
77. Subsidence is the lowering of the layer of rock or earth overlying a coal mine, including the land surface, caused by coal mining. Subsidence has the potential to substantially damage foundations, walls, etc. of buildings and homes, and can also cause sinkholes or troughs in the land. *Id.* at 474-75.
case was no different than Pennsylvania v. Mahon\textsuperscript{78} where the Court held a similar Pennsylvania statute amounted to an unconstitutional taking, and that the 50% requirement denied them of substantial investment backed expectations.

The majority ruled against the Association and distinguished it from Mahon.\textsuperscript{79} In Mahon, only one private building was to be saved by the Kohler Act and it was questionable even in Justice Holmes’ mind whether the law served a substantial public purpose. In this case, many structures, including cemeteries were involved and thus saving them served a significant public interest. The second difference concerned the degree of the regulation. In Mahon, the Act denied all use of the property for mining; the CMSA allowed 50% mining.\textsuperscript{80} Justice Stevens noted that even without the 50% rule companies never extracted all the coal because much of it was needed to support the mine tunnels.\textsuperscript{81} The questions then were whether the 50% rule served a reasonable public purpose and whether the rule had a substantial impact on the value of the property as a whole. The majority answered yes to the first, no to the second, and ruled that no taking had occurred. Therefore the Act was not unconstitutional.

The dissent, including Scalia, agreed with the Association that Mahon was controlling. In the dissent’s view, the CMSA and the Kohler Act both served public purposes but placed such substantial burdens on private property so that a taking had occurred.\textsuperscript{82} Using what appeared to be strict scrutiny, the dissenters inquired into the nature of the regulation and state interest involved.\textsuperscript{83} The dissenters argued the 50% rule denied Association members significant “investment backed expectations,”\textsuperscript{84} and was not regulation, but a regulatory taking or an act of eminent domain that required compensation. The dissenting opinion foreshadowed a return to strict scrutiny of legislation affecting property rights. Such a return to stricter scrutiny for economic legislation would mean that acts approaching the line between regulation and eminent domain would be subject to more acute analysis. This is exactly what had happened in Nollan, and this appeared to be the direction in which Scalia was heading in subsequent decisions.

In Pennell v. San Jose,\textsuperscript{85} Scalia concurred with, and dissented from, a

\textsuperscript{78} Pennsylvania Coal Co. v. Mahone, 260 U.S. 393 (1922).
\textsuperscript{79} Keystone, 480 U.S. at 481-86.
\textsuperscript{80} Id. at 492-97.
\textsuperscript{81} Id. at 496-98.
\textsuperscript{82} Id. at 508-10.
\textsuperscript{83} Id. at 512-14.
\textsuperscript{84} Id. at 513-17.
\textsuperscript{85} 485 U.S. 1 (1988).
majority opinion upholding a rent control ordinance that allowed a hearing officer to consider the hardship to the tenant when reviewing rent increase proposals. The majority held, among other things, that the ordinance did not violate either the Equal Protection or Due Process Clauses of the Fourteenth Amendment, and that it was premature to consider whether or not the hardship provision violated the Fifth Amendment Takings Clause.

In his dissent, Scalia agreed with the Majority regarding the Equal Protection and Due Process Clauses. However, Scalia proceeded to consider the merits of the Fifth Amendment claim, contending the tenant hardship provision effected an uncompensated taking 86 for two reasons. First, the provision did not advance a legitimate state interest.87 Second, the provision imposed a special public burden upon individual landlords when that burden should be shared collectively by society.88

To support these claims, Scalia first quoted from Armstrong v. United States89 where the Court said that the purpose of the Takings Clause was to "'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"90 What rent control does, specifically this tenant hardship provision, is to force particular landlords to subsidize housing for individuals who are poor by accepting a lesser financial return than they might otherwise obtain. Such a subsidy, for Scalia, is not the traditional mechanism American society employs to address poverty. More traditional routes of wealth transfer include food stamps, welfare, and taxation.91 This rent control policy hides the subsidy to circumvent the "normal democratic process" of raising taxes and paying for programs to help the poor, and places the burden on particular landlords to help specific tenants.92 The City of San Jose was not really promoting the valid state interest of land use regulation; instead it was illegitimately transferring wealth through the use of a tenant hardship provision without employing the proper democratic channels to undertake this transfer. It mandated that a few individuals had to use their property to benefit society and such a regulation of property is a violation of the Fifth Amendment.

Central to Scalia's claims is the belief that there are valid as well as invalid forms of land use regulation. Scalia considers more traditional land use policies to be those that: (1) do not totally destroy the economic use of the

86. Id.
87. Id. at 15.
88. Id. at 15-16.
89. 364 U.S. 40 (1960).
90. Pennell, 485 U.S. at 19 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
91. Id. at 21.
92. Id. at 22.
property; and (2) which link some type of cause and effect between the pro-
posed regulation and the evil or remedy that the regulation seeks to address. As demonstrated in Nollan, there must be a reasonably tight fit between the regulation and the problem the regulation seeks to address — otherwise Scalia will vote against the regulation. In short, Scalia will examine land use regulation with some level of scrutiny beyond some simply means/end or rational basis test that gives legislatures broad authority to regulate property. There must be some tighter fit between means and ends or cause and effect (in Scalia’s words) to sustain and distinguish a land use regulation from a regulatory taking.

Despite striking down a tenant hardship provision in one rent control ordinance, Scalia joined an O’Connor majority opinion that upheld a variety of rent control provisions affecting mobile homes. As in Pennell, the owners in Yee v. City of Escondido asserted that the rent control provisions constituted a regulatory taking. The Court declined to address the takings issue, arguing the property owners failed to raise the regulatory takings issue in their certiorari petition and, therefore, the Court could not address the issue. Instead the Court left the issue to the state courts. While it is difficult to extrapolate Scalia’s own views from an opinion written by someone else, it is curious that he did not write separately to address the merits of the takings claim as he did in Pennell. Perhaps the failure of the owners to raise this claim in their petition was crucial in making Yee the only vote Scalia has thus far cast against a property owner while on the Supreme Court. Had this claim been raised, Scalia might have ruled similarly in Yee as he did in Pennell, and thus offered a clearer view on whether he thinks all forms of rent control are forms of regulatory takings.

Perhaps Scalia’s most important land use decision is Lucas v. South Carolina Coastal Council. Lucas builds on the analysis laid down in Granite Rock, Nollan and Pennell. In some ways, Lucas is similar to Nollan. In Lucas, there existed a state law declaring certain coastal land as a “critical area” necessitating a permit from the state coastal commission if the owner wished to change the use of the property. Lucas purchased two pieces of beachfront property in the designated critical area and intended to build houses there. After Lucas bought the property, South Carolina enacted a law

93. Id. at 20.
95. Id. at 1532.
96. Id. at 1534.
97. Yet, as noted above, he did reach out in the Granite Rock case to address a property rights issue.
banning the construction of any occupiable structures beyond a designated area, including the beach. This regulation prevented Lucas from constructing his homes. As a result he challenged the ordinance in court, claiming the law was a regulatory taking that deprived him of all value of his property. Eventually the case was appealed to the Supreme Court where Scalia authored a majority opinion sustaining the owners’ claims.

Scalia opened his legal analysis by noting that prior Court decisions invoked the Takings Clause only when the government engaged in a “direct appropriation of property.” However, in *Pennsylvania v. Mahon* the Court held that mere physical appropriation of land alone did not trigger the Taking Clause. Instead, the regulation must go further to effect a taking. Seeking to clarify when the regulation goes too far, Scalia explained a regulation goes too far when either the owner suffers a physical invasion of his property, or when the regulation “denies all economically beneficial or productive use of land.” Scalia found the South Carolina law denied Lucas of all economically viable use of his land.

In its defense, the South Carolina Coastal Council contended that denying Lucas the building permit came within the well established principle that governments may prevent “noxious uses” (of property) without the requirement of compensation. Scalia acknowledges this exception, stating that it was the progenitor of the requirement that a valid land use regulation must substantially advance a legitimate interest. But the question for Scalia was how to distinguish a state interest that is clearly harm-preventing from one that is benefit conferring. By that, some land use regulation, in denying someone the right to use property in a certain way, is not really seeking to prevent a real harm but instead seeking to confer a benefit upon another party.

Using Scalia’s example, we may view the limits on Lucas’ land development as either aiming to prevent a harm that the construction would entail, or we could view the denial of construction as a means of conferring a benefit upon those who use the South Carolina coast. In the first instance, the building of a house is a harm in itself, in the latter instance, the building of the house is not a harm in itself, but denying construction is a way to preserve or

99. *Id.* at 2892.
100. 260 U.S. 393, 415-16 (1922).
102. *Id.* at 2896-97. For cases elaborating on the public nuisance or noxious use exception see *Miller v. Schoene,* 276 U.S. 272 (1928); *Muglar v. Kansas,* 123 U.S. 623 (1887).
103. *Lucas,* 112 S. Ct. at 2897.
104. *Id.* at 2897-98.
105. *Id.* at 2898.
protect something else, *i.e.*, the beach ecology. Those regulations that are truly harm preventing are a species of the noxious use exception to regulation, and would not implicate the Takings Clause or necessitate compensation. Conversely, regulations which are benefit conferring do invoke the Takings Clause and would require compensation.

For Scalia, specifying when a use or state interest is truly harm preventing or benefit conferring is often ambiguous, necessitating some rule to clarify what type of state interest or regulation is involved.\(^\text{106}\) His approach to clarifying that distinction is that where

the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the prescribed use interests were not part of his title to begin with. (Footnote omitted).\(^\text{107}\)

For a state to be able to deny someone total economic use of his property without paying compensation, the state must show the person never had the right to use her property for the use she desired. If a person did not have a right to use that property in a certain way, then denying the use would not diminish the value of the property and would not require someone be compensated for denying a use that never had conferred value to the property.\(^\text{108}\)

States need to show a pre-existing list of common law nuisances or prohibited uses that limit the owner's titled use of property. In Lucas' case, since building on the beach beyond a certain line was not among the prohibited uses when he acquired title to his property, the state interest in denying the building permit was clearly meant to be benefit conferring, thus invoking the Takings Clause and compensation.\(^\text{109}\)

In *Nollan* and *Lucas*, Scalia wrote majority opinions that stated several important points regarding property rights. First, the right to exclude is one of the important rights that property ownership entails and to deny that right would invoke a taking under certain circumstances. Second, Scalia suggested that state interests in regulation must directly aim at denying harms and not seek to use regulation to achieve other social goods that should be determined in other decision-making forums. Third, unless certain uses of property are excluded from the owner’s titled uses of his property, the owner may use her

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106. *Id.* at 2899.

107. *Id.*


property in any way she wishes unless the state seeks to compensate her for uses it denies. Fourth, the government generally needs more than a reasonable relationship between regulations and goals of the regulation if the Court is to uphold the legislation as a valid exercise of the police power. Exactly what that relationship or nexus is, and the level of judicial analysis the judiciary should give to state regulations, however, was left somewhat unclear until Dolan v. City of Tigard.110

In Dolan, the issue was whether or not the City of Tigard could condition a permit for expansion of a building upon requiring the owners to dedicate part of their property located in a flood plain to the city for the creation of a public greenway and pedestrian and bicycle path. In a 5-4 opinion, in which Scalia joined, the Court said no.

Rehnquist, writing for the Court, built on Scalia's earlier land use decisions by citing them as precedent, quoting dicta, or developing lines of argumentation formulated from these cases. He wrote that this decision resolves "a question left open by our decision in Nollan v. California Coastal Commission of what is the required degree of connection between the exactions imposed by the city and projected impacts of the proposed development?"111 Rehnquist turned to the examples of different states to answer this question. First, Rehnquist specifically rejected state standards that merely require some type of "generalized statements as to the necessary connection between the required dedication and the proposed development, as too lax."112 Such standards merely ask for some kind of reasonable relationship between the regulation and the state interest. Conversely, Rehnquist also rejected state tests mandating a "very exacting correspondence" between the regulation and state interest.113 According to Rehnquist, such a standard and level of scrutiny is not mandated by the Federal Constitution.114

The Chief Justice turned to states which had adopted a species of intermediate level of analysis,115 finding that this level of analysis is closer to what is constitutionally mandated.116 Thus, in putatively following some state case law analysis,117 Rehnquist argued that while no precise mathematical rule is

111. Id. at 2312.
112. Id. at 2318.
113. Id. at 2319.
114. Id.
115. Id.
116. Id.
117. Id. at 2326-29 (Stevens, J., dissenting) (contending that the majority does not really derive its standard of analysis from state precedent but from resurrecting substantive due process claims).
available to clarify the level of analysis, he adopted some type of intermediate level of scrutiny requiring a “rough proportionality” between the goals and the regulations.\textsuperscript{118} Such a rough proportionality and intermediate level of analysis seems to flow from Scalia’s arguments and levels of analysis in \textit{Nollan} and \textit{Lucas}, where an emphasis on establishing and clarifying the nexus or causality between state interests and land use regulations was developed.

\textit{Dolan}’s significance resides in part from the Court’s mandating a stricter level of analysis when examining the impact that regulations have on property than had been the norm for the last fifty or so years. For example, as noted above, Stevens’ dissent contended the majority does not really derive its standard of analysis from state precedent but from resurrecting substantive due process claims.\textsuperscript{119} Stevens chastised the majority for “abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on the City.”\textsuperscript{120} Stevens stated that this standard of proof is “essentially the doctrine of substantive due process,”\textsuperscript{121} and that the majority applied “heightened scrutiny to a single strand — the power to exclude — in the bundle of rights.”\textsuperscript{122}

Moreover, the significance of \textit{Dolan} appears more fully in Rehnquist’s statement that “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of poor relation.”\textsuperscript{123} This statement appears to indicate that the Takings Clause of the Fifth Amendment and, with it, property rights claims, should occupy a position no different than other types of civil rights claims arising under the Bill of Rights. Such a claim by Rehnquist, and foreshadowed and endorsed by Scalia, represents a significant challenge to contemporary jurisprudence. How it is a challenge can be understood in light of previous judicial treatment of property and civil rights claims.

\section{IV. THE PROPERTY RIGHTS/CIVIL RIGHTS DICHOTOMY}

\subsection{A. Property Rights and the Lochner Era}

One of the most enduring dichotomies in constitutional jurisprudence

\begin{thebibliography}{9}
\bibitem{118} \textit{Dolan}, 114 S. Ct. at 2319-20.
\bibitem{119} \textit{Id.} at 2326-29 (Stevens, J., dissenting).
\bibitem{120} \textit{Id.} at 2326.
\bibitem{121} \textit{Id.} at 2329-30.
\bibitem{122} \textit{Id.} at 2329.
\bibitem{123} \textit{Id.} at 2320.
\end{thebibliography}
represents the contrasting levels of judicial scrutiny given to property and civil rights. Even though the federal judiciary has a long history of protecting property rights, in a period approximately between the late nineteenth century and the New Deal, known as the *Lochner* Era, the Supreme Court decided cases such as *Lochner v. New York* and *Allgeyer v. Louisiana* where it articulated the doctrine of substantive or economic due process. While the Court during this time period sustained most state and federal economic regulation, in many cases it demanded a greater level of legislative justification for economic regulation than would be required for legislation curtailing individual rights. Despite some historical inaccuracies, *Lochner v. New York* or the *Lochner* Era, has often been used as shorthand phrases for reference to a legal ideology that involved active use of judicial power to protect property rights at the expense of the Bill of Rights claims.

While state precedent exists for substantive due process, the first Supreme Court case to invoke this doctrine came in 1872 with the *Slaughter-House Cases*. This case involved a Louisiana law granting an exclusive charter for a slaughterhouse to operate in New Orleans. All other slaughterhouses were required to cease operation and the butchers unemployed by this statute filed suit contending that it violated the Thirteenth and Fourteenth Amendments. Despite the Supreme Court upholding this statute and affirming the state police power, several points were made in both the majority and dissenting opinions that were important for the development of substantive due process.

First, the majority rejected the defendants' claim that the Louisiana law violated the Privileges and Immunities Clause of the Fourteenth Amendment. The Court conducted an extensive review of what this clause meant and stated that these were the same privileges and immunities found in Article IV, Section 2 that applied to the rights of citizens against the federal government. The Clause did not create any new rights of citizens but instead

125. 198 U.S. 45 (1905).
126. 165 U.S. 578 (1897).
128. Wynehamer v. People, 13 N.Y. 378 (1856), appears to be the earliest state court decision to invoke substantive due process to limit state property regulation. The development of substantive due process in New York was due in large part to Kent's influence in using natural law and Lockean arguments to protect property rights. Id.
129. 83 U.S. 36 (1872).
privileges and immunities [refers to those rights] which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate.  

The Privileges and Immunities Clause was a simple affirmation of pre-existing rights; it added nothing to the rights citizens enjoyed against the state. The second point made in the majority decision limited federal enforcement of this clause. The majority stated that Congress did not have the power to intervene on behalf of citizens against their state to enforce their rights.

And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights hithertofore belonging exclusively to the States?. . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.  

The majority effectively read the Privileges and Immunities Clause out of the Constitution — the Clause neither created new rights nor allowed for federal intervention to enforce the rights that might have been covered. This argument impliedly created three distinct spheres one belonging to the states, national government, and the individual. The majority opinion established a zone of individual freedom that states could not violate. All that was necessary to create substantive due process was to show that zone included economic rights. The dissents here paved the way for that inclusion (much in the same way that some of Scalia's opinions paved the way for Dolan).

Justice Field disagreed with the majority, relying on the Privileges and Immunities Clause to argue that the Constitution protects the "natural and inalienable rights which belong to all citizens." What rights were those? Field refers to the 1866 Civil Rights Act which lists, among other rights, 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.  

Field also cites Corfield v. Coryell where Judge Washington, stated that the Privileges and Immunities Clause protects, among other things, the

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130. Id. at 76.
131. Id. at 77-78.
132. Id. at 96-97 (Field, J., dissenting).
133. 4 Wash C.C. 371 (1823).
right to acquire and possess property and to pass through, or reside in a state for the purposes of a trade or profession. This clause did have a substantive meaning and it included the protection of certain economic rights. Disagreeing with the majority, Field claimed that the federal government had the authority to enforce these economic rights against state interference. Justice Bradley agreed and argued that

[The] right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected when these rights are arbitrarily assailed.

Bradley thus considered the Louisiana law violated the Due Process Clause of the Fourteenth Amendment, which in his view protected certain fundamental rights such as the right to property and freedom from government interference in following an economic calling.

Four years later, in Munn v. Illinois, the Court again refused to strike down a state regulation, this time a law establishing maximum rates for grain stored in elevators. Again as in Slaughter-House, both the majority and dissenting opinions tended to defend economic due process. The majority, relying upon a common law rule of Judge Hale's, held regulation of private interests is justified only when the private property is affected with a public interest.

The majority distinction between private and public interests meant that only the latter could be regulated. The implication was that (economic) interests that are truly private are beyond the scope of regulation. Field again dissented along the same lines as Slaughter-House. Judge Hale again affirmed the right of property owners to pursue a calling and would have found this law a violation of both the Due Process and Privileges and Immunities Clauses.

The majority and minority opinions suggested that certain rights of individuals were beyond the encroachment of the state. However, there was disagreement on two fronts. The majority did not necessarily see these rights as economic or property rights and they did not see it as a role for the courts

136. 94 U.S. 113 (1876).
to second guess the reasonableness of legislative action involving property regulation. The minority argued the opposite and their position might have remained a minority view except the personnel and attitude of the entire Court changed in the next several years. Evidence of the new attitude of the Court can be seen in *Mugler v. Kansas*, where the Court, in upholding a Kansas prohibition law, stated,

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of the statute, the courts must obey the constitution rather than the law-making department of the government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. *(citation omitted)*

The implication of the *Mugler* dicta was that the courts had the obligation to view economic regulation with special scrutiny. The courts could review regulations to determine the reasonableness of their encroachment upon private economic rights, and strike down encroachments if unreasonable. This heightened scrutiny of economic regulation led to the doctrines of liberty of contract and substantive due process.

Over the course of the next 50 years numerous state statutes were struck down as violations of substantive due process. While the Court did affirm most state regulation, substantive due process was extended to protect many property rights. Even those cases affirming regulation supported judicial scrutiny of legislative activity by judging its reasonableness according to

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137. 123 U.S. 623 (1887).
138. *Id.* at 661.
140. Doctrinal development of substantive due process included application of the 14th Amendment to corporations, holding them to be persons under the Due Process and Equal Protection clauses. See *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886). *See also* Chicago M. & St. R.R. Co. v. Minnesota, 134 U.S. 418 (1890) (placing limits upon rate fixing for railroads unless hearings were provided); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (placing limits upon Louisiana to prevent individuals from using the mail to conduct certain businesses with companies not licensed in that state); *Weaver v. Palmer Bros*, Co., 270 U.S. 402 (1926) (prohibiting certain manufacturing materials). For cases involving maximum work hours, minimum wage, yellow dog contracts, and wage settlements in labor disputes, see *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); and *Wolff Packing v. Court of Indus. Relations*, 262 U.S. 522 (1923).
substantive due process. The most famous cases of this era, such as *Lochner v. New York*,\(^\text{141}\) affirmed individual economic liberties, limits upon state police power, and the general right of the court to protect property by reviewing state legislation.\(^\text{142}\)

The point where substantive due process peaked as a legal doctrine is hard to identify. Whatever strength the Fourteenth Amendment had in protecting property rights and economic interests, events surrounding the New Deal ended that. Exact reasons why the Court reversed itself are numerous. Perhaps changes in Court personnel, the FDR packing plan, changes in public opinion, or perhaps other causes were a factor.\(^\text{143}\) Regardless of the reasons, the Court from 1937 on reversed itself and (re)affirmed state and federal police, regulatory, commerce, and taxation power.\(^\text{144}\) But *West Coast Hotel Co. v. Parrish*\(^\text{145}\) and *United States v. Carolene Products*\(^\text{146}\) were important in ending substantive due process and judicial protection of property rights.

*West Coast* contested the constitutionality of a Washington state minimum wage statute. An employee of West Coast Hotel, paid below the minimum wage, sued her employer to be paid at least the state minimum. *West Coast Hotel*, following precedent set in *Adkins v. Children's Hospital*\(^\text{147}\) where the Court struck down a similar minimum wage statute for Washington D.C., claimed this law was a limitation of their liberty and in violation of the Fourteenth Amendment. In a 5-4 decision Justice Hughes, writing for the majority, affirmed this statute. In reaching their decision, the Court rejected *Adkins* as ill-considered and as a departure from "the true application of principles governing the regulation by the state of the relation of employer and

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141. 198 U.S. 45 (1905).

142. During the substantive due process era the Court protected laissez-faire capitalism by invalidating many federal commerce and taxation statutes. Exhaustive review of taxation and commerce clause cases would constitute a book in itself but among the cases included in any review should be Hammer *v.* Dagenhart, 247 U.S. 251, (1918) (child labor); The Shreveport Case, 234 U.S. 342 (1914) (interstate commerce); United States *v.* E.C. Knight, 156 U.S. 1 (1895) (antitrust); and Pollack *v.* Farmers Loan & Trust Co., 158 U.S. 601, (1895) (income tax). *See also* Hovenkamp, *supra* note 134 (reviewing the Court's economic and legal philosophy from the Civil War to the New Deal).

143. *See* C. HERMAN Pritchett, *The Roosevelt Court* (1969) (discussing the speculation surrounding these matters). Here a contrast between the pre-FDR and FDR courts is made along with speculation to the roots of the change in constitutional doctrine lying in the judicial philosophies of Brandeis and Holmes. *Id.*


145. 300 U.S. 379 (1937).

146. 304 U.S. 144 (1938).

147. 261 U.S. 525 (1923).
employed." Further, Hughes inquired into what liberty of contract meant.

What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without the due process of law. . . . But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.\textsuperscript{148}

In \textit{West Coast Hotel}, Hughes departed from precedent in previous cases and affirmed the constitutionality of minimum wage regulations. Hughes referred to standards in previous due process cases to show the reasonableness of this state regulation. Second, noting this case involved a woman paid below minimum wage, Hughes expanded upon previous regulation that had sustained laws affecting the working conditions of women.\textsuperscript{149} Third, liberty of contract was effectively read out of the Due Process Clause by redefining liberty in terms of those ends furthered by the police power of the state. Half of \textit{Mugler} had been overruled by changing the standard of reasonableness from the existing standard (not impinging one's economic rights) to a new standard (whether the statute furthers the health, safety, morals, and welfare of the community). In \textit{Carolene Products}, the Court overturned the rest of \textit{Mugler} and returned to the legislature the right to determine the reasonableness of the regulation. This led to \textit{United States v. Carolene Products}.

\textit{Carolene Products} involved a federal law regulating and prohibiting the interstate shipment of doctored or adulterated skim milk. The Carolene Products Company contested this commerce regulation as a violation of the Fifth Amendment Due Process Clause. In affirming the regulation as a proper exercise of federal commerce power the Court's ruling also affirmed both congressional and state legislative authority to regulate and to use their discretion to determine the legislation's reasonableness under the circumstances.

\textquote{The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.}\textsuperscript{150}

According to Justice Stone, the judiciary generally should not second

\textsuperscript{148} 300 U.S. 379, 391 (1937).
\textsuperscript{149} See \textit{Muller v. Oregon}, 208 U.S. 412 (1908).
\textsuperscript{150} 304 U.S. at 152.
guess the wisdom of any legislation, but especially economic legislation. If legislation is not devoid of some reasonableness or rational basis, the courts should affirm the regulation. *West Coast* and *Carolene Products* together, heralded the end of judicial determinations of the validity of legislation designed to protect property interests. More specifically, Stone denied that courts would use any special or heightened scrutiny to judge economic regulation. Under scrutiny of this type, legislation would be presumed constitutional unless shown to the contrary.

**B. Individual Rights and the Carolene Products Era**

During the *Lochner* Era the Supreme Court and the federal judiciary subjected legislation seeking to regulate the economy to heightened scrutiny. At the same time that special protection was afforded to economic rights, other Bill of Rights claims during the *Lochner* Era were given short shrift, at least when judged by post-1937 standards. In cases such as *Plessy v. Ferguson* and *Bradwell v. Illinois*, among others, the judiciary indicated a willingness to accord broad deference to legislatures, letting them adopt legislation that restricted many civil rights. For instance, in the *Civil Right Cases*, the Court invalidated legislation protecting civil rights to protect the economic privileges of private businesses. One legacy of the *Lochner* Era was to create a property rights/civil rights dichotomy whereby the former occupied greater constitutional status and protection than did the latter.

*Carolene Products* ended the special status given to economic legislation. This case also established a new role for the Supreme Court by suggesting in Justice Stone's footnote number four that:

> There may be a narrower scope of operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.

> . . .

> . . . it is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . and most other types of legislation. . .

> . . . Nor need we enquire whether similar considerations enter into the review of statutes directed . . . against discrete and insular minorities may

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152. 83 U.S. (16 Wall.) 130 (1872).
153. 109 U.S. 3 (1883).
be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny. ¹⁵⁴

Implied in this footnote is a definition of a judicial role and review where judges are to promote individual liberty, the limiting of legislative power, and the protection of powerless minorities against intrusive and tyrannical majorities. It is a role that the Warren Court subsequently played most enthusiastically.

A good description of the Warren Court approach to the *Carolene Products* footnote is found in John Hart Ely’s arguments about judicial review in *Democracy and Distrust*.¹⁵⁵ Ely argued the role of the Supreme Court should be to keep the channels of political change open and to facilitate the representation of minorities in the political process.¹⁵⁶ Relying upon Justice Stone’s footnote number four in *Carolene Products*, Ely described the job of the courts as not to second guess the substance of legislation, but to help discrete and insular minorities protect their interests in the political process.¹⁵⁷ The role of the judiciary is to ensure that unrepresented and unprotected interests and groups receive a fair and adequate opportunity to be heard in the political process. The judiciary’s role is to broaden and to strengthen the democratic political process by striking down legislation that limits the access or ability of certain groups to protect themselves in the political process.

Ely’s comments, as well as the Court’s interpretation of footnote number four, were directed in support of intervention to protect Blacks and women, among others, who either lack adequate political representation or who were the source of prejudice and discrimination. The logic of *Carolene Products* jurisprudence, as interpreted by the Warren Court, was to incorporate Bill of Rights protections through the Due Process Clause of the Fourteenth Amendment to apply to the states and to otherwise give strict or heightened scrutiny to legislation affecting suspect or semi-suspect racial¹⁵⁸ or gender classifications,¹⁵⁹ or other fundamental rights such as interstate travel,¹⁶⁰ or the right to procreate.¹⁶¹ Unlike the logic of the *Lochner* Era, the jurispru-

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¹⁵⁶. Id. at 135-181.
¹⁵⁷. Id. at 75-6.
dence of the Carolene Products Era did not generally give economic legisla-
tion greater constitutional scrutiny than legislation affecting other individual
rights. Instead, the Carolene Products jurisprudence reversed the logic of the
Lochner Era and instead gave greater protection to civil rights claims than it
would to property rights and economic claims. In short, the Carolene Prod-
ucts Era continued to perpetuate the property rights/civil rights dichotomy,
only it now reversed the priority given to the different rights. Hence, while
in the Lochner Era the judiciary generally deferred to legislatures and the
political process to regulate civil rights, it did not always trust the political
process to regulate the economy. Conversely, in the Carolene Products Era,
the judiciary generally deferred to legislatures and the political process to
regulate the economy, but it did not always trust the political process to pro-
tect civil rights.

V. CONCLUSION: SCALIA AND THE EMERGENCE OF A
POST-CAROLENE PRODUCTS JURISPRUDENCE

Given the Court's changing historical approach to addressing property
and civil rights claims, Nollan, Lucas, and Dolan take on a different meaning.
These decisions represent an effort by Scalia and Rehnquist to reverse, in part,
the generally lax attitude and level of protection the Court has given to prop-
erty rights claims since 1937. Despite Scalia's claim that the Court lacks the
competence to address economic affairs,¹ sixty-two Scalia suggests that the Court
should nevertheless decide what is the appropriate way for legislatures to
address economic inequalities in our society. By that, in Pennell v. San Jose
Scalia argued that rent control is not a legitimate way to redistribute wealth
and that only taxation and direct welfare payments constitute "normal" ways
to effect wealth transfers.¹ sixty-three Scalia's comments show his willingness to sub-
stitute his opinion for the legislature's decision regarding the best way to
address economic inequalities in our society. Questioning legislative discre-
ion regarding the economy seems more characteristic of the Lochner Era than
of Carolene Products jurisprudence.

Next, recall Rehnquist's dicta in Dolan where he stated: "We see no
reason why the Takings Clause of the Fifth Amendment, as much a part of the
Bill of Rights as the First Amendment or Fourth Amendment, should be rel-
egated to the status of poor relation."¹ sixty-four Viewed in the context of the historic
property rights/civil rights dichotomy, such dicta indicates a break with the
sentiments of Carolene Products jurisprudence. Rehnquist's call in Dolan

¹ sixty-two Scalia, supra note 37, at 35.
¹ sixty-three 485 U.S. 1, 22 (1988).
¹ sixty-four Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994).
for an intermediate level of scrutiny to ascertain the nexus between regulation and state interests, as well as Scalia’s use of some type of heightened scrutiny in *Nollan* and *Lucas*, similarly seem to break with the use of rational basis tests to review economic and land use regulation in the *Carolene Products* Era.

Examining increased support for property rights claims only tells part of the story. Again, recall the data presented in Tables I-III, indicating that Scalia and Rehnquist have voting records strongly supportive of property claims while at the same time their voting records do not indicate sympathy either for First Amendment expressive claims or for criminal due process arguments. This voting record indicates Scalia and Rehnquist have switched their thinking on their role and the role of the Court in protecting property versus civil rights claims. This rethinking of the *Carolene Products* Era jurisprudence, prompts one to ask if Scalia and Rehnquist are prepared to weaken the level of protection they give civil rights against the political process. That also appears to be the case. For example, in a death penalty case, *Payne v. Tennessee*, Rehnquist stated:

> Stare decisis is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision’. . . . *This* is particularly true in constitutional cases, because in such cases ‘correction through legislation action is practically impossible’. . . . Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved. . . . [and] the opposite is true in cases such as the present one involving procedural and evidentiary rules. (citations omitted)

Rehnquist’s dicta implies that the Court should adhere less to the principles of stare decisis in civil rights and death penalty cases than in cases involving economic claims. In effect, legislatures should be given far more leeway to change rules of criminal procedure or adopt other types changes in civil rights than they should be when altering property or economic arrangements. Scalia’s death penalty analysis in *Stanford* offers further evidence to substan-

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165. *See Doris Marie Provine, Case Selection in the United States Supreme Court* (1980) (discussing how a Justice’s self-perception of his or her role and the role of the Court influence the type of cases that the Court selects as well as how those cases are decided).

166. *See* Richard A. Brisbin, Jr. & Edward V. Heck, *The Battle Over Strict Scrutiny: Coalition Conflict in the Rehnquist Court*, 32 SANTA CLARA L. REV. 1049, 1101 (1992). Here the authors argue, based upon a study of the Rehnquist Court’s decisions in the areas of the First Amendment, equal protection, and substantive due process, that the Rehnquist Court is accepting the use of “means-end scrutiny as a model for resolving conflicts between individual rights and governmental power. . . .” *Id.*


168. *Id.* at 827-28.
tiate that a rethinking of Carolene Products jurisprudence is occurring.\textsuperscript{169} In upholding imposition of the death penalty for individuals who committed crimes at age 16 or 17, Scalia looked to see if there was a consensus among the different states that the imposition of the death penalty for individuals this age is cruel and unusual. In finding that many states do allow for the execution of people this age,\textsuperscript{170} Scalia refused to strike down these executions as a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Instead, Scalia deferred to legislative judgments that determined such executions should be permitted. In a case invoking a Bill of Rights claim, Scalia is content to uphold majoritarian wishes, but not to protect a discrete and insular minority, \textit{i.e.}, a prisoner, for the political process. Obviously, this stance represents a departure from the logic of the Carolene Products jurisprudence.

A final set of evidence regarding Scalia's approach to the assumptions of Carolene Products jurisprudence can be seen in the fact that the Justice has never cited footnote number four of United States v. Carolene Products to support a civil rights claim and, in fact, has appeared to go out of his way to avoid referring to it.\textsuperscript{171} The most clear indication that Scalia is prepared to give legislatures greater leeway to legislate in the areas of civil rights can be found in Employment Division v. Smith,\textsuperscript{172} where Scalia appears to repudiate the logic of Carolene Products in rejecting a First Amendment religion claim while upholding the denial of unemployment benefits to a Native-American who used peyote in a traditional Indian religious ceremony.

Values that are protected against governmental interference through enshrinement in the Rights are not thereby banished from the political process. \ldots It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred. \ldots\textsuperscript{173}

What becomes clear in Smith is that Scalia is prepared to offer more deference to the political process regarding civil rights claims than is typical of the Carolene Products Era, while cases such as Dolan, Lucas and Nollan suggest that he is similarly prepared to offer less deference to legislatures to regulate economics and property than is typical of the Carolene Products Era.\textsuperscript{174}

\textsuperscript{170} Id. at 373-77.
\textsuperscript{172} 494 U.S. 872 (1990).
\textsuperscript{173} Id. at 890.
\textsuperscript{174} SCHULTZ \& SMITH, supra note 36.
What we have seen, then, is a rethinking of the relative level of analysis that Scalia and Rehnquist appear to be willing to give both economic and civil rights. Their civil rights decisions do not seem to accept fully the logic of the *Carolene Products* Era. However, their economic and property rights decisions do not fully return to the substantive due process logic of the *Lochner* Era. In fact, Scalia has stated he does not think the Court should or can go back to that jurisprudence. What seems to be emerging is something different. It is a move, much more with Scalia than with Rehnquist, toward a post-*Carolene Products* jurisprudence, where some type of rethinking of the property and civil rights dichotomy is being explored. Such a rethinking seems premised upon breaking with the use of different levels of analysis presently used to review the legislative process, depending upon whether or not economic or civil rights claims are at issue. After *Dolan*, the Court appears to be moving toward using some type of intermediate level of analysis for all types of rights based claims. This apparent move toward a post-*Carolene Products* jurisprudence could be based on ideology, increased skepticism towards the capacity of legislatures to deliberate without being affected unduly by pressure politics, or upon other reasons. Whatever the case, such a move represents a profound change for the Court, with Scalia leading the way.

This rethinking of the property rights/civil rights dichotomy by Scalia also raises two important issues. One, while Scalia, Rehnquist, and many of the other conservatives on the Court tend to support the same outcomes, their reasoning often is different. In the case of Scalia, he often writes separate concurrences to articulate his reasoning which is broader in scope and implications than found with other conservatives. The point here is that studies seeking to explain judicial outcomes and reasoning simply on the basis of ideology, without noting differences in reasoning, will often times fail to appreciate the full significance of a Justice's judicial philosophy. In the case of Justice Scalia, his opinions distinguish him from others on the bench in terms of his effort not just to support conservative outcomes, as in the case of a Kennedy or an O'Connor, but articulate a more comprehensive rethinking of the role of the judiciary in American law and politics.

Two, Scalia's rethinking of the property rights/civil rights dichotomy implicates the issue of legal functionalism and judicial efficacy in effecting

175. Scalia, *supra* note 37, at 33-34.


178. SEGAL & SPAETH, *supra* note 176 (providing an example of this type of claim).
social change in terms of how the Court can issue doctrines that prompt a
departure from the status quo. Arguing either for a new way to adjudicate
property rights claims or for a different attitude of the Court towards other
political institutions means that judicial opinions can precipitate behavioral
changes in others. In Scalia's case, demanding that legislatures approach
property or civil rights claims differently from the way they had for the last
fifty or so years means the legal environment has changed, that political and
legal actors will respond to that change in the environment, and that new litiga-
tion, legislation, and social activity will ensue. In short, despite skepticism
by some regarding judicial efficacy to precipitate change, Scalia's opinions
on property rights are intended by the Justice to change society and will cer-
tainly encourage further action of many types in the future.

Overall, a thinking of the property rights/civil rights dichotomy on the
part of Scalia and the Rehnquist Court was predictable, and not necessar-
illy bad. There is an intimate connection between property and civil rights and
the Court has long sought to sort out the relationship between the two. As
Justice Stewart stated in *Lynch v. Household Finance Corporation*:
The federal courts have been particularly bedeviled by 'mixed' cases in
which both personal and property rights are implicated, and the line be-
tween them has been difficult to draw with any consistency or principled
objectivity. . . . Such difficulties indicate that the dichotomy between
personal liberties and property rights is a false one. Property does not
have rights. People have rights. . . . In fact, a fundamental interdepen-
dence exists between the personal right to liberty and the personal right in
property. Neither could have meaning without the other. That rights in
property are basic civil rights has long been recognized.

As Justice Stewart notes, property rights do implicate civil rights. Moreover, the Framers were correct in viewing the protection of some type of
property interests as being important to the protection of individual free-

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Change?* (1991). Rosenberg, in this book, is the most recent critic to raise questions about
judicial capacity to effect social change. *Id.*

180. For a fuller treatment of the way courts participate in social change and alter the
political environment, see David Schultz & Stephen Gottlieb, *Legal Functionalism and Social
Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social
Change?* (Forthcoming paper to be presented at the 1995 American Political Science
Association Annual Convention, Chicago, Illinois).

(arguing that the Burger-Rehnquist approach to property rights appears to be headed towards
the use of some type of "intensified-means" scrutiny). The author also argued that the placing
of civil and property rights on the same plain appeared to be the direction the court was
headed. *Id.*

Furthermore, arguments from both the contemporary political left and right continue to note the importance of property rights claims to the defense of individual autonomy, constitutionalism, the protection of minority rights, and the articulation of a sense of personhood and identity. Scalia's efforts to rethink the property and civil rights dichotomy may not necessarily be unwelcome. As some have argued, for example, contemporary First Amendment doctrine is presently seeking to address this issue when it comes to the relationship between speech and money in the area of campaign finance reform.

Yet the concern with Scalia's move towards a rethinking of the property and civil rights dichotomy comes not in rethinking the connection, but in how that rethinking or new linkage occurs. If such a rethinking occurs in a way that sacrifices political freedom and respect for individual autonomy to the demands of the market, then such an approach would do no more than let market and economic considerations allocate rights (or the ability to exercise rights) on the basis of class distinctions. However, if the rethinking or linkage helps to sustain individual political rights, and seeks to empower all individuals regardless of class, then such a rethinking may go a long way towards addressing many of the inequities of a legal and political system that is compromised by class and economic considerations.

The evidence at present appears to be that Scalia's move towards a post *Carolene Products* jurisprudence resembles less of a synthesis than a retreat to the market. Evidence for this claim resides in cases where Scalia demonstrates more support for First Amendment claims when they implicate rights of corporate interests than the rights of less wealthy defendants, or support for the death penalty, or opposition to affirmative action. This suggests that Scalia's reevaluation of the property and civil rights dichotomy comes at the expense of many other Bill of Rights protections and to the benefit of traditional property claims.


188. See Schultz, supra note 30. See also Schultz, supra note 171.