Supplementary Material

Chapter 7: The Republican Era—Individual Rights/Property

State of Kansas v. Walruff, 26 F. 178 (C.C. Kan., 1886)

E. Walruff built and operated a brewery in Lawrence, Kansas. In 1880, the people of Kansas passed a constitutional amendment prohibiting the making of beer, except under very narrow circumstances. The Kansas state legislature passed laws implementing that constitutional provision in 1881 and 1885. The state then sought and obtained an injunction forbidding Walruff from using his brewery to manufacture beer. Walruff immediately filed a lawsuit in a federal district court claiming that the Kansas prohibition laws took his property in violation of the due process clause of the Fourteenth Amendment.

The federal district court ruled that the Kansas prohibition laws unconstitutionally took property. Judge Brewer declared that states could not prohibit a legal business without paying compensation. Why did Justice Brewer reach that decision? What could the people of Kansas do consistently with his opinion to limit alcohol in their state? One year later, the Supreme Court reached a different decision in Mugler v. Kansas *(1887). Was* Mugler *a sharp break from existing due process law, was* Walruff *the case inconsistent with the dominant trends of the late nineteenth century thought, or were both legitimate interpretations of existing constitutional law? Judge Brewer became Justice Brewer when he was appointed to the Supreme Court of the United States. Given Brewer's known commitments to private property at the time of his appointment, might one argue that such cases as* Lochner v. New York *(1905) were consistent with the regime principles of the dominant Republican Party?*

BREWER, J.

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In the light of th[e] declaration of the supreme court [in *Bartemeyer v. Iowa* (1873)], that when a man owns, with the unrestricted right to use or sell, a glass of liquor,—mere personal property which, without injury or depreciation in value, can be carried outside the jurisdiction of the state,—legislation of a state prohibiting its sale, and to that extent only diminishing its value, presents a grave question under the fourteenth amendment; the further positive assertion of one of the justices [in *Bartemeyer*] that such legislation is void under that amendment; and a still further intimation of the court in [*Beer Co. v. Massachusetts* (1877)] a later case that vested rights of property cannot be destroyed for the public good without compensation,—it would seem a contemptuous disregard by a subordinate tribunal of the judgments of its superior for me to hold that legislation of a state, destroying the value by prohibiting the use of property which cannot be moved, and in whose use the owner had prior thereto an absolute and unrestricted title, is clearly not in conflict with that amendment, and presents absolutely no question for the cognizance and judgment of the federal tribunals.

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Debarring a man, by express prohibition, from the use of his property for the sake of the public, is a taking of private property for public uses. It is the power to use, and not the mere title, which gives value to property. Give a man the fee-simple title to a flour-mill, coupled with an absolute prohibition on its use, and of what value is it to him? . . .

I meet here the common argument that, when private property is taken for public use, there is always a transfer of the use from one party to another; that here the use is not transferred, but only forbidden; and that this deprivation of the use is only one of the consequential injuries resulting from a

change of policy on the part of the state for which no compensation or redress is allowed. . . . The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed in order that another may be acquired. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public may acquire the benefit in another direction. So, where land is flowed by a mill-dam. And thus is it generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason, and upon no other ground, could it be disturbed. Of course, in this, as in other cases, some use remains to the owner; but here, as elsewhere, the use which is of special value is taken from him for the benefit of the public; and this is not a consequential, but a direct result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct command, and says, 'Stop your manufacturing.' It is idle to talk of consequential results and injuries when the law, in direct language, forbids the use of the premises for a brewery.

I assert, secondly, that natural equity, as well as constitutional guaranty, forbids such a taking of private property for the public good without compensation. . . . In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar, and in the opinion of some a deleterious article. Yet the industry is legal, the manufacture not forbidden. Suppose the next legislature should believe that glucose was injurious to the public health, and forbid its manufacture, could the wheels of that manufactory be stayed, and the value of that investment be destroyed, without compensation? Take, also, the illustration of playing cards, which, by reason of their use for gambling purposes, are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established, when, as now, a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority? Or, take a still stronger illustration. This is a corn-growing state, yet wheat also is raised abundantly, and many flour-mills exist. Suppose the legislature should determine that the best interests of the state would be promoted by stopping the growing of wheat, and increasing the crop of corn, and to that end should prohibit the milling of flour, must the owners, without compensation, abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guaranty, compel compensation as a condition to such sacrifice? Yet who can state what the law will recognize as a legal distinction between those cases and this. Of course, it will be said that no legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

Thirdly. I affirm that, no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not 'due process of law' if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute 'due process.' . . . Now, in the case at bar, while judicial proceedings are prescribed, yet the spoliation is the direct command of the legislature, and the judicial proceedings are only the machinery to execute that command. No discretion is left to the courts. The legislature has in terms said to defendants, 'Stop your use of your brewery,' and has directed the courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused valueless manufacture. As well might the executive as the courts be charged with the enforcement of this command. Such a command, no matter how enforced, operative to deprive a citizen of the value of his property without compensation, is 'arbitrary, oppressive, and unjust,' and therefore should be 'declared to be not due process of law.'

Fourthly, and as a necessary consequence of the preceding. Legislation which operates upon the defendants as does this is in conflict with the fourteenth amendment, and, as to them, void. . . .

. . . . [L]et me say that I do not in the least question the power of the state to absolutely prohibit the manufacture of beer, or doubt that such prohibition is potential as against any one proposing in the future to engage in such manufacture. Any one thus engaging does so at his peril, and cannot invoke the protection of the fourteenth amendment, or demand the consideration and judgment of the federal courts. All that I hold is that 'property,' within the meaning of that amendment, includes both the title and the right to use; that, when the right to use in a given way is vested in a citizen, it cannot be taken

from him for the public good without compensation. Beyond any doubt, the state can prohibit defendants from continuing their business of brewing, but before it can do so it must pay the value of the property destroyed.

Nothing that I have said in this opinion is to be taken as bearing on the question of the sale of beer, or the power of the state over that. Counsel claimed that the right to manufacture, without the right to sell, was a barren right. Whatever limitations may exist in this state, the markets of the world are open, and, with such markets, the right to manufacture is far from a barren right.

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