

Property Rights Versus Rent-Seeking Politics: A Public Choice Perspective

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Abstract:

Classroom discussion of political topics, if done in a way that encourages lively but healthy debate, can encourage student participation and critical thinking. This paper outlines several insights from public choice research as applied to the federal government set up by the U.S. Constitution and the protection of property rights. Using a Hobbes versus Locke framework, this discussion also encourages debate about the role of government generally. The interdisciplinary nature of the discussion encourages input from students majoring in various fields, making this framework particularly well suited to use in an upper division elective with limited pre-requisite courses.

Key Words: Property Rights, Takings, Eminent Domain, Public Choice, US Constitution

JEL Classification: H130; K1; N41

Introduction

The writings of two 17th century political philosophers, Thomas Hobbes and John Locke, offer a useful framework for classroom discussion of the role of government, especially as it applies to property rights. Hobbes (1651) and Locke (1689) differ greatly in their approach to rights and the proper role of government. The current U.S. federal system is a mixture of the Lockean and Hobbesian approaches with an increasing shift toward a Hobbesian based system. This paper analyzes the structure of the U.S. government within that framework. Public choice² pressures on various players in the three branches of government and legal cases provide material for engaging classroom discussions.³

Under the Lockean approach to rights, all rights precede government. The people voluntarily join together to emerge from the uncertainty of the state of nature into civil society. By consenting to grant certain rights to a government restricted to specific functions, man is better able to protect his property. Property, for Locke, is defined broadly to include all the natural rights of an individual. Locke's theory of property is founded on the notion that every man has property in his own person and whatever he removes from the state of nature by mixing his labor with it becomes his property as long as there is enough left for others, a consideration not binding in early times. The nature of the grant of rights requires that the

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² Public Choice: the study of "the economics of politics ... to understand and to predict the behavior of political markets by utilizing the analytical techniques of economics, most notably the rational choice postulate, in the modeling of non-market decision-making behavior." (Rowley 2004, p3)

³ Founding contributions to the public choice literature that are of particular relevance to this discussion include Black (1948), Arrow (1950), Downs (1957), and Buchanan and Tullock (1962). Olson (1965) extended the analysis of interest group behavior by using the rational choice model.

government, as fiduciary, serve and protect the people. Property is safe from arbitrary seizure by government. The existence of a common judge is necessary to place men within civil society; however, men must give up more than simply the right to punish transgressors. An effective government must have the sole right to interpret and execute civil laws. Man retains his natural rights, not least the natural right to property, though the common judge may adjudicate disputes over rights.

The Hobbesian approach to rights gives deference to the sovereign. To escape the state of nature and achieve peace, man must subject himself to the unlimited power of Leviathan and holds no rights, except the right to life, which are independent of him. The sovereign is established through a social contract and can be a political system, not necessarily one individual. Competing uses of resources drive demands for the establishment of rights. The Hobbesian notion that individuals must hand over all rights to Leviathan implies that rights derive by grant from the sovereign. When there are no property rights that are independent of government, man relies on the whim of Leviathan for the security of his property and has no assurances against arbitrary interferences.

The implications of the Hobbesian approach differ markedly from the Lockean civil society. When property rights derive from the sovereign, as in the Hobbesian approach, it is not necessary to gain the consent of the property owner to infringe on those rights. Instead of negotiating to achieve contractual solutions, the battle is played out in the political system. Those who wish to achieve a redistribution of rights in their favor must seek the approval and assistance of those in power. Rent seeking⁴ tends to drive property rights allocations, and those with greater political influence win the prize. Economic decisions regarding the best uses of resources are based on political influence instead of the demands of producers and consumers.⁵

Lobbying by companies, special interests and other well-organized groups aims to gain the benefits of the exertion of government power at the expense of those who are less organized (Olson 1965).⁶ In addition to physical takings of property, well-organized groups lobby for special treatment or protection from competition. For example, rent-seeking sugar producers in the United States enjoy special protection from foreign competition through tariffs. The American consumer and industries using sugar to produce candy and other products must pay more for sugar (Riley and Andel 2014). Sugar industry supporters claim the program benefits American consumers and taxpayers (Sanchez 2017). Most Americans are

⁴ Rent seeking: the socially costly pursuit of wealth transfers through government.

⁵ A substantial literature exists; however, a few authors serve as the foundation of research in this area. Tullock (1967) introduced the concept of rent seeking. Krueger (1974) coined the term and provided an early theoretical analysis and estimates of the costs of rent seeking. Posner (1975) provided the first empirical paper on rent seeking. Buchanan (1980) and Rowley, et al. (1988) influenced research in the area.

⁶ Olson's views and the resulting implications have been challenged by the Chicago School, especially Becker (1983) and Wittman (1989, 1995).

unaware of programs such as the US policy on sugar⁷ and the calls for protection of other industries, such as the steel industry.⁸

Outright transfers of property and regulatory limitations on the use of property work similarly to interfere with the owner's rights and alter economic decisions. In addition to the resources diverted to lobbying efforts, productivity is further hampered by the reduction of incentives that result from a world without secure property rights.⁹ Those who wind up bearing the burden will not work as hard when they cannot be certain that they will be able to keep the fruits of their effort.

Within the framework of limited government envisioned by Locke, judicial deference to the legislature or the executive undermines the role of the judiciary and alters the nature of competition. Although this proposition was at least mildly controversial among Antifederalists and followers of Jefferson, many of the Framers wanted the judiciary to impede attempts by other branches of government to overstep the role authorized by the social contract. Jefferson and his followers wanted interpretations of the limits of constitutional power to be determined by Congress in the way that such matters were resolved in the Parliament of the United Kingdom.

Protections against factions and other barriers included by the Framers of the Constitution have proven insufficient to protect property rights in the United States. Decisions regarding the use of resources are often based on political influence rather than the market. Judicial solutions have given way to rent-seeking politics. Justices of the Supreme Court of the United States, SCOTUS, often decide cases regarding physical and regulatory takings with deference to the other branches of government (Wagner 1987). The public choice approach provides insight into the process by which this transition has occurred.

United States Constitution

The actual text of the United States Constitution and the framework of government that it sets out are entirely consistent with Lockean notions of individual rights and representative government. While the ultimate power rests with the people, numerous safeguards are embedded in the structure of the government and private property garners special protection.

⁷ Presenting both sides of the issue using non-academic articles such as the two cited above is an especially effective way to stimulate healthy debate in the classroom. Students who feel strongly about either side can gather additional information and data from government sources, think tanks, or news agencies. Though most students will first consider the impact on consumers, it is also helpful to steer the conversation to the candy industry and other users of sugar.

⁸ Steel industry arguments for protection include national defense justifications (Gibson 2017) and serve to further the discussion. For the argument against protections, see Whiting and Zissimos (2017).

⁹ Discussion of these ideas may be enhanced by a review of the research on freedom. Various indices, often including a measure of property rights, exist in the literature. Measures of economic freedom, political freedom, and civil liberties permit comparison and ranking of countries or states. Three of the most widely cited indices are produced by the Fraser Institute, Freedom House and the Heritage Foundation. Berggren (2003) provides a brief description of economic freedom and the implications of policies restricting freedom.

Protections Against Factions

Madison warned of factions in *The Federalist* No. 10 and argued for safeguards against the damage they might cause. Various protections were included in the framework of government set out in the new United States Constitution to insure against dominance by self-interested political actors. This new structure set up a government where power was to be shared among three separate branches: executive, legislative and judicial. Each branch was designed to carry out certain functions, yet relied on the others in various ways. The complex system of checks and balances assured that no branch could act unilaterally to take full control of the sovereign power. Where the branches could not come to agreement on particular issues, the inability to act preserves the status quo, further protecting the rights of the people.

To protect the politically weak minority, the Framers included several non-democratic elements to reduce the power wielded by the majority. The bicameral design of the legislative branch, with Representatives in the House and Senators serving different terms in office, assured that some lawmakers would face greater pressure from the electorate. Senators, elected indirectly through the state legislatures¹⁰, would be more insulated and thus able to take a longer-term view. The President is also elected indirectly; the Framers set up the Electoral College system to diminish the power of the majority.

The separation of powers and system of checks and balances further protect the rights of the minority from being trampled by restraining the power of the majority to create new laws. As both houses of Congress must agree on a bill before it goes before the President, 51 Senators can stop a bill from becoming law. Once a bill gains the approval of Congress, the President then decides whether the Executive will also approve the bill. The Presidential veto allows one man to obstruct the will of the majority. Congress can then override the President's veto upon a two-thirds vote in each house.

Supremacy Clause

Though Madison and/or Hamilton¹¹ argued in *The Federalist* No. 51 that the separation of powers was essential, the judicial branch was permitted a greater degree of independence so that it could curb abuses by the other branches of government. Hamilton, in *The Federalist* No. 78 argued that the judiciary must have the power to review legislation because such review serves to uphold Constitutional limitations on legislative power.

Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing (230).

The Constitution lacks explicit provisions stating that judges are authorized to review legislation. Yet, support for judicial review of legislation can be found in Article VI, Paragraph 2 of the United States Constitution, a section known as the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

¹⁰ Since adoption of the Seventeenth Amendment to the United States Constitution in 1913, Senators have been directly elected by the voters.

¹¹ Authorship of various Federalist papers has been debated because Madison, Hamilton and Jay signed the papers as Publius.

Hamilton, in *The Federalist* No. 78 reasoned that the legislature cannot be presumed to serve as judge of its own actions. Judicial review as a check on legislative power necessarily follows from the logic of the framework of government laid out in the Constitution.

It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts (231).

The issue of judicial review came before the SCOTUS in *Marbury v. Madison* (1803). The Court found that the Constitution, by its very structure, permitted the Court to declare acts of Congress to be unconstitutional. Chief Justice Marshall pointed to the consequences of an alternate finding.

The distinction between a government with limited and unlimited power is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

The Takings Clause

The Fifth Amendment, including the Takings Clause, was added after ratification of the Constitution in the Bill of Rights. This simple proviso, “nor shall private property be taken for public use without just compensation,” clearly indicates that property rights are vested but can be removed under certain circumstances, such as situations with high transaction costs.¹² The ambiguity of the circumstances has fostered most of the subsequent debate.

In circumstances where the existing structure of rights does not fit a new situation, rights must be established to assure efficient resource allocation. This allows for the provision of typical Lockean public goods by specifying the limits of government seizure of private property. For example, when the state attempts to assemble a contiguous tract of land to build a highway, a single holdout property owner may freeze negotiations, jeopardizing the entire project. Takings are generally accepted as necessary to avoid the holdout problem, essentially a problem of high transaction costs.

The work of Ronald Coase¹³ stimulated extensive research on the topic of transaction costs. While he generally favored market solutions,¹⁴ his critics open the door for government intervention in markets. Coase (1960) began with the assumption of zero transaction costs, analyzing the outcome where a cattle rancher is fully liable for damage to a neighbor’s crops, and then comparing this result to the alternative legal rule of no liability for damage. In the absence of transaction costs, negotiations between the farmer and the cattle rancher lead to the same allocation of resources regardless of the liability rule, because each is led to incorporate the costs and benefits of the proposed bargain into the decision-making process. Later dubbed the Coase Theorem, this proposition states that with zero transaction costs, the initial

¹² Transaction costs are all of the costs of carrying out transactions using the pricing mechanism of the market. Setting prices, engaging in negotiations, drawing up contracts, policing those agreements and settling disputes are costs of transacting in the market.

¹³ Coase (1937) provides his first analysis of transaction costs. Coase (1959) provides a more systematic treatment of the issue. Coase (1960) answered critics of his earlier work, including many Chicago economists. In *The Problem of Social Cost*, Coase provided the widely-known cattle example and advocated a program of research, inspiring many in the field of law and economics.

¹⁴ Note that Coase is not a Lockean. He does not imply, as Locke does, that first possession rights are crucial. Rather, he argues that property rights must be determined.

assignment of property rights will not alter the final allocation of resources, although the distribution of income and wealth will differ.

Coase then demonstrated the central importance of property rights and the pervasive nature of transaction costs. Contractual solutions require clearly defined property rights and transaction costs that are lower than expected gains; thus, parties may fail to reach an agreement when transaction costs are high or benefits are low. In these instances, the initial allocation of property rights does matter. The decision of the court may very well be the final word in deciding how resources will be used.¹⁵ Most criticisms of Coase's research¹⁶ relate to three basic points: 1) inter-industrial long-term effects; 2) distributional effects; and 3) the assumption of zero transaction costs (Parisi, 153).

The legal debate goes further into the details of what constitutes a taking and what compensation, if any, is required. Numerous Supreme Court decisions¹⁷ have wrestled with the meaning of "public use" and "just compensation" as well as the subtler questions of partial takings and regulatory takings. The judiciary has been called upon to determine the extent of property rights under the Takings Clause.

Given this pivotal role, the independence of the judicial branch is vital to upholding the guarantees in the Bill of Rights. If the independence of the judicial branch is compromised, the question becomes: will the protection of property rights be litigated entirely in the court system or will political pressures determine rights? Rent-seeking will prevail where political influence

¹⁵ An interesting case to discuss with students is *Bryant v. Lefever* (1879) in which the plaintiff brought a nuisance claim after the defendant stacked timber on the roof of his house. The plaintiff argued that the timber interfered with the airflow over his house and caused smoke to back up in his chimney whenever he lit a fire. The opinion of the Court of Appeals discussed the reciprocal nature of the problem and found in favor of the defendant. According to the Coasean perspective, the activities of both parties combined to cause the damage. In the absence of transaction costs, the judicial assignment of rights will not determine the final allocation of resources. Through negotiations, the man who lit the fire can pay the man who stacked the timber on his roof to move the timber. The value of the property rights and the negotiated side payments alter the wealth of the two parties. In this case, the defendant becomes wealthier; however, if the judgment had been in favor of the plaintiff, he would have been wealthier as a result of negotiations subsequent to the judges' decision. The critical point to remember is that in the absence of transaction costs the assignment of rights will not alter the allocation of resources, but will alter the distribution of income and wealth between the parties.

¹⁶ Research critical of Coase includes Calabresi and Melamed (1972), Cooter (1982) and Holmes and Sunstein (1999). Coase (1988) responded to the critics.

¹⁷ Some cases of interest include: *Hadacheck v. Las Vegas* (1915); *Pennsylvania Coal Co. v. Mahon* (1922); *Village of Euclid, Ohio v. Ambler Realty Co.* (1926); *Miller v. Shoene* (1929); *Berman v. Parker* (1954); *Penn Central Transportation Company et. al. v. City of New York et. al.* (1978); *Agins v. Tiburon* (1980); *Hawaii Housing v. Midkiff* (1984); *First English Evangelical Church v. County of Los Angeles, California* (1987); *Nollan v. California Coastal Commission* (1987); *Hodel v. Irving* (1987); *Keystone Bituminous Coal Association v. DeBenedictis* (1987); *Lucas v. South Carolina Coastal Commission* (1992); *Dolan v. City of Tigard* (1994); *Casino Reinvestment Dev. Auth. V. Banin* (1998); *Palazzolo v. Rhode Island* (R.I. 2000); *Palazzolo v. Rhode Island* (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002); and *Kelo v. City of New London, Connecticut* (2005).

controls the allocation of rights. The shift of emphasis in the federal legal system from a Lockean vision to a Hobbesian vision has occurred in many small steps within the various branches of the federal government. “It is seldom that liberty of any kind is lost all at once. Slavery has so frightful an aspect to men accustomed to freedom that it must steal upon them by degrees and must disguise itself in a thousand shapes in order to be received.” (Hume, 118)

The Executive Branch

The Framers of the Constitution envisioned the executive branch to function as a controlling device through the veto power. They intended that the President enforce the Constitution and laws enacted by Congress. The Framers included several checks on the power of the executive, though the protections they bestowed have been reduced over time, making the executive branch a much more activist force.

Article II of the Constitution lays out the qualifications, election proceedings, powers and impeachment measures for the executive branch of the federal government. The President, Vice President, and a variety of departments and officers make up the executive branch. Ratified in 1804, the Twelfth Amendment changed the election process so that candidates clearly run for the office of President or Vice President. Otherwise, the Constitutional basis for the power of the executive has remained unaltered.

As originally conceived by the Framers, the President operates as a check on the legislative power. The President can veto acts of Congress, though Congress may override the veto with a two-thirds vote in both the House and Senate. The power to veto acts of Congress permits the President to assert his political will, counter to the intentions of the Framers. President Andrew Jackson was the first president to use the veto power extensively, and many presidents who followed him have used the veto power to set the nation’s legislative agenda.

Several checks on the power of the executive are included in the Constitution. The President, Vice President and federal judges may be impeached and, if convicted, removed from office. The Senate holds the exclusive power to try impeached officials, including the President, though only the House of Representatives may vote to file charges of impeachment. The Senate must confirm all presidential appointees and ratify treaties.

Pressures on the Executive Branch

The key relevance of the executive branch to this study is the power of the President to appoint justices to the Supreme Court. This important power is checked by the requirement that all nominees undergo a process of advice and consent by the Senate. These powers and the declining effectiveness of the constitutional checks leave the executive branch open to various pressures.

All elected officials face vote pressures, though this pressure is tempered by the realities of representative democracy. Since the probability of casting the deciding vote is tiny, individual voters do not gather the necessary information about the candidates to make an informed decision. Many realize that their vote will not decide the election and rationally choose to abstain from the costly act of voting at all. Those who do show up at the polls, perhaps out of a sense of civic duty, are ignorant of much of the information necessary to make a truly informed decision.

The Constitution specifies that voters do not elect the President directly; rather, the President is elected indirectly through the Electoral College. The presidential election is a very high profile election and voters are more likely to gather information about presidential candidates. Still, the indirect nature of the vote for President and the minuscule chance of casting the decisive vote in a national election combine to reduce the effort of voters in gathering information.

The vacuum created by rational ignorance and rational abstention is filled by well-organized interest groups who lobby the candidates (Olson 1965). These groups pressure politicians to support policy changes that will favor the members of the interest group. Campaign contributions and endorsements are traded for promises. While the benefits of policy are concentrated to serve a select few among the members of the interest group, the costs of providing those benefits will be spread among the broader electorate, who remain rationally ignorant. The most effective interest groups will be those small groups that are able to avoid the free rider problems associated with political benefits that often have public characteristics (Ekelund and Tollison 2001).

Once elected, the President can make good on his promises by filling vacancies on the Supreme Court with justices who support the ideological and political goals of his political supporters. Within the Federal court system, the appointments process is an inherently political process. Interest groups will exert direct pressure on the executive branch in an attempt to influence Supreme Court nominations.

As sitting members resign, retire or die, vacancies on the bench must be filled by the President. The President nominates judges to fill the positions of justices or chief justice. The Chief Justice of the Supreme Court presides over meetings and assigns the writing of opinions. This position carries with it the ability to significantly shape the direction of the Court. For example, the Marshall Court, 1801-1835, under Chief Justice John Marshall greatly enhanced federal power at the expense of states' rights. Thus, elevating a sitting justice or appointing a chief justice enables the President to have a substantial impact on the Court.

Although no qualifications for justices are laid out in the Constitution, one would expect nomination based on competence and ethics; however, it is clear that ideology, political support, and political activism also play a role. If the President is popular and the Senate is controlled by his party, the President enjoys great leeway in his selection of nominees for the bench. When circumstances are less favorable, the President may opt to nominate those who appear harmless to the political constituencies of the majority party. The American Bar Association weighs in on the suitability of the President's nominees. The ABA tends to favor judicial activism on civil rights issues and restraint on issues involving economic rights, positions that cause some writers to perceive the ABA as left-leaning.

The Legislative Branch

Article I of the Constitution sets out the framework, powers and many of the procedures of the legislative branch. Consisting of a bicameral Congress, the legislature is the law-making branch of the federal government. The House of Representatives holds the sole power to propose bills for raising revenue and can vote on charges of impeachment. The Senate exclusively has the power to ratify treaties, try impeached officials, and confirm presidential appointees.

Various amendments to the Constitution have directly impacted the legislative branch. The Fourteenth Amendment established rules for the apportioning of representatives in Congress to states. The Sixteenth Amendment authorized Congress to levy federal taxes on income. The Seventeenth Amendment established direct election of senators and the Twentieth Amendment changed the day Congress convenes.

The system of checks and balances works to rein in the legislature as well as the other branches of the federal government. Congress may impeach federal officers, including the President, Vice President, and federal judges. The Chief Justice of the Supreme Court presides

over the trial and a conviction requires a two-thirds vote in the Senate.¹⁸ The President can veto any legislation passed by both houses of Congress; however, Congress can override the President's veto with a two-thirds vote.

Pressures on the Legislative Branch

The key relevance of the legislative branch to this study lies in its powers to make law and the role of the Senate in the appointment of justices to the Supreme Court. Statutes enacted by Congress could be within or outside the confines of the Constitution. The House plays no role in the appointment process. The appointment process for presidential nominees to the Supreme Court gives the Senate great sway over the makeup of the Court. These opportunities to play politics leave the legislative branch open to many pressures.

Members of Congress face pressure to satisfy voters to ensure reelection; however, rational ignorance moderates the effect of direct elections. House Representatives face election every two years while one-third of all Senators are elected every two years for six-year terms. While most voters know the names of the presidential candidates, fewer know the names, let alone the policy positions, of the various men and women who run for Congress.

Various interest groups step in to pressure candidates to adopt policy positions favorable to the members of the group. Campaign contributions and direct advertising on behalf of candidates help to ensure that the candidate will win the election. Once elected, the politician repays the group by supporting policies that favor the members of the interest group. By directly influencing some of the major players in the Senate confirmation proceedings, interest groups are able to indirectly influence the members of the Court and other presidential appointments.

The Judicial Branch

Article III of the Constitution suggests a simple framework for the judiciary by providing that "(t)he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Constitution also contains several provisions intended to protect the independence of the judiciary. Supreme Court justices are nominated by the President and confirmed by the Senate. Once confirmed by the Senate, justices serve for life, barring resignation or impeachment. Also, the salary of a justice cannot be reduced during his or her time in office to prevent the legislature from imposing financial penalties on individual justices.

The Role of Justices

The structure of the judicial branch, as originally incorporated into the Constitution, was designed by many of the Framers to protect the Constitution from the executive and

¹⁸ To date, the House has initiated impeachment proceedings 62 times, though only seventeen federal officers have been impeached. Only two presidents, Andrew Johnson and William Jefferson Clinton, have been impeached and both were acquitted by the Senate. One cabinet officer, William W. Belknap, the Secretary of War, resigned before his trial. Senator William Blount was impeached even though the Senate had already expelled him. Associate Justice Samuel Chase was acquitted. Twelve other federal judges have been impeached, including Alcee Hastings who was convicted for taking a bribe and later won election to the House of Representatives. The House Judiciary Committee approved articles of impeachment against President Richard Nixon, but he resigned prior to House consideration of the impeachment resolution.

legislative branches. Judicial deference to the legislative or executive branches of government weakens the system of checks and balances. Decisions handed down by the SCOTUS increasingly depend on the identity of Justices appointed to the Supreme Court and their judicial philosophy regarding the role of justices.

Aside from general provisions regarding jurisdiction, the text of the Constitution is silent regarding the practical functioning of the Supreme Court. Specifically, the text of the Constitution is ambiguous regarding the role of justices, leaving this decision to be made, at least in part, by the justices themselves. Some assistance with this difficult question can be found, however, in *The Federalist* No. 78. There, Hamilton provided specific guidance for judicial review of legislation.

A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents (231).

Thus, the Framers firmly advocated the Lockean notion that the supreme power rests with the people and the Constitution should be favored over other inferior sources of law. The independence of the judiciary was to be protected to ensure that the rights of the people were protected from the other branches of government.

In practice, the ambiguity of the Constitution with regard to the functioning of the Court and the independence it provides the Court may serve to increase political activism. Justices must decide their own stance as regards the meaning of their sworn oath to uphold the Constitution and the means by which they will implement that pledge. Though legislators initiate and enact legislation, the Court can review that legislation and strike it down if they find that it violates the Constitution. Justices on the Court have a range of alternatives. At one extreme is unconstrained activism where justices make whatever rules they wish. Absolute judicial restraint, at the other extreme, leads justices to always accede to the legislature.

Under the doctrine of judicial review, justices have taken varied approaches generally and many have taken different approaches on the many issues that they are asked to consider. Some argue that the courts should actively monitor the legislature to discover and strike down infringements on the Constitution by the legislature. This judicial activism is justified as necessary to protect the rights of individuals. Others favor judicial restraint, arguing that the courts should show deference to the legislature as the representative of the people. Judicial pragmatism suggests that there should be no general presumption in favor of the courts or the legislature; rather, a pragmatic decision regarding the specific circumstances should allow justices to determine the best way to achieve principled objectives.

Each of these approaches has significant weaknesses. Unconstrained activist justices are likely to be guided by their personal political agendas and spurred on by the dominant special interest groups. On the other hand, absolute judicial restraint leaves individual rights vulnerable because of the rational ignorance of the electorate, ideological pressures within the legislature, vote trading and logrolling by minority factions. The ad hoc middle ground approach employed by judicial pragmatists leaves the courts and the legislature open to being used to achieve objectives that the other could not accomplish.

The two sides of this debate differ greatly in their views of the Constitutional text and the implications for judicial review of legislation. On one side of the debate are those who argue that several of the words used in the Constitution, in practice, have no fixed meaning. They contend that, as circumstances change within society, the meanings of words change.

This skepticism forms the basis of the notion that words must be reinterpreted by each successive generation in an effort to determine the meaning of the “Living Constitution”.

On the other side of the dispute are those who call for a strict constructionist approach to the text of the Constitution and judicial review. Strict construction, in general, requires that justices base their decisions on the actual wording of the Constitution and the notes and interpretations surrounding it. And, justices are not bound by precedent which derives from judgments based on judicial activism, restraint or pragmatism. Justices are permitted to make law from the bench only where the Constitution is silent regarding a particular issue and even then, in cases of particular importance, amending the Constitution is preferable.

There is a fundamental tension between the two competing notions that underlie these different approaches. The notion that the Constitution leaves the ultimate sovereign authority with the people, and their representatives by proxy, is in direct opposition to the notion that the courts make the final determination under the doctrine of judicial review. Proponents of the doctrine of judicial review argue that the independence of justices allows them to better interpret the law because they are insulated from normal political pressures. This allows justices to protect the Constitution in times of strife, such as war and economic disaster.

The opponents of judicial review argue that the hands of legislators in office should not be tied by the Framers. Also, they contend that judicial review separates principles from politics and leads to a decline in the sense of moral responsibility among the public. They fear that justices, left free to question legislators, will impose their own views about the proper ordering of society, on the pretense that they are consistent with the views of the Framers.

These views are most at odds where the Constitution is particularly vague or silent. The unavoidable discretion necessary in these situations opens the door for justices to force society to conform to their preferred social ideals. The crux of the debate on this topic centers on whether judicial discretion in the review of legislation should be constrained by current views of justice, the Framers’ intent, or even the Constitution itself.

Interpretation of the United States Constitution is a source of heated debate even among those who call for strict construction. An attempt to apply the precise wording of the Constitution leads to an endless play on words. Strict construction by a precise reading of words is actually quite difficult because words have changed meaning. It would be necessary to go back to the eighteenth century meaning of individual terms, a prospect that may only increase the debate rather than resolve it.

An alternative approach to strict construction calls for justices to construe the Constitution in accordance with the original spirit of the Constitution. It is clear in Madison’s later papers that the text of the Constitution is preferred as having authority over even the debates of the Framers; yet, remaining doubt must be resolved by looking to meaning attached to it by the people.

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, & as a source perhaps of some lights on the Science of Govt. the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses (Madison 1821).

Madison, together with Hamilton, greatly influenced the debate over the ratification of the Constitution in *The Federalist Papers* and that debate sheds light on the ideas and

understanding of the people at the time of ratification. In the shadow of the American Revolution, the people wished to protect their rights, not least the right to property, against a despotic government.

Madison, in his earlier papers, had provided his understanding of the proper role of government with respect to the people in general and their property in particular. "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own* (Madison 1792)". If the Constitution is to be meaningful, it must be strictly construed to comply with the spirit in which it was ratified.

In the context of the takings debate, Epstein (1985) rejects calls for linguistic skepticism and advocates the ordinary usage definition of "private property" as necessary not only to protect property, but also to maintain the rule of law (20-24). Epstein supports his argument by pointing to the definition employed by Blackstone, for whom "the right of property (is) that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (22). Blackstone and Locke, each who deemed the protection of private property as crucial, had a strong influence on the Framers and the understanding of the people at the time of ratification. Thus, Epstein argues that "greater progress will be made by assuming that the clause is designed to do what it says, namely to ensure that private property is not taken for public use without just compensation,"(26) in accordance with the spirit in which it was ratified by the people.

Pressures on the Judicial Branch

The key relevance of the judicial branch to this discussion lies in its ability to check the power of the other branches of government as it carries out its duty to uphold the Constitution. While the judicial philosophy of an individual justice may impede or promote political activism, justices face additional pressure from a variety of sources. The efficacy of the Constitutional provisions aimed at reining in the power of the judiciary has eroded in the face of these pressures.

The Constitution includes several checks on judicial power; however, some have only limited practical significance. The possible exertion of judicial power alters the incentives faced during nomination by the executive and the process of Senatorial advice and consent. Once in office, justices are protected from retribution by the other branches of government, though not perfectly.

The Court faces pressure because of the ambiguity of the Constitution regarding the structure of the federal courts. For example, the number of justices on the Supreme Court has varied over time. Established in 1789, the Supreme Court originally consisted of six justices; however, at one point after the Civil War, there were ten justices on the Court. Since 1869, there have been nine justices on the Court, though President Franklin D. Roosevelt made an attempt to increase the number in 1937. The Roosevelt administration made an overt attempt to pressure the Court to support the New Deal. The majority leader of the Senate, Joseph Robinson, apparently gathered enough votes to pass a Court packing bill, despite the disapproval of the Senate Judiciary Committee, but he died before the bill came up for a vote, and the bill died also.

Within the political system, the separation of powers and the role of the legislature vis-à-vis the judiciary becomes a political factor. To reduce the power of the Court, Congress could attempt to restrict the jurisdiction of the Court or adopt constitutional amendments. Congress and the President, working together, could attempt to reconstitute the Court as seats

come open. While all Supreme Court hopefuls face substantial inquiry during confirmation hearings, for some nominees the media circus surrounding the hearings can be staggering. While the attention is politically motivated, the life tenure of the position and range of issues that may come before the nominee justify the level of scrutiny and rigor of the proceedings.

Congressional pressure can also be exerted through financial appropriations. Although Congress is unable to reduce the nominal salaries of justices, its failure to raise salaries during inflationary times operates as a real wage decrease. In fact, salaries have not kept up with inflation and certainly do not compete with the opportunities available for highly skilled attorneys in private practice. Congress also holds the purse strings for funding of perks associated with office and even support services.

In one simple way, the power of the judiciary is constrained procedurally. Supreme Court justices are restricted to deciding the cases that come before the Court, thus limiting justices to a reactive role with limited ability to establish an agenda for political activism. Although they are a small portion of the cases heard by the Court, class action lawsuits brought by interest groups provide opportunities for willing justices to render decisions on politically charged issues. As the number of cases increases, so does the degree of judicial activism. The sheer numbers of lawsuits provide many occasions for justices to rule on their issues of choice. To compensate for the increasing caseload, justices rely more heavily on staff in the selection of cases and the preparation of documents they will draw upon to reach a decision.

Interest group pressures are another important factor. Interest groups will attempt to influence nominations and confirmations, often indirectly as these groups impact elections for the President and Senators, which make up the key players in the process. Interest groups may also attempt to intimidate justices through media attention on the deliberations of the Court or implicit threats of civil disobedience in the event of decisions unfavorable to their cause. These tactics should not sway an independent judiciary, though they are effective in some instances.

The desire for respect and a quiet life can be a powerful influence on the decisions of individual justices. These majoritarian pressures are precisely the danger warned against by Madison in *The Federalist* No. 10. Epstein (1985) recommends a principled solution:

If the power of the judges is to be legitimated, they cannot be just another political organ of government. As they cannot appeal to popular will, they must be able to provide authoritative interpretations of the constitutional text that are not simply manifestations of their own private beliefs about what legislation should accomplish. In order for judges to make principled interpretations, the language of the Constitution must be precise enough to bind even those who disagree with what it says, for the mission of constitutional government must soon founder if judges can decide cases as freely with the Constitution in place as without it (19-20).

Conclusion

This paper has outlined a way for instructors to lead discussion of property rights and the public choice pressures on the various players in the U.S. Federal system within the Hobbes versus Locke framework. Currently, the U.S. federal system is a mixture of these approaches and there is an increasing shift toward a Hobbesian based system. The Constitutional provisions designed to protect property rights have proven insufficient to protect property rights in the United States. Property owners have been stripped of rights through physical and regulatory takings decisions handed down by the SCOTUS. Public choice pressures on the various players in the US federal system provide insight into the process by which this has occurred. Property rights increasingly derive from the sovereign as Justices of the SCOTUS decide cases regarding physical and regulatory takings with deference to the

other branches of government. Decisions regarding the use of resources are based on political influence rather than the market as judicial solutions have given way to rent-seeking politics.

This transition provides substantial material for classroom debate. Further class discussions or a term paper assignment could require students to analyze landmark cases that have impacted property rights, specific laws or policies that restrict property rights or historical instances of direct political pressure on the Court, such as FDR's attempt to pack the Court. The interdisciplinary nature of the discussion encourages input from students with a broad range of backgrounds and interests. Students majoring in economics, as well as political science, history, general business, pre-law and philosophy respond well to this line of discussion, making this framework especially well-suited to use in an upper division elective with limited pre-requisites. Takings remains a controversial issue analyzed by many scholars, including several public choice scholars.¹⁹ Their work can be included to prepare for teaching in this area or to build a syllabus for a full semester course.

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¹⁹ See: Ellickson (1977); Epstein (1985); Epstein (1993); Farber (1992); Fischel (1995); Levmore (1991); Miceli and Segerson (1996); Parisi (1995); Rowley (1992); Siegan (1980); and Wyeth (1996).

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