Washington University Law Review

Volume 1 | Issue 4

January 1916

Special Benefit Assessments as Due Process of Law

Ralph R. Neuhoff

SPECIAL BENEFIT ASSESSMENTS AS DUE PROCESS OF LAW.

Our question is the validity of special assesments as affected by the following clause of the Federal Constitution:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property *without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws."[1] (Italics mine.)

The phrase "due process of law" occurs also in the Fifth Amendment, as follows:

> "No person shall be * * * *deprived of life, liberty or property without due process of law* * * * " (Italics mine.)

Authority of Cases Under Fifth Amendment.

The Fifth Amendment restricts the United States, whereas the Fourteenth Amendment restricts the states. It has been intimated that the cases under the one would not be necessarily binding as to the other. In *Wight vs. Davidson*,[2] the majority opinion calls attention to the fact that *Norwood vs. Baker*[3] was under the Fourteenth Amendment and says:

> "But it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the Acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation."

The dissenting opinion combats this view with these words:

> "It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the Fourteenth Amendment but not applicable under the Fifth Amendment, or upon principles applicable under the Fifth and not applicable under the Fourteenth Amendment. It seems to me that the words 'due process of law' mean the same in both Amendments."

---

[1]Fourteenth Amendment, section 1.
[2]181 U. S. 371, 384.
[3](hereinafter referred to)

In another case in the same volume[4] the court states that the purpose of the Fourteenth Amendment is to extend to citizens and residents of the States the same protection against arbitrary state legislation as is afforded by the Fifth Amendment against similar legislation by Congress. The dissenting opinion concurs heartily as to this point.[5]

Later decisions seem to make no distinction between the two Amendments, so it is probably safe to rely on cases arising under the Fourteenth Amendment as authority concerning the Fifth Amendment, and vice versa.

Nature of Special Assessments.

The special assessment is held to be referable to the taxing power.[6]

The choice of subjects of taxation is, generally speaking, a matter of legislative discretion.[7]

As stated by the United States Supreme Court in a recent case:[8]

> "A tax is an enforced contribution for payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the State, or upon those of a given class or locality, its essential nature is the same. The power of segregation for taxing purposes has every day illustration in the experience of local communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision are compelled to bear the burdens both of the successes and of the failures of the local administration. When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the Federal Constitution that for every payment there

[4]Tonawanda vs. Lyon, 181 U. S. 399.
[5]See also Cass Farm Co. vs. Detroit, 181 U. S. 396, 398.
Detroit vs. Parker, 181 U. S. 399, 401.
French vs. Barber Asphalt Paving Co., 181 U. S. 324, 329.
[6]Bauman vs. Ross, 167 U. S. 548.
11 Encyclopedia of U. S. Sup. Ct. Rep. 3.
Meier vs. St. Louis, 180 Mo. 391.
Parsons vs. District of Columbia, 170 U. S. 45.
French vs. Barber Asphalt Paving Co., 181 U. S. 324.
Garrett vs. St. Louis, 25 Mo. 505.
[7]Mobile vs. Kimball, 102 U. S. 691, l. c. 704.
[8]Houck vs. Little River Drainage District, 239 U. S. 254, l. c. 265.

must be an equal benefit. The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners."

In the case last cited a drainage district had been organized under the statutes of Missouri and a preliminary tax of twenty-five cents per acre levied in accordance with the statute on all the land in the district, including the land which would ultimately be taken for the purposes of the district and which could not, therefore, be said to be benefited.

Upon the objection being raised that the assessment without corresponding benefit was not due process of law, the court said that it was not necessary to base the preliminary tax upon special benefits, accuring from a completed plan, and that the exaction was not such as could be considered as abuse of the State's discretion.

Validity of Legislative Assessment.

It is said that if an assessment by the legislature is palpably arbitrary and a plain abuse, it will not be due process of law.[9]

An investigation of when the action of the State in assessing the benefits will be considered as due process and when it will not be so considered may best be pursued by a study of a few of the leading cases in the United States Supreme Court.

Norwood vs. Baker.[10] In this case, the village of Norwood passed an ordinance to condemn a strip of land fifty feet wide through the property of Ellen R. Baker. The statute of Ohio[11] gave the council permission to assess the cost and expenses of opening any street upon the abutting or contiguous lots according to several methods, one of which was: "by the front foot of the property bounding and abutting on the improvement * * *." In the ordinance, the council provided that not only the cost of the land taken, but also the expenses, cost of advertising and of the condemnation proceedings should be assessed on the property abutting on the strip taken.

In other words, Mrs. Baker received nothing for the strip taken and had to pay the expenses of the proceedings in addition. The majority of the Supreme Court of the United States held that

[9]GAST REALTY CO. VS. SCHNEIDER GRANITE CO., 240 U. S. 55.
[10](1898) 172 U. S. 269.
[11](1890) § 2264.

the proceeding was not due process of law. The decision, confined to the facts, is still authoritative.[12]

However, let us examine the dicta. At page 291, the court said:

> "The assessment was by the front foot, and for a specific sum, representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested on a basis that excluded any consideration of benefits."

Again, the court says:[13]

> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation of private property for public use without compensation."

From this and other language in the opinion, it was thought for a time that the mere fact that a rule was prescribed excluding all inquiry into benefits was sufficient to render the proceeding a taking of property without due process of law.[14]

French vs. Barber Asphalt Paving Co.[15] This case involved the paving of a street in Kansas City, Missouri. In accordance with the charter, the cost of the paving had been assessd as a special tax on the property abutting the street in proportion to the front feet. There was no hearing had or provided as to the apportioning of the benefits. It was urged that the adoption of a rule which precluded a hearing on the question of benefits was not due process of law under the ruling in *Norwood vs. Baker* (supra). The majority of the court held that this was not the necessary import of *Norwood vs. Baker*, and distinguished it with these remarks:[16]

> "That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, in-

---

[12]French vs. Barber Asphalt Paving Co., 181 U. S. 324.
Wagner vs. Baltimore, 239 U. S. 207, 219.
White vs. Tacoma, 109 Fed. 409.
Fay vs. Springfield, 94 Fed. 409.
[13]p. 279.
[14]Zehnder vs. Barber Asphalt Co., 106 Fed. 107.
White vs. City of Tacoma, 109 Fed. 32, 33.
[15]181 U. S. 324, affirming Barber Asphalt Paving Co. vs. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934.
[16]p. 344.

cluding not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be *an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power.* (Italics mine) * * *

"But there is no such state of facts in the present case. * * *

"What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles."

The court therefore held that the proceeding was due process of law.[17]

In *White vs. City of Tacoma,*[18] the court says in regard to *French vs. Barber Asphalt Paving Co.* and the cases following it (p. 32):

"In these several decisions the Supreme Court recognizes the fact that the per front foot plan may be a perfectly fair method of apportioning the burden of paying for street improvements and that in cases in which it appears that assessments levied according to that plan are not in excess of the benefits to the property assessed, and are equal and fair, so that there is no ground for complaining of actual injustice, the assessments are not necessarily in violation of the Constitution of the United States merely because made according to the per front foot plan; and it is shown that no such inflexible rule was announced or intended by the court in its decision in the case of *Village of Norwood vs. Baker* * * *."

The front foot rule for paving has also been approved in later cases.[19] It has also been approved for water mains.[20] The area

[17]The dissenting opinion maintained that the procedure was unconstitutional on the ground that Norwood vs. Baker controlled, and that a rule had been prescribed excluding all inquiry into benefits.

[18]109 Fed. 33.

[19]Tonawanda vs. Lyon, 181 U. S. 389.
Webster vs. Fargo, 181 U. S. 394.
Cass Farm Co., vs. Detroit, 181 U. S. 396.
Detroit vs. Parker, 181 U. S. 399.
King vs. Portland, 184 U. S. 61 (one-half of the cost assessed on adjoining property.)
Chadwick vs. Kelly, 187 U. S. 540 (three-fourths of the cost.)
GAST VS. SCHNEIDER GRANITE CO., 240 U. S. 55, l. c. 58.
Houck vs. Little River Drainage District, 239 U. S. 254, 265.
See also note in 28 L. R. A. (n. s.) at p. 1144.

[20]Parsons vs. District of Columbia, 170 U. S. 45.

rule has been approved for sewer assessments.[21] So it has been held that the legislature may direct that the whole cost of an improvement be levied on the lands benefited thereby.[22] It has also been held due process of law for Congress to assess one-half the cost of a street opening on a benefit district.[23]

Louisville and Nashville Railroad Co. vs. Barber Asphalt Paving Co.[24] Here a railroad company was assessed according to front feet for the paving of a street in front of a lot in which its only interest was a right-of-way for its main roadbed. It pleaded that neither the right-of-way nor the lot would or could get any benefit from the improvement, but would rather be harmed by the increase of traffic. A demurrer to the plea was sustained. This was affirmed by the Surpeme Court of the United States on the ground that the Fourteenth Amendment does not require absolute exactness and that the legislature is warranted in considering the land simply in its general relations and apart from its particular use.

GAST REALTY AND INVESTMENT CO. vs. SCHNEIDER GRANITE CO.[25] This case grew out of the paving of Broadway in St. Louis. The tax was levied according to the charter which provides that one-fourth of the total cost shall be levied upon all the property fronting upon or adjoining the improvement according to frontage, and three-fourths according to area upon a district to be ascertained as follows: "A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved; which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into

---

[21]Shumate vs. Heman, 181 U. S. 402, affirming Heman vs. Allen, 156 Mo. 534 (a case of a district sewer in St. Louis.)
See also McGhee vs. Walsh, 249 Mo. 266.
[22]Spencer vs. Merchant, 125 U. S. 345.
[23]Briscoe vs. District of Columbia, 221 U. S. 547.
For other examples of assessments held due process see:
Williams vs. Eggleston, 170 U. S. 304.
Fallbrook vs. Irrigation District, 164 U. S. 42.
Hagar vs. Reclamation District, 111 U. S. 701.
Phillip Wagner Inc. vs. Leser, 239 U. S. 207.
Embree vs. Kansas City & Liberty Bond Road District, 240 U. S. 242, 36 Sup. Ct. 317.
Kelly vs. Pittsburgh, 104 U. S. 78.
St. Louis and Kansas City Lane Co., vs. Kansas City, 36 Sup. Co. 647—U. S.—
Seattle vs. Kelleher, 195 U. S. 351.
Soliah vs. Heskin, 222 U. S. 522.
[24]197 U. S. 430.
[25]240 U. S. 55, 36 Sup. Ct. 254, reversing Schneider Granite Co. vs. Gast Realty and Investment Co., 259 Mo. 153.

lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved * * *. If there is no parallel or converging street on either side of the street improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located."

The district established according to the foregoing charter provision was bounded by a line which "after running not a hundred feet from the street, leaped to near five hundred feet when it encountered such a tract, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away."[26]

This was held not to be "an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout."

The ordinance establishing the district was, therefore, held to be in conflict with the Fourteenth Amendment.

Municipal Assembly as Legislative Body.

The question has been raised whether a municipal assembly may apportion the benefits without giving a hearing which is required when a board or other subordinante body fixes the benefits.

In *Heman vs. Allen*,[27] the municipal assembly of St. Louis assessed the cost of a district sewer according to area on the sewer district, without giving a hearing. This was held to be due process of law by the Missouri court and was affirmed by the United States Supreme court.[28]

Apportionment by Non-Legislative Body.

Where the State legislature determines the benefits a hearing

---

[26]240 U. S. l. c. 59.
[27]156 Mo. 534.
[28]Shumate vs. Heman, 181 U. S. 402.
See also Barber Asphalt Paving Co. vs. French, 158 Mo. 534, l. c. 547.
Bi-Metallic Co. vs. Colorado, 239 U. S. 441, l. c. 445.
Farrar vs. St. Louis, 80 Mo. 379.
Morse vs. Westport, 136 Mo. 276, 286.
Prior vs. Construction Co., 170 Mo. 451.
Paulsen vs. Portland, 149 U. S. 30, 39.
Mullins vs. St. Mary's—Mo.—187 S. W. 1169.

is not essential to due process of law.[29] And where the legislature prescribes a rule by which the benefit district and apportionment are arbitrarily fixed, it is considered that the legislature has fixed these things.[30]

But where the legislature delegates to a non-legislative body its power to apportion the benefits, it is essential to due process of law that notice and a hearing be given the property owner on matters delegated.[31]

> "There is a wide difference between a tax or assessment prescribed by a legislative body, having full authority over the subject, and one imposed by a municipal corporation. And the difference is still wider between a legislative act making an assessment, and the action of mere functionaries, whose authority is derived from municipal ordinances."[32]

The boards or commissioners to whom the fixing of benefits is committed are considered to act in a *quasi-judicial* capacity, and for this reason a hearing is required.[33]

The legislature may determine some of the factors and leave others to subordinate bodies, in which case there need be no hearing on the part determined by the legislature.[34] So, it is held that the legislature may fix the total amount to be raised and direct that it be apportioned on the several tracts of land according to benefits.[35]

The body charged with the discretion of fixing the benefits must not abuse the discretion. Although there is a hearing, it will not be due process of law if the action of the taxing body is plainly arbitrary, any more than the action of the legislature would be due process of law if it were plainly arbitrary.[36]

---

[29]King vs. Portland, 184 U. S. 61.
Phillip Wagner Inc. vs. Leser, 239 U. S. 207, 36 Sup. Ct. 66.
Parsons vs. District of Columbia, 170 U. S. 45.
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112.
Carson vs. Brockton Sewerage Comm. 182 U. S. 398.
Webster vs. Fargo, 181 U. S. 394.
Tonawanda vs. Lyon, 181 U. S. 389.
King vs. Portland, 184 U. S. 61.
Williams vs. Eggleston, 170 U. S. 304.
[30]Chadwick vs. Kelley, 187 U. S. 540.
[31]Embree vs. Kansas City Road Dist., 240 U. S. 242, l. c. 247.
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 167.
Parsons vs. District of Columbia, 170 U. S. 45, l. c. 52 (semble.)
[32]Parsons vs. District of Columbia, 170 U. S. 45, l. c. 51.
[33]Parsons vs. District of Columbia, 170 U. S. 45, l. c. 52.
[34]Phillip Wagner Inc. vs. Leser, 239 U. S. 207, 218.
[35]Bauman vs. Ross, 167 U. S. 548.
Briscoe vs. District of Columbia, 221 U. S. 547.
[36]Myles Salt Works vs. Iberia Drainage District, 239 U. S. 478.
[35]Bauman vs. Ross, 167 U. S. 548.
Briscoe vs. District of Columbia, 221 U. S. 547.
[36]Myles Salt Works vs. Iberia Drainage District, 239 U. S. 478.

In the case last cited the Police Jury included in a drainage district land which was so high that it could not be benefited. Plaintiff alleged that his property was included not for the purpose of benefiting it but for the predetermined purpose of deriving revenue therefrom. The inclusion was held to take property without due process of law.

The hearing which is essential to due process of law where the benefits are fixed by persons of delegated authority, need not come at any particular time. If there is an opportunity to contest the benefits when the property-owner is sued on the tax bills, this is a sufficient hearing.[37]

Time of Assessment.

The assessment need not be made before the improvement is completed, nor need it be made under the provisions of the law under which the improvement is constructed.[38]

So, if the ordinance under which the improvement was constructed is void, an assessment may be had under a new ordinance or a legislative permission granted after the work is completed.[39]

Phillip Wagner Inc. vs. Leser, just cited, was a striking case of this. The General Assembly enacted a statute providing that a special tax be levied upon property in the City of Baltimore, benefited by improved paving, of the amount specified, said tax to continue as to each property for ten years from the time that it attached thereto; the proceeds to be used for improved paving as provided. The act further provided that all landed property in Baltimore, adjoining or abutting upon any public highway, *which had been* or should thereafter be paved with improved paving without special assessment was declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax levied under the act.

The objection was made that the act was unconstitutional in providing for an assessment for benefits already received. The

---

[37]Hagar vs. Reclamation District, 111 U. S. 701.
2 Page & Jones, Taxation by Assessment, §773.
Embree vs. Road District, 257 Mo. 593.
St. Louis vs. Richeson, 76 Mo. 470.
Walston vs. Nevin, 128 U. S. 578.
[38]Phillip Wagner Inc. vs. Leser, 239 U. S. 206, 36 Sup. Ct. 66.
Seattle vs. Kelleher, 195 U. S. 351.
Spencer vs. Merchant, 125 U. S. 345.
Lombard vs. West Chicago Park Comm., 181 U. S. 33.
[39]Cases in note [38] supra.

court said the question was foreclosed by *Seattle vs. Kelleher*[40] and quoted from this case as follows, (p. 359):

> "The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say for a public work already done * * *."

The court continued:

> "As said in the Kelleher case (p. 359), 'the benefit was there on the ground at the city's expense.' So far as any Federal constitutional requirement is concerned, the State might exercise its authority to assess because of this special benefit, although that assessment was deferred for some time after the work was done at public expense."

Some states[41] have provisions in their constitutions prohibiting laws retrospective in their operation. Such a provision prohibits an assessment under an ordinance or law passed after the improvement is constructed.[42]

RALPH R. NEUHOFF.

---

[40]195 U. S. 351.
[41]Const. Mo., Art. 2, §15.
[42]City of St. Louis to use vs. Clemens, 52 Mo. 133.
See also Des Moines and Miss. Levee Dist. vs. C. B. & Q., 240 Mo. 614, 145 S. W. 35.