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# Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis Goes Too Far

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# REGULATORY TAKINGS AND ORIGINAL INTENT: THE DIRECT, PHYSICAL TAKINGS THESIS “GOES TOO FAR”

ANDREW S. GOLD\*

## TABLE OF CONTENTS

Introduction .....	182
I. The Text: “Nor Shall Property Be Taken for Public Use Without Just Compensation.” .....	187
A. The Meaning of “Taken” .....	187
B. Other Clauses in the Constitutional Text.....	190
II. Madison’s Pre-Ratification Commentary .....	192
A. Madison’s Proposal of the Bill of Rights.....	192
B. The Framers’ Views on Property Rights.....	195
III. Madison’s Post-Ratification Correspondence and Other Early Commentary .....	200
A. Madison’s “Property” Essay.....	200
B. Madison’s Belief that Emancipation Required Compensation for Slaveowners.....	204
C. St. George Tucker’s Edition of Blackstone’s Commentaries.....	206
IV. Colonial, State, and Territorial Precursors to the Takings Clause .....	207
A. The Magna Carta and Colonial Charters.....	208
B. The Vermont Constitution of 1777.....	210
C. The Massachusetts Constitution of 1780 .....	211
D. The Northwest Ordinance.....	213
V. William Blackstone and Other Philosophical Influences on the Original Understanding of Just Compensation.....	216
A. John Locke .....	217

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B. The Civil Law Tradition .....	219
C. William Blackstone's Influence on the Understanding of the Common Law .....	221
VI. Colonial Practice.....	223
VII. Post-Ratification Case Law.....	228
Conclusion.....	240

## INTRODUCTION

Due to a scant and ambiguous historical record, the original intent of the Fifth Amendment Takings Clause cannot be known.<sup>1</sup> Yet, with increasing frequency, commentators have declared that the original understanding of the Takings Clause only covered "direct, physical takings."<sup>2</sup> In fact, this "direct, physical takings" thesis lacks historical support. Contrary to most recent scholarship, the text and historical record of the Takings Clause arguably support a just compensation requirement for regulatory takings.<sup>3</sup> The existing evidence, however, is sufficiently ambiguous to preclude a clear sense of the original understanding.

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

2. See William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) [hereinafter Treanor, *Just Compensation Clause*]; see also John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996) (arguing against modern regulatory takings doctrine on the basis of colonial land use regulation); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994) (finding that James Madison's choice of words supports the notion that the clause was only intended to cover direct and physical takings); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995) ("While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings.") [hereinafter Treanor, *Takings Clause*].

3. A regulatory taking is an acquisition of property by regulation of property rights, as when, for example, a law prohibits the right to use a parcel of land. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 101 (1985) (discussing various forms of regulatory takings and finding that the "protean forms of regulation all amount to partial takings of private property"). As the Supreme Court explained in *United States v. General Motors*, "[The Takings Clause] may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." 323 U.S. 373, 377-78 (1945). This Article addresses regulatory takings, as such, and will not address the distinction between partial and total regulatory takings.

This Article also considers consequential takings. For example, when a law destroys a piece of property or a property right by consequence of the regulation of something else, or a regulation that causes the flooding of land so that the property owner's property becomes useless. See EPSTEIN, *supra*, at 51-52 (discussing consequential damages); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1292 (discussing the theory that a compensable taking would be determined based upon the proximity of the government actor to the harm).

The Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Commission*<sup>4</sup> sparked an ongoing controversy over the original intent of the Takings Clause. The Court in *Lucas* held that any regulation of land that destroyed all value of the property constituted a taking.<sup>5</sup> In dissent, Justice Blackmun argued that James Madison intended the Takings Clause to be limited to "direct, physical takings."<sup>6</sup> Moreover, Blackmun cited early state court decisions that precluded compensation for regulations that solely affected property values.<sup>7</sup> Following the Court's concession that "Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all,"<sup>8</sup> heated debate ensued over the proper application of the original intent in the regulatory takings context.<sup>9</sup>

The leading twentieth-century case on regulatory takings, *Pennsylvania Coal Corp. v. Mahon*,<sup>10</sup> has come under scrutiny as well.<sup>11</sup> In *Mahon*, Justice Holmes, writing for the majority, declared:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits. . . . The general rule at least is, that while property may be

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4. 505 U.S. 1003 (1992).

5. See *id.* at 1027 ("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 proscribed use interests were not part of his title to begin with.").

6. See *id.* at 1057 n.23 (Blackmun, J., dissenting) (citing Treanor, *Just Compensation Clause*, *supra* note 2, at 711).

7. See *id.* at 1058 n.24 (Blackmun, J., dissenting) (citing *Coates v. City of New York*, 7 Cow. 585, 605 (N.Y. 1827); *Brick Presbyterian Church v. City of New York*, 5 Cow. 538, 542 (N.Y. 1826); *Commonwealth v. Tewksbury*, 11 Metc. 55 (Mass. 1846); *State v. Paul*, 5 R.I. 185 (1858)).

8. *Id.* at 1028 n.15.

9. See, e.g., William J. Fisher, III, *The Trouble With Lucas*, 45 STAN. L. REV. 1393, 1394 (1993) (arguing that Justice Scalia "selects from a large and eclectic set of constitutional principles those that best suit his purposes in a given case"). Professor Fisher claims that Justice Scalia deemed the Takings Clause's original meaning "entirely irrelevant." See *id.* In fact, Justice Scalia merely noted: "Justice Blackmun . . . argu[es] that our description of the 'understanding' of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant." *Lucas*, 505 U.S. at 1028 n.15. This Article shows that Justice Scalia's view—that colonial practices were of limited value in interpreting the original intent—is correct based on the absence of the Fourteenth Amendment, as well as the reliance on due process for early state property protection.

10. 260 U.S. 393 (1922).

11. See generally William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 816-17 (1998) (discussing the misunderstanding of the *Mahon* decision).

regulated to a certain extent, if regulation goes too far it will be recognized as a taking.<sup>12</sup>

Justice Holmes' view, based on the diminution of property value, has become enshrined in modern takings doctrine.<sup>13</sup> There is little evidence that his pragmatic doctrine of when a regulation "goes too far" is historically supported.<sup>14</sup> The novelty of Justice Holmes' particular formulation of regulatory takings law, however, does not mean compensation for regulatory takings was unintended by the Framers.

It is the thesis of this Article that most scholarly commentary on the original understanding of the Takings Clause does not address the actual original understanding,<sup>15</sup> but merely the wisdom of adopting one of the various historical views on eminent domain. In particular, the constitutional text and pre-ratification history relied upon by the "direct, physical takings" thesis offers insufficient evidence to prove just compensation excludes regulatory takings.<sup>16</sup> In contrast, the post-ratification commentary of James Madison, author of the Takings Clause, and the influential philosophies of William Blackstone, John Locke, and Hugo Grotius appear to support a regulatory takings analysis.<sup>17</sup>

The Takings Clause represented a new development when ratified, as it limited the powers of the legislature as well as the executive.<sup>18</sup> A regulatory taking was unthinkable in the colonies and under most

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12. *Mahon*, 260 U.S. at 415.

13. See Treanor, *Takings Clause*, *supra* note 2, at 798 ("[*Mahon*] has repeatedly been described as the central case in modern takings law.").

14. See EPSTEIN, *supra* note 3, at 29 ("Historical arguments have played virtually no role in the actual interpretation of the clause.").

15. For purposes of this Article, "original understanding" and "original intent" will be used interchangeably to refer to the Framers' meaning of the constitutional text. This Article will not use a theory that attempts to "translate" the Founders' motivations into modern circumstances. For an explanation of the merits of "translation," see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1195 (1993).

16. Cf. Hart, *supra* note 2, at 1253 (relying on evidence of colonial land regulation); Treanor, *Takings Clause*, *supra* note 2, at 836-55 (relying on James Madison's post-ratification commentary).

17. See generally 2 WILLIAM BLACKSTONE, COMMENTARIES \*134 (suggesting that every person is entitled to use and enjoyment of his or her property except where that use and enjoyment interferes with the law); 2 HUGO GROTIIUS, DE JURE BELLI ET PACIS 118-19 (William Whewell trans., Cambridge Univ. Press 1853) (1625) (suggesting that the taking of a right requires compensation); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 119 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690) (arguing that every person that possesses or enjoys property gives tacit consent to the laws of the government).

18. See BERNARD SIEGAN, PROPERTY AND FREEDOM 26 (1997) (arguing that Madison adopted Hamilton's language from the New York Constitution, which "removed the power of the legislature to deprive a person of his rights," and thus only the judiciary may take property away).

early state constitutions because an act of the legislature that took property was considered to imply consent of the property owner.<sup>19</sup> Moreover, the Takings Clause originally was inapplicable to the states. The record of colonial just compensation practices is, therefore, of limited value because the state governments had no experience enforcing a just compensation clause of such sweeping jurisdiction, and the state ratifying conventions had no reason to expect the Takings Clause to reach their own legislatures.

From the nation's earliest days, takings case law has been inconsistent. Much history surrounds property rights in the Founding Era, but little history is directly applicable to the Takings Clause.<sup>20</sup> The lack of historical material on the Takings Clause has caused the original intent analysis to hinge largely on the scholar's choice of emphasis.<sup>21</sup> Although the Supreme Court's case-by-case handling of the Takings Clause may satisfy no one, the original understanding cannot serve as a guide for the courts. The riddle of regulatory takings may be resolved only through the common law and *stare decisis*.<sup>22</sup>

This Article adopts the standard methodology of originalism, interpreting the Constitution according to the following hierarchy of factors: (1) the plain meaning of the text in light of the entire document; (2) public statements explaining the text contemporaneous with ratification; (3) private statements contemporaneous with ratification; and (4) post-enactment history and practice.<sup>23</sup> An analysis of the Takings Clause through the

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19. *But see* FRED BOSSELMAN ET AL., THE TAKING ISSUE 84 (finding that "the use of land, both in rural and urban areas, was extensively regulated in the colonies"); Hart, *supra* note 2, at 1253 ("[C]olonial governments regulated land use extensively for purposes other than preventing harm.").

20. *See generally* Hart, *supra* note 2, at 1254-81 (providing a survey of colonial land use law).

21. *See* BOSSELMAN ET AL., *supra* note 19, at 99-100 (discussing the lack of data and legislative history on the motivation behind the Takings Clause); Treanor, *Takings Clause*, *supra* note 2, at 811-12 (explaining that scholars focus little attention on original intent because of a lack of evidence of the Framers' intent).

22. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 745 (1988) (arguing that the original understanding must defer to longstanding precedent). Where there is a longstanding precedent and the original intent is unclear, it would make sense to follow precedent. Such a rule requires just compensation for at least some regulatory takings.

23. *See* Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552-53 (1994) (presenting this hierarchy of factors and noting the variety of scholars that use this methodology, including Akhil Reed Amar, Robert Bork, John Hart Ely, and Justice Antonin Scalia); *see also* ROBERT BORK, *THE TEMPTING OF AMERICA* 144 (1990). Bork states that:

The search is not for a subjective intention. . . . [W]hat counts is what the public understood. Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution

application of the originalist theory indicates that: (1) the text is silent as to regulatory takings; (2) public and private statements contemporaneous with ratification were essentially nonexistent; and (3) post-enactment history is limited generally to a 1792 essay by James Madison and early state court decisions construing state just compensation clauses.

Scholars agree that very little historical material exists from which to ascertain the Framers' intent.<sup>24</sup> The just compensation requirement first appeared when James Madison offered his draft of the Bill of Rights to Congress in a speech on June 8, 1789.<sup>25</sup> This draft appears to be the sole pre-ratification statement that directly addressed the Takings Clause.

The lack of material has made historical analysis difficult because there is no contemporary discussion of what the text might cover. Professor Stoebecker pondered "how [eminent domain] got into our constitutions at all."<sup>26</sup> It appears that Madison authored the Takings Clause of his own initiative.<sup>27</sup> This historical gap has caused scholars to focus on Madison's remarks, both before and after ratification.<sup>28</sup>

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would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the [ratifying] conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.

*Id.*

24. See BOSSELMAN ET AL., *supra* note 19, at 99-100. Bosselman states that:

There is a conspicuous absence of historical data that might enable one to determine why Madison added the just compensation language to the Fifth Amendment. Records of state constitutional conventions and ratifying conventions shed no light on the subject. Nor do the debates in Congress at the time the Bill of Rights was proposed. . . . Such material as is available discloses virtually no debate on the last clause of what is now the Fifth Amendment.

*Id.*; see also Treanor, *Takings Clause*, *supra* note 2, at 811 ("Scholars have generally focused more on philosophy and economics than they have on history, partly because of the paucity of historical evidence of the framers' intent.").

25. See 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1789) ("No person shall . . . be obliged to relinquish his property where it may be necessary for public use, without just compensation."); BOSSELMAN ET AL., *supra* note 19, at 99 ("When Madison's draft was first offered to the House in a speech during the first session of Congress, on June 8, 1789, it added a 'just compensation' requirement. . . . The language, but not the substance changed slightly . . . to its present form.").

26. William B. Stoebecker, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 595 (1972).

27. Madison does not state what caused him to include the Clause in his draft of the Bill of Rights, but a just compensation clause was not proposed by any of the state ratifying conventions. See Treanor, *Takings Clause*, *supra* note 2, at 834.

28. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1181-82 (1991) (arguing that Madison sought to get the Takings Clause ratified without substantial support for its content by bundling it with other clauses of the Fifth Amendment and concluding that "[o]n these two provisions [the Takings Clause and original Fourteenth Amendment], Madison was putting forth his own somewhat prophetic ideas, rather than distilling the zeitgeist"); Treanor, *Takings*

In Part I, this Article explores the text of the Takings Clause. Part II discusses Madison's pre-ratification proposal of the Takings Clause and other Founding Era commentary. Part III examines Madison's post-ratification comments on just compensation and early commentary. Part IV explores colonial and early state charters and documents covering property rights. Part V examines influential pre-ratification philosophy on the requirement of just compensation. Part VI describes colonial enforcement of just compensation. Finally, Part VII discusses early post-ratification case law.

# I. THE TEXT: "NOR SHALL PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION."

## A. *The Meaning of "Taken"*

The text of the Takings Clause is silent on the question of whether regulatory takings are compensable.<sup>29</sup> Plausible interpretations of the term "taken" favor both sides of the argument.<sup>30</sup>

One interpretation of the term "taken" is that one can only "take" property by an actual appropriation and not by interfering, however severely, with property rights. Professor Bernard Schwartz supports this argument with reference to Samuel Johnson's Dictionary, which was contemporaneous with the ratification of the Bill of Rights.<sup>31</sup> Schwartz argues that the relevant definitions of the verb "to take" in Johnson's Dictionary—"To seize what is not given;" "To snatch; to seize;" "To get; to have; to appropriate;" "To get; to procure;" and "To fasten on; to seize"—all argue for an actual acquisition of property.<sup>32</sup>

Schwartz's interpretation is made in the originalist tradition, looking to the meanings of words at the time they were written.<sup>33</sup>

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*Clause*, *supra* note 2, at 836 ("Madison's conception of the Takings Clause . . . is significant because of his prominent role in its promulgation."); *see also* Treanor, *Just Compensation Clause*, *supra* note 2, at 708 ("The just compensation clause reflected the liberalism of its author, James Madison.").

29. *See* Hart, *supra* note 2, at 1290 ("Application of the Takings Clause to regulations of land use must confront and explain the silence in the constitutional text.").

30. *Compare* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) ("[T]he text of the clause can be read to encompass both regulatory as well as physical deprivations . . ."), and Treanor, *Just Compensation Clause*, *supra* note 2, at 711 (noting that "a broader reading would not do violence to the text"), with Schwartz, *supra* note 2, at 420 (arguing that "taken" indicates an acquisition, not something short of acquisition, as in a regulatory taking).

31. *See* Schwartz, *supra* note 2, at 420-21 (quoting 1-2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755-56)).

32. *See id.*

33. *See* BORK, *supra* note 23, at 144 (discussing how the originalist theory requires



Schwartz's reading, however, is not the only reasonable way to understand Johnson's definitions. Madison did not use the active tense of "to take." The passive tense of the verb "to take" in the Takings Clause ("nor shall property be taken") emphasizes the property's removal from its original owner, his dispossession, and not the mode of that removal, such as a physical seizure. Dispossession was a concern in the Founding Era. The 1776 Virginia Constitution, from which Madison, a Virginian himself, may have partly modeled the Takings Clause,<sup>34</sup> stated: "all men . . . cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."<sup>35</sup> Property "taken" from an individual could mean that an individual has been deprived of his property. In fact, one influential colonial document declared that property is "taken" whenever laws "affect" property without the property owner's consent.<sup>36</sup>

Although the verb tense is important to understand the term "taken," the need to read "taken" in the context of "property" is equally important.<sup>37</sup> One historical understanding of property extended beyond physical objects to appurtenant rights,<sup>38</sup> and even to personal liberties.<sup>39</sup> Indeed, eighteenth-century scholars recognized a number of "incorporeal hereditaments," which were treated as things despite their intangible character.<sup>40</sup> If tangible property was

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analysis of how the words would have been understood at the time). "The original understanding is thus manifested in the words used and in secondary materials, such as debates at the [ratifying] conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like." *Id.*

34. See BOSSELMAN ET AL., *supra* note 19, at 99 ("In Madison's initial draft he followed closely the Virginia Declaration of Rights.") (citing ZECHARIAH CHAFEE, *HOW THE HUMAN RIGHTS GOT INTO THE CONSTITUTION* 19-20 (1952)).

35. VA. CONST. OF 1776, art. I, § 6, reprinted in 7 FRANCIS NEWTON THORPE, *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES* 3813 (1909).

36. See *infra* notes 171-74 and accompanying text.

37. See D. Benjamin Barros, Note, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1853-54 (1995) (noting the importance of defining "property" to the interpretation of the Takings Clause).

38. See Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, UTAH L. REV. 1211, 1235 (1996) (suggesting that takings of rights associated with real property were compensable as stemmed from Grotius' natural law writings, which declared that the taking of a right required compensation) (citing 2 HUGO GROTIUS, *DE JURE BELLI ET PACIS* 118-19 (William Whewell trans., Cambridge Univ. Press 1853) (1625)).

39. See Laura Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 136 (1990) (suggesting that Madison had an understanding of property "as including rights to freedom of conscience, freedom of expression, physical liberty, and the ability to use one's intelligence and creative powers").

40. See Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 333 (1991) (listing as examples easements and profits, as well as feudal rights such as advowsons and tithes). Professor Alexander also notes

understood to include intangible rights, such as rights of use, then the word "taken," even defined as "to seize," would include regulatory takings. Even if intangible property must be alienable to fall under the Takings Clause, regulatory takings still would exist in certain instances. The word "taken" does not determine the meaning of the word "property," but rather, "property" determines the meaning of the word "taken."

The easiest way to view this contextual importance to the meaning of "taken" is to consider a form of property that cannot be seized physically, but must be seized by regulation. To use a modern example, suppose the Takings Clause had said, "nor shall intellectual property be taken for public use without just compensation."<sup>41</sup> It is unlikely that one would argue that the Takings Clause was a dead letter based on a physicalist interpretation of the verb "to take." Instead, the question must depend upon the nature of the property covered by the Takings Clause.

Incorporating Johnson's definitions with a broad legal concept of property, a regulatory taking may be understood to occur when property is "procured" from its owner, or to mean that property has been "seized without being given." For example, an owner of beachfront property who is not permitted to build anything on his land because of government regulation could argue, with perfect sense, that the government has "fastened on" his land. If the property owner can claim he no longer truly owns the property because the government regulation is directly preventing him from using his land, it is reasonable to say that the government "seized" the property from him.<sup>42</sup>

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the increase in speculative interests, such as promissory notes and banknotes, which could be transferred like other forms of property. See *id.* at 333-34.

41. Intellectual property is not a term from the Founding Era, but is used here as an example of one understanding of property that entails a particular meaning for the word "taken."

42. Cf. William Michael Treanor, *The Original Intent of the Takings Clause*, LEGAL TIMES, May 11, 1998, at 27. Treanor presents the analogy that:

If I tell my daughter she cannot play with her ball in the house, she has lost something of value (to her)—the right to play with the ball in the house. I have regulated what she can do with the ball, but I haven't "taken" it. She is still free to play with it outside. I can only "take" her ball when I physically seize it.

The flaw in this argument is that our legal system, rightly, has a more nuanced conception of property. It is possible for a legal right to be "taken," especially if there was a legislative grant of that right. Although the example allows the child to play outside, if she were not allowed to play with the ball anywhere, many would say this amounted to taking the ball away from her. See Roger Pilon, *Taking Liberties with Property Rights: Liberal Environmentalists Distort History to Promote Government Regulation*, LEGAL TIMES, May 25, 1998 (criticizing Treanor's narrow interpretation of the Takings Clause).

The idea of an indirect taking is not an oxymoron. Nor, for that matter, would compensation for a seizure of intangible property be a strange reading of the words in the Takings Clause. A direct taking by regulation, although it might not be "physical," could easily fit into the original definition of the word "taken." The fact that direct, physical takings come to mind most naturally does not lead logically to the conclusion that other types of takings are not well within the textual limits.<sup>43</sup>

### *B. Other Clauses in the Constitutional Text*

The next step in the textual analysis is to determine if any other clause in the Constitution provides guidance in understanding the words of the Takings Clause. In his recently published book, *Property and Freedom*, Professor Bernard Siegan reads the Takings Clause together with the Fifth Amendment Due Process Clause.<sup>44</sup> Reading the two together—"No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation"—Professor Siegan concludes that regulations that deprive individuals of their property are permissible only if they fall under the Takings Clause.<sup>45</sup>

Under Siegan's interpretation, the Due Process Clause applies to both criminal and civil matters, but the Takings Clause only applies to civil matters.<sup>46</sup> The Due Process Clause's text, therefore, is absolute as to criminal matters, but for civil matters the text has a Takings Clause exception for the power of eminent domain. Siegan, following Alexander Hamilton's interpretation, understands the law to enable only the judiciary to deprive citizens of their rights, not the legislature.<sup>47</sup>

According to Hamilton's understanding of the Due Process Clause of the New York Constitution:

[N]o man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words "*due process*" have a precise technical import, and are only applicable to

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43. See EPSTEIN, *supra* note 3, at 27 (noting that although individual events may have inspired constitutional provisions, their application is broader than the original occurrence).

44. See BERNARD SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATIONS* 27 (1997).

45. See *id.* at 27-28 (quoting and analyzing the Fifth Amendment of the Constitution).

46. See *id.* at 28.

47. See *id.* at 26 (discussing Hamilton's speech made to the New York legislature on February 6, 1787, in which he "insisted" that the power to deprive persons of property lies solely with the judiciary).

the process and proceedings of the courts of justice; they can never be referred to an act of legislature.<sup>48</sup>

Hamilton reportedly declared that "I hold it to be a maxim which ought to be sacred in our form of government, that no man ought to be deprived of any right or privilege which he enjoys under the Constitution, but for some offense proved in due course of law."<sup>49</sup>

It follows under this theory that any government action that deprives a person of property, other than legal proceedings against the individual, would be prohibited by the Due Process Clause unless it was an exercise of eminent domain. If we presume regulation of vested property rights is permitted under the Due Process Clause, Siegan's thesis suggests that we must read the word "taken" to cover non-physical takings. Otherwise, the regulation could not fit into the Due Process exception.<sup>50</sup>

In contrast, Professor Jed Rubenfeld argues that the Due Process Clause allows property to be taken so long as there are certain protections for the individual whose property is taken.<sup>51</sup> It follows that takings that fall outside of the Takings Clause under this espoused theory still are textually permissible so long as the process is fair.

It is noteworthy that the government's police power to regulate does not always deprive one of property<sup>52</sup> because one's property rights are preconditioned on the public health and safety.<sup>53</sup> Many

48. New York Assembly, *Remarks on an Act for Regulating Elections*, THE DAILY ADVISOR, Feb. 8, 1787, reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

49. THE BILL OF RIGHTS AND THE STATES 238 (Patrick T. Conley & John P. Kaminski eds., 1992).

50. See SIEGAN, *supra* note 44, at 27 ("Regulation requires deprivation of one or more prerogatives of ownership, and even if it is not subject to the Takings Clause, it would come under the prohibition of the due process clause.")

51. See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1119 (1993) (finding that a plain reading of the Constitution reveals that because the Due Process Clause, which provides protections when property is taken, precedes the Compensation Clause, there is a "special provision for . . . cases in which private property is not merely taken, but taken for public use").

52. For an example of this idea in practice, see *Mugler v. Kansas*, 123 U.S. 623, 667-69 (1887), which held that regulation may not prevent an owner from controlling, using, or disposing of property, but may only prevent an owner from using the property for purposes against the public interest.

53. Professor Kmiec argues that the distinction between harm and benefit was well accepted during the Founding Era, such that harmful uses of property would not be protected under the original understanding of the Takings Clause. See Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtruse*, 88 COLUM. L. REV. 1630, 1635 (1998) (discussing Madison's adoption of Blackstone's "total exclusion" definition of property where there are no property rights when someone's property is harmed); see also SIEGAN, *supra* note 44, at 18 (suggesting that Blackstone did not support the protection of harmful uses of property, and that "statutes and common law could regulate and penalize the

colonial regulations of property use were justified in terms of the public health, even where the purpose of the regulation seems to have been only loosely connected to this justification.<sup>54</sup> If the Framers viewed due process as a mere guarantee of fairness, or if they viewed property regulation as an extension of the police power protection against nuisances, then the Due Process Clause would not necessarily answer the regulatory taking question.<sup>55</sup>

The text, therefore, appears to allow for more than one legitimate interpretation of the meaning of "taken." The text could mean "direct, physical taking," or it could encompass both direct physical and direct regulatory takings.<sup>56</sup> Indirect, consequential takings are almost never compensated today, and they pose problems of state action under the broadest reading of the text. Such indirect, consequential takings, however, are also a possibility. The question of when property has been "taken," therefore, requires consideration of other historical evidence.

## II. MADISON'S PRE-RATIFICATION COMMENTARY

### A. *Madison's Proposal of the Bill of Rights*

Many commentators consider James Madison's views on the Takings Clause to be the primary evidence of its meaning because he authored the Takings Clause.<sup>57</sup> Madison's speech proposing the draft Bill of Rights is arguably his most significant statement on the Takings Clause because it is the only one that preceded ratification.<sup>58</sup>

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maintenance of both public and private nuisances").

54. See discussion *infra* Part VI.

55. The pattern of colonial regulations supports this argument. As discussed above, however, other sources suggest that the prevailing legal philosophy limited the police power to certain common law cases. See Kmiec, *supra* note 53, at 1633-35 (discussing the distinction between compensation for benefit and harm to property).

56. Theoretically, one could read indirect takings into the Takings Clause, but indirect, consequential damages are not necessarily an aspect of the eminent domain power and are not commonly understood to be a regulatory taking today. See *infra* Part IV. In the nineteenth century, indirect, consequential damages were covered on a proximate cause basis similar to tort law. See Kobach, *supra* note 38, at 1292 ("The final common thread of the early cases was the proximity requirement. Government actions that devalued property only very indirectly did not constitute compensable takings.").

57. See Schwartz, *supra* note 2, at 420 (noting that Madison's draft was the basis for the Takings Clause); Treanor, *Takings Clause*, *supra* note 2, at 790 (concluding that Madison's draft "provide[s] unusually significant evidence" as to the meaning of the Takings Clause).

58. See SIEGAN, *supra* note 44, at 24 (noting that Madison introduced his draft Bill of Rights on June 8, 1789). Madison later published his essay, *Property*, after the Bill of Rights' ratification to expand further his views on property. See Treanor, *Just Compensation Clause*, *supra* note 2, at 712.

In his speech, Madison declared:

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.<sup>59</sup>

The only notable difference between the Takings Clause as proposed by Madison and its final version is the word "relinquish."<sup>60</sup> Several scholars consider the original proposal to be limited to direct, physical takings.<sup>61</sup>

Professor William Michael Treanor's recent article, *The Original Understanding of the Takings Clause and the Political Process*,<sup>62</sup> is one of the most significant writings on the question of regulatory takings and original intent. Treanor relies primarily on Madison's post-ratification remarks as evidence that he did not intend that the government compensate for regulatory takings.<sup>63</sup> Moreover, Treanor argues that the language originally proposed demonstrates Madison's support for "the view that the clause only mandated compensation when property was physically taken from the owner."<sup>64</sup>

Treanor assumes his conclusion, however. Even if the original language indicated compensation only for physical takings, Madison and the other Framers may have understood the amended language as a change in meaning.<sup>65</sup> Schwartz argues, however, that the change in language was not intended to change the meaning of the Takings

59. 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1789).

60. See SIEGAN, *supra* note 44, at 21 (observing that the final version of the Takings Clause allowed takings "for public use").

61. See *id.* ("Over time, through judicial interpretation, the Takings Clause as adopted would cover taking by overregulation, something that Madison's original 'relinquish' language would not have allowed."); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) ("Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison . . .), we decline to do so as well.") (citations omitted).

62. See Treanor, *Takings Clause*, *supra* note 2.

63. See *id.* at 837-40 (analyzing Madison's post-ratification essay, *Property*, and also letters written by Madison).

64. *Id.* at 837. In THE TAKINGS ISSUE, Fred Bosselman, David Callies, and John Banta suggest that the change in language was probably Madison's, although they do not think the substance was changed. See BOSSELMAN ET AL., *supra* note 19, at 99 ("The language, but not the substance changed slightly in Committee, probably also the work of Madison, and in Conference in the Senate, to its present form.").

65. Compare *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1579, (Fed. Cir. 1993) (concluding that the change in the language of the Takings Clause resulted in a change in meaning), with Schwartz, *supra* note 2, at 420 (observing that change in wording is unlikely to change overall meaning).

Clause because the new language had the same meaning as the old.<sup>66</sup> On the other hand, Justice Scalia reads the new language as an indication that the text may include regulatory takings,<sup>67</sup> and the Federal Circuit has interpreted the removal of the word "relinquish" as an expansion of the Takings Clause to include regulatory takings.<sup>68</sup> This last view is persuasive if one determines a change in language was not merely stylistic, but was purposeful: if the new word suggests a different meaning it is reasonable to assume that the alteration was intended to have a consequence.<sup>69</sup>

Even if the words "relinquish" and "taken" possess the same meaning, it is not at all obvious that the original reference to an obligation to "relinquish" property is any more indicative of a physical conception of property than the later Fifth Amendment language of property that is "taken."<sup>70</sup> A property owner may relinquish intangible property as easily as a physical piece of land. In addition, if these intangible property rights are understood to be "property," certain government regulations would obligate the property owner to relinquish property.<sup>71</sup>

Madison also included a preamble to his proposed Bill of Rights that was not included in the final version. The preamble stated: "Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with

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66. See Schwartz, *supra* note 2, at 420. Schwartz writes that:

It is . . . most unlikely that the change in language was intended to change the meaning of Madison's draft Takings Clause. The substitution of "taken" for Madison's original "relinquish" did not mean that something less than acquisition of property would bring the clause into play. Acquisition was, indeed, the meaning of a "taking" with which the men of 1789 were familiar.

*Id.*

67. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (observing that the text of the Takings Clause can be read to include both regulatory and physical takings).

68. See *Skip Kirchdorfer*, 6 F.3d at 1579 ("Madison's proposed language for the just compensation clause changed during consideration in the First Congress. The changes made the language clearly broader than Madison's proposed version. The Fifth Amendment embraces direct physical invasion as well as other types of Government authorized intrusions.").

69. It is entirely possible, however, that the change was a purely stylistic one. This is the view taken by Bosselman. See BOSSELMAN ET AL., *supra* note 19, at 99. Professor Schwartz notes that there is no legislative record of why the change from "relinquish" to "taken" was made. See Schwartz, *supra* note 2, at 420.

70. Indeed, neither word provides a clear indication of a physical concept of property because of an absence of supporting materials as to their respective meanings at the time of ratification. See Schwartz, *supra* note 2, at 420 (noting the absence of a floor discussion and legislative history on the Takings Clause).

71. See SIEGAN, *supra* note 44, at 21 (concluding that the Takings Clause covers takings by regulation, "something that Madison's original 'relinquish' language would not have allowed").

the right of acquiring and using property . . . ."<sup>72</sup> This statement is of limited use, insofar as the Framers never ratified the preamble, but it does provide some indication as to which purposes Madison intended to serve through the rights contained in his draft.<sup>73</sup> The preamble language suggests that Madison believed his proposed Bill of Rights would function to protect the right of using property, and by implication, this meant the Takings Clause would help to protect that right where regulations were concerned.<sup>74</sup>

### B. *The Framers' Views on Property Rights*

Other extant pre-ratification commentary, such as the Convention debates, fails to address the Takings Clause directly. Nevertheless, there is significant documentation that suggests the majority of the Framers thought the protection of property was a high priority. For many of the Framers, protection of property was the most important, or one of the most important purposes of the Constitution.<sup>75</sup> For example, Alexander Hamilton declared during the Constitutional Convention that "[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property . . . ."<sup>76</sup>

It is important to note that the Framers disagreed on the exact meaning of the word "property" as well as on how to protect those property rights.<sup>77</sup> For example, Jennifer Nedelsky has argued that the

72. 1 ANNALS OF CONGRESS 433 (Joseph Gales ed., 1789).

73. See 5 BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED SOURCE BOOK OF AMERICAN FREEDOM* 1008 (1980) (observing that Congress eliminated some provisions in Madison's draft and states failed to ratify others).

74. The Due Process Clause also may have served to protect the right of using property. This preamble nevertheless makes it less tenable to argue that Madison intended legislatures to be able to regulate property without regard to compensation.

75. See SIEGAN, *supra* note 44, at 15. Siegan argues that state representatives also felt that protection of property was paramount:

Rufus King of Massachusetts and John Rutledge of South Carolina agreed that the protection of property was the primary or principal object of society. Pierce Butler of South Carolina contended that "property was the only just measure of representation. This was the great object of government: the great cause of war, the great means of carrying it on." William R. Davie of North Carolina, Abraham Baldwin of Georgia, and Charles Pinkney of South Carolina thought the Senate should represent property or wealth. George Mason of Virginia stated that an important objective in constituting a senate was to secure the right of property. John Dickinson of Delaware considered freeholders as the best guarantors of a free society.

*Id.*; see also F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 3-4 (1985) (noting property views of various delegates).

76. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1937) [hereinafter *FEDERAL CONVENTION*].

77. See McDONALD, *supra* note 75, at 10 (explaining that the word property had different meanings during the Constitutional Convention).



Founders held a wide range of views regarding the importance of protecting property.<sup>78</sup> Nedelsky has explained that: (1) Gouverneur Morris gave property the highest priority,<sup>79</sup> (2) James Madison attempted to protect property against redistributive legislation,<sup>80</sup> and (3) James Wilson gave a limited import to property rights.<sup>81</sup>

The Federalist Papers argue for the protection of property rights. In Federalist 70, Hamilton argues that energy in the executive is essential "to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice . . ."<sup>82</sup> Madison, in Federalist 54, argues that "government is instituted no less for the protection of the property, than of the persons of individuals."<sup>83</sup>

More obliquely, in Federalist 10, Madison notes:

The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the

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78. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 12 (1990) (noting the diverging views of Wilson, Madison, and Morris).

79. See *id.* at 68-75. Some of Morris' more strongly worded comments included the following: "Above all things government should never forget that . . . if the rights of property are invaded, order and justice will at once take their flight and perhaps forever." *Id.* at 73 (citations omitted). In an attack on depreciating currency, Morris declared, "Those who had been compelled to accept the paper would be as effectively robbed by the two acts of government taken together as they would have been by the one act of a highway man or house breaker." See *id.* It seems likely, based on Morris' unyielding rhetoric about the role of property rights in a just society, that he would prefer a Takings Clause that compensated regulatory takings, although this preference does not tell us what the textual language meant.

80. Nedelsky states:

Madison did not . . . have a simple conception of property as land or even material goods. The "faculties of acquiring property" emphasized a subtle, nonmaterial dimension of property. And the legislative injustice he feared was not straightforward confiscation, but the more indirect infringements inherent in paper money and debtor relief law.

*Id.* at 30. Nedelsky argues that Madison opposed laws with redistributive consequences. See *id.* "But we know that he did not envision a government that simply took a hands-off attitude toward property." *Id.*

81. Nedelsky asserts:

The importance of Wilson's concept of man as a social creature is not that it replaces a concern with man's individual rights and interests, but that it denies that this is all there is to man . . . . The relative unimportance of property in Wilson's theory should be understood in this context of Wilson's nonindividualistic, nonlibertarian premises and priorities.

*Id.* at 101.

82. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

83. THE FEDERALIST NO. 54, at 370 (James Madison) (Jacob E. Cooke ed., 1961).

influence of these on the sentiments and views of the respective proprietors ensues a division of society into different interests and parties.<sup>84</sup>

In his effort to determine the causes of faction, which he argues cannot be removed, Madison explains "the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."<sup>85</sup>

Although the subject of Madison's essay in the Federalist 10 is the source of factions and how to prevent their effects, his claim—that the protection of the faculties that produce different types of property is the object of government—necessarily places great importance on protection for the different types of property. Two of Madison's remarks may indicate a non-physical conception of property. First, Madison speaks of the "rights of property," not the "right to property." Second, Madison speaks of different "degrees and kinds of property." This last remark may merely refer to the different types and amounts of property owned by the landed class, the merchant class, and any other faction. The reference to the "rights of property," however, suggests Madison desired protection for the various rights that are a necessary part of the ownership of property.<sup>86</sup>

Nedelsky concludes that Madison believed that "[t]ax policies and economic regulation might have some redistributive consequences, but it should not be their *objective* to benefit some at the expense of others."<sup>87</sup> In light of Federalist 10, Treanor interprets the Madisonian perspective on economic regulation to mean that Madison "did not want a compensation requirement that would extend to any government action that would affect the value of property."<sup>88</sup> Treanor argues that Madison's perspective on property explains why Madison would have proposed a Takings Clause limited to direct,

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84. THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

85. *Id.* at 59.

86. Underkuffler writes that:

In the Federalist No. 10, the ostensible meaning of property is that which we ordinarily understand: Madison lists creditors, debtors, landed interests, manufacturing interests, mercantile interests, and monied interests as interests which must be regulated by government. However, it is possible to see something else in the discussion. Madison's emphasis upon liberty both as a cause of faction and as something which entitles property to protection from government suggests that he was concerned with more than protection of rights in material objects.

Underkuffler, *supra* note 39, at 134-35.

87. NEDELSKY, *supra* note 78, at 31.

88. Treanor, *Takings Clause*, *supra* note 2, at 844.

physical takings.<sup>89</sup> It is unclear, however, why Madison's acceptance of economic regulation would not preclude mere compensation for regulation of transactions,<sup>90</sup> as opposed to regulation of rights of use with respect to real property.

Federalist 10 also includes language suggesting that certain forms of intrusions on property rights are unlikely to occur at a local level:

[A] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire state.<sup>91</sup>

Treanor argues that Madison's view on the local nature of factions meant that he believed the federal government protected property rights and implies that "there is no need for special heightened protection of property interests against the federal government because there are already adequate structural protections for those interests."<sup>92</sup>

The difficulty with this theory is that it ignores the fact that the Takings Clause, as originally intended, applied only to the federal government and not the states.<sup>93</sup> A common belief is that Madison would have preferred to extend the Takings Clause to protect individual property rights from the state governments as well. The

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89. See *id.* ("[Madison] believed that government, in pursuit of the commonweal[th], necessarily employed tax policies and regulations that consequentially hurt some economic interests."). In fact, Treanor suggests that Madison may have favored redistributive regulations, and therefore opposed a compensation requirement for regulations. See *id.* This is, however, an admitted change in perspective from his apparent earlier view that Madison's motivation was purely liberal. See Treanor, *Just Compensation Clause*, *supra* note 2, at 709-10 ("Madison was a liberal. The ideas of a readily discernible common interest and of property rights subject to government abridgment were alien to him.").

90. In fact, the Supreme Court, even while recognizing regulatory takings, has refused to grant compensation for a regulation of the right of alienation. See *Andrus v. Allard*, 444 U.S. 51, 67-68 (1979) (denying compensation where statute prohibited sale of eagle feathers). The regulation of transactions more properly falls under the Contract Clause or the Ex Post Facto Clause, if at the state level, rather than the Takings Clause. See generally Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 526 (1987) (arguing that the correct interpretation of the Contract Clause "prohibits all retrospective, redistributive legislation" which violated inherent contract rights); Laura Ricciardi & Michael B. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 302-12 (1997) (arguing that the original understanding of the Ex Post Facto Clause covers civil legislation). Economic regulation was an exception to property rights under common colonial conceptions. See McDONALD, *supra* note 75, at 14.

91. THE FEDERALIST NO. 10, at 65 (James Madison) (Jacob E. Cooke ed., 1961).

92. Treanor, *Takings Clause*, *supra* note 2, at 843.

93. See Treanor, *Just Compensation Clause*, *supra* note 2, at 708.

Takings Clause, however, was not adopted in this manner.<sup>94</sup>

The likely inability to pass a state-level takings clause may have several ramifications. First, if the Takings Clause deviated sufficiently from state practice such that it would not be ratified if applied to the states, its presumed effect on state regulation would be significant.<sup>95</sup> Treanor claims that the norm in colonial times was to compensate only for physical appropriations.<sup>96</sup> By implication, the Takings Clause could have permitted compensation in different circumstances than those to which the colonies were accustomed, such as for regulatory takings.

Second, even if the greater ambit of the Takings Clause did not include many regulatory takings, its novelty must have been sufficiently important to preclude reliance solely on colonial practices and just compensation statutes as models for the definitive interpretation of the Fifth Amendment Takings Clause.<sup>97</sup> Inability to ratify the Takings Clause implies at minimum a change from the status quo, rendering it speculation to suggest what that change was.

Further, Madison allegedly intended to use the Takings Clause for an educative purpose.<sup>98</sup> This indicates that he thought the Takings Clause covered forms of property not protected in the states.<sup>99</sup> This

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94. As Treanor states:

All of these arguments, of course, also suggest that Madison would have liked the Takings Clause to have regulated state, as well as federal, actions. As a practical matter, however, Madison could not achieve this end directly. The movement to secure a Bill of Rights came from Anti-federalists who wanted to limit the national government's power. Madison's proposal to include in the Bill of Rights an amendment preventing the states from infringing freedom of the press and freedom of conscience and from denying jury duty was defeated by the Senate. . . . Presumably, an attempt to make a takings requirement—a fairly novel right—binding against the states would have met with a similar fate.

*Id.* at 843 n.308 (citations omitted).

95. See Treanor, *Takings Clause*, *supra* note 2, at 843 n.308.

96. See *id.* at 788 n.28 ("[C]ompensation was the *usual* practice; the fact that it was the norm, rather than the inviolable rule, demonstrates that the principle that the state *necessarily* owed compensation when it took physical property had not been established.")

97. See Treanor, *Just Compensation Clause*, *supra* note 2, at 715.

98. See *id.* at 710. Treanor states:

Madison believed that his Bill of Rights would provide a standard for judicial review of the actions of the federal government. Perhaps more important, it would have an educative function. "[P]aper barriers," he declared, have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community.

*Id.* (citing Speech Proposing the Bill of Rights (June 8, 1789), in 12 J. MADISON, *THE PAPERS OF JAMES MADISON* 204-05 (C. Hobson & R. Rutland eds., 1979)).

99. See NEDELSKY, *supra* note 78, at 30 (arguing that Madison did not conceive of property solely as material goods); Underkuffler, *supra* note 39, at 135 (proposing that Madison intended to protect more than material possessions).

Article suggests, contrary to Treanor, that the educative function of the Takings Clause, if there was one, was not hortatory. That is, Madison did not want the states to protect property rights not covered by the Takings Clause, but rather, he wanted states to protect property rights covered by the Takings Clause at the federal level. Those property rights, it will be shown, included intangible rights, appurtenant to physical property.

### III. MADISON'S POST-RATIFICATION CORRESPONDENCE AND OTHER EARLY COMMENTARY

Madison's post-ratification commentary demonstrates a strong interest in protecting the rights attached to property as well as to the physical property itself.<sup>100</sup> It remains unclear, however, whether Madison hoped to protect property rights through the educational function of the Constitution's "paper barrier,"<sup>101</sup> or whether he believed the Constitution's text itself served to protect those rights.

Treanor concludes that Madison's post-ratification statements "uniformly indicate that the clause only mandated compensation when the government physically took property."<sup>102</sup> Actually, Madison's post-ratification remarks appear to lean towards compensation for regulatory takings as well. In light of the scholarly disagreement about their meaning, one cannot conclusively argue that Madison opposed compensation for regulatory takings. The post-ratification remarks of Madison certainly do not provide the strong support Treanor describes.<sup>103</sup>

#### A. Madison's "Property" Essay

The linchpin of Treanor's reasoning is Madison's essay, *Property*, published in the 1792 National Gazette.<sup>104</sup> This essay was a response to Hamilton's economic proposals, and Treanor argues it should be read in that context.<sup>105</sup> Hamilton, just prior to Madison's *Property*

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100. See Treanor, *Just Compensation Clause*, *supra* note 2, at 712.

101. See *id.*

102. Treanor, *Takings Clause*, *supra* note 2, at 791.

103. Compare NEDELSKY, *supra* note 78, at 30 (emphasizing Madison's "nonmaterial" definition of property), and Underkuffler, *supra* note 39, at 134-35 (describing Madison's broad understanding of property), with Treanor, *Takings Clause*, *supra* note 2, at 711 n.97 (suggesting that St. George Tucker's 1803 treatise supports his view that the Takings Clause was concerned mostly with physical seizures).

104. See James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, in 14 J. MADISON, THE PAPERS OF JAMES MADISON 266-67 (R. Rutland & T. Mason eds., 1983) [hereinafter *Property*].

105. See Treanor, *Takings Clause*, *supra* note 2, at 838 ("Property was one of the series of essays that Madison published in the National Gazette newspaper in

essay, had published his Report on the Subject of Manufactures in support of certain tariffs and bounties to encourage manufacturing.<sup>106</sup>

Madison opposed Hamilton's view, and in his essay declared:

[T]hat is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.<sup>107</sup>

Madison then proceeded to attack "unequal taxes."<sup>108</sup> Treanor argues that the following paragraph proves Madison believed the Takings Clause did not cover regulatory takings. Madison explained:

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.<sup>109</sup>

Unquestionably, Madison referred to the Takings Clause in his first sentence. The conclusions one may draw from this fact, however, are less clear. Treanor argues that Madison distinguished the indirect violations from the direct violations covered by the Takings Clause.<sup>110</sup> Thus, regulatory takings, as indirect violations, would not be compensable under the Fifth Amendment.<sup>111</sup>

The flaw in Treanor's reasoning is that it does not interpret

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response to Hamilton's economic program, and the essay should be understood against that background.").

106. See generally S. ELKINS & E. MCKITTRICK, *THE AGE OF FEDERALISM* 258-64 (1992) (summarizing Hamilton's industrial vision).

107. *Property*, *supra* note 104, at 267.

108. See *id.*

109. *Id.*

110. Treanor writes:

[C]ompensation is not mandated for "indirect[]" violations of property. The contrast suggests that compensation is mandated for physical takings—"direct[]" violations—not regulations—"indirect[]" violations. To put this phrase in context: Madison is arguing that Hamilton's program is not barred by the rule of law established by the Takings Clause, but that it is inconsistent with the principle for which the clause stands.

Treanor, *Takings Clause*, *supra* note 2, at 838-39.

111. See *id.*

Madison's remarks in context.<sup>112</sup> The indirect violations of property addressed by the *Property* essay were presumably the taxes and tariffs proposed by Hamilton. These taxes and tariffs interfered with property by rendering it less "secure" and making it more difficult to "acquir[e] property strictly so called."<sup>113</sup> Such government actions "indirectly" violate the property in one's possessions by limiting transactions related to the property. A regulation that destroyed a property's value by forbidding any development of the property could fall into an entirely different category: a category of regulations that, according to Madison, would *directly* violate property rights.

Furthermore, if one shares Treanor's belief that the first half of Madison's concluding paragraph addressed legally prohibited violations of property rights—direct violations—and the second half of Madison's concluding paragraph addressed moral violations—constitutionally permissible, indirect violations—a regulatory taking could still be a direct violation.<sup>114</sup> One must assume a purely physical understanding of property to believe otherwise.

The indirect property violation is arguably just a surcharge on the rights of contract, not the property subject to the contract. A tax on sales, for example, does not limit the use of the property sold. Although Blackstone termed contract rights "property in action,"<sup>115</sup> they are not the property to which Madison refers. Moreover, according to Professor McDonald, ownership rights did not include the absolute right to buy and sell property in eighteenth-century England or America.<sup>116</sup> Indirect regulation under this understanding interferes with transactions concerning property rights.<sup>117</sup> Direct property violation interferes with the property rights that inhere in the property itself.<sup>118</sup>

In the alternative, Professor John W. Ely, Jr. interprets "indirect" violation of property to include non-physical takings of property,<sup>119</sup>

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112. See *Property*, *supra* note 104, at 266-67 (arguing that man has property rights in entities other than physical property, including his opinions and faculties, and that government should protect all property rights).

113. *Property*, *supra* note 104, at 267.

114. See Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 533-34, 544 (1995) (concluding that a regulatory taking may be a direct violation).

115. 2 WILLIAM BLACKSTONE, COMMENTARIES \*440.

116. See MCDONALD, *supra* note 75, at 14.

117. See EPSTEIN, *supra* note 3, at 102 (arguing that some government regulation restricts an owner's ability to dispose of private property).

118. See *id.* at 101 (noting that direct regulations, such as land-use regulation, limit an individual's ability to use property).

119. See J. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 56 (1992) (concluding that Madison had broad views of the Takings Clause).

but he draws a very different conclusion from Treanor: "Because the value of property can be diminished by governmental action short of actual seizure, Madison's reference to indirect infringement indicates a generous understanding of the Takings Clause to encompass more than just the physical takings of property."<sup>120</sup> Inasmuch as Madison states that such indirect violations are "not a pattern for the United States," these violations may be seen as unconstitutional.<sup>121</sup>

Madison's phrasing in his essay, *Property*, buttresses this argument. Assuming that indirect violations of property do include indirect takings, the tone of Madison's language appears to place the import of indirect appropriations of physical property beyond even the violation of the property in one's opinions, religion, or person.<sup>122</sup> A number of Framers held this property-oriented view.<sup>123</sup> The sentiment is reminiscent of Gouverneur Morris' remarks during the Constitutional Convention: "Life and liberty [are] generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property [is] the main object of Society."<sup>124</sup>

It is reasonable to interpret Madison's comment to mean that an indirect violation of the right to one's possessions is unconstitutional, as violations of the right to one's opinions and religion would clearly be unconstitutional under the First Amendment, and violation of one's person would be unconstitutional under the Fourth Amendment. Admittedly, this reading might prove too much, as it is doubtful that Madison believed the Constitution prohibited interference with "the hallowed remnant of time which ought to relieve their fatigues and soothe their cares,"<sup>125</sup> but Madison may have sought merely to describe the loss caused by indirect infringement of property rights.

Most striking is Madison's view that property extended beyond physical objects.<sup>126</sup> It is nearly impossible to read the *Property* essay and contend that Madison did not think intangible rights were a part of "property." In the essay Madison declared, "[A]s a man is said to

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120. *Id.*

121. See *Property*, *supra* note 104, at 268.

122. Madison begins his statement of opposition to indirect property violations with the words, "nay more." See *id.* at 166.

123. See SIEGAN, *supra* note 44, at 15 (proposing that the Framers wished to restrict governors' ability to confiscate property); see also McDONALD, *supra* note 75, at 3-4 (outlining property views of Gouverneur Morris, Rufus King, and John Rutledge).

124. FEDERAL CONVENTION, *supra* note 76, at 533.

125. *Property*, *supra* note 104, at 267-68.

126. See NEDELSKY, *supra* note 78, at 30 (noting Madison's "nonmaterial dimension of property").



have a right to his property, he may be equally said to have a property in his rights."<sup>127</sup> Therefore, Treanor's reading appears unnatural, at best. Given that Madison referred to the Takings Clause in his essay and explicitly stated that rights were property, it is strange to conclude that he thought tangible property was protected, but intangible property was not.<sup>128</sup>

Whether one equates regulatory takings with Madison's "direct violations," or concludes that Madison's "indirect violations" may trigger the Takings Clause, Madison's strong desire to protect private property makes both interpretations plausible.<sup>129</sup> Madison's essay may accommodate Treanor's interpretation, but it is hard to comprehend why Madison would argue for a non-physical conception of property in an essay supposedly limiting just compensation to physical takings. A more logical reading, assuming *arguendo* that Treanor is correct in his assertion that indirect violations are not compensable, is that Madison simply disapproved of Hamilton's taxation program and did not address regulatory takings under the indirect violations rubric.

*B. Madison's Belief that Emancipation Required Compensation for Slaveowners*

Treanor also contends that a Madisonian discussion of the Takings Clause with respect to slavery reflects the idea of compensation for physical takings.<sup>130</sup> In an 1819 letter to Robert J. Evans, an opponent of slavery,<sup>131</sup> Madison states the commonly held belief that the

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127. See *Property*, *supra* note 104, at 266; Underkuffler, *supra* note 39; see also Donald Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 56 (1998) (explaining the role of Madison's broad view of property in protecting liberty).

128. See Clegg, *supra* note 114, at 540 n.35 (arguing that Treanor's conclusion is puzzling).

129. There is a distinction in application between the two theories. A regulation may take property directly even when it is intangible property, as when a statute proscribes the right of use. A regulation also may take intangible rights indirectly by consequence, as when a regulation of one thing destroys a valuable property right in something else. Professor Kobach discusses this distinction in some depth. See Kobach, *supra* note 38, at 1227-29; see also *supra* note 3 (discussing both direct and consequential takings). One way of looking at the problem is to determine whether the effect on the property as such was intentional. The mere unintentional destruction of value would not necessitate a taking even under this theory. For example, if a government building relocated so that a store that profited by its previous association with the government building lost all of its value there would be no taking. Professor Kobach provides an example which might be compensable: government action on an adjacent property which results in flooding of a property owner's farm. See Kobach, *supra* note 38, at 1227.

130. See Treanor, *Takings Clause*, *supra* note 2, at 839 ("Thus, because the clause mandated compensation when the government physically took property from the owner, it required compensation for abolition.").

131. See Treanor, *Takings Clause*, *supra* note 2, at 839 (identifying Robert Evans as a

abolition of slavery would require just compensation:

They [non-slaves-owners] are too just to wish that a partial sacrifice should be made for the general good; and too well aware that whatever may be the intrinsic character of that description of property [slaves], it is one known to the constitution, and, as such could not be constitutionally taken away without just compensation.<sup>132</sup>

In fact, this language does not address regulatory takings. Madison's language emphasizes deprivation of property, however. This interpretation of the Takings Clause as applied to slavery requires compensation for government acts that dispossess a party of his property by rendering all private use of the property non-existent, not merely acts that put that property to government use. Thus, a statute abolishing slavery as a form of property would suffice to trigger the Takings Clause.

It begs the question to assume that rights appurtenant to real property were not "known to the constitution." Madison's logic indicates that intangible forms of property suggested by the Constitution itself, such as those now recognized as intellectual property,<sup>133</sup> would be subject to the Takings Clause because they are "known to the constitution." The rule may still be limited to direct takings of a form of property, albeit intangible, and not the usage and disposition rights that surround the property, however.<sup>134</sup> The point is that this question can only be resolved by defining "property."

The means of effecting emancipation show the limits of a purely direct, physical takings thesis. Prohibition of slavery is not inherently a direct, physical act such as the building of a road through one's property or the destruction of a building. Freeing of slaves can be accomplished by means akin to a regulatory taking. The government

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"slavery opponent").

132. Letter from James Madison to Robert Evans (June 15, 1819), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 315 (Marvin Meyers ed., 1981).

133. See U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

134. Treanor points out that Madison's letter indicates "compensation is owed even though slaves are freed, rather than impressed for government service." Treanor, *Takings Clause*, *supra* note 2, at 839 n.292. Treanor's viewpoint contrasts with Professor Jed Rubenfeld's contention that a compensable taking "can occur only when some productive attribute or capacity of private property is exploited for state-dictated service." *Id.* (quoting Rubenfeld, *supra* note 51, at 1114-15). For an excellent discussion of the "public use" requirement, see Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirements*, 49 DUKE L.J. 339 (1999).

did not free the slaves to put them to public use, rather, slaves were no longer the possessions of their owners.<sup>135</sup> Presumably, such a regulation would revoke owners' titles to their slaves. It is difficult, however, to support a theory that Madison thought the government could absolve itself of its compensatory debt by formally leaving title with the slaveowners.<sup>136</sup>

C. *St. George Tucker's Edition of Blackstone's Commentaries*

A final important post-ratification commentary is St. George Tucker's 1803 edition of Blackstone's Commentaries,<sup>137</sup> which contains notes on the Constitution.<sup>138</sup> Tucker stated that the Takings Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war. . . ."<sup>139</sup> Treanor argues that Tucker's explanation is "the best piece of evidence explaining why most people initially favored the clause."<sup>140</sup>

A possible source of Tucker's reading of the original purposes behind the Takings Clause was the case of *Respublica v. Sparhawk*.<sup>141</sup> *Sparhawk* is one of the few recorded colonial-era cases that tested the compensation principle.<sup>142</sup> In *Sparhawk*, the Pennsylvania Supreme Court, upholding a taking of provisions from Mr. Sparhawk during the Revolutionary War pursuant to a statute of the Continental Congress, stated:

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135. *See id.*

136. This is the problem discussed in *Pumpelly v. Green Bay*, 80 U.S. 166, 177-78 (1871), which refused to narrowly define "takings" as seizing property solely for public use. In *Pumpelly*, the issue was whether the flooding of private land caused by the construction of a dam across a stream is a taking of private property. The Court ruled that the flooding of Pumpelly's land, which effectively impaired its usefulness, was a taking within the meaning of the Constitution, regardless of whether the construction of the dam was for the public good. *See id.* at 180-81. An act that amounts to a direct, physical taking might reasonably be included in the original intent even if other forms of regulatory takings were not so intended. *See Schwartz, supra* note 2, at 421 ("Despite [the actual acquisition original intent] interpretation, there are situations where the Takings Clause clearly applies even though no public acquisition of the property has occurred.") (citing *Pumpelly*, 80 U.S. at 181).

137. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (Philadelphia, Birch & Small 1803).

138. *See id.*

139. *Id.* at 305-06.

140. Treanor, *Takings Clause*, *supra* note 2, at 835.

141. 1 U.S. (1 Dall.) 357 (1788) (denying compensation to an owner whose property was taken for military use during the Revolutionary War).

142. *See* BOSSELMAN ET AL., *supra* note 19, at 88 (noting the lack of recorded cases concerning land use during the colonial era).

The transaction, it must be remembered, happened *flagrante bello*, and many things are lawful in that season, which would not be permitted in time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a trespass.<sup>143</sup>

Tucker describes the intent of the Takings Clause in a manner far removed from the text. His interpretation does not resolve the question of whether military impressment is the full meaning of a "taking" of "property." Although impressment clearly would always be a "direct, physical taking," the originalist solely is concerned with the meanings of the words as they were understood when originally written, not with connotations subsequently imposed on those words.<sup>144</sup> Tucker does not indicate what he thinks the words meant to the Founders, but what harms the Founders may have hoped their words would prevent. Even those who believe the Takings Clause only covers direct physical takings are unlikely to believe that the Takings Clause only applies during times of war.

#### IV. COLONIAL, STATE, AND TERRITORIAL PRECURSORS TO THE TAKINGS CLAUSE

The early colonial documents based on the Magna Carta<sup>145</sup> stand in contrast to the few just compensation clauses contained in the pre-ratification state constitutions. The primary concern of property holders in the pre-Revolutionary War era was due process of law. Many state constitutions reflected this concern. As demonstrated below, the authors of the state (and territorial) constitutions that provided for just compensation—Vermont, Massachusetts, and the Northwest Territory—were deeply concerned that their legislatures would show insufficient respect for property rights.

Many of the Founders disapproved of the behavior of the state legislatures once the English reign had been cast aside. This perspective supported the need for the early state just compensation clauses mentioned above. Even though this distrust of legislatures may not have represented the prevailing view throughout the states, the Fifth Amendment Takings Clause, if it were modeled after any

143. *Sparhawk*, 1 U.S. (1 Dall.) at 362.

144. See BORK, *supra* note 23, at 144 (describing the text of the Constitution and its meaning at the time it was drafted).

145. See SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 9 (Richard L. Perry ed., 1959) [hereinafter SOURCES OF OUR LIBERTIES] (recognizing that the Magna Carta "played an essential role in the history of American Constitutional development").

state constitution, was written against the backdrop of these state just compensation clauses. The pre-ratification history in Vermont, Massachusetts, and the Northwest Territory suggests a frame of mind that was quite receptive to compensation for regulatory takings.

A. *The Magna Carta and Colonial Charters*

The legal template for the English and colonial American understanding of constitutional rights was the Magna Carta, and most of the colonial charters loosely followed its provisions for protecting property.

The text of the Magna Carta does not provide for just compensation upon a taking of land. It does, however, preclude the King from taking grain without payment.<sup>146</sup> There is no just compensation clause comparable to the Takings Clause in the Magna Carta, but there is an item comparable to the Due Process Clause. The Magna Carta originally declared in Article 39:

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.<sup>147</sup>

At the time of colonization, the document provided the colonists with an understanding that property rights are fundamental, in large part due to the efforts of Sir Edward Coke.<sup>148</sup>

In the early colonial days, most colonies' charters had no just compensation clause, but many of the charters referred to the taking of property, relying on text similar to Article 39 of the Magna Carta.<sup>149</sup>

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146. See Magna Carta art. 28, reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 8, 11 (1971) (providing that the King could not "take grain or other chattels of any one without immediate payment therefore [sic] in money. . ."); see also CHAFEE, *supra* note 34, at 45 (directing the reader to article 28 of the Magna Carta which states, "No constable or other bailiff of ours shall take grain or other provisions . . . without immediately paying in money . . .").

147. Magna Carta, art. 29; see also BOSSELMAN ET AL., *supra* note 19, at 56 (the authors note that the original Magna Carta contained 63 articles, and that Article 39, in the consolidated version is now known as Article 29).

148. See BOSSELMAN ET AL., *supra* note 19, at 77-80 (describing Sir Edward Coke's success in declaring the "fundamental" nature of English rights under the Magna Carta, and noting "more importantly for American purposes, the 'fundamental' nature of the rights attributed to the Magna Carta was established in the minds of the English citizens who were engaged in the colonization of the new world"); SIEGAN, *supra* note 44, at 16 ("Coke's *Institutes of the Laws of England* (1628-44) was also a major source for colonial lawyers. Throughout the eighteenth century, Coke was one of the most frequently cited legal and political thinkers.").

149. See Treanor, *Takings Clause*, *supra* note 2, at 786-87 (citing as an example the 1683 New York Charter of Liberties and Privileges, which provided that "Noe freeman shall . . . be disseized of his freehold . . . But by the Lawfull Judgment of his peers and by the Law of this province."); see also *id.* at 787 n.16 (listing other similar

Property was protected from a taking without consent, but consent included approval by the legislature. In effect, property could be taken if the taking was according to the law of the land.

The Massachusetts and Carolina colonies used just compensation language.<sup>150</sup> The Massachusetts Body of Liberties of 1641 contained the following clause:

No mans Cattle or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced.<sup>151</sup>

The 1669 Fundamental Constitutions of Carolina, drafted by John Locke, also provided for just compensation.<sup>152</sup> Although they were never implemented, the Constitutions authorized the High Steward's Court to build and lay highways with the following caveat: "The damage the owner of such lande (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint."<sup>153</sup>

A greater concern of the early colonial documents was the prevention of takings by the executive without approval by the legislature, not uncompensated takings per se.<sup>154</sup> Unlike the Fifth

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charters). One colonial document, although it allows for consent by the legislature, appears to recognize that the government may take property without appropriating all of it. See *The Rights of the Colonists and a List of Infringements and Violations of Rights art. 3 (1772)*, reprinted in 1 SCHWARTZ, *supra* note 146, at 203 ("The supreme power cannot Justly take from any man, any part of his property without his consent, in person or by his Representative.").

150. See Massachusetts Body of Liberties § 8 (1641), reprinted in *SOURCES OF OUR LIBERTIES*, *supra*, note 145, at 149; Fundamental Constitutions of Carolina art. 44 (1669), reprinted in SCHWARTZ, *supra* note 146, at 115.

151. *SOURCES OF OUR LIBERTIES*, *supra* note 145, at 149. Professor Treanor suggests that this provision was modeled after Article 28 of the Magna Carta. See Treanor, *Takings Clause*, *supra* note 2, at 785 n.12.

152. See Fundamental Constitutions of Carolina art. 44 (1669), reprinted in SCHWARTZ, *supra* note 146, at 115.

153. *Id.*, reprinted in SCHWARTZ, *supra* note 146, at 115.

154. See Treanor, *Just Compensation Clause*, *supra* note 2, at 701. Treanor writes that:

While republicans believed that a body of legislators would act wisely, they brooded almost obsessively about the corruption that they believed great individual power had produced in England. By emasculating the executive, the framers of the first state constitutions sought to ensure that similar abuses would not occur in this country. The first takings clauses—which barred the executive from taking property—did not reflect a changing view of property rights. Rather, they represented only one of many limitations imposed on gubernatorial action.

*Id.* (citations omitted); see also BOSSELMAN ET AL., *supra* note 19, at 94 ("Intermediate

Amendment Takings Clause, which limited the legislature, the English view was that a statute that did not provide for compensation constituted consent not to compensate the owner.<sup>155</sup>

### B. *The Vermont Constitution of 1777*

Three state constitutions adopted shortly after the Declaration of Independence contained eminent domain clauses, but these constitutions were modeled after Article 39 of the Magna Carta.<sup>156</sup>

Vermont, Massachusetts, and the Northwest Territory Constitutions addressed the issue of eminent domain with clauses that required just compensation. These just compensation clauses arose out of a distrust of legislatures.<sup>157</sup> A common concern among many citizens of these states was the legislative acquisition and regulation of property.

The Vermont Constitution of 1777 was the first state constitution to contain a just compensation clause.<sup>158</sup> In contrast to earlier due process protections of property, the text of the Vermont Constitution could also serve as a limitation on the legislature. Article II of the Vermont Constitution stated, "[P]rivate property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."<sup>159</sup> Although the 1777 version of the Constitution was never ratified, the just compensation clause remained in the Vermont Constitution, which was ratified in 1786.<sup>160</sup>

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colonial documents of the revolutionary period continued to follow Coke's pattern, expressing concern only over takings by the executive without legislative approval.").

155. See Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 598 n.15 (1942) ("The English Parliament, by virtue of its omnipotence and its freedom from any legal control, may wield any power of taking. Accordingly, the omission of a provision directing the payment of full compensation in a legislative act concerning expropriation has been construed as authorization to take without compensation.").

156. See MD. CONST. of 1776 art. XXI, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1688 (Francis N. Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; N.Y. CONST. of 1777 art. XIII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2632; N.C. CONST. of 1776 art. XII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2788.

157. See *infra* notes 160-63 and accompanying text (discussing Vermont citizens' displeasure with the New York legislature).

158. See VT. CONST. of 1777, ch. I, art. II, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1858.

159. *Id.*, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 3737, 3740.

160. See VT. CONST. of 1786 ch. I, art. II, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 3752 ("[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in

A likely justification for the Vermont takings clause was the historic difficulty citizens of Vermont experienced in keeping their land. Many of the original settlers of Vermont had been granted their land from New Hampshire.<sup>161</sup> When King George III gave Vermont to New York, the New York governors refused to recognize the New Hampshire settlers' claims.<sup>162</sup> Moreover, the New York legislature supported later attempts by the New York governors to end Vermont landowners' claims.<sup>163</sup> Consequently, Vermont settlers were not pleased with the state legislature.<sup>164</sup> This factual background may not indicate that Vermont addressed regulatory takings in its just compensation clause,<sup>165</sup> but it does demonstrate that citizens of Vermont would have desired limits on the power of state legislatures over their property.

### C. *The Massachusetts Constitution of 1780*

In 1780, the Massachusetts Constitution was ratified.<sup>166</sup> It contained the following language:

[B]ut no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.<sup>167</sup>

Unlike the Vermont Constitution, the Massachusetts Constitution included a clause for consent by the legislature, reflecting the tradition of the Magna Carta "law of the land" style clauses. On the other hand, the clause appears to require compensation even when

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money.").

161. See Treanor, *Just Compensation Clause*, *supra* note 2, at 702 ("[Vermont] was settled primarily by men who held grants from New Hampshire.").

162. See *id.* (stipulating that "the New Hampshire grants were thereby rendered void") (citing INTRODUCTION TO VERMONT STATE PAPERS xvii (William Slade Jr. ed., 1823)).

163. See *id.*

164. See *id.* ("A state legislature had attempted to deprive most of the citizens of Vermont of their land. Vermonters wanted to ensure that they would never again face such a threat.").

165. There appears to be no pre-ratification cases interpreting this clause. Professor Treanor was unable to find a single early case interpreting the Vermont just compensation clause. See Treanor, *Takings Clause*, *supra* note 2, at 791 n.50.

166. See MASS. CONST. of 1780 art. X, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1888.

167. *Id.*, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 156, at 1891.



there is legislative consent. Many Massachusetts citizens considered property regulation a serious issue.<sup>168</sup> The Massachusetts Constitution of 1778 was rejected, in part, because it did not sufficiently protect property rights.<sup>169</sup> In Lenox, Massachusetts, town meeting participants criticized the framers of the Massachusetts Constitution because they had not recognized adequately that "[a]ll Men were born . . . having certain natural and inherent and unalienable Rights, among which are the enjoying and defending Life and Liberty and acquiring possessing and protecting Property of which Rights they cannot be deprived but by injustice."<sup>170</sup> This statement, declaring that it is an injustice to deprive people of their rights of acquisition, possession, and protection of property, is a justification for providing just compensation for regulatory takings. The alternative means to prevent such "injustice" would be the absolute prohibition of regulation of property.

Theophilus Parsons, who was a member of the 1788 Massachusetts Convention, which ratified the U.S. Constitution, is an important figure in this debate. Parsons largely authored the *Essex Result*, a discussion of government that had a great impact in the Founding Era<sup>171</sup> and on the Massachusetts Constitution. In the *Essex Result*, Parsons proposed that laws that affect property should require the assent of people "who possess a major part of the property in the state."<sup>172</sup> This view indicates more than a concern for the relation of property and factions, as Madison discussed in *Federalist* 10.<sup>173</sup> Parsons' remarks indicate a concern among property owners that regulation of their property would harm them. It is reasonable to infer that the just compensation clause was one means by which property owners sought to protect their property rights.

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168. See INTRODUCTION TO POLITICAL AUTHORITY 22 (Oscar Handlin & Mary Handlin eds., 1966) (explaining that people of Massachusetts complained about insufficient protection of their property rights).

169. See *id.*

170. *Id.* at 253-54; see also Treanor, *Just Compensation Clause*, *supra* note 2, at 706 n.68.

171. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 231 (1996) ("Written mainly by Theophilus Parsons, the *Result* had a profound effect on the Framers' thinking about the separation of powers and individual rights. One historian of the period describes the document as 'an essay in political theory and constitutional practice comparable to *The Federalist* in the sophistication of its argument (and in its political outlook).'" (quoting CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 29 (1922)).

172. Theophilus Parsons, *Essex Result*, reprinted in THEOPHILUS PARSONS JR., *MEMOIR OF THEOPHILUS PARSONS*, app. I, at 372 (1859).

173. See THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961) (noting that the relationship between factions and property arises due to the unequal distribution of the latter).

Parsons also provides an analysis of the eminent domain clause that directly supports compensation for regulatory takings. Using a Lockean social compact model, Parsons explains in the *Essex Result*:

[I]n entering into political society, [man] surrendered this right of controul over his person and property. . . . If the law affects the property only, the consent of those who hold a majority of the property is enough. If it affects, (as it will very frequently, if not always,) both the person and property, the consent of a majority of the members, and of those members also who hold a majority of the property, is necessary. If the consent of the latter is not obtained, their interest is *taken* from them against their consent, and their boasted security of property is vanished. Those who make the law, in this case give and grant what is not theirs.<sup>174</sup>

This passage is striking for several reasons. First, it addresses laws that "affect" property, and interprets a law that "affects" property without consent to mean that a property interest is "taken." In addition, Parsons' language addresses regulations of property and uses "taken" in the same fashion proposed in the Fifth Amendment textual discussion in this Article.

Moreover, Parsons, as Chief Justice of the Massachusetts Supreme Judicial Court, authored some of the earliest cases to support compensation for indirect consequences of physical invasions of land.<sup>175</sup> From this evidence, it appears that Parsons, one of the most influential framers of the Massachusetts Constitution, intended to provide just compensation for regulatory takings.

#### *D. The Northwest Ordinance*

Adopted by Congress on July 13, 1787,<sup>176</sup> the Northwest Ordinance contained a contracts clause, a novel concept at the time,<sup>177</sup> and a just compensation clause.<sup>178</sup> Without question, it provided more

174. Parsons, *supra* note 172, at 371 (emphasis added).

175. Chief Justice Parsons allowed for compensation in circumstances which were not direct, but consequential harm to property. He suggested compensation should be due when a government intrusion such as roadbuilding causes the property owner to incur costs to use his land. See Kobach, *supra* note 38, at 1254-55 (discussing potential expenses for building a watercourse compensable) (citing *Perley v. Chandler*, 6 Mass. (6 Tyng) 454 (1810)); *Commonwealth v. Coombs*, 2 Mass. (2 Tyng) 489 (1807) (finding expenses for building a fence compensable)).

176. See Northwest Ordinance, reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 145, at 392. The impetus behind this Northwest Ordinance was to promote the purchasing of land and encourage settlers to move out west. See *id.* at 388-89 (noting that Congress recognized the revenue benefits of selling these lands to private companies).

177. See Treanor, *Takings Clause*, *supra* note 2, at 833 ("[The Northwest Ordinance] contained the first contract clause.").

178. See *id.* at 825 (noting that the just compensation clause broke with tradition

protections for property rights than any early state constitution.<sup>179</sup>

The just compensation clause in the Northwest Ordinance contained the following language: "[S]hould the public exigencies make it necessary, for the common preservation, to take any persons property, or to demand his particular services, full compensation shall be made for the same."<sup>180</sup> This clause, by reference to the "common preservation," supports Tucker's interpretation that the federal Takings Clause originally was intended to prevent impressment by the military.<sup>181</sup> Similar to the 1777 draft of the Vermont Constitution, however, it would require compensation even for legislative conduct.<sup>182</sup> Also, the Northwest Ordinance contained the unusual provision for compensation where services were demanded.<sup>183</sup>

There are contemporary comments that suggest a broad, property-protective purpose to the Northwest Ordinance. Congressman Richard Henry Lee of Virginia wrote to George Washington: "It seemed necessary, for the security of property among uninformed, and perhaps licentious people, as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined."<sup>184</sup> These remarks clearly cover the contracts clause in the Northwest Ordinance, but may be relevant to the Takings Clause as well.<sup>185</sup>

The Takings Clause may have been added to the Northwest Ordinance, along with the contracts clause, by Manasseh Cutler. Cutler, a lobbyist for the Ohio Company, apparently added the clause

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by requiring compensation in certain circumstances).

179. See Northwest Ordinance, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 145, at 389 (explaining that the Northwest Ordinance included enumerated individual rights, probably intended to attract settlers to its lands).

180. Northwest Ordinance, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 145, at 395.

181. See Treanor, *Takings Clause*, *supra* note 2, at 831 ("The language of the Northwest Ordinance—and in particular the words 'public exigencies' and 'common preservation'—suggests that the clause was designed to require compensation when goods were seized by the military."); see also *supra* Part III.C and accompanying text (discussing Tucker's belief that the Takings Clause was originally intended to prevent military impressment).

182. See Treanor, *Takings Clause*, *supra* note 2, at 830 n.254 (noting that the Vermont Constitution was likely to have been the model for compensation clauses).

183. See Northwest Ordinance, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 145, at 395 (providing that full compensation will be made to anyone from whom the legislature "demand[s] his particular services . . .").

184. Letter from Richard Henry Lee to George Washington (July 15, 1787), in 2 THE LETTERS OF RICHARD HENRY LEE 1779-1794, at 425 (James Curtis Ballagh ed., 1914), *reprinted in* Treanor, *Takings Clause*, *supra* note 2, at 832.

185. See Treanor, *Takings Clause*, *supra* note 2, at 833 ("Clearly, Lee was referring to the Contract Clause, and he may have been referring to the Takings Clause as well.").

as a means of protecting the Ohio Company's desired grant of 1.5 million acres in the Northwest Territories.<sup>186</sup> Treanor views this possibility as an example of the concern for process failure, which he interprets the Fifth Amendment Takings Clause to remedy.<sup>187</sup> If protection of a grant to the Ohio Company was the purpose of the clause, however, the word "take" in the Northwest Ordinance easily could extend to intangible property rights. A desire to protect business interests from retroactive laws supports a regulatory takings interpretation.<sup>188</sup> Moreover, there is a strong originalist argument that process-based protections of rights were not intended to supplant judicial review.<sup>189</sup>

Assuming that the drafters of the Northwest Ordinance did not perceive regulatory takings to cover takings of contract rights, they included a contracts clause to protect property rights from every conceivable government regulation. The alternative, that regulatory takings were not covered but rights of contract were covered, would leave an inexplicable gap in light of the drafters' concern that the "uninformed" occupants of the territories were a threat to property rights.<sup>190</sup> Whatever the intent of the Northwest Ordinance just compensation clause, it is likely that it was intended to protect property in the broadest manner possible.

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186. See *id.* ("A strong argument has been presented to the effect that the Reverend Manassah Cutler, A... lobbyist for the Ohio Company, was chiefly responsible for it.") (citing BENJAMIN WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 7 (1938)).

187. See *id.* ("If this were the case, however, the clause would have been written to remedy another kind of process failure: a legislature's singling out an entity that was disadvantaged in the political process...").

188. See Kmiec & McGinnis, *supra* note 90, at 530. Kmiec and McGinnis argue that:

The phrasing makes clear that this Clause [the Contract Clause] was designed to prohibit the states of the Northwest Territory from interfering with vested property and contract rights through the passage of retrospective laws. This interpretation is confirmed by the placement of the Clause directly after a clause that prohibited the taking of property or services without compensation. Laws taking property are obviously retrospective laws, because they abrogate rights possessed by property owners under prior positive law.

*Id.*

189. See John C. Yoo, *Judicial Review and Federalism*, 22 HARV. J.L. & PUB. POL'Y 197, 197-98 (1998) ("The Framers treated states' rights in much the same way as they treated individual rights. Although they believed that the national government would restrain itself from violating individual rights, the Framers fully anticipated that the courts would exercise judicial review to back up the political process.") (citing *THE FEDERALIST* No. 78, at 524-25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

190. See Letter from Richard Henry Lee to George Washington (July 15, 1787), in 2 *THE LETTERS OF RICHARD HENRY LEE*, *supra* note 184, reprinted in Treanor, *Takings Clause*, *supra* note 2, at 832-33.

V. WILLIAM BLACKSTONE AND OTHER PHILOSOPHICAL INFLUENCES  
ON THE ORIGINAL UNDERSTANDING OF JUST COMPENSATION

One of the primary issues to resolve in understanding the Founders' thoughts is the role of republican versus liberal political philosophies during the Founding Era.<sup>191</sup> The importance of individual rights was central to liberalism, but marginal to republicanism. The republican theory, which was prominent during the Revolution, emphasized the state's active role as a cultivator of virtue and traced its roots to the sixteenth-century humanists of Florence, Italy.<sup>192</sup> James Harrington is reputed to be one of the most important republican influences on colonial American thought.<sup>193</sup> Harrington's 1656 *Oceana* was premised on a doctrine of balance, whereby property was distributed equally among the king, nobility, and people.<sup>194</sup> Property ownership was desirable under this theory, but only insofar as the individual owned enough property to participate in the polity.

The republican view was overcome, in part, by liberalism during the Founding Era.<sup>195</sup> It is difficult to argue that the Takings Clause was anything but a product of liberalism, unless it was a reflection of a more narrow distrust of legislatures.<sup>196</sup> Compensation for individual property owners, if not an indication of distrust of government, is centered on a concept of individual rights. Republican theory may explain why just compensation clauses were not a part of the early state constitutions, or why the Takings Clause was not proposed as a limitation on the state governments, but it does not explain the intended meaning of the Takings Clause. Recent studies of the

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191. For discussions of these philosophies, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

192. See POCOCK, *supra* note 191, at 504-07 (asserting that American political republicanism evolved from Renaissance political theories).

193. See David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 473 (1993) ("The primary Republican influence upon colonial America is James Harrington and his utopian treatise *Oceana*.").

194. See *id.* at 473-74 (purporting to find support in J.G.A. POCOCK, *THE POLITICAL WORKS OF JAMES HARRINGTON* 167, 405 (1977)).

195. See POCOCK, *supra* note 191, at 606-15; WOOD, *supra* note 191, at 523 (explaining the shift in political thought in response to the people's perception of their liberty).

196. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 107 n.220 (1999) (suggesting that, in light of Locke's use of legislative "consent," "the proliferation of just compensation clauses may have been due to a more general loss of faith in legislatures").

Takings Clause agree that the Takings Clause was intended to support judicial review of legislative actions.<sup>197</sup> This policy cannot be squared with the republican vision that the common good should take priority over individual rights.<sup>198</sup>

Whatever differences in political philosophy the Founders may have had, the important element for original intent purposes is whether a particular philosophy was enshrined in the text of the Takings Clause. The idea of compensating a taking is inherently liberal because it implies that a government action, even with the best intentions, must still recognize the right of the individual property owner. This Article is concerned not with the desires of the different factions among the Framers, but with their understanding of the law when they ratified the Constitution. Any shared understanding of property rights and just compensation, if one exists, is relevant to defining the meaning of those terms in the Takings Clause.

#### A. *John Locke*

Along with Coke and Blackstone, John Locke was one of the most influential liberal thinkers on property rights during the late eighteenth century in America.<sup>199</sup> Locke gave property rights a role of singular importance within the governmental system:

The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.<sup>200</sup>

Locke's philosophy places property rights above the interests of the government as long as the property owner has not consented to relinquish his rights.<sup>201</sup> In addition, Locke held a very broad concept of property.<sup>202</sup> Locke, however, argued for a concept of tacit consent:

197. See Kmiec, *supra* note 53, at 1647.

198. But see Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 276-78 (1991) (suggesting a combination of liberal and republican principles on property was represented among Founding legal thinkers).

199. See *infra* note 212 and accompanying text (discussing the influence of Locke's theories).

200. 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 138, at 378 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1967) (1690).

201. See *id.*

202. See Underkuffler, *supra* note 39, at 138 (suggesting that Locke defined property to include "the inherent liberties and rights of individuals"). Locke stated that: "Though the earth, and all inferior Creatures be common to all Men, yet every

"that every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it . . . ."<sup>203</sup>

Professor Richard Epstein gives content to the Takings Clause by referring to the concepts of property and just compensation espoused by John Locke<sup>204</sup> and William Blackstone.<sup>205</sup> Blackstone defines property in the following manner:

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.<sup>206</sup>

Epstein accordingly divides property into three rights: the rights of possession, use, and disposition, which he argues the Founders understood in their definition of property.<sup>207</sup> The essence of Epstein's argument is that whenever the government takes any of these rights without compensation, a taking subject to the Takings Clause occurs.<sup>208</sup> It follows that certain regulations that directly interfere with one of these property rights would be compensable.<sup>209</sup>

Although Epstein's views on takings have been challenged,<sup>210</sup> the import of Locke's philosophy is clear.<sup>211</sup> Professor McDonald notes

Man has a *Property* in his own *Person*." 2 LOCKE, *supra* note 200, § 27, at 305.

203. 2 LOCKE, *supra* note 200, § 119, at 366.

204. See EPSTEIN, *supra* note 3, at 13-16 (discussing Locke's view on the role of property in governance, treatment of consent, and relation to just compensation).

205. See *id.* at 22-23 (elaborating on Blackstone's definition of rights implicit in ownership of property).

206. 1 WILLIAM BLACKSTONE, COMMENTARIES \*134.

207. See EPSTEIN, *supra* note 3, at 20-24 (discussing meanings of property); see also *id.* at 29 (stating that the Founders shared Locke's and Blackstone's affection for private property).

208. See *id.* at 35 (stating that prohibition against the taking of private property has powerful roots in all legal systems); see also *id.* at 22 (discussing Blackstone's definition of property, which consists of use, enjoyment, and disposal of property); *id.* at 23 ("Most important for this inquiry, Blackstone's account of private property explains what the term means in the eminent domain clause. A constitution that wishes to protect private property must take the meaning of private property from ordinary usage.").

209. See Epstein, *supra* note 3, at 95 ("All regulations, all taxes, and all modifications of liability rules are takings of private property *prima facie* compensable by the State.").

210. See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556-67 (1995) (questioning Epstein's interpretations of history). But see Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 591 (1995) (addressing issues of "proper interpretation").

211. For example, Professors Laurence Tribe and Michael Dorf note that:

Undoubtedly, one of the most influential thinkers for American statesmen of [the eighteenth century] was the seventeenth-century English political philosopher John Locke . . . . Whether or not a modern reader thinks that

that during the Constitutional Convention "[t]he contract and natural-rights theories of John Locke were repeatedly iterated without reference to their source."<sup>212</sup>

Treanor believes that Epstein's interpretation of original intent is dubious because Epstein's theory "rests on his understanding of the general principles animating the Takings Clause and the Constitution, rather than on the specific construction that the framers gave the clause."<sup>213</sup> But because the original understanding of the Takings Clause is actually unclear, Epstein's argument legitimately suggests that the word "taken" may have extended to the rights which inhere in property ownership. This reading is supported by language from Grotius, as discussed below.<sup>214</sup> Moreover, Epstein's argument does not require "translation" of the Founders' concerns into the modern perspective—it simply interprets the Takings Clause in accordance with the alleged Founders' philosophy of property rights.

### B. *The Civil Law Tradition*

Treanor suggests that if scholarly writing influenced the rise of the just compensation principle, civil law scholars, like Grotius and Pufendorf, were probably the most important.<sup>215</sup> Although Treanor notes that some Federalists believed there was a natural right to just compensation,<sup>216</sup> he fails to consider whether the Takings Clause should be interpreted to codify the entirety of that natural right as it was then understood. The civil law tradition of natural rights may extend just compensation to regulatory takings.

In light of the ambiguity in the original intent, Grotius' understanding of the natural right to compensation is of added significance. Grotius declared:

[T]hrough the agency of the king even a right gained by subjects can be taken from them in two ways, either as a penalty, or by the force of eminent domain. But in order that this may be done by the power of eminent domain the first requisite is public advantage; then, that compensation from the public funds be

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Locke's theory [of property] is a sensible one, something like it is necessary to make sense of, and therefore give content to, the Takings Clause.

LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 70-71 (1991). Professor Treanor lists several other articles in support of Locke's role. See Treanor, *Just Compensation Clause*, *supra* note 2, at 817 n.186.

212. McDONALD, *supra* note 75, at 7.

213. Treanor, *Just Compensation Clause*, *supra* note 2, at 815.

214. See H. GROTIUS, DE JURE BELLIE ET PACIS bk. VIII, ch.14, § 7 (1625).

215. See Treanor, *Just Compensation Clause*, *supra* note 2, at 815 n.178.

216. See *id.* at 835.



made, if possible, to the one who has lost its right.<sup>217</sup>

Notably, Grotius referred to compensation for the taking of property in very broad terms, and did not merely refer to the taking of physical property<sup>218</sup>—this perspective is in accord with Epstein's reading of Locke. Furthermore, it has been suggested that Grotius' arguments influenced Chancellor Kent's early nineteenth century holding that compensation was due for the taking of rights associated with physical property.<sup>219</sup> On the other hand, Grotius appears to have believed that economic regulation did not fall under the eminent domain power.<sup>220</sup>

Pufendorf, in contrast to Grotius, does not refer to the taking of property generally, but to the seizure of goods. In his discussion of the right to compensation, Pufendorf stated:

The third right is that of Eminent Domain, consisting in this, when urgent necessity of the state demands, any subject's which the immediate situation especially requires can be seized and applied to public purposes, even if the property far exceeds the proportion which he was bound to contribute to the expenses of that state. But for this reason the excess ought to be refunded to that citizen from the public treasury, or by contribution of the other citizens so far as possible.<sup>221</sup>

Grotius' protection of property appears more extensive.<sup>222</sup> Nevertheless, Grotius' broad language shows that compensation for taking of property rights was not necessarily a novel idea at the time of the Founding Era.<sup>223</sup> Indeed, the Founders easily could have used language like Pufendorf's, referring to the seizure of land, or of goods, instead of the more general taking of property.

Treanor contends that these civil law scholars did not believe there was a legal right to just compensation, but merely a moral right.<sup>224</sup> This argument has no bearing on the Takings Clause itself, which adopted the language of "just compensation" as a requirement. Moreover, not all of the early eminent domain theorists considered

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217. GROTIUS, *supra* note 214, bk. VIII, ch. 14, § 7.

218. See Kobach, *supra* note 38, at 1235.

219. See *id.* (commenting on the similarity between Chancellor Kent's opinions and Grotius and noting that Kent made explicit reference to Grotius' writings).

220. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 54 (1964) ("One of the little known facts of our legal history is that Grotius, the father of the compensation clause, was a firm advocate of government regulation of prices.").

221. SAMUEL PUFENDORF, *DE OFFICIO HOMINES ET CIVIS*, Vol. II, ch. 15, § 4 (James Brown Scott ed., Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682).

222. See GROTIUS, *supra* note 214, bk. VIII, ch. 14, § 7.

223. See *id.* (stating that in the seventeenth century Grotius wrote that citizens should receive compensation for takings of private property).

224. See Treanor, *Just Compensation Clause*, *supra* note 2, at 815 n.178.

the right to compensation to be merely moral.<sup>225</sup>

At a minimum, the writings of influential legal philosophers at the time the Fifth Amendment Takings Clause was drafted suggest that a broad interpretation of the takings that merit just compensation is reasonable.<sup>226</sup> Incorporation of the allegedly moral need for "just" compensation into the codified legal right recognized by the Fifth Amendment in no way suggests a limitation of the compensation right to physical takings. Instead, it indicates that the courts now may enforce the full extent of just compensation even where it would otherwise have been a mere moral obligation of the state to do so.

### C. *William Blackstone's Influence on the Understanding of the Common Law*

Among the most important additions to the takings debate is the discussion of just compensation in William Blackstone's *Commentaries*.<sup>227</sup> Blackstone was consulted as the decisive authority during the debates at the Constitutional Convention to define the meaning of legal terms.<sup>228</sup> Madison quoted Blackstone in his *Property* essay.<sup>229</sup> Madison's regard for, and familiarity with, Blackstone's understanding is especially important as a drafter of the Takings Clause's language.<sup>230</sup>

For this reason, Blackstone's full text on the subject is needed.

225. Lenhoff writes that:

The theory of enforced sale originated in French writings on civil law and was proclaimed by no less a writer than Montesquieu. It may have been that Montesquieu, a conservative advocate of the protection of vested rights, thought he could base the right to compensation on solid and traditional ground by deliberately picking a concept out of the field of private law. Under the older doctrines of natural law, compensation was considered as a moral charge upon the exercise of the power of eminent domain.

Lenhoff, *supra* note 155, at 601-02.

226. See ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 160 n.16 (1987) (listing other Founding Era legal philosophers who supported the need for just compensation including Emer de Vattel, Cornelis van Bynkershoek, Jean Jacques Burlamaqui, and Charles de Secondat Montesquieu).

227. 1 WILLIAM BLACKSTONE, COMMENTARIES \*135.

228. See Schultz, *supra* note 193, at 484. Schultz writes that:

[Blackstone's] views on the rights of Englishmen supposedly influenced the writing of the Declaration of Independence where 16 of its signers were known to have purchased the Commentaries. At the Constitutional Convention the Founders discussed terms such as "ex post facto laws" and "due process" in the sense that Blackstone had described these concepts.

*Id.*

229. See *Property*, *supra* note 104, at 266 (quoting Blackstone in claiming that property "means that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual").

230. See *id.* at 272-73 (noting the importance of Madison's understanding of property rights in interpreting the Takings Clause).

According to Blackstone:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.<sup>231</sup>

There are several concepts contained in Blackstone's argument that suggest regulatory takings should be compensable.<sup>232</sup> Blackstone's example of a road through private property is, in part, a restriction on the property owner's use of his land.<sup>233</sup> Blackstone does not stipulate that title to the strip of land is taken. Arguably, the state does not deprive the owner of his land, but some of the land's possible uses, through a required public right of way. In fact, as discussed below, this view of road building as not taking the land was the view of some colonies in New England.

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231. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*135. This understanding of the role of property rights does not indicate, however, that Blackstone thought every property right was absolute. See McDONALD, *supra* note 75, at 13 ("Blackstone's sweeping definition of the right of property overstated the case; indeed, he devoted the succeeding 518 pages of book 2 of his Commentaries, entitled 'Of the Rights of Things,' to qualifying and specifying the exceptions to his definition."). Professor McDonald notes that Blackstone makes exceptions for rights reserved to the sovereign when the property was granted to the individual, such as the regulation of economic activity, and sumptuary laws, which regulated the public morals. See *id.* at 13-19.

232. See Treanor, *Just Compensation Clause*, *supra* note 2, at 786 n.15 (finding that Blackstone argued compensation was due when real property was taken by the state).

233. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*135 (referring to the "private rights" of the individual whose land may have a new road built through it).

Unlike the colonies, however, Blackstone appears to have thought this loss of use was compensable.<sup>234</sup> This interpretation is suggested by Blackstone's reference to the protection of "every individual's private rights," and not merely private property.<sup>235</sup> The "injury" was compensable.

Furthermore, Blackstone believed the private rights that inhere in property are protected.<sup>236</sup> Blackstone offers this conclusion as evidence of his introductory premise that the "regard for private property" will not authorize "the least violation of it."<sup>237</sup> It is difficult to read these sentences and not see parallels to Madison's *Property* essay, which suggested that even indirect violations "are not a pattern for the United States."<sup>238</sup> The "least violation" of the "individual's private rights" is compensable under this reading.

## VI. COLONIAL PRACTICE

Colonial and early state governments showed very limited respect for property rights.<sup>239</sup> Professor McDonald estimated in 1976 that \$100 million worth of property was taken without compensation during the Revolutionary Period.<sup>240</sup> During that time, Loyalist property was taken, debts to British subjects were canceled, and worthless bills of credit were issued.<sup>241</sup> Although there is some disagreement over the extent to which early statutory just compensation clauses protected private property,<sup>242</sup> it is clear that regulatory takings were often left uncompensated by the colonies.<sup>243</sup>

It is certainly true that the colonies were familiar with regulation of

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234. See *id.* (arguing that the state compels the individual to cede property "by giving him a full indemnification and equivalent for the injury thereby sustained").

235. See *id.*

236. See *id.* ("[T]he public good is in nothing more essentially interested, then in the protection of every individual's private rights . . ."); *supra* notes 206-09 and accompanying text.

237. *Id.*

238. See *Property*, *supra* note 104, at 267.

239. See *id.*

240. See PAUL, *supra* note 226, at 74 n.14 (indicating that Professor McDonald's estimate of \$100 million is a conservative figure) (citations omitted).

241. See *id.* at 74.

242. Compare Treanor, *Just Compensation Clause*, *supra* note 2, at 788 n.28 (arguing that the principle of just compensation had not been established based on the absence of an inviolable rule of compensation), with James W. Ely, Jr., "That due satisfaction may be made": *The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 4 (1992) (arguing that colonial and post-Revolutionary practice supported a compensation requirement).

243. See Treanor, *Just Compensation Clause*, *supra* note 2, at 787-88 (listing circumstances in which owners of private property were not compensated for their land taken).

land use.<sup>244</sup> Frequently, colonial statutes that took property included compensation clauses.<sup>245</sup> Many statutes, however, did not contain such clauses.<sup>246</sup> In either case, there were numerous statutes that allegedly regulated property for public benefit or to prevent a community harm, thus formally avoiding the need to compensate.<sup>247</sup> Therefore, it would be incorrect to assume that the Takings Clause failed to mention regulatory takings because land use regulation was unheard of in the Founding Era.

One type of regulation was intended to encourage development by requiring property owners to seat or improve their land.<sup>248</sup> An early Massachusetts ordinance provided for forfeiture of title if the owner did not build on or improve the land within three years.<sup>249</sup> New Netherland had an ordinance that required land owners to fence and plant their land or else it would be given to others.<sup>250</sup> Colonial Virginia actually forfeited improved land if it was later deserted by its owner.<sup>251</sup> Other colonies passed similar ordinances.<sup>252</sup>

Regulation also covered enclosure of farm land,<sup>253</sup> the rate of mining operations,<sup>254</sup> and drainage of meadows and marshes.<sup>255</sup> Colonies even had regulations affecting the height and appearance of buildings.<sup>256</sup> One of the more egregious regulations was Maryland's Mill Act of 1669 (the "Mill Act").<sup>257</sup> The Mill Act empowered an

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244. See generally Hart, *supra* note 2, at 1259-81 (describing colonial land use regulations).

245. See Ely, *supra* note 242, at 5 (commenting that colonial statutes invariably required compensation to owners when land was taken for public buildings).

246. See Treanor, *Just Compensation Clause*, *supra* note 2, at 787 (noting that all colonies, except Massachusetts, took private property without compensation).

247. See Hart, *supra* note 2, at 1257 (commenting that colonial lawmakers regulated land to secure public benefits as well as to prevent harm to health and safety).

248. See *id.* at 1259-63 (describing colonial affirmative land use requirements that reflect a policy preference for land developments).

249. See *id.* at 1260.

250. See *id.* at 1261.

251. See *id.* at 1262.

252. See *id.* at 1262-63 (describing North Carolina's requirement of owners to develop their land within six months of ownership and South Carolina's appropriation of non-used land).

253. See *id.* at 1263-65 (outlining colonial fencing regulations for farm land).

254. See *id.* at 1265-66 (discussing mining regulations in the colonies of Plymouth and Connecticut).

255. See *id.* at 1268-72 (noting colonial legislation compelling owners to participate in drainage projects in Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, and South Carolina).

256. See *id.* at 1275-76 (describing restrictions for orderliness and beauty in the city of New Amsterdam, the city of New York, and in the colonies of Virginia and Connecticut).

257. See generally John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1, 15-18 (1995) (discussing the Maryland Mill Act as an example of a colonial legislature

individual to get an 80-year lease on proprietary riparian land for purposes of building a grist mill.<sup>258</sup> The property owner could prevent condemnation only by agreeing to build a grist mill himself.<sup>259</sup> The Mill Act did require compensation, but for less than market value.<sup>260</sup>

Many of the regulations of land use were intended to prevent harm to the public.<sup>261</sup> Such regulations hardly qualify as evidence against an understanding of regulatory takings, however, because noxious uses were not considered a right of property.<sup>262</sup> But some regulations had purposes that were purely for public benefit, and often for economic development.<sup>263</sup> One cannot contend that these regulations are other than evidence that some colonies had little respect for the property rights associated with land use.

Nevertheless, colonial history does not prove that the Takings Clause does not cover regulatory takings. It merely proves that many colonists were familiar with such regulatory measures.<sup>264</sup> It is worth remembering that only two states had just compensation clauses in their constitutions when the Bill of Rights was ratified.<sup>265</sup>

Early colonial charters, as discussed above, treated the law of the land as a form of consent to the taking. As a result, just compensation was never required as long as the taking was pursuant to the law.<sup>266</sup> But mere evidence of colonial statutes that regulated vested property rights is not proof that these property rights are unprotected by the Takings Clause. Regulatory statutes standing alone provide no insight into the meaning of a just compensation

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disrespecting property rights by a process of condemnation and transferal without any judicial supervision).

258. *See id.* at 1.

259. *See id.* at 3.

260. *See id.* at 4.

261. *See* Hart, *supra* note 2, at 1273 (noting that several New England colonies required landowners to destroy barberry bushes to prevent wheat blight and that some also controlled when land was to be used for residences to maintain public order).

262. *See* PAUL, *supra* note 226, at 72 (finding that property rights have always been limited in that one could not use one's property to the harm of one's neighbor).

263. *See* Hart, *supra* note 2, at 1277-78 (describing New Netherland's effort to induce city building development and New York City's order that undeveloped land be sold).

264. *See id.* at 1281.

265. *See* PAUL, *supra* note 226, at 73 (citing Vermont and Massachusetts as the only two states with constitutional provisions requiring the payment of compensation for exercises of eminent domain).

266. *See* Hart, *supra* note 2, at 1283-84 (noting that just compensation was often required by colonial regulation, although not by constitution or charter); *see also* McDONALD, *supra* note 75, at 268 (noting that prior to incorporation, states only compensated for takings as provided by statute).

clause not beholden to legislative discretion because colonial charters would only require just compensation for regulatory takings where a colonial statute required just compensation.

Furthermore, the difficulty in relying on the colonial practice to prove that regulatory takings were intended to be noncompensable is that one must make inappropriate assumptions about the ratification debates. For example, Professor John Hart argues that the evidence of the colonial practices refutes modern regulatory takings jurisprudence:

The supposed American tradition of minimal land use regulation is critical to reconciling the modern doctrine of regulatory takings with the Takings Clause. Application of the Takings Clause to regulations of land use must confront and explain the silence in the constitutional text . . . . That silence does not present a fatal objection to substantive review of land use regulations, however, if the regulations under review are of a sort not found in America when the Bill of Rights was adopted.<sup>267</sup>

Hart concludes, in light of the numerous colonial aesthetic land use regulations,<sup>268</sup> that the textual silence is to be expected. "The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking."<sup>269</sup>

In a footnote, however, Professor Hart concedes, "My discussion assumes that current takings doctrine rests upon incorporation of the Takings Clause into the Fourteenth Amendment."<sup>270</sup> This assumption defeats the entire historical argument. As Professor Michael McConnell has explained in depth, the Takings Clause originally was intended to apply only to the federal government,<sup>271</sup> just as the Contracts Clause was intended to apply only to the states.<sup>272</sup> Irrespective of one's views on the appropriateness of incorporation of the Bill of Rights into the Fourteenth Amendment,<sup>273</sup> the scope of the

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267. Hart, *supra* note 2, at 1289-90.

268. *See id.* at 1275-76.

269. *Id.* at 1292.

270. *Id.* at 1290 n.255.

271. *See* McDONALD, *supra* note 75, at 268 (explaining that the Founders' concerns in protecting commerce and individual property rights led them to provide just compensation only at the federal level).

272. *See id.* (explaining, on the same theory as provided for the Takings Clause, that the Founders' concerns led them to provide protection of contract obligations only at the state level).

273. Compare Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 139 (1949) (finding a record of history overwhelmingly against incorporation of the Bill of Rights), with William W. Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations of State Authority*, 22 U. CHI. L. REV. 1, 1 (1954) (responding to Fairman and buttressing Justice Hugo Black's belief that the Privileges and Immunities Clause makes the Bill of Rights good

Takings Clause in terms of regulatory acts must follow from the intent of the Framers of the Fifth Amendment, who thought they would limit only the federal government.<sup>274</sup> Indeed, this fact may account for the lack of debate on the Takings Clause in the state ratifying conventions—the states did not stand to lose any power by the Takings Clause.<sup>275</sup>

Assuming, as Treanor argues, that the Founders trusted the legislature not to unjustly appropriate private property,<sup>276</sup> this trust was at the state level, not federal.<sup>277</sup> Indeed, Madison showed a strong distrust of legislatures generally.<sup>278</sup>

Equally destructive of the argument that the Founders intended a

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against the states).

274. See Treanor, *Takings Clause*, *supra* note 2, at 713 ("The Anti-federalist apparently voiced no opposition to the just compensation clause. Since the amendment was intended to bind only the federal government, these critics of the Constitution had no reason to oppose the compensation requirement: Their fear was that the federal government would be too strong, not too weak.").

275. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1200 (1992). Professor Amar claims that:

Various state conventions endorsed amendments limiting the new central government, some phrased in general language, others using words explicitly targeted at the central government—"Congress," the "United States," and so on. Yet no one ever suggested that the general language, simply because of its juxtaposition with other clauses worded differently, would limit state governments as well.

*Id.*

Professor Amar, however, also notes the opposing view that certain rights stated in the Bill of Rights were merely declaratory of rights that existed under the state governmental regime. See *id.* at 1206-08. This argument seems inapplicable to the Takings Clause because its text clearly limits legislatures in a way that could not have occurred under the typical early state and colonial due process protections of property.

276. See Treanor, *Just Compensation Clause*, *supra* note 2, at 835 ("[T]he absence of demand for a takings clause indicates that other national political actors had greater faith than Madison that the national government would act in a way consistent with property rights."); see *id.* at 834 ("[T]he bulk of the evidence concerning the predecessor clauses to the Fifth Amendment's Takings Clause suggests that these clauses were not written out of a belief that legislatures could not be trusted to protect property rights.").

277. See McDONALD, *supra* note 75, at 293 ("The Framers apparently saw no need to retain the power at the level of government least likely to abuse it. The most that can be said is that the just compensation clause applied to the level of government most needful of restraint.").

278. See THE FEDERALIST NO. 10, at 2 (James Madison) (Jacob E. Cooke ed., 1961). Madison wrote:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?

*Id.*



continuation of the just compensation scheme practiced by the colonies is the fact that the colonies failed to provide just compensation for many "direct, physical takings." For example, in New England in the seventeenth century, land owners were required to allow town roads through their property, but retained title and the right to build fences and gates across the roads.<sup>279</sup> The legal argument, based on the theory that such roads were merely public rights of way, was that owners were not entitled to compensation because the government did not take anything.<sup>280</sup> Then, when a royal decree required highways appropriated for postal service, the colonies narrowed the roads but provided no compensation because the taking was compensated by letting the landowner keep the rest of his land.<sup>281</sup>

Thus, the evidence of colonial practices proves too much. Although it is possible to argue that the Framers did not intend the Takings Clause to be enforced because the colonists did not enforce just compensation, this argument is not an acceptable originalist position. Courts must assume that the Constitution was meant to be enforced.

## VII. POST-RATIFICATION CASE LAW

Early Takings Clause decisions in the Supreme Court suffer from the same weakness as the pre-ratification commentary,<sup>282</sup> as there is almost no early Supreme Court case law applying the Fifth Amendment Takings Clause.<sup>283</sup> The early state court decisions, on the other hand, show two lines of jurisprudence: one that provided compensation for regulatory takings<sup>284</sup> and one that precluded compensation.<sup>285</sup>

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279. See MCDONALD, *supra* note 75, at 22.

280. See *id.* at 23 (advancing the position of denying compensation in the absence of a total taking).

281. See *id.* (recognizing the practice in which adjacent landowners were given land obtained from narrowing of roads as compensation for land taken).

282. See *supra* note 24 and accompanying text (noting the lack of historical commentary).

283. Professor Treanor offers a variety of reasons for why there is a lack of early Supreme Court case law applying the Fifth Amendment Takings Clause. See Treanor, *Takings Clause*, *supra* note 2, at 794 n.69 (asserting that the lack of case law is due to three principal factors: the Takings Clause was held to apply only against the federal government, the federal government relied on states to condemn the property to be taken, and Congress solely was responsible for paying takings claims against the federal government).

284. See *infra* notes 286-97 and accompanying text (discussing cases that provided compensation for regulatory takings).

285. See *infra* notes 298-305 and accompanying text (discussing regulatory takings cases that found compensation unnecessary).

Protection for nonphysical takings, contrary to some accounts, was recognized very early in the nation's history. In 1816, Chancellor Kent decided a case in which government diversion of a stream had diminished the amount of water flowing to the plaintiff's property.<sup>286</sup> In *Gardner v. Trustees of the Village of Newburgh*,<sup>287</sup> Kent held the right to water "is as sacred as the right to the soil over which it flows,"<sup>288</sup> and concluded that it was "part of the freehold of which no man can be disseized 'but by lawful judgment of his peers, or by due process of law.'<sup>289</sup> New York did not have a just compensation clause at the time;<sup>290</sup> Kent ruled on the basis of natural law, as many state judges did in that era.<sup>291</sup> The notable aspect of the *Gardner* holding for purposes of this Article, however, is that Kent's conception of the taking of property was not limited to the physical land, but encompassed rights that pertained to land ownership.<sup>292</sup>

Even earlier, in 1807, Chief Justice Parsons of the Massachusetts Supreme Judicial Court had reached, in dicta, a similar conclusion to Kent.<sup>293</sup> In *Commonwealth v. Coombs*,<sup>294</sup> a Massachusetts statute required a Court of Sessions to determine compensation for damage when a public highway was built through private land.<sup>295</sup> One effect of such highways was the need to build additional fencing to protect livestock.<sup>296</sup> Chief Justice Parsons barred construction of a road where the compensation procedures were not followed, and added:

In estimating the damages, the committee are [sic] not confined to

286. See *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. ch. 162, 163 (N.Y. Ch. 1816) (explaining that trustees of the Village of Newburgh, acting pursuant to an act of the legislature, attempted to divert a stream that would have resulted in great harm to plaintiff's farm).

287. *Id.*

288. *Id.* at 165-66.

289. *Id.* at 166 (arguing that this common right is fundamental and dates back to the Magna Carta).

290. See J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. REV. 67, 71 (1931) (noting that New York had not adopted a Declaration of Rights at the time *Gardner* was decided).

291. See *id.* at 71-81 (discussing the use of natural law by state court judges to compensate for the lack of an express provision in the federal or state constitutions that protected against the appropriation of property for other than public use or without just compensation); see also Stoebe, *supra* note 26, at 573 n.66 (listing cases in which state constitutions did not expressly require compensation, but courts required compensation based upon natural law principles).

292. See *Gardner*, 2 Johns. ch. at 164-66 (characterizing the government creation of a private nuisance as a taking requiring just compensation).

293. See *infra* note 297 and accompanying text (discussing the holding of *Commonwealth v. Coombs*).

294. 2 Mass. (2 Tyng) 489 (1807).

295. See *id.* at 489-90 (indicating that under the statute of February 27, 1787, the Court of Sessions must assess and pay damages to the adverse party before establishing a highway).

296. See Kobach, *supra* note 38, at 1254.

the value of the land covered by the road, and the expense of fencing the ground. The owner may suffer much greater damage by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm, and that he may suffer very little or no injury by the location.<sup>297</sup>

In contrast, a New York court upheld a statute in 1826 that mandated that a church, whose land was conveyed by the City of New York for use as a cemetery, could no longer be used as a cemetery for public health reasons.<sup>298</sup> In 1831, a Massachusetts court held that the Town of Boston could take a right of navigation when it covered a creek for sanitary purposes.<sup>299</sup> In addition, in 1846, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court held that a property owner could be prevented from moving stones on his private beach without compensation to prevent erosion.<sup>300</sup> Shaw characterized the statute as "a just restraint of an injurious use of the property, which the legislature has the authority to make."<sup>301</sup> Shaw further explained this principle in *Commonwealth v. Alger*.<sup>302</sup>

But he is restrained, not because the public have occasion to make use of the property, or to take any benefit or profit to themselves from it,—but because it would be a noxious use, contrary to the maxim, *sic utere tuo ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner; and it is therefore not within the principle of property taken under the right of eminent domain.<sup>303</sup>

Justice Shaw's position in *Alger* merely applied the common law rule against nuisances. Not all of these state cases were mere applications of the nuisance doctrine; indeed some scholars regard the above line of cases as convincing evidence that early state courts did not recognize regulatory takings.<sup>304</sup> Professor Stoebe has

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297. *Coombs*, 2 Mass. (2 Tyng) at 492.

298. See *Brick Presbyterian Church v. City of N.Y.*, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826) (upholding the statute in question and rationalizing it by weighing the property rights of the church against the potential danger posed to the public).

299. See *Baker v. Boston*, 29 Mass. (12 Pick.) 184, 194-95 (1831) (arguing that police regulations which direct the use of private property to prevent public harm are not void even though they may interfere with private rights without providing compensation).

300. See *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 58-59 (1846) (reasoning that such interference is not so severe as to render it a taking worthy of compensation).

301. *Id.* at 59.

302. 61 Mass. (7 Cush.) 53, 84-85 (1851) (maintaining that property rights, like all other rights, are subject to reasonable limitations necessary to preserve the common good).

303. *Id.* at 86.

304. See BOSSELMAN ET AL., *supra* note 19, at 106-14 (arguing that courts were

argued, and is cited by other authors, for the proposition that the prevailing rule in state courts of the nineteenth century was "no taking without a touching."<sup>305</sup>

Professor Kris Kobach argues persuasively that regulatory takings were compensated in the early nineteenth century.<sup>306</sup> Chancellor Kent's holding in *Gardner*, one of the earliest state just compensation cases, was the first in a long line of cases that recognized takings that were neither direct nor physical.<sup>307</sup>

Some cases recognized direct regulatory takings. For example, in *People v. Platt*,<sup>308</sup> decided in 1819, New York's Supreme Court of Judicature ruled on two regulatory statutes that required riparian property owners to alter their dams so that salmon could pass over them. A property owner whose dam was built prior to the statutes sued and the court ruled in his favor.<sup>309</sup> Chief Justice Spencer declared:

The power of regulating and controlling the use of the Saranac, so as to subserve the public interests, would have been impliedly reserved, had that river been navigable; but, not being so, the legislature have no greater right to pass laws, directing how the waters of that river shall be used, than they would have to regulate the use of the most inconsiderable rivulet, or streams throughout the state, which have been granted by and held from the state.<sup>310</sup>

The *Platt* court held that compensation was due for the property taken.<sup>311</sup>

Furthermore, there is an important distinction between the type of takings in *Gardner* and *Platt*. Although both cases dealt with riparian

willing to uphold police power regulations even when they left landowners with no feasible use of their land); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1057-58 (1992) (Blackmun, J., dissenting) (noting that indirect and consequential injuries to property resulting from regulations were not considered takings).

305. See Stoebe, *supra* note 26, at 601 (describing early notions of what constituted a taking); see also BOSSELMAN ET AL., *supra* note 19, at 106 (explaining the position of the nineteenth-century courts that only actual physical appropriation or divesting of title constituted a taking).

306. See Kobach, *supra* note 38, at 1223-65 (providing in-depth analysis of the early nineteenth century development of just compensation for regulatory takings).

307. See *supra* notes 287-92 and accompanying text (discussing the holding of *Gardner*); see also *infra* notes 308-15 and accompanying text (discussing cases that recognized regulatory takings and provided compensation).

308. 17 Johns. 195 (N.Y. Sup. Ct. 1819). For a more complete discussion of the import of this case, see Kobach, *supra* note 38, at 1236-40.

309. See *Platt*, 17 Johns. at 214 (holding that the statutes constituted a regulatory taking due to the fact that the river was not navigable, which precluded the state from regulating its use to protect the public interest).

310. *Id.*

311. See *id.* at 215 (stating that appropriating private property for public use is allowable only when compensation is awarded to the owner of the property).

rights, *Gardner* covered a consequential taking, where the consequences of government action indirectly destroyed property rights.<sup>312</sup> *Platt*, however, involved a pure regulatory taking, where the government had taken the property right of usage.<sup>313</sup> Both styles of takings, the one indirect and the other non-physical, were soon recognized in other states.<sup>314</sup>

Another group of cases which compensated non-physical taking claims has been recognized even by opponents of physical takings. Treanor concedes in a footnote that "judges repeatedly concluded that the revocation of a franchise gave rise to a compensable taking on the theory that the revocation was a seizure of intangible property."<sup>315</sup> This means there was an early understanding among

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312. See *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. ch. 162, 164-65 (N.Y. Ch. 1816) (noting that the governmental diversion of a stream for public use resulted in a loss of water flowing over the landowner's property, thereby causing injury to him).

313. See *Platt*, 17 Johns. at 195-96 (explaining that the government attempted to deny a landowner the right to maintain a dam on the river that ran through his property).

314. Professor Kobach cites many early nineteenth century state taking cases in which courts granted compensation where regulations took intangible property rights, or devalued property by indirectly limiting its use. See Kobach, *supra* note 38, at 1234-59; see also *Woodruff v. Neal*, 28 Conn. 165, 170 (1859) (requiring compensation for regulation that took usage rights from landowners by requiring them to allow others to graze cattle on their land); *Transylvania Univ. v. Lexington*, 42 Ky. (3 B. Mon.) 25, 27 (1842) (granting compensation for regulation that denied convenient access to and from property); *Fletcher v. Auburn & Syracuse R.R. Co.*, 25 Wend. 462, 464 (N.Y. Sup. Ct. 1841) (ordering compensation for denial of right of access between owners dwelling house and the street caused by a railroad company's construction of an embankment); *Patterson v. City of Boston*, 37 Mass. (20 Pick.) 159, 163-64 (1838) (approving compensation for lost right of use of store front); *Perley v. Chandler*, 6 Mass. (6 Tyng) 454, 456-58 (1810) (allowing compensation for potential expenses in addition to necessary expenses where a road was built across the plaintiff's land thereby obstructing his watercourse).

315. Treanor, *Just Compensation Clause*, *supra* note 2, at 792 n.56 (asserting that a franchise is property and is accorded the same protections as real property) (citing *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 533-34 (1848)); see also *Dix*, 47 U.S. (6 How.) at 543 (Woodbury, J., concurring) (maintaining that a franchise cannot be distinguished from other property); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (McLean, J., concurring) (ordering compensation for the destruction of the franchise formerly granted to the plaintiff); *id.* at 638 (Story, J., dissenting) (asserting that a franchise is private property, and so far as it is injured, it is the taking of private property worthy of reasonable compensation); *Enfield Toll Bridge Co. v. Hartford & New Haven R.R.*, 17 Conn. 40, 59-61 (1845) (declaring that a franchise is accorded the same protection as an estate in land in that when a franchise is yielded for public use, compensation must be paid); *Boston Water Power Co. v. Boston & Worcester R.R.*, 40 Mass. (23 Pick.) 360, 393 (1839) (determining that a legislature can take a franchise under eminent domain, but only upon payment of a full equivalent); *Backus v. Lebanon*, 11 N.H. 19, 24 (1840) (indicating that a franchise is subject to the right of eminent domain, but cannot be taken for public use without compensation); *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66-67 (1834) (rejecting any distinction between a franchise and other property, and embracing the taking of a franchise for adequate compensation when the public interest requires); 2 JAMES KENT, COMMENTARIES ON

many judges that regulations could take property *rights* and fall under the Takings Clause, or under its state equivalent. Title to the franchise was not necessarily acquired by the government act, unless by consequence.

For example, in *Piscataqua Bridge v. New Hampshire Bridge*,<sup>316</sup> the plaintiff had a state franchise to build a bridge across a portion of a river. The court held that if the state granted the defendant a franchise to build a bridge in the same portion of the river, then it constituted a taking of the original franchise.<sup>317</sup> This type of reasoning required an early understanding of property that extended beyond physical objects to the rights that surround those objects, e.g., the right to exclude other bridge proprietors from the area. Justice Story was among the judges who believed that compensation for the taking of a franchise was appropriate.<sup>318</sup>

Treanor looks to late nineteenth century Supreme Court cases, such as the *Legal Tender Cases*,<sup>319</sup> for parallels to his understanding of the state court decisions as limiting compensation.<sup>320</sup> Treanor's thesis, however, conflates consequential damages, which are indirect and frequently were deemed non-compensable,<sup>321</sup> with a direct regulatory taking of the property rights that inhere in the owned property.

The *Legal Tender Cases*,<sup>322</sup> which comprised a controversial five-four overruling of a previous Supreme Court decision,<sup>323</sup> declared:

AMERICAN LAW 400 n.a (8th ed. 1854) (maintaining that when public exigencies require, a franchise must yield to the right of eminent domain, but just compensation is required; even if the damage is merely consequential or indirect).

316. 7 N.H. 35, 56 (1834).

317. See *id.* at 67 ("If, instead of a corporeal hereditament, the legislature have [sic] granted an incorporeal hereditament of such a nature that it may afterward be necessary that the property, or a part of it, be taken for public use, why is not that subjected to the public servitude, and in the same manner?"); see also KENT, *supra* note 315, at 400 n.9 ("Even if the damage is merely consequential or indirect, as by the creation of a new and rival franchise . . . the same compensation is due. . .").

318. See *Charles River Bridge*, 36 U.S. at 638 (Story, J., dissenting) (arguing that where "the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore: and . . . [a] franchise is property").

319. 79 U.S. (12 Wall.) 457, 551-52 (1871) (asserting that the Takings Clause only applies to "direct appropriation, and not to consequential injuries resulting from the exercise of lawful power," and that it "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals").

320. See Treanor, *Just Compensation Clause*, *supra* note 2, at 794-97 (analyzing early Supreme Court decisions interpreting the Takings Clause).

321. But see *supra* notes 286-92 and accompanying text (discussing *Gardner* which found a compensable taking even though the governmental action only indirectly destroyed property rights).

322. 79 U.S. (12 Wall.) 457 (1870).

323. See *Hepburn v. Griswold*, 75 U.S. 603, 624-25 (1869) (holding that an act that forced one to accept U.S. currency instead of more valuable gold or silver was an

[The Takings Clause] has always been understood as referring to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?<sup>324</sup>

When the Supreme Court in the *Legal Tender Cases* ruled that the Legal Tender Act of 1862, which made all debts payable in paper currency, was not a taking despite the devaluation of debts to be paid in gold, it made clear that consequential damages were not compensable under the Takings Clause.<sup>325</sup> Consequential damages, however, are not necessarily the core of regulatory takings. A regulatory taking is a taking of property rights appurtenant to property, or occasionally the property itself, without physically seizing the property or its title. Diminution in value is different and is not always properly attributed to the government, as the *Legal Tender Cases* rightly note. Regulatory takings are not related to the devaluation or destruction of property rights as an incidental effect of regulation not directed toward the property.<sup>326</sup>

Consequential damages are indirect effects on property stemming from government acts or regulations that are not directed at the property itself.<sup>327</sup> Although some early nineteenth century courts compensated consequential damages to property, such practices had fallen out of favor by the late nineteenth century. For example, in *Smith v. Corporation of Washington*,<sup>328</sup> decided in 1857, the Supreme Court was faced with a takings claim based on the actions of the Washington, D.C. government, which had lowered the level of a road

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unconstitutional deprivation of property), *overruled in part by Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

324. *Legal Tender Cases*, 79 U.S. at 551-52.

325. *See id.* at 551.

326. Justice Scalia takes note of the potential ramifications of this distinction in contemporary jurisprudence:

The equivalent of a law of general application that inhibits the practice of religion . . . , is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages in Mugler comes to mind—cannot constitute a compensable taking.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992).

327. *See EPSTEIN, supra* note 3, at 51-52 (noting courts' characterization of consequential damages as unintended incidents).

328. 61 U.S. (20 How.) 135 (1857).

such that the entrance to a home was unusable.<sup>329</sup> The Court held that the resulting inconvenience was "*damnum absque injuria*."<sup>330</sup> The government in *Smith* had neither physically invaded the plaintiff's property nor directly taken any property rights from the plaintiff.<sup>331</sup>

Neither *Smith* nor the *Legal Tender Cases* convincingly supports the "direct, physical taking" thesis because they both involved indirect, consequential damages to property values. As a result, the holdings in those cases are readily distinguishable from many regulatory takings: a regulatory taking may be a direct taking even when it is not a physical taking of property.<sup>332</sup> It is true that the benchmark twentieth century regulatory takings case, Justice Holmes' *Mahon* decision, may have run against recently decided predecessors.<sup>333</sup> It is impossible, however, to argue that the mid-nineteenth century rule against indirect takings equaled an understanding that regulatory takings were beyond the scope of the Takings Clause.

In fact, the Supreme Court recognized a regulatory taking claim as early as 1870. In *Yates v. Milwaukee*,<sup>334</sup> a property owner had built a wharf that extended into the Milwaukee River.<sup>335</sup> Wisconsin had passed an act that gave Milwaukee the power to regulate "encroachments" into the Milwaukee River, and Milwaukee had already established a dock line limiting the building of docks.<sup>336</sup> The Wisconsin Supreme Court held that riparian proprietors had the right to build docks to the point where the river became navigable, and required compensation where the dock line would render the owner's property valueless.<sup>337</sup> Peter Yates had a dock that was rendered valueless by the dock line and sued in federal district court.<sup>338</sup>

329. See *id.* at 146.

330. See *id.* at 148.

331. See *id.* (noting that the defendant had committed no wrong, but had fulfilled a public duty).

332. See EPSTEIN, *supra* note 3, at 100-01 (listing examples of how the government can restrict the use of property).

333. See *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (denying compensation for a regulation which drastically reduced the value of the property owner's property because the act was not arbitrary or unjustly discriminatory); see also Kobach, *supra* note 38, at 1212-13 (arguing that *Mahon* seemed new in light of the *Hadacheck* decision, but regulatory takings were actually well-established doctrinally in the state courts as early as the 1810s).

334. 77 U.S. (10 Wall.) 497 (1870).

335. See *id.* at 498; see also Kobach, *supra* note 38, at 1267-72 (discussing *Yates* at length and noting how the decision was the Supreme Court's first recognition of regulatory takings as compensable).

336. See *Yates*, 77 U.S. (10 Wall.) at 498.

337. See *id.* at 504 (observing that the Wisconsin Supreme Court asserted that title extends to the center of the stream, subject to easement for navigation).

338. See *id.* at 499.



Justice Miller, writing for the Court, determined that Yates possessed property rights that included the power to build a wharf to the edge of the navigable stream.<sup>339</sup> Consequently, the Court determined that the Milwaukee regulation constituted a taking:

This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.<sup>340</sup>

Justice Miller's conclusions parallel some of the holdings in the Court's recent decision, *Lucas v. South Carolina Coastal Commission*.<sup>341</sup> In addition to requiring compensation for the valuable right destroyed by the regulation, Justice Miller held that Milwaukee could not simply declare the wharf a nuisance to avoid takings liability.<sup>342</sup> The wharf would already have had to be a nuisance under common law principles. Thus, regulatory takings clearly were recognized during the nineteenth century.

Moreover, in *Pumpelly v. Green Bay Co.*,<sup>343</sup> decided in 1871, indirect, consequential damages were held to be compensable.<sup>344</sup> The Green Bay Company, pursuant to state statute, built a dam that flooded Pumpelly's property.<sup>345</sup> The Supreme Court interpreted the Wisconsin Constitution's takings clause as equivalent to the federal Takings Clause.<sup>346</sup> The language of the Court bears a striking resemblance to Justice Holmes' reasoning in *Mahon*, that a regulation which destroys property value may "go too far".<sup>347</sup>

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual

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339. See *id.* at 504.

340. *Id.*

341. 505 U.S. 1003, 1031 (1992) ("We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*.").

342. See *Yates*, 77 U.S. (10 Wall.) at 505 (noting that the power to declare a structure a nuisance by showing it can be a nuisance would give the local authorities too much control).

343. 80 U.S. (13 Wall.) 166 (1871).

344. See *id.* at 181 (opining that effective destruction of property or impairment of its usefulness is a taking).

345. See *id.* at 177.

346. See *id.* (observing that the Wisconsin statute's language is almost identical to that of the Takings Clause).

347. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (reasoning that excessive regulation of property is a taking).

as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use.<sup>348</sup>

Treanor argues that "the government action in *Pumpelly* gave rise to a compensation requirement because it was a de facto physical taking."<sup>349</sup> The logic of *Pumpelly*, however, would also support compensation for any de facto direct taking, including one of non-physical property, as in *Gardner*. It does not require a physical invasion for the government to utterly destroy the value of a property, and thus all but take the title to the property by means of regulating the owner's rights of usage.<sup>350</sup>

The protection afforded by *Pumpelly* was short-lived. A later case, *Mugler v. Kansas*,<sup>351</sup> distinguished *Pumpelly* as an exercise of eminent domain, rather than the state's police powers.<sup>352</sup> In *Mugler*, a beer manufacturer challenged a Kansas statute mandating the closure of places that manufactured liquor because they were nuisances.<sup>353</sup> Justice Harlan declared:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.<sup>354</sup>

But Harlan's reasoning is not an argument against regulatory takings as such. It is an argument against takings when they stem from the state's police power in prevention of noxious uses. Thus, a regulation that did disturb the lawful use and possession of one's property might be distinguishable from *Mugler*.

348. *Pumpelly*, 80 U.S. (13 Wall.) at 177-78.

349. Treanor, *Just Compensation Clause*, *supra* note 2, at 795-96 n.74.

350. See *Pumpelly*, 80 U.S. (13 Wall.) at 177-78 (opining that it would be a perversion of the Takings Clause for the government to avoid paying compensation for any act short of absolute conversion).

351. 123 U.S. 623 (1887).

352. See *id.* at 668 (observing that *Mugler* involved a question of police power, while *Pumpelly* involved a question of eminent domain).

353. See *id.* at 624-25.

354. *Id.* at 668-69.

The police power exception was not new, but stemmed from the English common law.<sup>355</sup> The distinction between taking of property to prevent harm and taking of property for public benefit was recognized in Blackstone's Commentaries<sup>356</sup> and in law dictionaries of the Founding Era.<sup>357</sup> James Madison's *Property* essay takes specific notice of the distinction.<sup>358</sup> *Mugler* was decided in 1887, almost a century from the Founding, and so its relevance to original intent analysis is attenuated at best. Yet, its meaning still falls short of rejecting regulatory takings. Arguably, the *Mugler* decision cannot be squared with the Court's earlier jurisprudence in *Yates* because the *Mugler* Court allowed the legislature to define a nuisance after the fact.<sup>359</sup>

All of the above-mentioned Supreme Court cases were decided long after the actual Founding. Consequently, it is mere speculation to attempt to determine what a truly early Supreme Court would have thought of the early state just compensation decisions covering regulatory takings. The early opinions, however, do imply a sympathy for the protection of property rights, especially under natural law. In 1795, Justice William Patterson, a delegate to the Constitutional Convention, authored an opinion in *Vanhorne's Lessee v. Dorrance*<sup>360</sup> that applied the Pennsylvania Constitution—a document without a just compensation clause. According to Justice Patterson:

[T]he right of acquiring and possessing property and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The preservation of property then is the primary object of the social compact. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation.<sup>361</sup>

Notably, Justice Patterson's opinion is concerned with the right of property possession and "having it protected."

The Supreme Court's 1810 decision in *Fletcher v. Peck*<sup>362</sup> also suggests a view of individual property rights as needing protection

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355. See Kmiec, *supra* note 53, at 1635.

356. See *id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES \*2).

357. See *id.* at 1635 n.34 (citing as an example, G. JACOB, A NEW LAW DICTIONARY (10th ed. London 1782)).

358. See *id.* at 1635 (quoting Madison's definition of the right of property to include "leav[ing] to everyone else the like advantage").

359. See *Mugler*, 123 U.S. at 671 (affirming the state's power to declare any place dealing in alcohol a public nuisance, and reasoning that the statute is prospective in that it only declares such a place a nuisance if it is injurious to the community after passage of the statute).

360. 2 U.S. (2 Dall.) 304 (1795).

361. *Id.* at 310.

362. 10 U.S. (6 Cranch) 87 (1810).

from legislatures. In *Fletcher*, Chief Justice Marshall struck down a Georgia statute that retroactively voided state land grants.<sup>363</sup> Marshall, recognizing that the Fifth Amendment Takings Clause applied only to the federal government, not to state governments, held that land grants were actually a form of contract.<sup>364</sup> As a result, the legislation violated the constitutional prohibition against state interference with contract obligations under the Contracts Clause.<sup>365</sup> Marshall noted, however, that the taking of property was likely prohibited in any event:

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public, be in the nature of the legislative power is well worthy of serious reflection.<sup>366</sup>

The opinions of the Court share a common conceptual grounding with Chancellor Kent's belief in compensation for property rights. In *Terret v. Taylor*,<sup>367</sup> the Court declared that the taking of a church's property by a Virginia statute would be "utterly inconsistent with a great and fundamental principle of republican government, the right of the citizens to the free enjoyment of their property legally acquired."<sup>368</sup> An early Supreme Court held:

That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. . . . The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention.<sup>369</sup>

Early Supreme Court cases contained very strong language in defense of property rights based upon natural law arguments, not express constitutional provisions. Madison's remarks indicate that he shared a similar philosophy, although he thought the right to

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363. See *id.* at 138-39 (holding that the Georgia statute was ex post facto and thus invalid).

364. See *id.* at 137 (holding that a grant implies a contract that a grantor may not reassert a property right).

365. See *id.* at 138.

366. *Id.* at 135-36.

367. 13 U.S. (9 Cranch) 43 (1815).

368. *Id.* at 50-51.

369. *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829).

property was created by the state.<sup>370</sup>

The early Supreme Court cases, and certainly the early state cases, demonstrate a strongly held view that property rights were extremely important. It was not the only view at the Founding—many state governments had never enacted a just compensation clause,<sup>371</sup> and the clauses were not always equally enforced by the state courts. Yet intangible property, and property rights generally, seem to have been comprehended within the Takings Clause if it is read within this strand of Founding thought.

### CONCLUSION

The text of the Takings Clause is ambiguous because the original understanding of the word "property" is uncertain. In all likelihood, there was no consensus by the Founders as to what "property" meant. If one accepts the meaning of "property" as understood by its author, James Madison, the Takings Clause would apply to regulatory takings in addition to physical takings. One must remember, however, that the Constitution was ratified by the states.

Unfortunately, the historical record for the Fifth Amendment Takings Clause is limited. There is enough material for a party on either side of the regulatory takings debate to muster an argument for his or her position. But there is nothing remotely sufficient to prove the Takings Clause originally was intended to cover only "direct, physical takings."

The strongest evidence that the Takings Clause is limited to direct, physical takings is the fact that many colonies had a practice of uncompensated regulation that directly took private property rights. The import of this evidence is curtailed by the fact that the colonies did not have takings clauses that regulated the legislature and thus, no strictures on colonial regulation comparable to the Fifth Amendment Takings Clause. Although it is reasonable to question whether such a significant change in just compensation protection—limiting the legislature and requiring compensation for regulatory takings—could have been ratified absent any debate, this is easily explained by the fact that the Takings Clause originally did not apply to the states. Moreover, many states were no longer as trusting of the

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370. See NEDELSKY, *supra* note 78, at 29-30 ("Possession was merely a social right, but the thrust of Madison's arguments was to invest it with the sanctity of the natural right from which it derived.").

371. See, e.g., *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795) (applying Pennsylvania's Constitution in a takings case, even though the constitution had no just compensation clause).

legislature as they had been during colonial times.

The strongest evidence that the Takings Clause originally was intended to cover regulatory takings are the Framers' strong leanings in favor of protection for property rights, James Madison's post-ratification statements, and the just compensation philosophy contained in the writings of Blackstone, Locke, and Grotius. Although Madison's statements do not carry the same weight as pre-ratification commentary, they should carry some weight because of Madison's role in drafting the Takings Clause and the fact that he published the *Property* essay so shortly after ratification. Madison's view supports the jurisprudential position taken by Grotius and Blackstone and clearly extends the Takings Clause to non-physical takings.

Essentially, there is a split between the colonial protection of property rights in practice and the Framers' philosophy and rhetoric.<sup>372</sup> Moreover, neither colonial practice nor Founding Era philosophy was entirely clear.<sup>373</sup> In such circumstances, it is appropriate to extend the protection of property as far as the text reasonably allows: neither the police power nor the power of eminent domain are enumerated in the Constitution. The best argument against a broadly enforced Takings Clause is the likelihood that the states would not have ratified a clause that would cover state regulatory takings.<sup>374</sup> But this is an argument against incorporation under the Fourteenth Amendment, an issue resolved long ago.<sup>375</sup> Absent that caution, there is no reason to read the Fifth Amendment Takings Clause narrowly if its text reasonably encompasses regulatory takings any more than the First Amendment should be limited to political speech when its text reasonably covers others forms of expression. Even if regulatory takings were not extended to the states—a limitation that might approach the original intent in terms of federalism—the Fifth Amendment would still cover regulatory takings by the federal government.

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372. See Schultz, *supra* note 193, at 491 (discussing implications of a split between Founding Era rhetoric and colonial practices for property rights). Schultz argues the correct way to see the influence of the political philosophies during the Founding Era is to observe the Jacksonians who matured under its influence. See *id.* at 494.

373. See McDONALD, *supra* note 75, at 4 (noting that the delegates at the Constitutional Convention had different understandings of words such as property and liberty).

374. See Amar, *supra* note 28, at 1181-82 (writing that no state ratifying conventions had offered any just compensation restriction).

375. See *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 234-35 (1897) (holding the Fifth Amendment Takings Clause was incorporated against the states under the Fourteenth Amendment).

The constitutional text is clear enough to require something substantive—it is not so ambiguous so as to raise questions on whether courts may interpret the Takings Clause at all.<sup>376</sup> Accordingly, the judicial system is well within the original intent framework in granting compensation for regulatory takings.

It is quite possible, but far from clear, that the original understanding of the Takings Clause included regulatory takings. Original intent may raise questions regarding the current incarnation of regulatory takings law,<sup>377</sup> but it hardly resolves the question of whether regulatory takings deserve compensation generally. One thing is clear: the direct, physical takings interpretation “goes too far” with a sparse historical record.

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376. During his nomination hearings, Judge Robert Bork posed the originalist problem created by the vagueness of the Ninth Amendment:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example if you have an amendment that says “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

*Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Judiciary Comm.*, 100th Cong. 249 (1987) (statement of Robert Bork). The uncertainty of the extent of the Takings Clause does not raise the issue arguably raised by the Ninth Amendment, however, because we do “know something of what it means.” The uncertainty of the Takings Clause is the extent to which it should be enforced.

377. The evidence of the original intent, whatever it was with respect to regulatory takings, does not speak anywhere of lost value as the indicator of the existence of the taking. See Sax, *supra* note 220, at 54-56 (arguing the diminution of value theory conflicts with the early natural law theorists’ understanding of just compensation). If the original understanding does extend to regulatory takings, then a strict enforcement of the text would require compensation for destruction of even the smallest vested right of usage if the right did not constitute a nuisance. This is, however, an issue that is appropriate for another article.