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THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE AND THE POLITICAL PROCESS

William Michael Treanor*

The original understanding of the Takings Clause of the Fifth Amendment1 was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used. In 1922, however, the Supreme Court's decision in Pennsylvania Coal v. Mahon2 established a new takings regime. In an opinion by Justice Holmes, the Court held that compensation must be provided when government regulation "goes too far"3 in diminishing the value of private property. Since that decision, the Supreme Court has been unable to define clearly what kind of regulations run afool of Holmes's vague standard. Attempts to do so, including the Court's recent decisions in Lucas v. South Carolina Coastal Council4 and Dolan v. City of Tigard,5 have created a body of law that more than one recent commentator has described as a "mess."6

The Court and leading commentators have not seriously considered the possibility that there was an underlying rationale, worth reviving, that explains why the Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value. This Article contends that the limited scope of the takings clauses reflected the fact that, for a variety of reasons, members of the framing generation believed that physical possession of property was particularly vulnerable to process failure. The Article then argues on both

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1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
2. 260 U.S. 393 (1922).
3. Id. at 415.
originalist and non-originalist grounds for a process-based theory of the Takings Clause that departs dramatically from current takings jurisprudence.

Part I of this Article traces the history of the just compensation principle through Pennsylvania Coal. It begins by looking at compensation practices prior to the enactment of the Takings Clause and shows that initially there was no rule requiring compensation when the government physically took property or regulated it. The decision whether or not to provide compensation was left entirely to the political process. The emergence of the compensation principle represented a break with that tradition, but only a partial one. While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations.

Part II discusses modern misunderstanding (or disregard) of the original understanding. It begins by looking at Pennsylvania Coal and then turns to the way in which original understanding of the clause figures—or, for the most part, does not figure—in current controversies. Focusing on the recent decisions in Dolan and Lucas, it discusses the Supreme Court's limited concern with the original understanding. This Part then surveys academic writing on takings, which typically interprets the initially narrow reach of the Takings Clause as a reflection of an outdated conception of property. Even Professor Joseph Sax's article "Takings and the Police Power" and Professor Richard Epstein's book Takings, works in part grounded in appeals to original intent, minimize the significance of the early limits on the compensation requirement. Their theories reflect instead broad applications of what each considers the animating concept behind the Takings Clause: a bar on arbitrary government action (for Sax); Lockean-liberalism (for Epstein).

Part III provides the historical background for an alternative reading of the Takings Clause by analyzing why constitutional protection for property rights was initially so limited. The framers did not desire substantive protection of all property interests because, contrary to much legal scholarship, liberalism was not the dominant world view at the time of the framing. Rather, republicanism continued to exert substantial influence on political discourse. Many of the framers believed that government could—and in the interests of society often should—limit individuals' free use of their property; balancing societal needs against individual property rights was left in large part to the political process. After examining the ideological background of the framing in order to show why the framers did not favor absolute protection of property rights, this Part then examines the history of the first takings clauses and the political

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philosophy of James Madison, who initially proposed the Fifth Amendment's Takings Clause, to determine why the right against physical seizure received special protection. It argues that these interests were protected because of the framers' concern with failures in the political process. At the same time, Madison desired that the clause have a broader educative function, embodying a national commitment against arbitrary interference with property interests.

Updating original intent, Part IV develops a modern political process theory of the Takings Clause. Under this theory, courts should mandate compensation only in those classes of cases in which process failure is particularly likely today—when there has been singling out or in environmental racism cases, where there has been discrimination against discrete and insular minorities. Outside of this realm, the Takings Clause should serve an educative function, but should not lead to court enforcement. Except where process failure is likely, the decision about whether to compensate should be left to the political process, even in cases involving government seizure of property. The political process is certainly capable of handling that responsibility. A string of current legislation and legislative proposals, including the Contract with America, provide for compensation in situations in which courts would not order it.9

This Part defends this political process approach on originalist grounds. The analytic approach used is derived from Professor Lawrence Lessig's recent elaboration of a translation model10 that was implicit in earlier constitutional scholarship.11 According to that model, the most faithful application of original intent interprets the constitutional text in a way that, rather than mechanically following the initial construction, is sensitive to changed circumstances. This Part also provides non-originalist justifications for a political process approach to the Takings Clause. The political process approach is consistent with constitutional structure in a way that current takings law is not, and, unlike current caselaw, it is consistent with a sensible reading of the language of the Takings Clause. In addition, because it reflects the presumption that majoritarian decisionmakers should resolve property questions whenever their judgment is not suspect, this process-based approach accords appropriate deference to majoritarian decisionmaking. Recent scholarship regarding political and civil rights has argued that activist courts can skew the political process in a way that, ironically, hampers the causes that the courts sought to help. This Article suggests that the same critique is equally applicable in the context of economic rights. Finally, while a process-based approach would depart from current caselaw, it would also return to an older tradition of judicial deference.

9. See infra notes 436-440 and accompanying text.
11. See id. at 1171 n.31 (discussing precedents for his approach).
I. Takings Law Through *Pennsylvania Coal*

This Part looks at early takings law with the help of different historical guides to the interpretation of constitutional text: background practices, framers' intent, and early judicial interpretations. In colonial America, government routinely acted in ways that affected private property, and the political process determined when compensation was due. No judicially enforceable compensation requirement existed during this period. Even after the establishment of a compensation requirement, it applied only to interference with physical ownership, and government routinely acted in ways that diminished the value of private property without providing compensation.

A. Takings Law Before the Fifth Amendment

Precedents for the Fifth Amendment's Takings Clause were relatively few in number and narrow in application. Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment. Moreover, no colonial charter or state constitution recognized that regulations could give rise to a requirement of compensation. Majoritarian decisionmakers did not always provide compensation, and courts did not mandate compensation when they failed to do so.

Only two fundamental documents of the colonial era provided even limited recognition of a right to compensation. A provision of the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement, but it was limited to the seizure of personal property:

No mans Cattel 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 suffitiently recompenced. 12

The 1669 Fundamental Constitutions of Carolina, drafted by John Locke and never fully implemented, provided compensation for the seizure of real property. 13 They authorized the High Steward's Court to erect build-

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12. *Massachusetts Body of Liberties* § 8 (1641), reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 148, 149 (Richard L. Perry & John C. Cooper eds., 1952) [hereinafter Sources of Our Liberties]. This provision of the Body of Liberties appears to have been modelled on Article 28 of *Magna Carta*, which barred crown officials from "tak[ing] anyone's grain or other chattels, without immediately paying for them in money." *Magna Carta* art. 28 (1215), reprinted in Sources of Our Liberties, supra, at 11, 16; see also Fred Bosselman et al., The Takings Issue: A Study of the Constitutional Limits of Governmental Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners 98 & n.45 (1973) (suggesting this linkage).

ings and lay highways, adding: "The damage the owner of such lands (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."^{14}

None of the other colonial charters recognized a compensation requirement, either for personal or real property.^{15} Where they protected personal or real property, the colonial charters did so by imposing a requirement of procedural regularity, rather than by recognizing a substantive right. For example, in a typical provision, the 1683 New York Charter of Libertyes and Priviledges provided that "Noe freeman shall . . . be disseized of his freehold . . . But by the Lawfull Judgment of his peers and

1660–1713, at 99–101 (1968) ("The proprietors . . . advised the colonists to look upon the Constitutions as a guide to the ultimate goal, rather than as an objective that could be immediately achieved.").

14. Fundamental Constitutions of Carolina art. 44 (1669), reprinted in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 108, 115 (1971). Perhaps because the attempts to put the Fundamental Constitutions of Carolina into operation were unsuccessful, see supra note 13 and accompanying text, leading accounts have considered the Massachusetts Body of Liberties, with its protection of personal property, the only colonial precursor of the Takings Clause. See Bosselman et al., supra note 12, at 92–94; 1 Schwartz, supra, at 319.

15. Although compensation requirements were not adopted in the colonies, they did have a great champion in the English legal world. William Blackstone argued in his Commentaries that compensation was due when real property was taken, although he did not provide a citation to support this assertion. He stated that, regardless of how beneficial the construction of a new road was, it could be built over private land without the owner's consent only if the legislature directed its confiscation, adding: "But how does [the legislature] 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." 1 William Blackstone, Commentaries *139.

However, Blackstone's statement about compensation must be viewed in the larger context of parliamentary sovereignty, a doctrine of which he was the most prominent defender. See, e.g., id. at *147 (asserting that "the supreme and absolute authority of the state . . . is vested by our constitution" in Parliament). As Professor Arthur Lenhoff has written, "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." Arthur Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596, 598 n.15 (1942). Thus, in Governor & Company of the British Cast Plate Mfrs. Co. v. Meredith, 100 Eng. Rep. 1306 (K.B. 1792), citation to Blackstone did not convince the court to award compensation for consequential damages in a road-building case: "If the Legislature think it necessary, as they do in many cases, they enable the [road] commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction . . . ." Id. at 1307 (Kenyon, C.J.). Justice Buller added, "There are many cases in which individuals sustain an injury, for which the law gives no action . . . ." Id.; see also Boulton v. Crowther, 107 Eng. Rep. 544 (K.B. 1824) (rejecting claim against trustees of roads for damages to private property caused by public road construction authorized by Act of Parliament).
by the Law of this province." 16 Such provisions can be traced back to Article 39 of Magna Carta, which provided that "No free man shall be ... dispossessed ... except by the legal judgement of his peers or by the law of the land." 17

These provisions assigned to a majoritarian decisionmaking body—either a jury or the state legislature—the responsibility for determining when to take property and when to compensate. In practice, compensation was the norm when the state took private property. For example, in the case of road-building, the most common occasion in colonial America for the exercise of the eminent domain power, 18 the authorizing statutes typically provided for juries to award compensation for the land taken. 19 At the same time, however, colonial governments often took private property without providing compensation. In particular, all colonies except Massachusetts provided that undeveloped land could be taken for roads without compensation. 20 Virginia apparently did not provide compensation even for developed land 21 (although it did provide compensation when the colony executed slaves who had participated in rebellions or had been found guilty of crimes). 22 Moreover, uncompensated takings occurred outside the context of physical takings of land. For example, a parliamentary statute aimed at obtaining masts for the navy assigned the crown rights to white pines growing on undeveloped land in the colo-

16. New York Charter of Liberties and Priviledges (1683), reprinted in 1 Schwartz, supra note 14, at 163, 165. For other examples of provisions imposing a requirement of procedural regularity, see Pennsylvania Frame of Government (1682), reprinted in 1 Schwartz, supra note 14, at 132, 140 (freeman cannot be dispossessed of freehold without due process of law); Concessions and Agreements of West New Jersey ch. XVII (1677), reprinted in 1 Schwartz, supra note 14, at 126, 127 (individual cannot be deprived of real or personal property "without a due tryal, and judgment passed by twelve good and lawful men of his neighbourhood"); Maryland Act for the Liberties of the People (1639), reprinted in 1 Schwartz, supra note 14, at 68, 68 (Christian inhabitants of Maryland, other than slaves, shall not be "disseissed or dispossessed of their freehold goods or Chattels ... [except] according to the Laws of this province"); see also The Rights of the Colonists and a List of Infringements and Violations of Rights art. 3 (1772), reprinted in 1 Schwartz, supra note 14, at 200, 203 ("The supreme power cannot Justly take from any man, any part of his property without his consent, in person or by his Representative.").


20. See Treanor, supra note 19, at 695.

21. See id. at 695 n.6 (citing Virginia statutes).

nies, and Virginia statutes aimed at protecting the state’s reputation as a producer of quality tobacco empowered the state to seize without compensation processed tobacco of less than premium quality. In addition, land could be taken with compensation that was less than full value, or, indeed, that was anything more than nominal. Thus, in Connecticut, Massachusetts, and Rhode Island, highways for the postal service between New York and Boston were built over what had been privately owned roads; the new roads were narrower than the old privately owned roads, and the only “compensation” the owners received was the land produced by the narrowing. As historian Forrest McDonald has observed of this practice, “New England colonial governments compensated landowners for taking part of their land by letting them keep the remainder of their land.” Similarly, in Maryland, land for ironworks was condemned, and the former owners received only its value as uncultivated land, not its value as a mill site. Legal scholar John Hart has characterized the statute authorizing this minimal compensation as “consciously confiscatory.” There appears to be no case in which a court directed compensation from the government where a statute did not provide for it or in which a court increased the amount of compensation already provided by another governmental body.

Although colonies clearly limited the ways in which individuals could use property, no colonial charter mandated compensation when regula-

23. See 2 Geo. II, ch. 35, §§ 1–2 (1729); 8 Geo. I, ch. 12, §§ 1–2 (1721); 9 Anne, ch. 22, §§ 1–2 (1710).
25. McDonald, supra note 18, at 23.
26. Id.
28. For more detailed analyses of early compensation practices and takings law, see Bosselman et al., supra note 12, at 82–104; Horwitz, supra note 22, at 63–66; McDonald, supra note 18, at 22–24; 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 (1992); Stoebuck, supra note 14, at 572–88; Treanor, supra note 19, at 695–98 & nn.5–6.

Based on my research in early records, I have previously argued that, while compensation was often given in the years before the Fifth Amendment, there were also numerous cases in which it was not given; the most frequent instances of uncompensated takings involved unimproved land taken for roads. See Treanor, supra note 19, at 695. Professors Horwitz and McDonald have reached similar conclusions. See Horwitz, supra note 22, at 63–65; McDonald, supra note 18, at 22–24. Professor Ely has recently criticized what he labelled the “Horwitz/Treanor” thesis, stating, “Contrary to the opinion of Horwitz and Treanor, the common law principle of compensated takings was well established long before the framing of the Fifth Amendment. Indeed, the usual practice was to compensate owners for the appropriation of their property.” Ely, supra, at 15 (emphasis added). This criticism misses my point: Compensation was the usual practice; the fact that it was the norm, rather than the invariable rule, demonstrates that the principle that the state necessarily owed compensation when it took physical property had not been established. The absence of judicial decisions requiring compensation was not a colonial aberration. English courts did not require compensation. See supra note 15.
tions affected the value of property. Furthermore, courts did not direct compensation for such regulations. Land use was subject to extensive regulations. In colonial Virginia, for example, various statutes barred overplanting of tobacco and required the growing of crops other than tobacco. Boston had zoning regulations governing the location of bakeries, slaughterhouses, stills, and tallowchandlers, and violators were subject to prosecution. New York City and Charlestown enacted ordinances barring further operation of slaughterhouses within city limits.

Colonial governments regulated not only land use, but also business operations and economic decisionmaking. For example, fee schedules for ferries were imposed, peddlers had to obtain licenses and pay duties, and pork, beef, flour, tar, pitch, and turpentine were subject to inspection for compliance with statutory standards prior to sale or export. Taverns were licensed, based on need and a determination of whether the tavern would impair public morals, and licensing fees were charged. Bread prices were regulated. Various colonies experimented with sumptuary legislation, restricting expenditures on clothing and jewelry. Laws barred speculation in commodities, including such practices as forestalling (purchase of goods while in transit to the market), engrossing (purchase of large quantities of commodities for resale), and regrating (purchase of goods in a market for resale in the same market).

The first state constitutions of the revolutionary era followed colonial precedent. None of the state constitutions adopted in 1776 had just compensation requirements. The three that contained eminent domain clauses simply echoed Article 39 of Magna Carta, providing that the consent of the owner or of the legislature was needed for the state to exercise its eminent domain power.

29. See Bosselman et al., supra note 12, at 84.
30. See id. at 82-83; see also 1 Mays, supra note 24, at 60, 113 (noting planter requests for laws limiting tobacco production).
32. See Bridenbaugh, supra note 31, at 239.
33. See Nelson, supra note 31, at 52, 200 (Massachusetts).
35. See 1 Mays, supra note 24, at 56 (Virginia).
36. See Bridenbaugh, supra note 31, at 266-73 (New York, Rhode Island, Pennsylvania, South Carolina, Massachusetts); Nelson, supra note 31, at 52 (Massachusetts).
37. See McDonald, supra note 18, at 14.
38. See id. at 15-17 & n.9.
39. See id. at 14 & n.8.
40. 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 1686, 1688 (Francis N. Thorpe ed., 1909) [hereinafter The Federal and State Constitutions]; N.Y. Const. of 1777,
The Revolution increased governmental actions that challenged or destroyed property rights. The revolutionary army seized private goods without compensation.\footnote{41} States passed statutes limiting wages and prices and barring forestalling and engrossing.\footnote{42} A variety of statutes undercut the property interests of British citizens and American loyalists. Some states passed laws that allowed Americans to escape most of the debts owed to the English. For example, in 1777 Virginia passed a Sequestration Act that allowed Virginia debtors to pay money owed English subjects into the state treasury and provided that payments in paper money would be treated at face value. As paper money depreciated to a value of sixty to one, Virginians were able to pay off their English debts at a small fraction of their cost.\footnote{43} Even more dramatically, divestment acts and bills of attainder effected the confiscation of loyalist property worth, by one historian's estimates, twenty million dollars at a time when the value of all improved real estate in the country was two hundred million dollars.\footnote{44} Equally significant, revolutionary era governmental actions also had the effect of redistributing wealth among Americans. In order to avoid concentrations of property ownership, many of the states adopted legislation that explicitly required the sale of seized loyalist property only in small tracts.\footnote{45} State legislators aided debtors, and thus deprived creditors of property rights, by passing statutes that stayed execution of debts, that made valueless land legal tender, and that permitted payment of debts in depreciated paper money.\footnote{46}

The first state constitution to contain a compensation requirement was the Vermont Constitution of 1777, which declared that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."\footnote{47} The Massachusetts Constitution of 1780 provided that "whenever the public exigencies re-
quire that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." The final revolutionary era document to contain a compensation requirement was the Northwest Ordinance of 1787, which the Continental Congress passed as the governance instrument for the Northwest Territories. It stated: "[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." In each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way.

B. The Fifth Amendment's Takings Clause

Despite this precedent for a constitutional compensation requirement, states did not demand a similar limitation on the federal government in the Bill of Rights. State ratifying conventions sought as amendments to the Constitution every provision in the Bill of Rights except the Takings Clause. There are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states. Madison's statements thus provide unusually significant evidence about what the clause was originally understood to mean (and about why Madison thought this particular protection of property necessary). As will be discussed, those statements uniformly indicate that the clause only mandated compensation when the government physically took property. Similarly, St. George Tucker, the first legal scholar to offer an interpretation of the clause, took the position that it was concerned with physical seizures. In his 1803 treatise, he wrote that the clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining...

50. For constructions of the Massachusetts Constitution, see, e.g., Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846) (no compensation when statute barred owner from removing sand and gravel from beach); Callender v. Marsh, 18 Mass. (1 Pick.) 418 (1823) (no compensation for consequential damages); Perry v. Wilson, 7 Mass. 393 (1811) (compensation required for logs taken for canal construction); Gedney v. Tewksbury, 3 Mass. 306, 309 (1807) (Parsons, C.J.) (statutory provision of compensation for land taken for public road to be built "[i]n pursuance of" Takings Clause of Massachusetts Constitution). For a construction of the Northwest Ordinance, see Renthorp v. Bourg, 4 Mart. 97, 132-33 (La. 1816) (Northwest Ordinance only required compensation when an individual's property or services were taken to aid war effort). There are no early Vermont cases construing the takings clause of its constitution.
52. See infra Part III.C.
supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war."

C. Early Interpretations of the Takings Clause and Its State Counterparts

Most of the early caselaw came from state courts. These courts held that compensation was required if government physically took property, but not if it merely regulated the owner's use of property. When the Supreme Court eventually began to resolve takings issues under the federal Constitution, its holdings accorded with these earlier state decisions.

1. State Courts. — In antebellum America, state courts usually required compensation only when the government physically took property or, at most, when governmental actions involved the physical invasion of property. Thus, the majority view was that consequential damages—those from activities that did not involve physical invasions or appropriations of property for a public use, but that nonetheless had physical consequences, such as subsidence occasioned by a road-building project—were not compensable takings. Indeed, treatise writer Theodore Sedgwick observed in 1857 with respect to the Takings Clause: "It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word . . . ."

More significant, in states in which there was a takings clause or in which a takings requirement was judicially imposed in the absence of such a constitutional provision, antebellum courts nonetheless consistently held that state regulation pursuant to the police power did not give

53. 1 Tucker, supra note 41, at 305–06.
54. It should be added that ratification of the Fifth Amendment did not immediately lead all the states to abandon uncompensated physical takings. See Horwitz, supra note 22, at 64–65 (discussing Pennsylvania and South Carolina case law).
56. Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 519–20 (1857). Sedgwick's statement does not fully capture all antebellum case law. For example, 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. See, e.g., West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 533–34 (1848); id. at 543 (Woodbury, J., concurring); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 571 (1837) (McLean, J., concurring); id. at 638 (Story, J., dissenting); Enfield Toll Bridge Co. v. Hartford & New Haven R.R., 17 Conn. 40, 59–61 (1845); Boston Water Power Co. v. Boston & Worcester R.R., 40 Mass. (23 Pick.) 360, 393 (1839); Backus v. Lebanon, 11 N.H. 19, 24 (1840); Piscataqua Bridge v. New Hampshire Bridge, 7 N.H. 35, 66–67 (1834); 2 James Kent, Commentaries on American Law 400 n.a (8th ed. 1854). Nor did the proposition that consequential damages were not compensable command universal assent. See Gardner v. Trustees of Newburgh, 2 Johns. Ch. 161, 167–68 (N.Y. Ch. 1816) (Kent, C.) (compensating for consequential damages); Charles River Bridge, 36 U.S. (11 Pet.) at 638 (attacking decisions holding consequential damages not compensable) (Story, J., dissenting); 2 Kent, supra, at 400 n.a (same). Nonetheless, the dominant early approach was "'no taking without a touching.'" Stoebuck, supra note 19, at 601.
rise to a compensation requirement, regardless of how dramatically that regulation affected the value of property.57 These decisions sanctioned what one historian has called "a deluge of state and local legislation regulating economic and social life."58 Even Chancellor Kent believed regulation of nuisances, without the provision of compensation, appropriate. In his treatise, he stated: "The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens."59 In early cases, courts approved regulations addressing common law nuisances, such as the location of cemeteries,60 the discharge of sewage,61 fire hazards,62 the storage of gunpowder,63 and the operation of a bowling alley.64 Chief Justice Lemuel Shaw was a pioneer in a broader conception of the police power that gave the legislature the power to regulate activities that were not traditional nuisances,65 and, under his

57. See Bosselman et al., supra note 12, at 106–10; Stephen A. Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 76 (1986); Scott M. Reznick, Note, Land Use Regulation and the Concept of Takings in Nineteenth Century America, 40 U. Chi. L. Rev. 854, 862 (1973).

58. William J. Novak, Common Regulation: Legal Origins of State Power in America, 45 Hastings L.J. 1061, 1076 (1994). In support of his claim that in late eighteenth and early nineteenth century America public regulatory power was "omnipresent," id., Novak offers a dizzying list of state and municipal regulations. See id. at 1077–80. For example, he notes that between 1781 and 1801 the New York legislature

passed special laws regulating lotteries; hawkers and peddlers; the firing of guns; usury; frauds; the buying and selling of offices; beggars and disorderly persons; rents and leases; firing woods; the destruction of deer; stray cattle and sheep; mines; forges; apprentices and servants; bastards; idiots and lunatics; counsellors, attorneys and solicitors; travel, labor, or play on Sunday; cursing and swearing; drunkenness; the exportation of flaxseed; gaming; the inspection of lumber; dogs; the culling of staves and heading; debtors and creditors; the quarantining of ships; sales by public auction; stock jobbing; fisheries; the inspection of flour and meal; the practice of physic and surgery; the packing and inspection of beef and pork; sole leather; strong liquors, inns, and taverns; pot and pearl ashes; poor relief; highways; and quit rents.

Id. at 1076; see : ➔ William J. Novak, Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th-Century America, 18 L. & Soc. Inquiry 1, 18–31 (1993) (arguing that regulations were pervasive in antebellum America).

59. 2 Kent, supra note 56, at 405.

60. See Brick Presbyterian Church v. Mayor of New York, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826); see also Stuyvesant v. Mayor of New York, 7 Cow. 588 (N.Y. Sup. Ct. 1827) (same); Coates v. Mayor of New York, 7 Cow. 585 (N.Y. Sup. Ct. 1827) (upholding principle, but finding regulation invalid because of failure to comply with requirements of authorizing state statute).


62. See Republica v. Duquet, 2 Yeates 493 (Pa. 1799); Reznick, supra note 57, at 862–63.


64. See Tanner v. Trustees of Albion, 5 Hill 121 (N.Y. Sup. Ct. 1843).

leadership, the Massachusetts Supreme Judicial Court upheld a statute designed to prevent erosion by barring the removal of gravel and sand from certain beaches,\textsuperscript{66} and another that banned the construction of wharfs beyond a certain point in Boston Harbor.\textsuperscript{67} Thus, the scope of permissible police regulation was not fixed. As long as majoritarian decisionmakers operated within an area in which they were permitted to regulate, no compensation was due. As one pre-	extit{Pennsylvania Coal} treatise explained the relationship between the police power and compensation:

Under the police power, rights of property are impaired not because they may become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.\textsuperscript{68}

2. Supreme Court Jurisprudence. — Supreme Court decisions prior to 1870 interpreting the Takings Clause are few in number.\textsuperscript{69} One of the

\begin{itemize}
\item \textsuperscript{66} See Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846).
\item \textsuperscript{67} See Commonwealth v. Alger, 61 Mass. (7 Cush.) 58 (1851).
\item \textsuperscript{68} Ernst Freund, \textit{The Police Power: Public Policy and Constitutional Rights} 546-47 (1904).
\item \textsuperscript{69} See Harry N. Scheiber, \textit{The Road to \textit{Munn}: Eminent Domain and the Concept of Public Purpose in the State Courts}, 5 Persp. in Am. Hist. 329, 376 (1971) (commenting on small number of early Supreme Court cases). The dearth of early Supreme Court takings law reflects several factors. First, the Court held that the Takings Clause only applied to takings by the federal government. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833). Second, until after the Civil War, the federal government relied on the states to condemn the property that would be used by the federal government. See Kohl v. United States, 91 U.S. 367, 373 (1875); Stoebuck, supra note 19, at 559 n.18. Third, until the passage of the Tucker Act, ch. 359, § 1, 24 Stat. 505 (1887), Congress retained sole responsibility for paying takings claims against the federal government; at that time, it gave the Court of Claims jurisdiction over such cases. See Langford v. United States, 101 U.S. 341, 343 (1880) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation."); Floyd D. Shimomura, \textit{The History of Claims Against the United States: The Evolution from a Legislative toward a Judicial Model of Payment}, 45 La. L. Rev. 625, 627-64 (1985) (tracing evolution of jurisdiction over takings claims).
\item That Congress initially retained control over takings claims does not undermine my claim that passage of the Fifth Amendment represented a departure from previous takings theory (although, given our court-centered views, this may not be immediately apparent). In a system, such as the British system, where Parliament is sovereign, the legislature has the ultimate power to decide whether to grant compensation. See supra note 15. By contrast, in a system in which the People are sovereign and the written constitution creates government and limits its powers, the legislature must provide compensation when the constitution mandates it. For a discussion of the Blackstonian conception of parliamentary sovereignty and "the peculiar American idea of a constitution," see Gordon S. Wood, \textit{The Creation of the American Republic}, 1776-1787, at 350, 600-02 (1969). While Congress was the forum for takings claims, it did not have discretion to deny takings claims
\end{itemize}
few exceptions was the 1857 case *Smith v. Corporation of Washington.* The Court there found that the Takings Clause did not require compensation when the Washington, D.C. municipal government lowered the grade of a road adjoining a lot, thus rendering the entryway to a home unusable and obliging the homeowner to construct a new entryway. "The plaintiff may have suffered inconvenience and been put to expense in consequence of such [regrading]," the Court acknowledged, but found that the harm was "what the law styles 'damnum absque injuria.' Private interests must yield to public accommodation . . . ."71 In 1879, in *Transportation Company v. Chicago,*72 and in 1897, in *Gibson v. United States,*73 the Court similarly found that compensation was not due when public works indirectly caused harm to private property. In *Transportation Company,* access to the company's property was blocked during construction of a tunnel and improvement of the adjoining street. In *Gibson,* a dike altered the flow of water to the property-owner's landing. The result was the same in both cases. As the Court expansively stated in *Transportation Company,* "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."74
Smith, Transportation Company, and Gibson all involved governmental actions that had physical consequences. The Court also consistently refused to find takings where the claim was simply that government actions had lowered the value of property. The leading early decision was in the Legal Tender Cases,\(^{75}\) in which the Court confronted the question whether the Legal Tender Act of 1862, by making all debts payable in government-issued currency, violated the Just Compensation Clause by devaluing debts that had been payable only in gold. In finding that it did not, the Court observed:

[The Takings Clause] has always been understood as referring only 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? . . . [I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.\(^{76}\)

compensation requirement as equivalent to the national compensation requirement. See id. at 177. Drawing on precedent, the Green Bay Company responded that "[Pumpelly's] lands have not been taken or appropriated. They are only affected by the overflow occasioned by raising the water in Lake Winnebago." Id. at 174. The Court unanimously rejected this argument, stating:

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 as against the government, . . . it shall be held that the 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 that word, it is not taken for the public use.

Id. at 177-78. The decision thus contained the seeds of the reconceptualization of the Takings Clause that was to occur subsequently, since it explicitly recognized that the harm suffered by Pumpelly was a loss of "value." But the Pumpelly Court carefully limited its holding to cases "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness." Id. at 181. In other words, the government action in Pumpelly gave rise to a compensation requirement because it was a de facto physical taking. Initially, the Court construed Pumpelly as limited to this very narrow category of cases. See Bosselman et al., supra note 12, at 117-23 (discussing cases). For example, Mugler v. Kansas, 123 U.S. 623, 667-68 (1887), distinguished Pumpelly on these grounds.

\(^{75}\) 79 U.S. (12 Wall.) 457 (1871).
\(^{76}\) Id. at 551-52.
Similarly, in a series of decisions, the Court found that police power regulations were not compensable takings. The principal Supreme Court decision in this line is *Mugler v. Kansas*, in which the Court upheld a Kansas prohibition statute that, among other things, declared places where liquor was manufactured to be common nuisances and directed that they be closed. *Mugler*, a beer-maker, claimed that the act represented an uncompensated taking. Writing for the majority, Justice Harlan rejected this claim. His opinion reflected the view that the judiciary had only a limited role in reviewing regulations. "It belongs," he stated, "to [the legislative department] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or public safety." Turning to the relationship between police power regulations and the compensation requirement, Justice Harlan observed:

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. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Thus, if a regulation were constitutionally valid, compensation was not required, no matter how much the regulation affected the value of private property.

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77. 123 U.S. 623 (1887).
78. See id. at 662–63.
79. Id. at 661.
80. Id. at 668–69.
II. MISUNDERSTANDING (OR IGNORING) THE ORIGINAL UNDERSTANDING

The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property. Despite this clear history, the Supreme Court in 1922 in Pennsylvania Coal held that a government regulation could give rise to a requirement of compensation. Neither that decision, nor any subsequent Supreme Court decision, nor any of the leading takings scholars, has seriously considered the possibility that there was a principle of relevance today that would explain why the requirement of compensation originally applied only to physical seizures of property.

A. Pennsylvania Coal

Pennsylvania Coal has repeatedly been described as the central case in modern takings law. Chief Justice Rehnquist observed in 1987 that it "has for 65 years been the foundation of our 'regulatory takings' jurisprudence." Professor Ackerman called it "both the most important and most mysterious writing in takings law." Professor Epstein has noted that "Pennsylvania Coal has long been regarded as perhaps the single most important decision in the takings literature," adding:

Its clear insistence that the just compensation requirement bites in at least some instances of general regulation has been the major reason why takings law has not been wholly swallowed up by an expansive construction of the twin exceptions to the takings clause—the police power and implicit in-kind compensation—that are necessarily part of the overall development of takings doctrine.

Pennsylvania Coal represented the culmination of Justice Holmes's career-long critique of a physicalist view of property and the attendant view of the Takings Clause. As a young lawyer, Holmes criticized the use of the police power doctrine to justify governmental actions that affected property values without providing compensation. In an 1872 book review, he suggested that the term police power was "invented to cover certain acts of the legislature which are seen to be unconstitutional, but
which are believed to be necessary.\textsuperscript{86} On the Massachusetts Supreme Judicial Court, he wrote one of the first opinions to suggest that a governmental regulation that undermined the value of property too greatly could be a taking. In \textit{Rideout v. Knox},\textsuperscript{87} the court upheld a statute that barred property owners from building fences more than six feet in height. Holmes stated that the statute did not give rise to an obligation to compensate, but that a greater restriction might have done so:

> It may be said that the difference is only one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; larger ones could not be, except by exercise of the right of eminent domain.\textsuperscript{88}

Holmes was not alone in his critique of takings case law. As intangible property replaced land as the dominant form of property in the economy, other legal thinkers also concluded that the reach of takings law had to be expanded.\textsuperscript{89} For example, in his influential 1888 \textit{Treatise on the Law of Eminent Domain in the United States}, John Lewis attacked earlier judicial decisions holding that only physical seizures were takings.\textsuperscript{90} He declared, "We must . . . look beyond the thing itself, beyond the mere corporeal object, for the true idea of property."\textsuperscript{91} For Lewis, this insight mandated a dramatic expansion of the reach of the Takings Clause beyond its earlier limits: "If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property . . . though his title and possession remain undisturbed . . ."\textsuperscript{92}


\textsuperscript{87} 19 N.E. 390 (Mass. 1889).

\textsuperscript{88} Id. at 392.

\textsuperscript{89} The leading historical statement of this view is Morton J. Horwitz, \textit{The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy} 146-48 (1992), and the presentation in this section of the transformation in views of property follows his analysis. For an early treatment of this shift in the Supreme Court's conception of property, see John R. Commons, \textit{The Legal Foundations of Capitalism} 14 (photo. reprint 1974) (1924); see also Horwitz, supra, at 145-46 (discussing Commons's critique of Supreme Court cases); Kenneth J. Vandevelde, \textit{The New Property of the Nineteenth Century: The Development of the Modern Concept of Property}, 29 Buff. L. Rev. 925, 333-35 (1980) (discussing "dephysicalization" of concepts of property in nineteenth century).

\textsuperscript{90} See John Lewis, \textit{A Treatise on the Law of Eminent Domain in the United States} § 57 (Chicago, Callaghan & Co. 1888).

\textsuperscript{91} Id. § 54.

\textsuperscript{92} Id. § 56.
Similarly, beginning in the 1870s, state courts started to break from the view that takings clauses only protected physical possession and to embrace the idea that the clauses protected value. As Lewis observed, "The law as to what constitutes a taking has been undergoing radical changes in the last few years."\(^93\) The case that began that shift was the New Hampshire Supreme Court's 1872 decision *Eaton v. Boston, Concord & Montreal Railroad*.\(^94\) The court criticized earlier caselaw holding that a taking of property meant "a total assumption of possession."\(^95\) Such a view was "founded on a misconception of the meaning of the term 'property,' as used in the various State constitutions."\(^96\) The correct view was that "[p]roperty is the right of any person to possess, use, enjoy, and dispose of a thing."\(^97\)

As it confronted constitutional challenges to utility and railroad rate regulations, the Supreme Court also came to embrace the notion that the Takings Clause protected value, a view championed by Justice David Brewer, "one of the most conservative members of a notoriously conserva­tive bench."\(^98\) Thus, in the 1894 railroad rate regulation case, *Reagan v. Farmers' Loan & Trust Co.*,\(^99\) he wrote for the Court: "[T]he forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."\(^100\) But these cases—in which the Court permitted regulation so long as it was not found to be confiscatory—were of limited scope: They involved businesses clothed with a public interest—like utilities or railroads or apartments in wartime.\(^101\)

\(^{93}\) Id. at § 57.
\(^{94}\) 51 N.H. 504 (1872). Lewis described it as "[t]he leading case upon the subject, and the one which has contributed more than any other towards bringing about the change [in takings law]." Lewis, supra note 90, § 58. The other critical case in the shift was the Supreme Court's decision in *Pumpelly*. But Pumpelly's significance lay more in the way it was subsequently interpreted, than in its actual holding or rationale, since, unlike Eaton, it did not explicitly reject the premises of earlier takings law. See supra note 74.
\(^{95}\) 51 N.H. at 511.
\(^{96}\) Id.
\(^{97}\) Id. (quoting Wynehamer v. People, 13 N.Y. 378, 483 (1856)). For a collection of post-Eaton cases adopting a similar approach, see Lewis, supra note 90, § 59 & n.1.
\(^{99}\) 154 U.S. 362 (1894).
\(^{100}\) Id. at 399. For a discussion of Brewer's takings jurisprudence, see Siegel, supra note 98, at 215-23; see also Horwitz, supra note 89, at 160-64 (discussing rate regulation and dephysicalization of property); Glynn S. Lunney, Jr., A Critical Reexamination of the Takings Jurisprudence, 90 Mich. L. Rev. 1892, 1914-27 (1992) (discussing Supreme Court's review of regulations).
**Pennsylvania Coal**, Supreme Court case law was still consistent with the position enunciated in *Mugler*: If something was so harmful as to justify regulation under the police power, it could be regulated without compensation, regardless of the effect of the regulation on value.\(^{102}\)

*Pennsylvania Coal* involved a challenge to Pennsylvania’s Kohler Act, which barred coal companies from removing coal when such removal would cause subsidence. An exception was recognized for lots on which the coal company owned the surface rights. The Court found that this regulation violated the Takings Clause. Writing for the majority, Holmes framed the decision in terms of first principles, and simply ignored the precedents in which the Court had held that regulations did not fall within the Takings Clause.\(^{108}\) In his opinion, Holmes stated:

> 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, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.\(^{104}\)

The previous brightline test—regulations were never a taking—was replaced by a far more imprecise test: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”\(^{105}\) It was the role of the court to determine when a regulation “goes too far,” and one factor that the court was to consider was the “extent of the diminution”\(^{106}\) of value caused by the regulation. Underlying this view was a suspicion of the legislature. “When this seemingly absolute protection [for property] is found to be

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\(^{102}\) For leading cases, see supra note 81. It should be added, however, that there was some foreshadowing in Supreme Court caselaw of the decision in *Pennsylvania Coal*. In particular, in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), Holmes, writing for the majority, in dicta advanced an approach to the constitutionality of police power regulations similar to that adopted in *Pennsylvania Coal*. He observed that a building height restriction might be a valid exercise of the police power, but if it rendered the lot “wholly useless . . . the police power would fail . . . [requiring] compensation and the power of eminent domain.” Id. at 355.

\(^{103}\) See supra text accompanying notes 77–81 and note 81.

\(^{104}\) *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

\(^{105}\) Id. at 415.

\(^{106}\) Id. at 413.
qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."

That an overwhelmingly conservative Supreme Court would reach the *Pennsylvania Coal* result is not surprising. By extending the Takings Clause beyond physical takings, *Pennsylvania Coal* enabled the judiciary to review the full range of majoritarian decisionmaking concerning property rights. The use of a balancing test—a regulation is invalid if it "goes too far"—paralleled the earlier rise of similar tests in the context of substantive due process, which also permitted the judiciary to scrutinize a broad range of majoritarian decisions. 108

Given his strong support of active government intervention in the economy, it is similarly unsurprising that Justice Brandeis dissented. His opinion reflects the narrow reading of the Takings Clause established by precedent: "[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use." 109 In contrast, Holmes's decision puzzled contemporary commentators and has provoked extensive academic commentary since then. As one Holmes biographer has observed, Holmes's approach in *Pennsylvania Coal* is "almost exactly the reverse" of his approach in his due process dissents, in which the police power took precedence over individual rights. 110 But his views in the takings area were consistent. Both *Pennsylvania Coal* and *Rideout* 111 reflect a belief that property is properly viewed as value, not physical possession, and that the Takings Clause should therefore protect more than physical possession. Holmes's position seems to be the product not of his larger jurisprudential concerns, but of his embrace of a syllogism: The Takings Clause protects property. Property is value. Therefore, the Takings Clause protects value. 112

107. Id. at 415.


111. For further discussion of *Rideout*, see supra text accompanying notes 87-88.

112. For a related suggestion concerning the underpinnings of Holmes's opinion in *Pennsylvania Coal*, see Rose, supra not 85, at 565 n.22. Professor Rose speculates that Holmes may have treated the case as a takings case, rather than one involving the impairment of an obligation of contract, because he was influenced by Wesley Hohfeld's analysis of property rights. She notes: "Hohfeld's theory suggested that 'contract' or 'property' rights were interchangeable nomenclature for legal relationships." Id; see also Bosselman et al., supra note 12, at 124-26 (discussing consistency of Holmes's critique, throughout his career, of traditional distinction between police power and eminent domain power). For an alternative explanation of Holmes's takings jurisprudence, see Patrick J. Kelley, Holmes's Early Constitutional Law Theory and its Application in Takings Cases on the Massachusetts Supreme Judicial Court, 18 S. Ill. U. L.J. 357, 413 (1994)
Holmes’s position has an intrinsic appeal. Why should one form of property receive strong protection under the Takings Clause and others none? There are, however, two problems with the Pennsylvania Coal approach. First, compared to the earlier approach, it makes the decision about when courts should direct compensation a very difficult one. The text, original understanding, and early interpretations of the Takings Clause explain clearly when a court should order compensation—when the government physically takes private property. In contrast, the Pennsylvania Coal inquiry into when regulation “goes too far” is open-ended and unconstrained. Second, the Pennsylvania Coal approach rests on the implicit premise that the question why the framers protected physical possession rather than other forms of property does not merit serious inquiry. In other words, Holmes assumes that, because anything of economic value is property, anything of economic value also merits protection under the Takings Clause. Despite these problems, Pennsylvania Coal established the pattern that has dominated modern takings law. The Supreme Court has consistently held that a regulation that “goes too far” can give rise to a compensable taking.

B. The Modern Supreme Court, Original Understanding, and Takings Law

In fashioning a modern takings jurisprudence, the Supreme Court has essentially ignored the original understanding of the Takings Clause. As Professor Richard Epstein has observed, “Historical argu-

113. This is not to claim that the pre-Pennsylvania Coal test did not have any gray areas. The question of when and if government acts that physically invaded an individual’s property were takings—as in Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)—was difficult, but this was a much smaller area of uncertainty than that created by Pennsylvania Coal. For a more detailed discussion of Pumpelly, see supra note 74.


115. The Court’s oft-cited opinion in United States v. General Motors Corp., 323 U.S. 373 (1945), is perhaps the classic example of this disregard. General Motors was a 1945 case in which the Court considered the appropriate measure of just compensation when the Government took over the unexpired term of a lease of a warehouse that had been equipped for GM’s business. Construing the meaning of the word “property” in the Fifth Amendment, Justice Roberts observed:

It is conceivable that the [word “property”] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it 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. In point of fact, the construction given the phrase has been the latter. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.
ments have played virtually no role in the actual interpretation of the clause." 116 This statement requires one caveat: To the extent that the original understanding was that physical possession by the government necessitated compensation, modern case law is true to that understanding. 117 In the realm of regulatory takings, however, the original understanding has been all but disregarded. The Court has not treated seriously the possibility that there was some reason of relevance to modern jurisprudence why regulations did not originally fall within the ambit of the clause. Strikingly, even originalists do not use history to interpret the Takings Clause. "Even Justice Black," Professor Bruce Ackerman has ob-

116. Epstein, supra note 8, at 29.

117. Loretto indicates the continuing power of the older notion that any physical invasion gives rise to a compensable taking. In that case, the Court found that the laying of a cable wire across an apartment building gave rise to a compensable taking, even though the invasion was trivial. Although it did not appeal to the original understanding per se, Justice Marshall's opinion for the Court cited a series of late nineteenth and early twentieth century cases involving either the permanent flooding of property or the laying of telegraph wires in which the Court held or indicated in dicta that such permanent physical invasions were takings. See Loretto, 458 U.S. at 427-30. At the same time, even in this realm, not all members of the Court have accepted the relevance of the early case law. Justice Blackmun caustically observed that the majority decision was "curiously anachronistic." Id. at 442 (Blackmun, J., dissenting). Dismissing the relevance of the early cases, Blackmun stated:

The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided. But if, by chance, they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age.

Id. at 446-47. He argued that "takings questions should be resolved through 'essentially ad hoc, factual inquiries,' into 'such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'" Id. at 444 (citations omitted) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) and PruneYard, 447 U.S. at 83, respectively).
served, "lacked the courage of his convictions when it came to the takings clause." The Court’s recent decisions in *Lucas* and *Dolan* illustrate the willingness of its members to disregard the original understanding of the Takings Clause.

After David Lucas had paid almost $1,000,000 for two beachfront lots, the South Carolina Beachfront Management Act was passed, significantly restricting the use of all beachfront property in the state. The state coastal commission, acting pursuant to the Act, subsequently barred Lucas from building any habitable structure on his lots. Lucas claimed that the commission's determination was a taking under the Fifth Amendment. In a majority opinion by Justice Scalia, which Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joined, the Court announced that when a regulation deprives property of all its value, compensation is due. It accordingly found that, because Lucas's property had lost all economic value, the regulation blocking development of the property was presumptively a taking. The Court, however, framed an exception to this general rule: Regulation that concerns a common law nuisance or is in accordance with background principles of property law does not give rise to a taking. The case therefore was remanded for a determination of the relevant South Carolina law.

Justice Scalia offered two principal arguments in defense of the rule that deprivation of all economic value is a taking. First, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." While not appealing to original intent, in making this claim Scalia was implicitly starting from the premise that a requirement of compensation for physical appropriations lies at the core of the Takings Clause. From there, he analogized a total deprivation of economic value to a physical taking. Second, "regulations that leave the owner of land without economically beneficial or productive options for its use... carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."

Justice Blackmun's dissent was in significant part a critique of the majority opinion on historical grounds. "The Fifth Amendment's

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120. Id. at 2894.

121. Id. at 2894-95.
Takings Clause," he wrote, "originally did not extend to regulations of property, whatever the effect."\textsuperscript{122} In reaching this conclusion, he acknowledged that Professor Joseph Sax had noted that "'contemporaneous commentary upon the meaning of the compensation clause is in very short supply.'"\textsuperscript{123} Justice Blackmun, however, stated that "James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government,"\textsuperscript{124} and he invoked Professor Sax's conclusion that the limited relevant evidence "indicate[d] that the clause was 'designed to prevent arbitrary government action,' not to protect economic value."\textsuperscript{125}

Justice Blackmun also argued that early decisions had typically interpreted the Takings Clause and its state constitutional analogues as requiring compensation for physical takings, not for regulations that affected values.\textsuperscript{126} When courts eventually began to find that some regulations could give rise to a compensation requirement, they nonetheless permitted government to regulate harmful activities without providing compensation, even when the regulation deprived the property of all of its value and even though the regulated activity was not a common law nuisance.\textsuperscript{127} He concluded:

[\textit{The Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.}\textsuperscript{128}

Justice Blackmun's invocation of history is unusual in Supreme Court takings jurisprudence. Indeed, it is the judicial opinion that most seriously confronts the framers' vision of the clause and its original interpretations. But, significantly, Blackmun uses history to criticize, rather than to construct an alternative theory based on original intent.

\textsuperscript{122} Id. at 2915 (Blackmun, J., dissenting). My student Note, see Trenor, supra note 19, is one of the secondary sources on which Justice Blackmun relies. See id. at 2914–16, 1215 n.23 (Blackmun, J., dissenting).
\textsuperscript{123} Id. at 2915 n.23 (quoting Sax, supra note 7, at 58).
\textsuperscript{124} Id. (citing Trenor, supra note 19, at 711).
\textsuperscript{125} Id. (quoting Sax, supra note 7, at 58–60).
\textsuperscript{126} See id. at 2915.
\textsuperscript{127} See id. at 2915–17.
\textsuperscript{128} Id. at 2917.
Blackmun in *Lucas* did not seek to return to the original position that only physical appropriations and invasions required compensation. As Justice Scalia observed in response to the dissent's attack: "[E]ven [Justice Blackmun] does not suggest (explicitly, at least) that we renounce the Court's . . . conclusion in *Mahon* [that government regulations could fall within the Takings Clause]." 129 Indeed, while his dissent does not set forth an alternative conception of the Takings Clause, it seems clear that Blackmun believes that some regulations can be takings. Significantly, he opened his takings analysis with the statement: "I first question the Court's rationale in creating a category that obviates a 'case-specific inquiry into the public interest advanced,' if all economic value has been lost." 130 The notion of a case-specific inquiry implies that some regulations will be takings. Thus, even the one Justice to have made a serious invocation of original understanding in a takings case did not believe that original intent should be used to provide a rule of decision. 131

Justice Scalia offered relatively little response to Blackmun's historical critique. He acknowledged that "Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." 132 With citation to relevant precedent, he also recognized that before 1922 the Court took the same position as the theorists:

> Prior to Justice Holmes' exposition in *Pennsylvania Coal v. Mahon* . . . it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, . . . or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago* . . . See also *Gibson v. United States* . . . . 133

Further, Justice Scalia observed that when James Madison originally proposed the Bill of Rights to Congress, he drafted the Takings Clause language too narrowly to reach regulatory takings. 134

Justice Scalia briefly offered several points in support of his interpretation. "[T]he text of the Clause," he wrote without elaboration, "can be read to encompass regulatory as well as physical deprivations. . . ." 135 He dismissed as "irrelevant" early state takings cases that preceded incorporation of the Takings Clause: "The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses—which as Justice

129. Id. at 2900 n.15 (Scalia, J.).
130. Id. at 2910 (Blackmun, J., dissenting) (citation omitted) (quoting id. at 2893 (Scalia, J.)).
131. See supra note 117 (discussing Blackmun's rejection of majority's appeal to history in *Loretto*).
133. Id. at 2892 (complete citations omitted).
134. See id. at 2900 n.15 (commenting on Madison's proposal that "[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation" (citation omitted)).
135. Id. at 2900 n.15.
Blackmun acknowledges, occasionally included outright physical appropriation of land without compensation—were out of accord with any plausible interpretation of those provisions."\(^{136}\) Moving to a broad level of generality, Justice Scalia concluded: "[W]e think the notion pressed by the [State] that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."\(^{137}\)

The power of such historical arguments is limited. Justice Scalia’s appeal to the text and his rejection of the early state case law do not rebut Justice Blackmun’s historical claims; they indicate, at most, that the text and state case law do not preclude the result reached by the Court. Moreover, Justice Scalia’s opinion does not even attempt to respond on originalist grounds to the fact that the pre-\textit{Pennsylvania Coal} Supreme Court case law limited application of the clause to physical deprivations of property by the government. Thus, Justice Blackmun was able to offer the tellingly sarcastic comment: "I cannot imagine where the Court finds its ‘historical compact,’ if not in history."\(^{138}\)

Justice Scalia’s approach in \textit{Lucas} is at odds with his announced commitment to a doctrine of originalism and his explanation of what originalism means. For example, in "Originalism: The Lesser Evil," Justice Scalia contended that original meaning as revealed in the contemporaneous record should control constitutional adjudication.\(^ {139}\) A constitutional clause should be treated as capable of evolution only "on the basis of some textual or historical evidence."\(^ {140}\) Nonetheless, in \textit{Lucas}, Justice Scalia seemed to be treating the Takings Clause as capable of evolution, without making a case for why it should be so treated.

\textit{Lucas} is an anomaly in that the original understanding is at least discussed. At the same time, the case neatly illustrates the irrelevance of the original understanding for modern takings jurisprudence. The Justice who invokes original understanding apparently does not actually believe that it should be used to decide the case. The Justice who is most closely

\(^{136}\) Id. (citations omitted). For the relevant discussion in Justice Blackmun’s dissent, see id. at 2914–15 (Blackmun, J., dissenting).

\(^{137}\) Id. at 2900.

\(^{138}\) Id. at 2917 n.26 (Blackmun, J., dissenting).


\(^{140}\) Scalia, \textit{Originalism,} supra note 139, at 862.
associated with a jurisprudence of original intent essentially dismisses it as irrelevant.

_Dolan v. City of Tigard_ is a more typical example of the peripheral role of history in takings law. Florence Dolan wished to expand her hardware store and applied for a permit to develop the site. The Tigard City Planning Commission approved her application, subject to the conditions previously imposed by the municipality's Community Development Code for new developments in the central business area, where the store was located. In exchange for permission to expand, Dolan was required to dedicate to the city that part of her property lying within the 100-year floodplain for use in a storm drainage system, and she was also required to dedicate a fifteen-foot strip of land adjoining the floodplain for use as a bikepath. Dolan sought a variance, and when it was denied by the Planning Commission and by the Land Use Board of Appeals, she brought suit, claiming a taking.

The Supreme Court divided sharply in response to the case. Chief Justice Rehnquist wrote for a five-member majority that found in Dolan's favor, while Justices Stevens and Souter dissented. The Court held that the Takings Clause required that, to avoid compensation, there had to be an "essential nexus" between a legitimate state interest and the permit condition and, in addition, that the government bore the burden of demonstrating the existence of "rough proportionality" between the harm associated with the expansion—additional water run-off and additional car and bike trips to the larger store—and the burdens imposed on Dolan. The Court concluded that the findings relied on by the municipality did not satisfy the rough proportionality test and that burdens imposed in the absence of such a showing were unconstitutional conditions.

None of the the opinions in the case contains any focused discussion of original intent. Only Justice Stevens touched on the issue, and he did so obliquely. Observing that the Takings Clause had been incorporated into the Fourteenth Amendment and applied against the states, he added:

_There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property. Justice Holmes charted a significant new course, however, when he opined that a state law making it "commercially impracticable to mine certain coal" had "very nearly the same effect for constitutional purposes as appropriating or destroying it." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414, 43 S. Ct. 158, 67 L. Ed. 322 (1922). The so-called "regulatory takings"_
doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.  

Stevens thus criticized *Pennsylvania Coal* as akin to *Lochner* in vesting unconstrained power in the judiciary. He then contended that the Court’s use in *Dolan* of the unconstitutional conditions doctrine to evaluate a “mutually beneficial transaction between a property owner and a city” was, like Holmes’s decision, a “judicial innovation,” and suggested that this doctrine may provide the grounds for “a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.”  

Despite these criticisms, Stevens did not suggest that the Court reevaluate the central tenets of that decision: that regulations can be compensable takings and that the Court, in evaluating regulations, should balance public benefit against private harm. Indeed, Stevens’s position in the case—that the property-owner bore “[t]he burden of demonstrating that [the challenged] conditions have unreasonably impaired the economic value of the proposed improvement”—embraces these views. In other words, Stevens implicitly criticized the majority for again expanding the realm of judicial discretion, as it had previously done in *Pennsylvania Coal*, but he did not call for a return to the original understanding, nor did he suggest that the original understanding had any lesson to offer for contemporary jurisprudence.

C. Academic Commentary and Original Intent

As the above discussion indicates, the original understanding has played at most a marginal role in modern Supreme Court takings jurisprudence. Like the Court, scholars have not seriously considered the possibility that the framers’ requirement of compensation for physical seizures but not for regulations might be based on a principle relevant to modern constitutional discourse. This section discusses the academic disregard of original intent and what are probably the two most prominent exceptions to this trend: Joseph Sax’s “Takings and the Police Power” and Richard Epstein’s *Takings*. Both Sax and Epstein use original intent to support their conceptions of takings law, yet dismiss the significance of the fact that the Takings Clause was originally limited in scope.

146. Id. at 2327 (Stevens, J., dissenting) (footnote and citations, except to *Pennsylvania Coal*, omitted).
149. Id. at 2329.
150. Id. at 2330.
151. Sax, supra note 7.
152. Epstein, supra note 8.
In doing so, they fail to grasp the full significance of the Takings Clause.\footnote{153}

1. Disregard of Original Intent. — Typically, in proposing how the Takings Clause should be understood, modern theorists have devoted relatively little attention to the original understanding. Scholars have generally focused more on philosophy and economics than they have on history,\footnote{154} partly because of the paucity of historical evidence of the framers’ intent.\footnote{155} In addition, some takings scholars do not rely on original intent because they are not originalists.\footnote{156} Holmes’s reason for departing from established precedent suggests another reason why the original un-

\footnote{153. Epstein and Sax, it should be added, are not the only prominent scholars to develop takings theories that draw in significant ways on original understanding. See, e.g., Bosselman et al., supra note 12, at 238–53 (discussing overruling Pennsylvania Coal as inconsistent with original intent); Kmiec, supra note 69, at 1639–47 (urging on originalist grounds various elements of takings doctrine, such as harm/benefit analysis and provision of remedy); Frank Michelman, Tutelary Jurisprudence and Constitutional Property, in Liberty, Property, and the Future of Constitutional Development 127, 129–35 (Ellen F. Paul & Howard Dickman eds., 1990) (proposing existence of historically grounded republican and liberal approaches to takings doctrine). But, like Sax and Epstein, none of these writers shares the project of this Article. They do not try to recapture why the framers protected only physical possession in order to use that underlying rationale as a basis for modern takings theory.

One article, however, that is similar in nature to this Article is Michael W. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure, 76 Cal. L. Rev. 267 (1988). Professor McConnell asks why the Contract Clause was intended to limit actions of the states, but not the national government, while the Fifth Amendment’s Takings Clause was intended to do the reverse. He argues, in part, that the Contract Clause applied only to the states because factions were seen as a greater problem at the state level than at the national level. See id. at 288–93. This argument is correct, and I have drawn on it, see infra text accompanying note 308. He is less certain of why the Takings Clause did not apply to the states, but suggests that the clause “applies to the level of government most needful of restraint.” McConnell, supra, at 293. In contrast, I do not think that the framers were particularly fearful that the national, as opposed to the state government, would seize private property. I suggest infra, see note 308, that Madison limited the reach of the clause for political reasons. But Professor McConnell’s argument that the Takings Clause was in part a response to the high costs associated with monitoring the military impresses me as correct, and I rely on it. See infra note 278 and accompanying text.


155. See Ackerman, supra note 83, at 7–8; Bosselman et al., supra note 12, at 97–104.

156. See, e.g., Ackerman, supra note 88, at 7, 192 n.11.}
Understanding has had only a limited influence on modern scholarship. Scholars have concluded that the early view of the Takings Clause reflected a physicalist view of property that is either incoherent or outdated in the modern economy. At best, this physicalist conception is merely one of the contemporary understandings of property and, as a contested definition, no longer establishes the correct reading of the clause.

For example, in "The Malthusian Constitution," 157 Professor Thomas Grey highlighted changes in the conception of property:

Under the classical conception, actual dispossession was required before ownership rights were violated and property was taken.

By contrast, modern lawyers—or at least modern legal scholars—are nominalists about "ownership"; they see property in resources as consisting of the infinitely divisible claims to possession, use, disposition, and profit that people might have with respect to those things. There is, on this conception, no essential core of those rights that naturally constitutes ownership.

But the other side of the modern conception that sees property rights everywhere is a greatly enhanced toleration of their infringement. 158

Similarly, in Private Property and the Constitution, 159 Bruce Ackerman wrote: "Unlike our ancestors, we no longer count our wealth by looking first to our social property of land, farms, buildings. Instead, our principle means of support consist of legal property: stocks, bonds, pensions, an assortment of rights granted by the activist welfare state." 160 Frank Michelman in "Property, Utility, and Fairness" 161 focused on the logical weakness of the earlier view. "At one time," he wrote, "it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur only through physical encroachment and occupation." 162 But such a position could not withstand analytic scrutiny: "Wordplay—in short dogged adherence to the constitutional formulas of 'taking' and 'property'—cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint." 163

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158. Id. at 30.
159. Ackerman, supra note 83.
160. Id. at 166.
161. Michelman, supra note 154.
162. Id. at 1184.
163. Id. at 1186–87. The works of Ackerman and Michelman referred to suggest reasons why it may be particularly appropriate to find a taking when a governmental action interferes with physical possession (as opposed to when it simply diminishes value). The reasons advanced are, however, cultural, not originalist, and they also apply to certain governmental actions other than physical takings. In addition, the two authors reveal the weaknesses of these reasons. See Ackerman, supra note 88, at 113–167 (analyzing takings law as reflecting protection for "Layman's things"); Michelman, supra note 154, at 1284.
Such critiques rest on the notion that the initial scope of the Takings Clause can be explained as reflecting a physicalist conception of property. As the next Part will discuss, the scope of the clause cannot be so simply explained. However, lack of concern with the question of why substantive constitutional protection of property rights was limited is characteristic not only of non-originalist theories of the Takings Clause. Originalists Sax and Epstein both present theories that fail to confront adequately the limitations of the Takings Clause.

2. Joseph Sax. — In his 1964 article, "Takings and the Police Power," Professor Sax argued that compensation was due only when the government, to advance its ends as an enterpriser, curtailed legitimate individual economic interests. 164 In support of this theory, Sax provided a pathbreaking survey of the early history of eminent domain law that included discussions of both the writings of seventeenth- and eighteenth-century civil law thinkers and English and American authorities writing at roughly the time of the Fifth Amendment's ratification. 165 Sax argued that this early history rebutted "the notion, so commonly held, that the taking clause [sic] was to be a bulwark for the maintenance of the established distribution of wealth." 166 Thus, the Holmesian vision that the clause protected value was inconsistent with early understandings.

Sax acknowledged that there were relatively few historical sources, but he suggested that these sources reflected a concern with preventing governmental arbitrariness, particularly the "appropriation of property by the state for its own account to finance its own enterprise." 167 Thus, in his treatment of America and England, Sax highlighted Tucker's statement that the clause was meant to be a remedy against military impressment and observed that Blackstone's paradigmatic case for compensation con-

164. Sax formulated the test as follows:
[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.
Sax, supra note 7, at 67.
166. Sax, supra note 7, at 53.
167. Id. at 59.
cerned the taking of land for a highway.\textsuperscript{168} Sax also found support for his view in Chief Justice Marshall's statement in \textit{Fletcher v. Peck}:\textsuperscript{169}

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.\textsuperscript{170}

While the language of \textit{Fletcher} would seem to suggest a broad conception of the rights of private property, Sax argued that the case supported his thesis since it concerned the legitimacy of Georgia's invalidation of land grants for which it had already received money.\textsuperscript{171} "[E]xamples of takings given by the early writers all fit quite clearly into the enterprise capacity,"\textsuperscript{172} Sax concluded.

At the same time, however, Sax's enterprise theory was broader in its reach than early understandings of the Takings Clause. "[A] finding of enhancement of the resource position of a government enterprise," he wrote, "does not necessarily require a physical invasion, or an acquisition of a formal proprietary interest."\textsuperscript{173} Sax contended that the distinction in the early case law between police power regulations, which were never compensable, and physical seizures, which always were, no longer made sense and that some regulations should therefore now give rise to a compensation requirement:

\begin{quote}
As the scope of government regulations grew . . . the economic impact of government regulation undermined the rationality of [the distinction between the police power and the eminent domain power]. Particularly with the growth of zoning, conservation legislation, and pervasive business regulation, the impact of the police power, however defined as qualitatively distinct, upon the traditional perquisites of private ownership could hardly be ignored.\textsuperscript{174}
\end{quote}

Sax is unquestionably correct that the economy has changed and that the nature of government intervention in the economy has dramatically expanded. Nonetheless, significant government regulation was common even in the world of the framers.\textsuperscript{175} Thus, given such regulation and the fact that the Takings Clause was not originally understood to bar it, the question is raised: Was there a limiting principle shaping the

\begin{footnotes}
\footnote{168. See id. at 58–59; see also supra note 15 (Blackstone's statement); supra text accompanying note 58 (quoting Tucker's statement concerning the original understanding of the Takings Clause).}
\footnote{169. 10 U.S. (6 Cranch) 87 (1810).}
\footnote{170. Id. at 135.}
\footnote{171. See Sax, supra note 7, at 59–60.}
\footnote{172. Id. at 63.}
\footnote{173. Id.}
\footnote{174. Id. at 40.}
\footnote{175. See supra notes 29–39 and accompanying text.}
\end{footnotes}
Takings Clause that merits serious regard today? And it is a question that Sax does not resolve.

3. Richard Epstein. — Almost certainly, in recent years Professor Richard Epstein has influenced political discourse about the Takings Clause more than any other academic. In *Takings*, his chief work on takings doctrine, Professor Epstein invoked original intent—and specifically his claim that the framers were Lockeans—to support his expansive conception of the Takings Clause. Under that view, "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state."\(^{176}\) Like Sax, however, Epstein fails to account for the fact that the Bill of Rights initially provided such limited protection for property rights.

Epstein's invocation of history 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. According to Epstein, "The Lockean system was dominant at the time when the Constitution was adopted,"\(^{177}\) and "the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights."\(^{178}\) The Takings Clause,

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176. Epstein, supra note 8, at 95.
177. Id. at 16.
178. Id. at 29. One problem with this claim is that, in his brief discussion of the takings issue in the *Two Treatises of Government*, Locke did not assert that the state had an obligation to compensate the affected individual; his concern was only with procedure. He wrote, "[T]he Prince, or Senate, however, it may have power to make Laws for the regulating of Property between the Subjects one amongst another, yet can never have a Power to take to themselves the whole or any part of the Subject's [sic] Property, without their own consent." John Locke, *Two Treatises of Government* § 407 (Peter Laslett ed., 1960) (1690). Epstein's response to this problem is that "the takings clause should be read as being inspired by Locke's treatise but not as following its language, or its logic, to the end." Epstein, supra note 84, at 2 n.5 (discussing argument in *Takings*). A contrary reading of Locke is that the consent to taking of property occurs when individuals surrender their natural rights and enter the social contract; according to this view, when the social contract is formed, individuals consent to subsequent legislation aimed at advancing the common good, even when that legislation is redistributive. See Note, Richard Epstein on the Foundation of Takings Jurisprudence, 99 Harv. L. Rev. 791, 804-05 (1986) [written by Deborah Goldberg]. The best evidence linking Locke to a compensation requirement does not figure in Epstein's account: Locke's authorship of compensation requirement in the Fundamental Constitution of the Carolinas. See supra text accompanying note 13. The varying readings in *Takings* and the Harvard Note are a manifestation of a larger debate about whether Locke's thought was purely liberal. Compare C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 203, 211 (1962) (Locke's theory legitimizes unlimited appropriation) with James Tully, *A Discourse on Property*: John Locke and His Adversaries 152-54, 165 (1980) (unlimited appropriation sanctioned only if proviso of "enough and as good left in common for others" is satisfied).

To the extent that scholarly writings influenced the eventual rise of the just compensation principle, the most important authors may have been, not Locke, but civil law scholars. See J.A.C. Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67, 69-81 (1931) (discussing role of natural law in early state
according to Epstein, mirrors Locke's philosophy about property, whose central premise is antiredistributionism. Thus, the Takings Clause embodies the following principle, which Epstein ascribes to Locke:

whenever any portion of [his property] is taken from [the property-owner], he must receive from the state . . . some equivalent or greater benefit as part of the same transaction. The categorical command that property shall not be taken without tacit consent must therefore be rewritten to provide that property may be taken upon provision of just compensation.\(^{179}\)

The obvious problem with this approach to the historical meaning of the clause is that the clause was initially read to have a limited scope. Epstein offers two reasons for why there is no need "to take into account the actual historical intention of any of the parties who drafted or signed the document."\(^ {180}\) First, examination of contemporaneous statements about the meaning of constitutional clauses "may well increase confusion."\(^ {181}\) In this regard, Epstein stresses the diversity of meaning which different framers could have attached to a constitutional provision and the range of intent that animated their public statements (although he does not offer specific examples of different understandings of the Takings Clause).\(^ {182}\)

Epstein's second rationale for ignoring the specific constructions that historical actors gave the clause is that the framers did not realize the clause's implications. Thus, to use an example offered by Epstein, governmental regulation of wages and prices are a taking, even if the framers did not view them as such:

[The framers] may have meant to endorse both the takings clause and wages and price controls without knowing the implicit tension between them. If they cannot have both, then their explicit choice takes precedence over their silent one.

takings cases and noting appeals to Grotius, Pufendorf, and Bynenshoek); Scheiber, supra note 69, at 362. At the same time, even these scholars did not recognize a legal right to compensation. As Professor Lenhoff wrote, "[T]he references of [civil law scholars] to a right of an individual to receive compensation were in the nature of moral suggestions, rather than statements of law." Lenhoff, supra note 15, at 596. For example, Grotius, the seventeenth century civil-law scholar who has been dubbed "the father of the compensation clause," Sax, supra note 7, at 54, recognized that compelling state needs could legitimate a decision not to award compensation:

[Through 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 made, if possible, to the one who has lost its right.]


179. Epstein, supra note 8, at 15.
180. Id. at 26.
181. Id. at 27.
182. See id.
Suppose the framers believed both A and X, when A entails not-X. If A is the constitutional text, then X is not allowed.\textsuperscript{188} Epstein does not specifically confront the broader issue of why regulations should now be treated as takings when they were not so treated until the twentieth century. However, the answer he would offer is clear from his discussion of historical intention and, specifically, from his treatment of wage and price controls. Although the framers’ passage of the Takings Clause testifies to their opposition to the redistribution of wealth, they did not grasp the fact that regulation could run afoul of that principle; they did not see the "implicit tension."\textsuperscript{184} Now that it is apparent, the principle should triumph over the concrete application because the principle received constitutional recognition.\textsuperscript{185}

Epstein’s presentation of original intent and the Takings Clause is particularly worthy of analysis because his view reflects a widely shared understanding of the ideology underlying the Takings Clause. For example, Professors Laurence Tribe and Michael Dorf have offered a similar reading of the historical record:

Undoubtedly, one of the most influential thinkers for American statesmen of [the late eighteenth century] was the seventeenth-century English political philosopher John Locke. . . . Whether or not a modern reader thinks that 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.\textsuperscript{186}

Despite its broad acceptance, consideration of Epstein’s argument forces us to confront the question: If the framers opposed government acts with

\textsuperscript{183} See id. at 28.

\textsuperscript{184} See id.

\textsuperscript{185} See id. However, Epstein does not believe that every government regulation that diminishes the value of private property gives rise to a compensable taking. Thus the state can prevent common law wrongs without providing compensation. Here, again, Epstein’s argument draws on his reading of Locke, rather than on any concrete historical understanding of what the Takings Clause meant to the framers. Because, in Lockean theory, the state stands in place of the individual and because the individual could take action against any person who engages in wrongful conduct against her, it follows that the state can act against any individual who is engaging in wrongful conduct against another. See id. at 111–12.

\textsuperscript{186} Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 70–71 (1991); see also Bruce W. Burton, Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation, 75 Or. L. Rev. 605, 608 (1993) ("Heeding their own unhappy history of government appropriation, the framers of the United States Constitution integrated Lockean notions into their new republic."); John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 Cath. U. L. Rev. 771, 776–77 (1993) ("Significantly, the drafter of the taking clause [sic], James Madison, incorporated the Blackstonian definition in his writing on property . . . ."). In an earlier work, I also treated the original intent animating the Takings Clause as a reflection of Lockean liberalism. See Treanor, supra note 19, at 704–05, 709–713; see also infra note 226 (discussing shift in my thought on the ideological background of the Takings Clause).
redistributive consequences as strongly as Epstein asserts, why did they craft a Takings Clause that required compensation only for physical seizure? Epstein's suggestion—that they did not fully realize the clause's implications—is unsatisfying in light of the obvious thoughtfulness of framers like Madison, and thus another explanation is needed.\(^{187}\) The answer lies, not in some shortsightedness in their thinking, but rather in the fact that they were not committed to absolute, liberal protection of property rights.

### III. Understanding the Original Understanding

If we are to take seriously the original understanding of the Takings Clause, we cannot focus only on its animating principle, but must also focus on the clause's limiting principle. As Professor James Ely has written, "For all their devotion to property rights, the framers were content to rely primarily on institutional and political arrangements to safeguard property owners."\(^{188}\) Why did the people who drafted and enacted the Takings Clause and its state counterparts decide that the interest in physical possession of property needed substantive protection, but that other property interests did not? To put the question in what is perhaps its simplest and most striking form: Why does the Bill of Rights contain a Takings Clause, but not a Contract Clause? This Part examines both why the compensation requirement emerged and why other property rights did not receive similar constitutional protection.

This Part begins by considering why the framers did not require compensation for any government act that affected the value of property. To this end, it examines the prevalent views of property during the framing period. Drawing on recent historical scholarship about the ideologies of republicanism and liberalism at the time of the framing, it suggests—contrary to Epstein—that Lockean liberalism, which treats the right to property as prepolitical, was not the single dominant ideology of the time. Rather, republicanism, which values the right to property but subjects it to majoritarian delineation, was also extremely influential. The power of the republican view of property during this period shows that there was no consensus among the framers that majoritarian decisionmakers could not be trusted to determine the appropriate level of protection for property interests.

After advancing this explanation for the initially limited scope of the Takings Clause, this Part then considers why possessory property interests in particular received substantive protection. It rejects the explanation that the limited scope of the Takings Clause resulted from the framers'...
limited conception of property and regulation. Instead, it examines the rise of the just compensation requirement in various state constitutions and in the Bill of Rights and concludes that in each case it was produced by the fear of process failure.

Finally, this Part turns to Madison, whose sophisticated conception of the clause and its purpose accords with the general reasons for which others sought special protection for physical possession of property. His conception of the clause reflected the synthesis of republicanism and liberalism in his political philosophy. At one level, Madison saw the clause as serving a hortatory function; it stood for the broad principle, which could be appealed to in political discourse, that governmental acts should not diminish the value of private property. The clause thus provided a broad recognition of a republican property right. At the same time, it put certain interests above majoritarian determination: when the federal government physically took property, compensation was necessarily owed. In other words, physical possession was protected as a liberal right. Physical possession received such heightened protection because of Madison's concern that the political process would not fairly consider certain possessory interests, specifically the ownership of land and slaves.

A. Revolutionary Ideology and the Protection of Property

Epstein's view that the Takings Clause should be understood as embodying the framers' Lockean liberalism accords with the dominant view among historians in the late 1950s and early 1960s. At that time, the conventional wisdom among historians was that the Revolution, the Constitution, and, indeed, all of American history reflected the broad acceptance in this country of Lockean liberalism. Thus Louis Hartz, the leading proponent of this school of thought, concluded, "Locke dominates American political thought, as no thinker anywhere dominates the political thought of a nation. He is a massive national cliché."189

Beginning in the mid-1960s, this consensus came under attack, largely because of three works. Bernard Bailyn in his Ideological Origins of the American Revolution argued that the dominant intellectual influence on the revolutionary generation was not Locke, but early eighteenth-century English opposition writers such as John Trenchard and Thomas Gordon, who subsequently had been largely forgotten.191 In Creation of

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190. Hartz, supra note 189, at 140.

the American Republic, Gordon Wood contended that republican ideology inspired the Revolution, although he also concluded that the Constitution represented a rejection of that ideology. In his 1975 The Machiavellian Moment, J.G.A. Pocock also powerfully advanced the thesis that revolutionary ideology was republican, although he believed that the primary sources of republican thought were not the English writers on whom Bailyn and Wood had focused, but rather Renaissance writers, such as Niccolo Machiavelli. Historians Eric McKitrick and Stanley Elkins have recently observed that these three works "represent an extraordinary effort of rescue, a retrieval of something which in the course of time had become all but lost," and what had been lost was "the mind and sensibility of the founding generation."

While historians disagree on precise terminology and meaning, republicanism can be differentiated from liberalism in a number of critical ways. In particular, they differed in their conceptions of the nature

rediscovery of the importance of eighteenth-century English writers such as Trenchard and Gordon substantially influenced subsequent historical writings that advanced the republican thesis, Ideological Origins does not use the term "republicanism" and Professor Bailyn has subsequently argued that republicanism did not occasion the American Revolution. See Bernard Bailyn, Faces of Revolution 227 (1990).

192. See Wood, supra note 69, at 467.
195. Wood and Pocock generated two different schools of thought about the meaning of republicanism. For a discussion of the two, see Rodgers, supra note 189, at 19–21. Rodgers notes that one critical difference concerns the meaning of virtue. As Wood uses the term, virtue primarily means self-abnegation, sacrifice of individual interest to the common good. See, e.g., Wood, supra note 69, at 53. For Pocock, virtue consists largely of public-spirited participation in the life of the polity; virtue is civic virtue. See Pocock, supra note 193, at 73–76, 86–87. This distinction has been generally ignored in the legal literature. However, it is significant since the aspect of republicanism that many legal scholars have found attractive—its celebration of political participation—is largely absent from Wood's account. The second critical difference between Creation of the American Republic and The Machiavellian Moment concerns the timing of liberalism's triumph over republicanism. Wood indicates that republicanism had collapsed as an ideological influence by the time of the Constitution, and that the Constitution represented a rejection of republican politics. See Wood, supra note 69, at 135–36. In contrast, Pocock makes clear that republicanism continued to influence American politics even after the founding. See Pocock, supra note 193, at 462.

More recently, in The Radicalism of the American Revolution, Wood departed from his earlier position and indicated that republicanism continued to influence American politics in a significant way at least through the War of 1812, although he continues to see the Constitution as a response to the perceived problems of republicanism. See Gordon S. Wood, The Radicalism of the American Revolution 230–32, 927 (1993).

196. For reasons of clarity, it should be stressed that historians most commonly define the term liberal differently than philosophers and scholars of jurisprudence. In particular, the latter typically posit a fair distribution of societal resources as a precondition to rights assertion. In addition, the liberal, as historians generally use the term, fully accepts the legitimacy of the pursuit of self-interest, while the same is not necessarily true of the liberal, as philosophers and scholars of jurisprudence generally use the term. See Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence,
of rights and the role of property in the polity. Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest. Whereas liberals are comfortable with economic self-interest, republicans have a profoundly ambivalent stance toward private property. Believing that the purpose of the state was to promote virtue, they saw sources of corruption in luxury and in commerce, and they campaigned against the pursuit of self-interest and were suspicious of the worlds of finance and manufacturing. For example, at the Constitutional Convention, John Dickinson stated that he "doubted the policy of interweaving into a Republican constitution a veneration for wealth [and] had always understood that a veneration for poverty & virtue, were the objects of republican encouragement."197

At the same time, republicans treasured private property, and land in particular, as providing the individual with the autonomy that was a prerequisite for full participation in the polity. Thus, Professor Drew McCoy has written of the republican view of property:

The personal independence that resulted from the ownership of land permitted a citizen to participate responsibly in the political process, for it allowed him to pursue spontaneously the common or public good, rather than the narrow interest of the men—or the government—on whom he depended for his support. Thus the Revolutionaries did not intend to provide men with property so that they might flee from public responsibility into a selfish privatism; property was rather the necessary basis for a committed republican citizenry.198

65 S. Cal. L. Rev. 1171, 1203-28 (1992) (discussing Rawls and Dworkin and arguing that the thought of neither is atomistic).


198. Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America 68 (1980). Professor Pocock has more recently offered a similar summary of why republicans believed private property important:

The citizen possessed property in order to be autonomous and autonomy was necessary for him to develop virtue or goodness as an actor within the political, social and natural realm or order. He did not possess it in order to engage in trade, exchange or profit; indeed, these activities were hardly compatible with the activity of citizenship.

The relationship between property (particularly land) and citizenship was critical. Property led to independence. Jefferson observed that “dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition,” 199 and thus sought to include in the Virginia Constitution a provision granting fifty acres of property to every man who did not have any. 200 Similarly, John Adams in 1776 noted that “power always follows property” and urged that government “make the acquisition of land easy to every member of society” or that it “make a division of . . . land into small quantities, so that the multitude may be possessed of landed estates.” 201

The converse was that republican thought indicated either that the propertyless should be excluded from the full rights of citizenship or, at least, that there were significant dangers associated with granting them such rights. 202 That is why Jefferson, while he celebrated yeoman farmers, distrusted urban workers. 203

Influenced by the work of sociologist Clifford Geertz, 204 the methodological assumption behind Wood’s and Pocock’s treatments of ideology was that political discourse during a particular era is dominated by a single ideological paradigm. 205 Pocock thus wholly excluded liberalism from his account of the Revolution: “Not all Americans were schooled in [the republican] tradition, but there was (it would almost appear) no alternative tradition in which to be schooled.” 206 For Pocock, not only did liberalism play no role in fostering the revolution, it was simply absent from the political discourse of the period.

Wood’s Creation also reflected the conception that there are dominant paradigms, though his account was one of a paradigm shift. With its stress on the common good and sacrifice to the community, republicanism was the reigning ideology of the Revolution. The ideology, however, lost its intellectual coherence during the revolutionary era. As state legislatures took actions that aided some segments of society at the expense of others—such as paper money legislation and debtor stay laws, both of which aided debtors at the expense of creditors—political leaders began to reject the core republican ideas that there was a common good animating society and that the legislature could discern that good. 207

203. See id. at 178.
204. See Rodgers, supra note 189, at 21.
206. Pocock, supra note 193, at 507.
207. See Wood, supra note 69, at 396–403.
More recent work on political discourse during the revolutionary era and the early republic—including Wood's and Pocock's—is more nuanced and, at least with respect to the time of the Constitution's ratification, breaks from the assumption of a dominant ideological paradigm. While historians are sharply divided on a host of interpretive matters concerning republicanism and liberalism in the revolutionary era and the first years of the early republic, there is now a near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s.

As historian Robert Shalhope has observed, "America did not make a neat or smooth march into modernity. Instead, liberal and classical [republican] ideas existed in constant tension." Equally important, much recent historical work has contended that, at the time of the framing, relatively few, if any, politicians of note were purely liberal or purely republican. Rather, the framers typically drew on both paradigms. As the writings of historians such as Wood, McCoy, Jennifer Nedelsky, Lance Banning, and Michael Lienisch show, most of the framers continued to accept the quintessentially republican belief in the importance of (and the possibility of) the promotion of virtue by the state. As Professor Kramnick has observed:


209. For example, both Professor Joyce Appleby, the leading proponent of the view that the Jeffersonians championed a liberal economic order, and Professor Lance Banning, the most prominent advocate of the view that republicanism powerfully influenced the Jeffersonians, agree that neither ideology was dominant at the time of the ratification of the Constitution nor the Bill of Rights. See Joyce Appleby, Liberalism and Republicanism in the Historical Imagination 322-39 (1992); Lance Banning, Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic, 43 Wm. & Mary Q. 3, 12 (1986) [hereinafter Banning, Jeffersonian Ideology Revisited]. Other important recent works that recognize the influence of both ideologies include Michael Lienesch, New Order of the Ages (1988) [hereinafter Banning, Jeffersonian Ideology Revisited].


211. See Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 41-44 (1989); McCoy, supra note 198.

212. See Nedelsky, supra note 209.

213. See Banning, Jeffersonian Ideology Revisited, supra note 209; Banning, Quid Transit?, supra note 209.

214. See Lienesch, supra note 209.
Federalists and Antifederalists . . . tapped several languages of politics. . . . None dominated the field, and the use of one was compatible with the use of another by the same writer or speaker. There was a profusion and confusion of political tongues among the founders. They lived easily with that clatter; it is we, two hundred and more years later, who chafe at their inconsistency.215

This scholarship indicates that Epstein’s equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke had no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as the ideology of the framing. Revolutionary and early national era cases upholding uncompensated takings also suggest the continuing power of republican attitudes. The Pennsylvania Supreme Court, for example, denied a claim for reimbursement for goods seized as part of the war effort with the observation that “it is better to suffer a private mischief, than a public inconvenience.”216 In M’Clenachan v. Curwin,217 that court rejected a claim for compensation on the grounds that citizens “were bound to contribute as much [land], as by the laws of the country, were deemed necessary for the public convenience.”218 In Commonwealth v. Fisher,219 it observed that compensation was “a bounty given . . . by the state” for reasons of “kindness.”220 In Lindsay v. Commissioners,221 the South Carolina Attorney General proclaimed that the uncompensated taking of unimproved land was “one of the inherent prerogatives of the majesty of the people, and a power which the supreme authority of the state had a right to exercise, for the general good and convenience of the whole, and that it resulted from the very nature and ends of civil society.”222 An evenly divided court upheld the uncompensated taking as justified by “ancient rights and principles.”223

Such comments and early compensation practices reflect a distinctly republican attitude towards property. It was a state creation and its scope was appropriately set by the state. As Benjamin Franklin put it, “Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing

217. 3 Yeates 362 (Pa. 1802).
218. Id. at 373.
220. Id. at 465.
221. 2 S.C.L. (2 Bay) 38 (1796).
222. Id. at 50.
223. Id. at 57.
Yet the fact that individual property claims could be curtailed did not evidence hostility to private property. As already discussed, republican ideology accorded the institution of private property a high degree of respect and protection because it provided the autonomy necessary for citizenship. In practice, republican attitudes toward property and rights meant that when property was taken, compensation was *usually* paid. The relevant republican decisionmaking body, normally a jury or the legislature, weighing the facts of the case would decide that compensation was consistent with the public good. But a resolution in favor of compensation was not inevitable. Thus, it could be decided (as it generally was) that in view of the community’s need for cheap roads and the minimal burden imposed on an individual by building a road across that individual’s unimproved property, no compensation would be paid. Because of faith in majoritarian decisionmakers, the early state constitutions did not contain substantive protections of property rights. They simply contained procedural protections—land could be taken only with the consent of the individual or of the legislature.

B. The Rise of the Just Compensation Requirement

The constitutionalization of the compensation requirement in the Massachusetts and Vermont constitutions and in the federal Bill of Rights and its incorporation in the Northwest Ordinance reflects a break from this republican tradition. In certain circumstances, compensation was now mandated and no longer a matter to be determined by majoritarian deliberations. It was, to use the terms set forth earlier, now a liberal right, existing outside of—and trumping—ongoing majoritarian deliberations. Thus, the story of the rise of the compensation requirement accords with historical accounts of revolutionary era ideology. As the revolutionary era progressed, people lost faith in legislatures and liberal ideas became increasingly prevalent.

At the same time, as previously discussed, the earliest clauses were narrow in scope: They applied only to physical takings. Thus, the early taking clauses did not represent a complete triumph for liberal attitudes. Again, the fact that the clauses applied only to physical takings squares with current historical accounts of the ideology of the period. Just as revolutionary era ideology in general reflected both liberal and republican elements, there were now liberal and republican spheres with respect to property rights. The liberal sphere concerned physical takings, and here the obligation to compensate was absolute. The republican sphere concerned all other governmental actions affecting private prop-

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225. See supra Part I.A.
Form: Here, the majority decided to what degree it wished to limit property claims and, if so, whether it wished to compensate.226

The foregoing discussion leads to certain crucial questions: Why was the line separating property interests that received substantive constitutional protections from those that did not drawn where it was? In other words, if there was a sphere in which majoritarian decisionmakers could limit property interests and a sphere in which they could not, why did possessory interests fall in the latter sphere? One possible explanation might be that the framing generation was limited to thinking of property in physicalist terms and thus saw only possessory interests as property. Their conception of property was not, however, so limited. As Professor Forrest McDonald has observed, "[T]he framers of the Constitution . . . understood that the word property had more meaning than one."227 While one such meaning equated property with physical possession (or, even more narrowly, land),228 in its traditional (and Lockean) sense, property meant "particular to, or appropriate to, an individual person."229 Blackstone’s conception, while narrower than Locke's, was still

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226. One wrinkle to this account should be added. The Northwest Ordinance of 1787 had a contract clause. See Northwest Ordinance of 1787, art. 2, reprinted in Sources of Our Liberties, supra note 12, at 392, 395. Thus, it, unlike the Massachusetts and Vermont constitutions, contained a second substantive limitation on governmental control over private property.

One final definitional point should be made: Republican and liberal attitudes towards compensation should not be viewed as polar opposites. Under both schools of thought, compensation was considered the norm. The republican school, however, believed that the ultimate decision of whether to compensate the affected individual was to be resolved by the ordinary political process; the liberal believed that the obligation to compensate existed outside of that process and could not be compromised by it. See Gregory S. Alexander, Time and Property in the American Republican Legal Culture, 66 N.Y.U. L. Rev. 278, 276 (1991) (noting “interdependency” of republican and liberal attitudes).

I have previously explained the rise of the compensation principle in revolutionary America and in the early republic as a product of the rise of liberalism. See Treanor, supra note 19, at 704–05. My treatment of the topic here is significantly different in a number of respects. Influenced by then-current historical scholarship, in the earlier piece, I saw republicanism and liberalism as polar opposites and the takings clauses, as well as Madison’s thought, as purely liberal. As indicated in the previous section, subsequent historical scholarship has shown that the relationship between republicanism and liberalism was more subtle and that the thought of leading politicians, including Madison, reflected the influence of both schools of thought. This Article attempts to apply those insights to the takings context. In particular, the new historical work has led me to focus on why the takings clauses were limited to physical possession, and I argue that those limitations can best be understood as reflecting the republican idea that in a certain sphere the state should continue to control the definition of property interests.

227. McDonald, supra note 18, at 10.

228. See Stanley N. Katz, Thomas Jefferson and the Right of Property in Revolutionary America, 19 J.L. & Econ. 467, 473 (1976) (“'Property,' to Jefferson, meant 'land.'); Vandeveldt, supra note 89, at 525 (arguing that Blackstonian conception of property was physicalist and "prevalent at the founding of the nation").

229. McDonald, supra note 18, at 10; see also Locke, supra note 14, § 27 ("E]very man has a property in his own person . . ."); see also David Schultz, Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding, 97
broad, as well as remarkably modern: The individual's right of property "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control of diminution, save only by the laws of the land." The capacious quality of Blackstone's conception of property is suggested by the fact that Epstein warmly embraces it, hailing the "completeness, universality, and relevance" of Blackstone's definition. In part because of the Financial Revolution of the early eighteenth century and the rise of marketable shares of the public debt, well before the time of the American Revolution, intangible assets played a significant economic role and assets, whether tangible or intangible, were described as property. During the course of the debates about the Constitution, the word property was used in all these different senses by Madison and other Federalists. In sum, the narrow protections of the first takings clauses were not the product of the fact that people could only conceive of property as physical possession. To explain the narrow scope, the following subsections examine the first constitutions that mandated compensation. In each case, it appears that the just compensation requirement was inspired by the fear that the political process could not adequately protect physical possession of property.

1. The Vermont Constitution. — In the case of Vermont, whose 1777 constitution contained the first compensation requirement, it seems obvious why physical possession of property received special protection: Vermonters' experience had taught them that title to land needed substantive constitutional protection because the political process would not
always respect legitimate land titles. Indeed, the preamble to the Vermont Constitution—in which Vermonters declared their independence from New York, as well as Great Britain—reads like an apologia for the state’s takings clause, for the principal theme of the preamble is that the New York government had unjustly invalidated the land grants held by Vermonters.

The land that subsequently became Vermont was originally part of the colony of New Hampshire and was primarily settled by individuals whose grants had issued from the New Hampshire government.\(^\text{235}\) In 1764, however, the English government transferred control of these territories to the New York colonial government, which subsequently refused to acknowledge the New Hampshire land grants. The preamble of the Vermont constitution of 1777 recounted the tale in detail. It stated:

\[\text{[T]he late Lieutenant Governor Colden, of New-York, with others, did ... covet those very lands; and by a false representation made to the court of Great Britain, (in the year 1764, that for the convenience of trade and administration of justice, the inhabitants were desirous of being annexed to that government,) obtained jurisdiction of those very identical lands ex parte; which ever was, and is, disagreeable to the inhabitants.}\]

The crown government of New York then “refused to make regrants of our lands to the original proprietors and occupants, unless at the exorbitant rate of 2900 dollars fees for each township; and did enhance the quit-rent, three fold, and demanded an immediate delivery of the title derived before, from New-Hampshire.”\(^\text{237}\) New York judges pronounced the New Hampshire land grants “utterly null and void.”\(^\text{238}\) When Vermonters refused to comply with the terms necessary to secure regrants, the colonial New York Legislature passed an act providing for a fine and imprisonment for anyone who refused to assist the sheriff in ousting those who held land under New Hampshire grants in favor of new grantees, and a series of acts empowering judges “to award execution of death against those inhabitants in said district, that they should judge to be offenders, without trial.”\(^\text{239}\)

The preamble also reported that independence from Great Britain did not improve the situation in Vermont. The New York Convention of 1776 demanded for the new state government of New York the quit-rents that the crown government had asserted Vermonters owed.\(^\text{240}\) “[T]he legislature of New-York ... still continue [sic] to disown the good people of this State,” the preamble complained, noting section thirty-six of the New York constitution, which recognized the validity of the land grants


\(^{236}\) Vt. Declaration of Rights pmb. (1777), reprinted in 1 Schwartz, supra note 14, at 319, 320 [hereinafter Vt. Declaration].

\(^{237}\) Id.

\(^{238}\) Id.

\(^{239}\) Id. at 321.

\(^{240}\) See id.
from the New York crown government.\textsuperscript{241} The larger problem that New York's failure to recognize the land grants illustrated was that "the local situation of this State, from New-York, at the extreme part, is upward of four hundred and fifty miles from the seat of that government, which renders it extreme [sic] difficult to continue under the jurisdiction of said State."\textsuperscript{242} In other words, because Vermont was far removed from the capital where decisions were made, its claims could not be fairly considered. As a result, it was "absolutely necessary" for Vermont to split away from New York and to become a separate state.\textsuperscript{243}

Their experience with the government of New York led Vermon ters to include in their constitution a series of rights, many of which were either novel or at least uncommon in the first state constitutions. Clause IV set forth Vermon ters' exclusive right to govern themselves: "That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."\textsuperscript{244} Clause XIX had the effect of barring extradition to New York: "That no person shall be liable to be transported out of this State for trial, for any offence committed within this State."\textsuperscript{245} Clause XVII guaranteed the individual's and the community's right to exit from a polity: "That all people have a natural and inherent right to emigrate from one State to another, that will receive them; or to form a new State in vacant countries, or in such countries as they can purchase, whenever they think that thereby they can promote their own happiness."\textsuperscript{246} And Clause II provided: "That private 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."\textsuperscript{247}

Significantly, this last clause, the takings clause, was the only substantive protection for property rights in the Vermont constitution (as well as the first substantive protection for property rights in any of the state constitutions). In its historical context, this clause clearly does not not represent a belief that legislatures, as a general matter, would not respect prop-

\begin{itemize}
\item \textsuperscript{241} Id. at 320; see also N.Y. Const. of 1777, § 36, reprinted in 1 Schwartz, supra note 14, at 301, 311 (recognizing validity of New York land grants).
\item \textsuperscript{242} Vt. Declaration pmb., supra note 236, at 321.
\item \textsuperscript{243} Id.; see also Charles T. Morrissey, Vermont: A Bicentennial History 89 (1981) (noting that local convention voted in 1777 to establish a separate state). Vermont was not, however, admitted to the United States until 1791. See id. at 100. The Vermonters' concern that distance made adequate representation impossible was one that others in the revolutionary era shared. In particular, Anti-federalists argued that, because the national government would be physically distant from most of its constituents, Congress would not be able to learn about what citizens at any given time wanted and the people would have difficulty monitoring Congress. Distance would therefore weaken faith in government. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1137-45 (1991).
\item \textsuperscript{244} Vt. Declaration ch. I, cl. IV, supra note 236, at 322.
\item \textsuperscript{245} Id. cl. XIX, at 324.
\item \textsuperscript{246} Id. cl. XVII.
\item \textsuperscript{247} Id. cl. II, at 322.
\end{itemize}
property claims. Rather, it protects the one property interest that Vermonters’
experience had showed them was peculiarly unlikely to receive fair con­
sideration in the political process: the real property interests of people
who lived in a region distant from the state government and who were a
small part of the polity’s populace. Because Vermonters were a small and
powerless minority in New York politics, their claims had been disre­
garded in revolutionary era majoritarian deliberations (as well as in colo­
nial legislative decisions). The property interest most at risk when the
people of a region were a political minority was the property interest that
defined them: their land claim in that region. As a result of their vulner­
ability, Vermonters’ land claims had been invalidated and their land had
reverted to the state, which had regranted it. The Vermont Takings
Clause was thus designed to provide security against the type of process
failure to which majoritarian decisionmaking processes were peculiarly
prone.

2. The Massachusetts Constitution of 1780 and the Northwest Ordinance of
1787. — The process that led to the passage of the next just compensa­
tion clause, contained in the Massachusetts Constitution of 1780, is less
clear. In 1778, a proposed state constitution had been rejected, largely
on the grounds that it did not adequately safeguard the rights of prop­
erty.248 The various Massachusetts town meetings that rejected the 1778
Constitution called for protection of property rights through institutional
mechanisms, such as property qualifications for voters and state office
holders; apparently, none mentioned a desire for a just compensation
requirement.249 Responding to this concern, the framers of the 1780
constitution established such property qualifications.250 But they also in­
cluded a takings clause: “[W]henever the public exigencies require, that
the property of any individual should be appropriated to public uses, he
shall receive a reasonable compensation therefor.” 251 It is not clear why
this takings clause was included, given the apparent lack of demand for
such a clause. Perhaps, as the framers of the constitution cast about for
devices to protect property, they decided to emulate the one substantive
protection already recognized in a state constitution, the takings clause of
neighboring Vermont.252 If this is the case, it is possible that the

248. See The Popular Sources of Political Authority 22 (Oscar Handlin & Mary
Handlin eds., 1966).
249. For the texts of the various town responses, see id. at 202–379.
250. For a comparison of the property qualifications in the draft 1778 constitution
and the 1780 constitution, see Willi P. Adams, The First American Constitutions:
Republican Ideology and the Making of the State Constitutions in the Revolutionary Era
295 (Rita Kimber & Robert Kimber trans., 1980).
252. My research has uncovered only one other relevant piece of evidence. In 1784,
one Massachusetts citizen complained that, both before and after the adoption of the 1780
constitution, Massachusetts juries denied compensation to land owners whose property was
taken for roads by determining that the benefits from the roads more than offset the value
of the land taken; he claimed that such actions were invalid under the 1780 constitution.
See Jonathan Parsons, A Consideration of Some Unconstitutional Measures, Adopted and
Massachusetts framers were simply copying someone else’s handiwork without reconsidering the lines that the Vermont constitution established between the permissible and the impermissible.

Consideration of the next compensation clause, the Northwest Ordinance of 1787, however, suggests an alternate understanding of the Massachusetts history. The Northwest Ordinance provides: “[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. . . .” 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. Both phrases seem to refer not to ordinary takings of property for roads and the like, but rather to seizures effected out of compelling need to preserve the polity itself. One early Court interpreted the Northwest Ordinance in this fashion. “The words common preservation,” the Louisiana Supreme Court declared in 1816, “imply that Congress had then in view those extraordinary cases, in time of war or danger, when the property or services of an individual become accidentally necessary to the preservation of the country . . . .”

Uncompensated seizures by the military had been a source of concern during the revolutionary era. John Jay in 1778, for example, publicly denounced “the Practice of impressing Horses, Tents, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land.” Similarly, as has already been noted, St. George Tucker, in explaining in 1803 why the Fifth Amendment’s Takings Clause had been added to the federal Constitution, observed that the clause “was probably intended to restrain the arbitrary and op-

Practiced in This State 17–22 (Newbury-port, Mass. 1784). If Parsons’s view were widely held, the takings clause arguably reflected broad discontent with the way in which juries awarded compensation for lands used in road building. But if this were a broadly held concern, it would presumably have shown up in the town resolves responding to the 1778 proposed constitution. Since it did not, it seems that the framers may simply have copied the Vermont constitution because it provided a model.

Another possible and related explanation for the takings clause is that the framers of the Massachusetts constitution, seeking a model for protection of property, used either chapter 8 of the Massachusetts Body of Liberties or Article 28 of Magna Carta. Both documents, however, only protected personal property, unlike the Vermont constitution and unlike the 1780 Massachusetts constitution. See supra note 12 and accompanying text. Thus, the Vermont constitution offered the more likely model. It may, however, be the case that the presence of similar clauses in Magna Carta and the Body of Liberties affected the framers of the Massachusetts constitution as they decided whether or not the presence of a takings clause was appropriate.

254. Renthorp v. Bourg, 4 Mart. 97, 132 (1816).
pressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war.  

In at least one court case, an individual whose property was seized by military authorities sued, only to have the claim denied on the grounds that no right to compensation existed.

The Northwest Ordinance may provide a helpful gloss to the Massachusetts Constitution because one of the members of the congressional committee that drafted the compensation clause of the Northwest Ordinance—indeed, the committee member who handwrote the draft of the ordinance in which the clause appeared for the first time—was Massachusetts Congressman Nathan Dane. In an 1830 letter Dane stated, “The Ordinance of ‘87 was framed mainly from the laws of Massachusetts.” This suggests that, if the Northwest Ordinance was concerned with requiring compensation when the military seized goods, as the language of the clause suggests, the same may have been true of the Massachusetts Constitution of 1780. If so, the Ordinance merely made explicit what was implicit in the state constitution. Under this reading, both takings clauses addressed a particular problem beyond the direct control of the political process—the seizure of goods by a military acting on its own authority and without the sanction of political decisionmakers. This is a very different kind of process failure than the one the Vermont framers sought to redress, but it is nonetheless a process failure. If this reading is correct, none of the three revolutionary era takings clauses reflected a broad belief that legislatures would not fairly consider property rights. Rather, each embodied the belief that there was a small class of cases in which property concerns would not be fairly considered, and that a compensation rule was necessary for that class.

There are two other possible explanations for the presence of a takings clause in the Northwest Ordinance, and it is possible that all three played a part in the clause’s inclusion in the document. The first is that the clause may have reflected a broad concern on the part of some congressmen that the territorial legislature would not adequately respect private property rights. Clearly, at least one congressman had such a concern prior to the enactment of the Ordinance, and he was satisfied by the Ordinance. The congressman was Virginia’s Richard Henry Lee, who wrote Washington about the Ordinance: “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 govern-

256. 1 Tucker, supra note 41, at 305–06.


258. See 1 Schwartz, supra note 14, at 385.

259. Id. at 386.

260. These two explanations parallel Professor Benjamin Wright’s explanation of the presence of a contract clause in the document. See Benjamin F. Wright, Jr., The Contract Clause of the Constitution 6–7 (1938).
ment should exist, and the rights of property be clearly defined."261 The Ordinance contained two provisions providing substantive protection for property rights; in addition to the takings clause, it contained the first contract clause.262 Clearly, Lee was referring to the contract clause,263 and he may have been referring to the takings clause as well. If (contrary to my previous argument) one sees the Northwest Ordinance's takings clause as applicable to all physical takings (rather than just seizures by the military), then, taken together, the contract clause and the takings clause limited an entire range of legislative actions concerning property, not just one particular type of legislative action. However, Lee's letter reflects not a generalized distrust of legislatures, but rather a distrust of territorial legislatures. He was anxious about the territorial legislature because "the greater part of those who go there [the territories]" are "uninformed, and perhaps licentious people."

It is also possible that the clause was designed to prevent the territorial legislature from revoking the Ohio Company's land grant. At the time that the Northwest Ordinance was enacted, the Ohio Company, an association composed of former soldiers and officers from Massachusetts, was seeking to obtain from Congress 1.5 million acres of the Northwest Territories on terms that were remarkably favorable to the company.264 A number of historians have suggested that the company's lobbyist, Manasseh Cutler wrote and engineered the passage of the contract clause in order to protect the grant that the company received shortly thereafter.265 The takings clause appeared for the first time in the draft of the Northwest Ordinance that also introduced the contract clause.266 Conceivably, Cutler might have also written the takings clause, and for the same reason. 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, since it was principally owned by stockholders who lived outside of the Northwest Territories and hence were unrepresented in its legislature. Article 4 of the Ordinance provides further support for the view that the document's framers were concerned about process failure. It provides that "in no

262. See Wright, supra note 260, at 6–7.
263. See id.
265. See Wright, supra note 260, at 7 n.10 (listing sources).
266. See July 11, 1787, Draft of Northwest Ordinance, reprinted in 1 Schwartz, supra note 14, at 391, 395.
case shall non-resident proprietors be taxed higher than residents.  

This article illustrates the recognition of the vulnerability of those who lacked the vote and whose voice was weakened by distance.

In short, the 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. Rather, the evidence—with the exception of Lee's letter—reflects a belief that constitutionalization of the compensation issue was seen as necessary to address those isolated instances in which the political process would not adequately protect property rights. The reasons for the failure of process varied, as did the type of physical property perceived to be at risk. But the overall purpose of the clauses and the perceived vulnerability of physical property remained constant.

3. The Fifth Amendment's Takings Clause. — The framing of the Fifth Amendment's Takings Clause gives rise to similar observations. Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government. Indeed, none of the state ratifying conventions requested a just compensation clause or a contract clause binding on the federal government. The Constitution already limited the national government's exercise of power concerning property rights: Export duties and taxation on interstate commerce were banned; the slave trade protected until 1808; direct taxes restricted; preferential treatment of ports, bills of attainder, ex post facto laws, and corruption of the blood prohibited. Some of the constitutional protections of private property—like the bans on bills of attainder and retrospective laws—can be understood as designed to address the limited range of cases in which structural protections would not adequately protect against singling out. Nonetheless, the national government's power to act in ways that would affect the distribution of wealth was clear. Any taxes the national government imposed or trade policy it pursued would have enormous consequences. The Constitution explicitly barred the states not only from impairing contracts, but from coining money, issuing bills of credit, and making anything but gold or silver coin legal tender; the federal government was not so limited.


268. For a full discussion of Madison's views on this point, see infra Part III.C.

269. For a compilation of the various proposals, see Dumbauld, supra note 51, at 161-65.

270. See U.S. Const. art. I, § 9; id. art. III, § 3; McDonald, supra note 18, at 268-70.


272. See U.S. Const. art. I, § 10; McDonald, supra note 18, at 270.
Those concerned with the protection of property presumably found convincing the argument that Madison advanced in Federalist Ten\textsuperscript{273} and believed that the structure of the national government that the Constitution established adequately protected property interests. Thus, there was no need for a clause barring the federal government from interfering with contracts because the institutional structures adequately protected the underlying property interests.

Indeed, the 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. In fact, an Anti-federalist complaint was that the national government would likely treat property rights with \textit{too much} respect. For example, an anonymous 1787 tract, written in the form of a catechism, contained the following lesson as part of its critique of the Constitution:

\begin{itemize}
  \item Q. What ought to be the object of government?
  \item A. The welfare of the governed.
  \item Q. How is such a government to be obtained?
  \item A. By forming a constitution which regards men more than things.\textsuperscript{274}
\end{itemize}

Why, then, was Madison's takings clause ratified, if there was so little demand for it? Why not just trust the national government to pay compensation when appropriate? Madison's rationale will be developed in the next section, and presumably others favored the clause for similar reasons. In addition, although they had not sought its inclusion as an amendment, some federalists thought that there was a natural right to compensation.\textsuperscript{275} It would appear likely that, for some Anti-federalists suspicious of the power of the central government, any limitation was desirable.

But the best piece of evidence explaining why most people initially favored the clause is St. George Tucker's previously quoted statement that the clause was ratified in order to insure compensation when there was military impressment of personal property.\textsuperscript{276} Tucker's comment ap-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{273} See infra Part III.C (discussing The Federalist No. 10).
  \item \textsuperscript{274} Michael Kammen, The Rights of Property, and the Property in Rights, in Liberty, Property, and the Foundations of the American Constitution 1, 10 (Ellen F. Paul & Howard Dickman eds., 1989) (quoting catechism).
  \item \textsuperscript{275} The strongest early statement of such a position is Justice Patterson's decision in Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795). The case held that Pennsylvania could not take land from one citizen and vest it in another, but the language indicates that Patterson believed that natural law barred an uncompensated taking by the government of an individual's land. He observed:
    \begin{quote}
    The legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government . . . .
    \end{quote}
    Id. at 310.
  \item \textsuperscript{276} See supra text accompanying note 256.
\end{itemize}
\end{footnotesize}
pears to be the only more or less contemporaneous statement of why the clause was passed. Moreover, Tucker was in a good position to make such a judgment. He was a prominent Virginia jurist, politician, legal educator and lawyer, and a friend of Jefferson. He was one of Virginia's representatives at the Annapolis convention that issued the call for the federal constitutional convention, and the author of the most prominent constitutional law treatise in the early republic.\textsuperscript{277}

Tucker suggested that the clause was ratified in order to insure compensation when there was military impressment of personal property. As previously pointed out, concern with impressment without compensation is not the same thing as a general concern that government will not adequately protect property rights. It reflects, instead, a belief that compensation must be constitutionally mandated in a small category of cases in which the normal safeguards of the political process are absent. Here, safeguards were absent because the military was engaging in unsanctioned and forcible acts of confiscation. Unchecked by political decisionmakers who because of distance could not effectively monitor the military's actions, the military was free to single out individuals and take their property without providing redress.\textsuperscript{278} Presumably, few saw this as a critical problem. If the problem had been a source of widespread concern, at least one state would have proposed a constitutional amendment to redress it. Nonetheless, once Madison had proposed an amendment that was seen as addressing this problem, it won support.

In short, the proponents of the various compensation requirements for the most part acted from a desire to protect property in those particular cases in which majoritarian decisionmaking processes would not fairly consider the claims of the owner. The original understanding did not reflect a broad belief that majoritarian decisionmakers would subvert property. It reflected, instead, a narrower concern with process failure.

C. James Madison and the Just Compensation Requirement

This section explores Madison's conception of the Takings Clause, which is significant because of his prominent role in its promulgation. Moreover, his extensive writings reflect a sophisticated view of the potential threats of majoritarian decisionmaking and the appropriate protections for private property. The republican and liberal elements evident in Madison's political philosophy help to explain his view of the appropriate scope of protection for certain property interests. Properly understood, Madison's views support an originalist reading of the Takings


\textsuperscript{278} See McConnell, supra note 153, at 292 (suggesting that because of high monitoring costs, a self-interested military had been free to seize goods during the Revolutionary War and that the Takings Clause responded to this problem).
Clause that recognizes strong concern with protecting against failures in the political process.

1. The Two-Tiered Protection of Madison's Takings Clause.— Madison's speech proposing the Bill of Rights offers the first guide to understanding why he crafted the clause in the way he did. In this speech, he offered two separate arguments for the Bill of Rights. First, it would establish enforceable rules: "[I]ndependent tribunals of justice," he declared, "will consider themselves in a peculiar manner guardians of those rights . . . ." Second, it would serve an educative role: "[P]aper barriers 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 . . . ." The Bill of Rights would therefore advance both the liberal end of protecting certain interests from the political process and the republican end of informing majoritarian deliberations. In presenting his Bill of Rights to Congress, Madison did not detail what the Takings Clause meant. But the way in which he understood the clause accords with these two general ends.

The liberal end of the clause established a rule of law barring the federal government from physically taking real or chattel property, including slaves, without compensation. Madison's statements that directly concern the meaning of the Takings Clause are limited in number, but they consistently reflect the view that the clause only mandated compensation when property was physically taken from the owner. When he proposed his draft Bill of Rights to Congress, the Takings Clause he offered was clearly limited in this way: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." Moreover, Madison's 1792 essay Property, in which he criticized the economic program proposed by Secretary of Treasury Alexander Hamilton, indicates that he also understood the legal import of the clause as adopted to be that compensation was required only for physical takings. Hamilton had proposed a series of measures designed to promote manufacturing and investment interests, and Madison had opposed them. In 1790, for example, Hamilton had successfully urged that when the federal government paid off debts incurred by the Continental Congress, it should pay the current holders of the notes. Madison opposed the plan because it aided speculators; he preferred to split the federal government's payments between the original and current note holders. Shortly before Madison wrote Property, Hamilton issued his Report

279. James Madison, Amendments to the Constitution (June 8, 1789), in 12 The Papers of James Madison 197, 207 (Charles F. Hobson et al. eds., 1979) [hereinafter Madison Papers]; see also Bernard Schwartz, Great Rights of Mankind 200 (1977) (arguing that Madison intended rights embodied in Bill of Rights to be enforceable in the courts).
280. Madison, supra note 279, at 204–05.
281. Id. at 201.
282. See Elkins & McKitrick, supra note 194, at 143–44.
on the Subject of Manufactures, which called for a series of tariffs and bounties to encourage the manufacture of certain products; Madison was sharply critical. Property was one of the series of essays that Madison published in the National Gazette newspaper in response to Hamilton's economic program, and the essay should be understood against that background. The essay criticizes restrictive economic regulations:

That 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 their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

It then criticizes "unequal taxes":

A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities.

To combat these evils Madison then invokes the Takings Clause of the Fifth Amendment:

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.

The quoted language indicates that, as a rule of law, the Takings Clause has a narrow meaning. The reference to the governmental provision "that none shall be taken directly even for public use without indemnification to the owner" is a clear reference to the language of the clause. By

283. See id. at 258–66.
284. See id. at 266; Ralph Ketcham, James Madison, A Biography 330 (1971).
286. Id.
287. Id. at 267–68.
contrasting these governmental actions with those that follow, Madison clarified by process of exclusion the class of governmental actions for which he believed that compensation was required. In other words, compensation 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 quote 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.²⁸⁸

Madison’s other significant discussion of the compensation requirement occurred in 1819, after he had retired from the presidency, in a private letter to slavery opponent Robert Evans. This letter, in which Madison laid out his plan for the United States government to purchase all slaves, using the proceeds from the sale of public lands, and then transport the freed slaves to Africa, also reflects the view that the clause mandated compensation when property was physically taken from the owner. Madison wrote that any program for emancipation would have to include “a provision in the plan for compensating a loss of what [the slaveowner] held as property guaranteed by the laws, and recognised by the Constitution.”²⁸⁹ Expanding on this point, he argued that, because of the Takings Clause, the “portion of the nation which . . . has no interest in slave property” would not oppose compensation:²⁹⁰

> They [the non-owning part of the nation] 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.²⁹¹

Thus, because the clause mandated compensation when the government physically took property from the owner, it required compensation for abolition.²⁹²

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²⁸⁸. The interpretation of *Property* advanced here elaborates on that in Treanor, supra note 19, at 712–15.


²⁹⁰. Id. at 318.

²⁹¹. Id.

²⁹². Madison’s belief that the Takings Clause required compensation in the event of abolition was the consensus view prior to 1830 and the dominant view throughout the antebellum era. See *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14, 445); *In re Perkins*, 2 Cal. 424, 429, 443 (1852) (Anderson, J.); Gary Nash, *Race and Revolution* 36 (1990). One aspect of this view of the Takings Clause worth noting is that compensation is owed even though the “property” “taken” is not thereafter used by the government. In other words, compensation is owed even though slaves are freed, rather than impressed into government service. This conception of the meaning of the Takings Clause is of particular significance to current debates about its meaning because it is at odds with Professor Jed Rubenfeld’s recent suggestion, which he defends in part on
The republican end of the clause was that it embodied a broader principle of governmental respect for private property, a principle that could be appealed to in majoritarian debates. Property is an example of such an appeal. Madison attacked Hamilton's economic program by arguing that "unequal taxes [that] oppress one species of property and reward another species" and "arbitrary restrictions, exemptions, and monopolies" were inconsistent with the principle underlying the Takings Clause: A nation that enacted a Takings Clause should also shun governmental actions that "indirectly violate[ ] [citizens'] property." Implicit in the fact that Madison did not claim direct constitutional violations is his belief that the Takings Clause did not prevent the national government from using its taxing and regulatory powers to affect the distribution of wealth, as he believed Hamilton’s policies would do. The only protection against such policies lay in the political process. At the same time, he believed that the Takings Clause, despite its narrow legal significance, could influence that process by educating citizens about the sanctity of property. It was a statement of national principle.

It should be added that the Takings Clause proved immensely influential in this regard. In particular, it influenced state court decisions to impose a compensation requirement on state actions in the absence of state takings provisions. By 1868, every state but North Carolina had a takings clause in its state constitution. And, although there were obviously other factors at work, Madison’s goal in writing Property was achieved: Congress did not adopt the proposals set forth in Hamilton’s Report on Manufactures.

2. The Limited Protection of Property Interests in General. — If Madison understood the clause to apply only to physical takings, the question again becomes: Why did he go this far and no further? Madison’s concern with the protection of private property interests is well known and one of the central tenets of his political theory. The republican appeal of

historical grounds, that "a taking for public use ... can occur only when some productive attribute or capacity of private property is exploited for state-dictated service." Jed Rubenfeld, Usings, 102 Yale L.J. 1077, 1114–15 (1993).


294. Id.

295. This point is developed in Treanor, supra note 19, at 714–15; see also Grant, supra note 178, at 71 ("federal bill of rights [not] without value as authority" for state courts establishing compensation requirement in absence of constitutional provision).


297. See Elkins & McKitrick, supra note 194, at 270–71. Among the other factors were the defeat of St. Clair’s army by Native Americans and the panic of 1792. See id.

Property signifies his commitment to that principle. Why, then, did he not write the clause more broadly or propose some other means to protect private property from the federal government? Why did he satisfy himself with a clause that, with respect to many property interests, was merely hortatory? The answer here is very clearly not that Madison failed to see the close relations between the physical seizure of property (which required compensation) and other state actions that affected property (where the only remedy was political). With a very broad sense of property, Madison was acutely aware of that connection and, in fact, made it explicitly. Property illustrates this point, arguing against Hamilton's economic program on the grounds that it was inconsistent with the principle embedded in the Takings Clause. Similarly, in 1786, he argued in the Virginia Legislature against the issuance of paper money on the grounds that it "affects rights of property as much as taking away equal value in land." As Professor Nedelsky has written:

Madison did not . . . have a simple conception of property as land or even material goods. The "faculties of acquiring property" [the protection of which was, according to Federalist Ten, the first object of government] emphasized a subtle, non-material 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. . . . Madison's concept of property thus had a modern, sophisticated quality that went far beyond the focus on land that we associate with the traditional image of the yeoman farmer.

While Madison never explained why he believed the limited scope of the Takings Clause was appropriate, his overall governmental philosophy suggests several reasons. Madison believed that governmental actions could properly (and in fact inevitably) affect the value of people's property, and that, as a general matter, the checks and balances provided by

298. In fact, Property reflects a view of property that is broader than the notion of property as value. Madison explicitly contrasted a notion of property as dominion, pursuant to which "a man's land, or merchandise, or money is called his property," with a "larger and juster [definition that] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage." Madison, Property, supra note 285, at 266. He summarized the distinction as follows: "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights." Id. For further discussion, see Kammen, supra note 274, at 10–13; see also Underkuffler, supra note 229, at 135–38 (discussing implications of essay's conception of property in rights); supra note 234 (quoting Nedelsky on different ways in which Madison and other Federalists used the word "property," including "in the modern sense of a bundle of rights"); see generally notes 227–234 and accompanying text (discussing definitions of property available to framers).


300. Nedelsky, supra note 209, at 30. While I agree with Professor Nedelsky's statement that Madison feared "indirect infringements" by the legislature of property rights, I disagree with her belief that he was not concerned about direction confiscation. See infra text accompanying notes 331–355.
the federal system's political process adequately protected property interests.

Federalist Ten directly evidences these themes. Madison wrote:

[T]he most common and durable source of factions has been the various [sic] and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.\textsuperscript{301}

Thus, divisions based on competing property interests are the principal cause of faction, and civilization inevitably produces new divisions. The legislative process necessarily involves determinations that aid the interests of one group and hurt those of another. Laws "concerning private debts" will either help creditors or debtors.\textsuperscript{302} The "manufacturing classes" will seek governmental subsidies for themselves and "restrictions on foreign manufacturers"; the landed interest will oppose both types of measures.\textsuperscript{303} The nature of government is to create winners and losers. Self-interested people will disagree about who should win and who should lose. "Yet," Madison observed, "the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail."\textsuperscript{304}

Moreover, Federalist Ten argues that the system of governance set forth in the Constitution will allow for wise selection between competing interests. Property will be better protected at the national level than at the state level. The size of the country served to protect the rights of property, because "[l]arge districts are manifestly favorable to the election of persons of general respectability, and of probable attachment to the rights of property, over competitors depending on the personal solicitations practicable on a contracted theatre."\textsuperscript{305} The size of the country also served to protect property rights because it affected coalition building:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other

\textsuperscript{301} The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).
\textsuperscript{302} Id. at 79–80.
\textsuperscript{303} Id. at 80.
\textsuperscript{304} Id.
\textsuperscript{305} James Madison, Note to his Speech on the Right of Suffrage (1821), \textit{in 3} Farrand, supra note 197, at 450, 454 [hereinafter Madison, Right of Suffrage].
citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

Because national representatives would be more respectable than state representatives and because of the "extension of the sphere," protections that were necessary against the state were not required for the federal government. To make his point, Madison offered hypothetical invasions of property interests:

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.

Implicitly, the last point is Madison's explanation of why a contract clause may be needed against the states (where a campaign for "the abolition of debts" might succeed), but not against the national government. Because the small size of a state permits domination by a faction, a contract clause might be necessary to bar state governments from unjustly interfering with private contracts. But the same was not true of the nation. The institutional structure established by the federal constitution meant that property rights were safeguarded.

In short, for our purposes Federalist Ten makes two points. The first is that there is no way to escape the fact that governing involves choice, and as a result benefits some and hurts others. The second is 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.

Federalist Ten's acceptance of the fact that the governmental actions affect—and in some cases diminish—private property interests, was not anomalous. Professor Jennifer Nedelsky has recently summarized

306. The Federalist No. 10, supra note 301, at 83.
307. Id. at 84.
308. See McConnell, supra note 153, at 288–93. 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 trials was defeated by the Senate. See Editor's Note, in 2 Schwartz, supra note 14, at 1093. Presumably, an attempt to make a takings requirement—a fairly novel right—binding against the states would have met with a similar fate. Since Madison only proposed amendments that he thought the Anti-federalists would not oppose, see Letter from James Madison to Samuel Johnson (June 21, 1789), in 12 The Papers of James Madison, supra note 279, at 249, 250, it seems that for political reasons he did not try to extend the Takings Clause to the states and trusted that the educative aspect of the clause would ultimately serve the same end. See Treanor, supra note 19, at 710–11 n.92.
Madisonian thought on the relation between property and governance in the following way: "Tax policies and economic regulation might have some redistributive consequences, but it should not be their \textit{objective} to benefit some at the expense of others."\textsuperscript{809} Thus, Madison did not want a compensation requirement that would extend to any government action that affected the value of property. He believed that government, in pursuit of the commonweal, necessarily employed tax policies and regulations that consequentially hurt some economic interests. For example, he favored protective tariffs that fostered infant industries, even though such tariffs increased the costs of goods.\textsuperscript{810} Indeed, while he believed it necessary as a restraint on factionalism in the states, Madison saw that even the Contract Clause, with its flat prohibition on interference with contracts, would sometimes have undesirable consequences. As he informed the convention, "[I]nconveniences might arise from such a prohibition \ldots"\textsuperscript{311}

At times in his career, however, Madison appears to have moved beyond the position that redistributive consequences were a normal consequence of governmental actions, and to have favored government actions that had redistributive \textit{objects}, if that redistribution accorded with republican ends. These positions suggest an alternative view of Madison's philosophy, one even more strongly opposed to the creation of a compensation requirement for regulations.

One example is his 1786 response to a letter he received from Thomas Jefferson during the latter's tenure as minister to France. Jefferson's letter was probably the most radical document of his career, and certainly his most radical statement about property.\textsuperscript{812} The tremendous wealth of the nobility and the poverty of the French peasantry led Jefferson to conclude that redistributive taxes were appropriate under certain circumstances, and he suggested that even confiscation might be appropriate if it were necessary to furnish all citizens with a minimum level of property. He wrote:

\begin{quote}
I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking
\end{quote}

\textsuperscript{309} Nedelsky, supra note 209, at 31.

\textsuperscript{310} See James Madison, Import and Tonnage Duties (Apr. 9, 1789), in 12 The Papers of James Madison, supra note 277, at 69, 71–72 (observing that "commercial shackles are generally unjust, oppressive and impolitic," but that imposition of protective tariffs is appropriate in some cases because "[t]here may be some manufactures, which \ldots for want of the fostering hand of government will be unable to go on at all"); Ketcham, supra note 284, at 280, 602–03 (noting Madison's support for protective tariffs as Secretary of State and President).

\textsuperscript{311} Remarks of James Madison (debate of Aug. 28, 1787), in 2 Farrand, supra note 197, at 437, 440.

\textsuperscript{312} See Katz, supra note 228, at 480–81.
care to let their subdivisions go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, or to all the brothers and sisters, or other relations in equal degree is a politic measure, and a practicable one. Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. . . . It is too soon yet in our country to say that every man who cannot find employment but who can find uncultivated land, shall be at liberty to cultivate it, paying a moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state.313

Madison did not take issue with Jefferson's progressive taxation scheme, showing that, on the eve of the constitutional convention, "[h]e saw no violation of property rights in taxation rising geometrically upon great fortunes,"314 to quote Irving Brant, Madison's preeminent biographer. He did express practical concerns with Jefferson's redistributive proposals. In particular, he suggested that redistribution of wealth was not a complete answer to the problem of European poverty: In Europe, there was not enough land for everyone, and more equitable distribution of agricultural property would hurt those who were engaged in nonagricultural occupations.315 Overall, however, his response was positive: "I have no doubt that the misery of the lower classes will be found to abate wherever the Government assumes a freer aspect, & the laws favor a subdivision of property."316

Even more striking is Madison's essay Parties, another one of the essays that he published in the National Gazette in 1791 and 1792 as part of his campaign of opposition to Alexander Hamilton's economic program. Madison offered, among others, the following methods for combatting party strife:

1. By establishing a political equality among all. 2. By withholding unnecessary opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited,

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315. See Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 The Papers of James Madison, supra note 299, at 76, 76–77. He also indicated, however, that those occupations were not, as a general matter, societally desirable:
From a more equal partition of property, must result a greater simplicity of manners, consequently a less consumption of manufactured superfluities, and a less proportion of idle proprietors & domestics. From a juster Government must result less need of soldiers either for defence agst. dangers from without or disturbances from within.

Id.
316. Id. at 76.
accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort. 317

Madison's essay recalls Jefferson's earlier letter. Not only do both call for redistribution, but they do so in similar language: Jefferson's "silently lessening the inequality of property" is echoed by Madison's "silent operation of laws." 318 Commenting on this essay, Brant observed: "Madison lived a century and a half too soon to be hauled before congressional committees as a subversive radical for talking like that, but one can only marvel at the historians who present him to modern generations as a conservative guarantor of the status quo." 319 More broadly, Brant stated:

Madison was well aware that in a competitive society, with public order and private rights maintained, property would flow ceaselessly into the hands of those most able to gain and hold it. . . . [For Madison,] one of the first objects of government was to protect the poor and near-poor by laws restraining concentration of wealth and the power of its holders. 320

These statements date from 1950, and Brant has been criticized with some justice as seeking to make Madison into a proto-New Dealer. 321 But at the same time, Brant recognized what leading scholars have often denied: Madison's acceptance of state ordering of the economy in ways designed to equalize wealth. 322 As Lance Banning has pointed out, Madison had a profound ideological "commitment to a social order characterized by comparative equality, honest industry, frugality and simple manners." 323 In other words, he remained committed to certain fundamental tenets of republicanism and a republican vision of property. This commitment caused him at certain points in his career to favor governmental actions—such as in tax policy and economic policy—that were intended to have redistributive consequences. 324

318. See Nedelsky, supra note 209, at 45–46.
319. 3 Brant, supra note 314, at 175.
320. Id. at 174.
324. For other examples, see Madison, Right of Suffrage, supra note 305, at 450, 452 (discussing with approval "equalizing tendency of laws" as way of preventing wealthy from getting too wealthy and too powerful); James Madison, Note During the Convention for Amending the Constitution of Virginia, in Mind of the Founder, supra note 289, at 406, 408 (salute to republican laws that regulate inheritance as operating to equalize wealth).
There are, then, two competing views of Madison and his conception of the relationship between government and private property. According to Nedelsky, Madison recognized the necessity of government regulation and accepted that it would sometimes have redistributive consequences. According to the thesis presented here, at certain times in his career, Madison actually favored the use of governmental power to redistribute wealth. Despite their differences, both theses recognize Madison's belief that government had to be free to advance some economic interests at the expense of others without incurring the obligation to make whole those who were injured. Given that conviction, he would not have drafted the Takings Clause to require compensation for government actions that diminished the value of property.

3. The Absolute Protection of Physical Possession. — Thus far, the discussion has highlighted what might be considered the limiting principle of the Takings Clause. Madison's view of government, property, and their places in society explains why he did not go further in limiting the federal government's power to affect property rights. But why did he think that a takings clause was needed in the first place? Although Madison nowhere directly addressed this question, an examination of his writings and speeches indicates that he believed that physical property needed greater protection than other forms of property because its owners were peculiarly vulnerable to majoritarian decisionmaking. Specifically, he believed that the majoritarian decisionmaking process was least likely to protect the interests of landowners and slaveowners.

Madison frequently distinguished what he called the rights of property from what he called the rights of persons, and he argued that the history of the revolutionary era demonstrated that there was enormous tension between the two. Thus, in 1788 in criticizing Jefferson's proposed constitution for Kentucky and arguing for property qualifications for voting, he wrote:

The necessity of thus guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution. In all the Governments which were considered as beacons to republican patriots & lawgivers, the rights of persons were subjected to those of property. The poor were sacrificed to the rich. In the existing state of the American population, & American property[,] the two classes of rights were so little discriminated that a provision for the rights of persons was supposed to include of itself those of property, and it was natural to infer from the tendency of republican laws, that these different interests would be more and more identified. Experience and investigation have however produced more correct ideas on the subject.\footnote{James Madison, Observations on the "Draught of a Constitution for Virginia" (ca. Oct. 15, 1788), in 11 The Papers of James Madison 285, 287 (Robert A. Rutland et al. eds., 1977) (alteration in original).}
He added: "It is well understood that interest leads to injustice as well when the opportunity is presented to bodies of men, as to individuals."326

The interests of the rich and poor were opposed, and therefore neither could be trusted to protect the other: "Give all power to property; and the indigent [will] be oppressed. Give it to the latter and the effect may be transposed."327 At the same time, Madison felt that the propertied were less likely to undermine the rights of persons than the majority were to undermine the rights of property. Thus, he wrote in 1821: "As the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter."328 As previously indicated, Madison saw the Constitution and the structure of the federal government as a response to the problem of competing interests.329

Even as he was concerned that the Constitution should protect "the rights of property," Madison also recognized that conflicts about property were not limited to tension between the propertied and the propertyless. The interests of different categories of property holders were also in conflict. "The three principle classes into which our citizens were divisible," he told the federal convention,

were the landed the commercial, & the manufacturing. The 2d. & 3rd. class, bear as yet a small proportion to the first. The proportion however will daily increase. We see in the populous Countries in Europe now, what we shall be hereafter. These classes understand much less of each others interests & affairs, than men of the same class inhabiting different districts. It is particularly requisite therefore that the interests of one or two of them should not be left entirely to the care, or the impartiality of the third.330

326. Id.
327. Id. (alteration in original) (footnote omitted).
329. See supra Part III.C.2.
330. Remarks of James Madison (debate of July 26, 1787), in 2 Farrand, supra note 197, at 118, 123, 124 (arguing that "[l]anded possessions were no certain evidence of real wealth" and that "some other [voting] criterion than the mere possession of land should be devised"). While arguing for direct election of one branch of the legislature, he advanced similar claims:

All civilized Societies would be divided into different Sects, Factions, & interests, as they happened to consist of rich & poor, debtors & creditors, the landed the manufacturing, the commercial interests . . . . What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure. . . . The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests &
Of the three types of property identified by Madison—landed, commercial, and manufacturing—he believed landed property was the type that in the long run was most threatened by majoritarian rule. This belief stemmed from Madison's anticipation that this country would experience enormous population growth. As the passage quoted above indicates, in the 1780s, and indeed throughout his career, Madison predicted a population explosion in the United States and he believed that landowners would soon become a minority.331

The increase in population was problematic for several reasons. First, it meant that, because fewer citizens would be freehold owners, fewer would have the independence that citizens should have. Second, the greater the number of the unpropertied, the more likely would they be to pass redistributive legislation. "An increase of population," Madison stated,

will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to give notice of the future danger.332

The ideal solution to these problems was to limit suffrage to freeholders. Commenting on a proposal to impose a property requirement for voters for the House of Representatives, Madison told the Philadelphia convention: "Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty."333

parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in the case they shd. have such an interest, they may not be apt to unite in the pursuit of it.

Remarks of James Madison (debate of June 6, 1787), in 1 Farrand, supra note 197, at 132, 135–36.

331. See, e.g., Madison, Right of Suffrage, supra note 305, at 451 (editorial note written in 1821); James Madison, Speech on the Power to Levy Direct Taxes (June 12, 1788), in 11 The Papers of James Madison, supra note 325, at 121, 125 (comments at Virginia ratifying convention); see also McCoy, supra note 198, at 121–32 (noting Madison's post-war vision of American westward expansion); McCoy, supra note 211, at 192–93 (noting Madison's fear that "unfavored" landless class would become majority of population).


333. Remarks of James Madison (debate of Aug. 7, 1787), in 2 Farrand, supra note 197, at 196, 203. Although Madison continued to fear the propertyless majority, by the 1820s he concluded that it would be unfair and, given that the majority would eventually be propertyless, impracticable to limit the right to suffrage to the propertied. See Madison, Right to Suffrage, supra note 305, at 450–55 (written in 1821). For discussions of
Although the Constitution did not restrict suffrage to freeholders, Madison ultimately decided that through the “expansion of the sphere”—the central argument of Federalist Ten\textsuperscript{334}—the Constitution adequately protected property rights \textit{in general}. Expansion of the sphere, however, did not adequately protect the particular class of landed property. In preparing his notes of the convention for publication, Madison wrote:

[W]henever the Majority shall be without landed or other equivalent property and without the means or hope of acquiring it, what is to secure the rights of property agst. the danger from an equality & universality of suffrage, vesting compleat power over property in hands without a share in it: not to speak of a danger in the mean time from a dependence of an increasing number on the wealth of a few? In other Countries this dependence results in some from the relations between Landlords & Tenants in other both from that source, & from the relations between wealthy capitalists & indigent labourers. In the U.S. the occurrence must happen from the last source; from the connection between the great Capitalists in Manufactures & Commerce and the members employed by them.\textsuperscript{335}

In writing this, Madison was simply applying conventional republican wisdom. Lacking financial independence, the propertyless also lacked political independence and would vote as their employers instructed them. As Madison’s note indicates, there was no logic that compelled the conclusion that universal suffrage would favor one particular propertied interest over the other. The question of which interest would prevail would turn simply on which interest, when combined with those it employed, had the most votes. The landed interest was at risk simply because demographic trends in the United States ran against it; the future belonged not to “Landlords & Tenants,” but to “the great Capitalists in Manufactures & Commerce and the members employed by them.” Indeed, the massive confiscations of loyalist property, which Madison as a state legislator acted to end,\textsuperscript{336} provided a concrete contemporary demonstration of the risks faced by landowners.

Thus, the landed interest was peculiarly vulnerable to majoritarian decisionmaking. The propertyless, who would eventually become a majority in this country, would have the votes to secure their ends. “[T]he great Capitalists in Manufactures & Commerce” would be easily able to gain majority support by combining with their employees. For this rea-

\textsuperscript{334} This argument is discussed supra at notes 305–308 and accompanying text.

\textsuperscript{335} Madison, Right of Suffrage, supra note 302, at 452.

\textsuperscript{336} See, e.g., Bill Prohibiting Further Confiscation of British Property (introduced Dec. 3, 1784), in \textit{8} The Papers of James Madison, 173 (Robert A. Rutland et al. eds., 1973) (Madison’s proposal to Virginia legislature on ending confiscation).
son, only the owners of land were endangered by majority rule. Against this background, it becomes clear why Madison thought a takings clause that established a rule of compensation when physical property was seized was necessary. Landed property owners could not rely on the political process for their protection and needed some extra measure of protection. At the same time, other types of property owners could rely on the political process to protect their interests; thus, for property interests other than those threatened with possible physical seizure by the government, it was enough for the takings clause to be hortatory.

Madison recognized that slaveowners were similarly threatened by the majoritarian process, and he imagined that the clause would protect them in the same way that it protected landowners. Madison believed that the Takings Clause established an absolute requirement that the government owed the slaveowner compensation whenever it freed a slave. Indeed, despite his anguish on the subject of slavery, Madison seems to have regarded slavery as perhaps the paradigmatic form of property subject to threat from the majority. Strikingly, although Federalist Ten is now considered Madison's central exposition of his views on property, he used the word "property" only eight times in that paper. His most frequent use of the word "property"—seventeen times—was in Federalist Fifty-Four, where he defended Article I, Section Two of the Constitution (which counted slaves as three-fifths of a person for purposes of taxation and representation) on the grounds that "[g]overnment is instituted no less for protection of the property, than of the persons of individuals." Madison's conviction that the Constitution should protect all interests not only extended to slaveowners, but also applied to them with unique force. Slaveowners' "property" was jeopardized by the possibility that opposing interests would combine against them. Thus, in opposing giving each state equal representation in the Senate, Madison argued:

[Every peculiar interest whether in any class of citizens, or any description of States, ought to be secured as far as possible. Wherever there is danger of attack there ought to be given a constitutional power of defence. But he contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: it lay between the Northern & Southern. and if any defensive power

337. See Ketcham, supra note 284, at 625.
338. See The Federalist Concordance 493 (Thomas Engeman et al. eds., 1988).
339. See id. at 494.
were necessary, it ought to be mutually given to these two interests.\textsuperscript{341}

In short, slaveowners were the most vulnerable interest group.

To solve this problem, Madison considered giving slaveholders greater representation in one house of the legislature by apportioning representation in that house on the basis of the entire number of inhabitants, both slave and free.\textsuperscript{342} He finally endorsed basing representation in both houses of the legislature on the number of free inhabitants. He defended this position on the grounds that it would protect slaveowning interests better than a system in which states were equally represented in the Senate:

\begin{quote}
[T]he perpetuity [equal representation of the states in the Senate] would give to the [preponderance of the] Northn. agst. the Southn. . . . was a serious consideration. It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination. There were 5 States on the South, 8 on the Northn. side of this line. Should a proportl. representation take place it was true, the N. side would still outnumber the other: but not in the same degree, at this time; and every day would tend towards an equilibrium.\textsuperscript{343}
\end{quote}

For Madison, the failure of his proposal meant that slaveowning states were disadvantaged under the Constitution. The majority of the Senate and, at least in the short term, the majority of the House would be selected from free states. Thus, because interests hostile to those of the slaveowners would control both houses under the Constitution as ratified, Southern states would lack the "defensive power" needed to protect their interests. Moreover, slaveowners were particularly disadvantaged as a group because, even within the slaveowning states, a majority of people were not slaveowners and would thus lack sympathy for their cause. Thus, Madison told the Virginia state convention of 1829: "It is apprehended, if the power of the Commonwealth shall be in the hands of a majority, who have no interest in this species of property [i.e., slaves], that, . . . injustice may be done to its owners."\textsuperscript{344}

\begin{footnotes}
\item\textsuperscript{341} Remarks of James Madison (debate of June 30, 1787) in 1 Farrand, supra note 197, at 481, 486.
\item\textsuperscript{342} See id. at 486.
\item\textsuperscript{343} Remarks of James Madison (debate of July 14, 1787), in 2 Farrand, supra note 197, at 2, 9–10. The quoted language reflects Madison's assumption that the current trends in population growth would continue and that the South would, in time, become more populous than the North. This assumption, in turn, accorded with the common view that, by the 1780s, much of the Northeast was already overpopulated. See McCoy, supra note 198, at 114, 114–17 ("[T]he pressure of population growth on a limited supply of land in some eastern areas of the United States, especially in New England, seems actually to have created by the 1780s a situation of 'crowding' . . . .").
\item\textsuperscript{344} James Madison, Speech at Virginia Convention (December 2, 1829), in Mind of the Founder, supra note 289, at 402, 404.
\end{footnotes}
This disadvantage was potentially critical because of the possibility that the national government would eventually move to abolish slavery. As Madison was aware, during the state ratification debates, James Wilson— with Madison, one of the primary authors of the Constitution— contended that under the Constitution, “Congress will have the power to exterminate slavery within our borders.” In the Virginia ratifying convention Anti-federalists Patrick Henry and George Mason asserted, as a reason to oppose ratification, that Congress would have the power to end slavery. Madison’s response during the Virginia ratifying convention, and throughout his career, was that the Constitution did not delegate that power to the national government. While Madison’s view doubtless reflected the implicit understanding of the framers, the possibility remained that, in the absence of a constitutional clause explicitly barring such action, the majority would seek to abolish slavery under the Constitution, or, alternatively, that they would seek a constitutional

345. The national government would not, however, have been able to do so before 1808, since the Constitution protected the slave trade until twenty years after ratification. See U.S. Const. art. I, § 9, cl. 1.

346. See Letter from James Madison to Robert Walsh (Nov. 27, 1819), in Mind of the Founder, supra note 289, at 320, 321–22 & nn.1–2 (discussing published reports of Wilson’s speeches in the Pennsylvania ratifying convention concerning Congress’s power under the Constitution to abolish slavery and Henry’s and Mason’s statements at the Virginia ratifying convention on the same subject).

347. Remarks of James Wilson at the Pennsylvania Convention (Dec. 4, 1787), in 2 The Documentary History of the Ratification of the Constitution 469, 499 (John P. Kaminski & Gaspare J. Salding eds., 1993) [hereinafter Documentary History]. Madison in 1819 argued that the “fairest construction” of Wilson’s meaning was not that Congress had the power to abolish slavery, but that its power after 1808 to end the importation of slaves would set an example which would eventually cause all states to “yield[ ] to the general way of thinking & feeling” and abolish slavery. Letter from James Madison to Robert Walsh, supra note 342, at 321 n.1.

348. See Remarks of Patrick Henry at the Virginia Convention (June 24, 1788), in 10 Documentary History, supra note 347, at 1473, 1477 (“The majority of Congress is to the North, and the slaves are to the South.”); Remarks of George Mason at the Virginia Convention (June 11, 1788), in 9 Documentary History, supra note 347, at 1142, 1161 (“[T]here is no clause in the Constitution that will prevent the Northern and Eastern States from meddling with our whole property.”)


350. There is relatively little evidence here on one side or the other. The fact, however, that Southern defenders of slavery—who fought so bitterly against restrictions on the slave trade—did not demand a textual provision explicitly guaranteeing that Congress would not be able to abolish slavery compellingly indicates that it was assumed that Congress did not have such a power. See Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 28–30 (1981).
amendment banning slavery. Indeed, at the end of his career, Madison privately favored the latter course of action.\(^{351}\)

By providing that abolition required compensation, the Takings Clause gave the slaveowners the "power of defence"\(^{352}\) that they lacked under the unamended Constitution. The Takings Clause therefore served a similar function with respect to landowners and slaveowners. Without Madison's proposed structural remedy, the Constitution would have placed both groups at a distinct disadvantage. Madison thus saw that the balance between competing interests would generally ensure that government under the Constitution would ultimately produce a just result. But that balance did not exist in the case of slaveowners and property owners. For different reasons, the core property claim of each group was in opposition to that of the majority. Madison's comments during the ratification debate and at the Constitutional Convention did not indicate that any other interests faced a similar threat. Prior to the passage of the Takings Clause, neither slaveowners nor landowners were able to check majority factions from compromising their property rights.

For Madison, then, the Takings Clause protected against political process failures. It mandated a remedy—compensation—in those classes of cases in which the political process was unlikely to consider property claims fairly. It should be added that Madison would have recognized that a rule mandating compensation for all physical seizures, but nothing else, was both overinclusive and underinclusive as a remedy for the kinds of process failure with which he was concerned.\(^{353}\) For Madison, then, the takings principle represented an attempt to frame an intelligible legal rule that mediated between his competing concerns. He saw property interests in land and slaves as particularly vulnerable in the political process.\(^{354}\) At the same time, he knew that a rule that required compensation whenever a governmental action diminished the value of property (or even the value of some particular kind of property, such as land or slaves) would be inconsistent with the fact that governmental operations inevitably created winners and losers; to require that all losers be compensated would be inconsistent with the functioning of government.\(^{355}\)

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\(^{351}\) See Letter from James Madison to Robert Evans (June 15, 1819), supra note 289, at 318–19.

\(^{352}\) Remarks of James Madison (debate of June 30, 1787), in 1 Farrand, supra note 197, at 481, 486.

\(^{353}\) For example, it would not mandate compensation for regulations (such as certain tariffs) that disproportionately affected landed interests (or that disproportionately affected slaveowners); if, as Madison believed, landed interests (and slaveowning interests) were politically vulnerable and if that political vulnerability lay behind the adoption of some tariff, the rule was therefore underinclusive. At the same time, the clause uniformly mandated compensation when physical property was seized, and to the extent that in some particular situation owners of seized property had fully participated in the political process and, despite the fact that their claims were fairly considered, had simply lost, as any faction loses at some times, then the rule was overinclusive.

\(^{354}\) See supra text accompanying notes 331–352.

\(^{355}\) See supra text accompanying notes 298–324.
A requirement of compensation for physical takings would allow government to go on because it was limited in scope; at the same time, it would create a remedy where there was a particularly high likelihood of process failure (because landowners and slaveowners were disadvantaged), where the consequences of that failure were particularly dramatic and threatening to the economic well-being of the property owner (i.e., where there was physical seizure of land or slaves), and where (because of the history of Loyalist land confiscations and because of ratification debates statements about abolition) there was reason to fear that the majority would act against private property interests. Moreover, the compensation requirement, although limited, would provide the basis for political appeals in a broader range of cases.

Other proponents of the Fifth Amendment’s Takings Clause and its predecessor clauses would not have had similar grounds for concern about overinclusivity and underinclusivity. Seizures of goods by the military and confiscation of land grants by legislatures in which the affected landowners were either unrepresented or imperfectly represented are instances in which the process failure directly undermines possessory interests in physical property (rather than other interests in physical property).356

In sum, the background understanding (i.e., almost all of the concerns that led to the adoption of previous takings clauses), the framers’ intent (i.e., Madison’s intent), and the ratifiers’ intent (to the extent that we have evidence of it through Tucker’s observation) all indicate that the Fifth Amendment’s Takings Clause should be understood as concerned with redressing political process failure. There was, admittedly, not a consensus motive for all the particulars. Madison was worried about majoritarian confiscation of land and slaves. The Vermont farmers opposed invalidation of their land grants by a legislature in which they were the minority. Some proponents of the Northwest Ordinance may have feared that the territorial legislature would revoke the land grants of the unrepresented. There was a widespread reaction against military confiscation of personal property. However, these various understandings of why a takings clause was needed shared the same basic themes: Physical property was vulnerable in the political process and the Takings Clause sought to redress that problem.

IV. A Political Process-Based Theory of the Just Compensation Clause

The previous Part provided historical evidence indicating that the Takings Clause was originally intended to remedy certain types of process failure. The relevance of this original understanding to current takings jurisprudence remains for discussion. There are several plausible re-

356. See supra text accompanying notes 226–278 (discussing non-Madisonian support for takings clauses).
sponses to the historical evidence presented in this Article. One might follow a traditional originalist approach and return to the practice that existed before *Pennsylvania Coal*; that is, compensation only for physical appropriations of property. Alternatively, one might acknowledge the original understanding and yet treat it as irrelevant to modern adjudication. This Part rejects these approaches and argues for a political process-based theory of the Takings Clause, inspired by its original meaning and purpose, yet modified to reflect the changes in economic and political circumstances since the late eighteenth century.

This theory draws on a model recently developed by Professor Lawrence Lessig\(^\text{357}\) showing how the original understanding can be “translated” into a modern context. This Part argues that translating the original understanding into a contemporary takings jurisprudence means that courts today should protect those whose property interests are, given modern political realities, particularly unlikely to receive fair consideration from majoritarian decisionmakers. Thus, the translation of the original understanding outlined here would interpret the Takings Clause to provide heightened protection to the property interests of those who have been singled out and the property interests of discrete and insular minorities.

This Part begins by explaining why a translation model is superior to traditional originalism and to non-originalist methods of interpretation. It then describes how a translation of the original understanding would work in practice. Finally, this Part demonstrates why the resulting process-based model of takings adjudication would be preferable to the current state of takings jurisprudence.

A. Why Translate?

An originalist model of constitutional interpretation is attractive for two related reasons. First, it constrains judicial decisionmaking to a significant degree. Rather than deciding independently what factors are relevant to a case, originalist judges defer to already established choices. As a result, originalism accords with the belief that the rule of law requires judges to follow externally imposed rules, rather than resolve cases in accordance with their own personal views. Second, originalism connects constitutional decisionmaking with majoritarian decisionmaking. Originalist judges are implementing the considered choices made by “We the People” under circumstances that fostered careful deliberation and that “We the People” have not subsequently altered.\(^\text{358}\)

\(^{357}\) See Lessig, supra note 10.

\(^{358}\) See The Federalist No. 39, at 241 (James Madison) (Clinton Rossiter ed. 1961) (“W)e may define a republic to be ... a government which derives all its powers directly or indirectly from the great body of the people . . . .); 1 Bruce Ackerman, We the People: Foundations 285–87 (1991) (discussing “mobilized deliberation” and American higher lawmaking);
Under the traditional originalist approach to constitutional interpretation, judges construe a text as it was construed at the time of its ratification. Robert Bork, the leading advocate of this approach, has described it as follows: "What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law’s enactment." 859

The translator is also an originalist, but she looks not to the concrete constitutional understandings of “We the People,” but to the underlying values that “We the People” embraced. According to Professor Lessig, a translator seeks to identify the ends that the Constitution’s framers sought to advance and then interprets a constitutional provision in a way that best advances those ends in today’s world. The translator begins by studying the historical context in which constitutional text was written and examining what the constitutional text meant in that context. She then determines what factual presuppositions underlying the original interpretation are no longer accurate. Finally, she reinterprets the text in light of changed circumstances, altering the original reading as little as possible while seeking its modern “equivalent.” 860

From an originalist standpoint, translation is a better model than traditional originalism because the available evidence suggests that it better reflects the original approach to constitutional interpretation. The framers were not traditional originalists. They created a terse, open-ended constitution whose meaning would change in response to changed circumstances. In the debates about ratification, the Anti-federalists repeatedly claimed that a constitution should be more explicit and detailed in its grants of power and limitations. 861 The Federalists, in contrast, made clear that they had intended to draft a flexible document. As historian Michael Lienesch has written, “[T]he Federalist founders seemed surprisingly at ease in making the case for experimentation and flexibility. . . . Although Federalists did not assume automatic progress, they did believe that their politics could be adapted to future circumstances.” 862

This notion of an adaptable Constitution is represented perhaps most famously by Chief Justice Marshall’s statement in McCulloch v. Maryland: 863 “We must never forget it is a constitution we are expounding.” 864 Such a conception of the Constitution as flexible was the norm. Drawing on his analysis of common law interpretive techniques and early discussions of constitutional meaning, Professor H. Jefferson Powell contends that the framers did not intend their specific subjective

860. Lessig, supra note 10, at 1268. Lessig summarizes his model at id. For precursors to his approach, see id. at 1171 n.32. In developing his model, he does not argue for it; rather, his end is simply to outline what a translation model would look like. See id. at 1173.
861. See Lienesch, supra note 209, at 147–50.
862. Id. at 151.
864. Id. at 407.
intentions to bind future generations and that they believed that constitutional meaning would evolve over time.\textsuperscript{365} Indeed, there is evidence that many in the framing generation employed an approach to constitutional interpretation that was anti-literalist\textsuperscript{366} and thus even more flexible than Powell's work suggests. For example, in the one American case prior to ratification of the Constitution in which we have evidence of substantial discussions of constitutional interpretation, Virginia's 1782 \textit{Case of the Prisoners},\textsuperscript{367} both the presiding judge and the members of the bar who argued the case repeatedly invoked the spirit of the state constitution as a guide to interpretation.\textsuperscript{368} In short, serious deference to original intent requires deference to the framers' conception of constitutional construction, and the information that we have about that conception supports a translation model because it allows for the interpretive flexibility that the framers desired.

At the same time, a translation model is superior on non-originalist grounds. It aspires to be faithful to the text, history, and structure of the Constitution, while avoiding the problems of a narrow, inflexible originalism that offers an inadequate account of continuity and change in constitutional interpretation. Perhaps nowhere is this more evident than with the Takings Clause. As this Article has shown, there was a reason why the Bill of Rights recognized the principle that the government must always pay when it physically takes the individual's property, but that it is never under an obligation to pay when government actions diminish the value of property. Yet the world has changed so much that to modern thinkers this line between when compensation is mandatory and when it is not appears incoherent and unintelligible, and an effort in recovery has been needed to make the underlying rationale comprehensible. A traditional originalism yields a reading of the Takings Clause that is clearly unpersuasive to almost everyone today—so even originalists such as Black and Scalia are not originalists when it comes to the Takings Clause. Moreover, traditional originalism is at odds with seventy years of Supreme Court precedent, which has held that some regulations can give rise to a compensation requirement. A translation model, unlike traditional originalism, allows the adaption to changed circumstances that is needed for a reading of the clause to have any non-originalist appeal.


\textsuperscript{366} The term is Professor Morton Horwitz's. See Morton J. Horwitz, Foreword: The Constitution of Change: Legal Fundamental without Fundamentalism, 107 Harv. L. Rev. 30, 49–51 (1993) ("a distinct anti-literalism seems to have been present among some of the Virginia founders").

\textsuperscript{367} Commonwealth v. Caton, 8 Va. (4 Call) 634 (1782) (case was contemporaneously known as \textit{Case of the Prisoners}).

\textsuperscript{368} See Treanor, supra note 277, at 544–52 (discussing opinion of Chancellor Pendleton and arguments of Tucker and Randolph); see also id. at 554–56 (discussing Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793)).
Finally, a translation model, unlike a traditional originalist model, allows us to benefit from the insights of the framing generation. The individuals who drafted and then defended the Constitution were a remarkable group. Madison, Wilson, and Hamilton, to take the most prominent examples, were subtle and powerful thinkers and experienced leaders. In a serious and considered way, they drew on what they had seen in the revolutionary era, a time of fundamental political transformation, and participated in the re-conceptualization of government. More broadly, the process of shaping the state constitutions, the federal constitution, and the Bill of Rights produced widespread sustained and thoughtful deliberation about the nature of government. This conjunction of factors—accomplished politicians with remarkable intellectual gifts participating in the constitution making of “We the People”—is unique in American history. We can therefore learn from the framers even if we view their work simply as political philosophy, rather than as the creation of the Constitution and the Bill of Rights that still bind us. But if we do what traditional originalism calls for and focus on the concrete formulations that the framers adopted, we necessarily miss what they were trying to do. In contrast, the translator asks what the purpose of the concrete formulation was, and thereby allows us to learn, for example, what motivated the framers to protect certain property interests from the majority. In other words, the translator uncovers the framers’ insights and enables us to profit from them today.

B. Translating the Original Understanding

Having discussed the general benefits of the translation model, this section now applies that model to a concrete problem—the original understanding of the Takings Clause. It begins by isolating the intended purpose of the clause at the framing and then examines the way in which society has changed since then. Taking these factors into account, it proposes a theory of takings adjudication that is true to the origins of the clause, yet adapted to the political, social, and economic realities of contemporary society.

1. The Original Understanding. — As we have seen, the federal Takings Clause and its predecessor clauses, as they were originally understood, divided governmental actions affecting property into two groups. When the government physically took property, it owed compensation. Any other governmental action, no matter how severely it affected the value of property, did not give rise to a compensation requirement. This requirement applied to physical takings because the framers believed that majoritarian decisionmaking processes would not give fair consideration to the individual’s interest in not having her property physically seized by the government.

The clause sought to remedy failures in the political process. But the underlying idea was not that all majoritarian decisions should be reviewed to determine whether the process behind any particular decision was fair
or unfair. Rather, heightened constitutional protection was provided only for the limited category of decisions in which unfairness was most likely. At the same time, while the clause only mandated compensation in a limited sphere, it had a broader significance: It was also designed to teach the people that governmental actions that arbitrarily affected property interests (including the value of property) were illegitimate.

One might argue, however, that in takings cases involving state and local governments, the relevant intent is not that of the framers of the Fifth Amendment, but rather that of the framers of the Fourteenth Amendment. Under this view, the critical period for the translator would not be 1789 to 1791, when the Fifth Amendment’s Takings Clause was proposed and ratified, but 1866 to 1868, when the Fourteenth Amendment—which has been held to incorporate the Fifth Amendment’s Takings Clause against the states—was proposed and ratified. Under closer scrutiny, however, the selection of the relevant period becomes more complicated.

In interpreting the Fourteenth Amendment, the threshold question for the translator is whether the framers of the Fourteenth Amendment sought to incorporate the provisions of the Bill of Rights. If they did not, then incorporation is simply the handiwork of the judiciary and there is no governing original intent concerning what incorporation of the Fifth Amendment’s Takings Clause meant. Thus, “the People” considered which property interests to protect from the government only once—at
the time of the proposal and ratification of the Fifth Amendment's Takings Clause. Even in construing the Fourteenth Amendment, a translator should therefore look to the earlier time period to discover original intent because the principle underlying the translation model is that the judiciary should defer to considered majoritarian decisionmaking embodied in constitutional law and the earlier period is the only one in which such decisionmaking occurred.\textsuperscript{372}

The weight of recent scholarship, however, supports the view that incorporation (through the Privileges and Immunities Clause) was part of the original understanding of the Fourteenth Amendment.\textsuperscript{373} To the extent that there was a particular desire to apply the Takings Clause Amendment cannot, by itself, resolve the dilemma created by the conflicting commitments of those who participated in the process."

\textsuperscript{372} Additionally, if one believes that the ratifiers of the Fourteenth Amendment did not intend to incorporate the protections of the Bill of Rights against the states, one might argue that a modern translation should not apply the Takings Clause against the states at all. Thus, the process failure concerns of the framers and ratifiers of the Takings Clause would be irrelevant to the interpretation of the Fourteenth Amendment, since the Takings Clause would not bind the states.

Such an approach might work as a pure example of translation. But it would run counter to a fundamental (and precedentially-established) principle of modern constitutional structure, which is that some of the provisions of the Bill of Rights, including the Takings Clause, are applicable against the states. See supra note 369 (discussing cases holding Takings Clause incorporated against the states). As Professor Lessig has suggested, the translator may ultimately conclude that, because of other concerns, the translation may not be the best reading of a constitutional text. See Lessig, supra note 10, at 1263. Thus, in view of larger concerns of constitutional structure, even if the translator believes that incorporation was not part of the original intent of the Fourteenth Amendment, she should still hold that the Takings Clause applies against the states. The question then becomes how to interpret the Takings Clause. If a principle goal of the translation model is to promote deference to the considered judgments of the majority acting as "We the People," that goal would again suggest that, even in interpreting the Fourteenth Amendment, the translator should look to the ends that animated those who framed and ratified the Fifth Amendment's Takings Clause.

At a deeper level, however, as indicated in the text, see infra text accompanying notes 374-378, the weight of historical evidence favors incorporation. Thus, in his leading work, Professor Curtis has found 30 statements of Republicans in the 38th and 39th Congresses indicating that at least some Bill of Rights liberties limited the states; he found none to the contrary. See Curtis, supra note 370, at 112. As a result, the translator should interpret the Fourteenth Amendment in light of incorporation, and such a view would lead her to look at the ends of the framers and ratifiers of the Takings Clause, for reasons set forth in the text. See supra text accompanying note 360.

\textsuperscript{373} The leading work (and one that convincingly presents the case for incorporation) is Michael Kent Curtis's \textit{No State Shall Abridge} (discussed supra notes 370, 372). For other accounts developing the evidence of incorporation, see Amar, supra note 297; Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57 (1993); Robert J. Kaczorowski, Searching for the Intent of the Framers of the Fourteenth Amendment, 5 Conn. L. Rev. 368 (1972-1973). The discussion in the text concerns a translator's interpretation of the Fourteenth Amendment. If one posits that incorporation was intended, and if one wanted to provide a traditional original intent reading of the takings protections encompassed by the Fourteenth Amendment, then the Fourteenth Amendment should be read to provide compensation only for physical
against the states, it was driven by the same impulse that animated the
Fifth Amendment's Takings Clause: protecting the property interests of a
group that was isolated from the normal give and take of the political
process. Congressman John Bingham, the principal author of what be­
came Section One of the Fourteenth Amendment, feared that former
Confederate states would seize the property of Unionists. He declared:

[T]he rebels will be found in a majority of three to one or four
to one in every one of the States that have been engaged in re­
bellion, except in Tennessee.

How will you prevent that overpowering majority from tak­
ing possession of those reconstructed governments? . . . Where
is the power in Congress, unless this or some similar
amendment be adopted, to prevent the reenactment of those
infernal statutes of banishment and confiscation and imprison­
ment and murder under which people have suffered in those
States during the last four years? 374

During the course of the committee meetings about the Fourteenth
Amendment, Bingham proposed imposing on the states just compensa­
tion and equal protection requirements (and not due process or privi­
leges and immunities), 375 and the support for this unsuccessful proposal
reflected this perceived need to safeguard Unionist property after former
rebels returned to power. 376 But, of course, this version was not passed.
It was rejected by a vote of seven to five, and the committee opted instead
for the broader language of Section One. 377 Incorporationist scholar­
ship indicates the framers adopted this language in order to subject the states
to the same restraints as the federal government. 378 Thus, passage of the
Fourteenth Amendment does not reflect a separate consideration of what
specific property interests needed protection from the government. In­
corporationist scholarship therefore leads to the same conclusion as non­
incorporationist scholarship: The period in which the Fifth
Amendment's Takings Clause was proposed and ratified is the only time
at which the nation considered which property rights needed protection
from the government. The translator should therefore focus on the con­

Bingham) (emphasis added).

375. See Benjamin Kendrick, The Journal of the Joint Committee of Fifteen on
Reconstruction 85 (1914) ("nor shall any state deny any person within its jurisdiction the
equal protection of the laws, nor take private property for public use without just
compensation").

376. See Earl Maltz, The Fourteenth Amendment as a Political Compromise—Section
One in the Joint Committee on Reconstruction, 45 Ohio St. L.J. 993, 999 (1985).

377. See Curtis, supra note 361, at 84.

378. See id. at 91; Aynes, supra note 373, at 66–94; see also Cong. Globe, 58th Cong.,
1st Sess. 2765–66 (1864) (statement of Senator Jacob Howard, chair of the Senate
delegation to the joint committee, enumerating the right to compensation among the
privileges and immunities guaranteed by the proposed Fourteenth Amendment).
cern with process failure animating the Fifth Amendment's Takings Clause. Having determined that the Takings Clause was originally intended to remedy certain kinds of process failure, she should offer a reading of the clause that serves the same ends in today's society.

2. The Takings Clause and Changed Circumstances — At the time of the framing and ratification of the Takings Clause and its predecessor clauses, different people were concerned with risks to different possessory interests, but there was nonetheless a close match between the end served by the clause—remedying process failure—and the means adopted—requiring compensation for physical takings. Today, protection of physical possession no longer advances the broader end of remedying process failure.

Slaveownership obviously no longer falls within the ambit of the clause. Madison believed that slaveowners were particularly politically vulnerable because those who did not own slaves would be unlikely to enter into political combinations with them. However, the Thirteenth and Fourteenth Amendments rendered this aspect of the clause moot by requiring uncompensated emancipation of all slaves.379

The situation with respect to landownership is more complex, but the essential point—that the affected property interest no longer needs heightened protection—is also applicable here. Critical factual presuppositions that animated Madison are inconsistent with contemporary realities. Madison anticipated that in the near future most Americans would not own land. Moreover, in accordance with republican theory, he thought landowners would be particularly weak because employees, dependent on their employers for support, would follow their employers' wishes and most employers would be engaged in trade or industry, rather than farming. Neither assumption is accurate today. According to the most recent census report, sixty-four percent of Americans own their own homes.380 In addition, voter studies indicate that voting behavior reflects variables like class, gender, ethnicity, region, and age, not the voting orientation of one's employer.381

Indeed, a group of landowners faced with seizure of their land for a public use are particularly well situated to secure compensation from majoritarian decisionmakers. As Professor Daniel Farber has observed, "[I]f public choice theory has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political

379. See U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude... shall exist within the United States"); id. amend. XIV, § 4 ("[N]either the United States... any claim for the loss or emancipation of any slave").

380. See Andrea Stone & Mindy Fetterman, Home Owning Takes First Dip Since '30s, USA Today, June 11, 1991, at 1A.

process. Thus, landowners have some political advantages in seeking compensation.382 Because the stakes are typically high and the bearers of the loss are easily identifiable, affected property owners can organize to demand compensation with relative ease. United by one issue of compelling interest, landowners are in a position to engage in legislative log-rolling that will enable them either to obtain compensation or to block the project, trading off votes on other matters for support on the confiscation issue. Moreover, in a society of property owners, even in the absence of logrolling on any particular project, the political majority has an interest in compensating for this particular type of property loss. As a group that may one day face confiscation of its own land, a uniform practice of compensation is clearly in its own interest. Finally, people commonly place a higher subjective value on forms of property with which they have a strong personal relationship than on property of equivalent dollar value that lacks such association.383 For this reason, people seem likely to fight particularly hard to block a proposed government activity that would take away their homes or, alternatively, for psychic as well as economic reasons, to fight particularly hard for compensation.384

As previously noted, landowners were routinely awarded compensation before it became a constitutional requirement.385 In fact, as Professor Farber has pointed out, "compensation for physical invasions is almost universal in democracies."386 That compensation is the norm even in the absence of a constitutional compensation requirement shows that the political process generally protects landowners from the risk of uncompensated confiscation. While Madison thought that for demographic reasons this protection would disappear (and that is part of the reason why he proposed the Takings Clause), he proved a poor prophet. None of this is to say that today there would never be situations when,

382. Daniel A. Farber, Economic Analysis and Just Compensation, 12 Int'l Rev. L. & Econ. 125, 130 (1992). It should be added that the advantages that landowners currently possess, see infra text accompanying notes 382–84, were also possessed by them in Madison's day. The critical point is that the offsetting disadvantages that he feared did not materialize.

383. For example, the family home is seen as more important than stock of equivalent economic value. See Margaret J. Radin, Property and Personhood, 34 Stan. L. Rev. 957, 1003–08 (1982) (discussing personhood perspective and takings).

384. On the reasons why landowners are in a good position to obtain compensation, see Farber, supra note 6, at 289–90, 298–99. Professor Levmore has argued that, when a government project threatens a large number of landowners (as is the case with a large road project), they are well able to secure compensation, but that a small number of landowners are at a relative disadvantage in securing redress from the political process. See Levmore, supra note 6, at 920; Levmore, supra note 154, at 1352–53. This point, however, is consistent with the overall theory of this piece. Landowners do not deserve special protection; they, like other property owners, deserve special protection only when they have been singled out.

385. See Treanor, supra note 19, at 696 n.6; supra note 28, text accompanying notes 18–19.

386. Farber, supra note 6, at 290 n.37.
without a rule requiring compensation, landowners would not be compensated. Nor is it to say that a translated law of takings will never require compensation when land is taken. In fact, the takings doctrine developed in the next Section requires compensation in some circumstances when land is taken. But landownership is not now a particularly vulnerable kind of property interest. Therefore, as we begin to translate the original understanding and to determine which property interests by their very nature are particularly at risk of being victimized by the political process, we should conclude that landowners do not need special protection.

Similarly, the regional minority issue that lay behind Vermont's just compensation clause is no longer a problem today. As Vermonters realized, their distance from the state government made them powerless as a practical matter. Given improvements in communication and transportation, distance no longer impedes participation in the political process.

The situation in the Northwest Territories, where one company from outside of the political entity owned much of the land within yet was at risk because of its lack of representation in the legislature, has its closest modern analogue in Professor William Fischel's suggestion that, while discrimination against outsiders does not exist at the state or federal level, it may exist at the local level, where those in charge of land use regulation may seek to impose burdens on property owners who are unrepresented in the electoral process. But as Professor Vicki Been has convincingly argued, the mobility of modern capital means that, if one community overregulates, investors will simply take their money elsewhere. Thus, there is currently no need to provide special protection for investors who live outside of the polity.

The need for special protection with respect to confiscation by the military persists. Now, as in the late eighteenth century, when the military seizes an individual's goods without statutory authorization or provision for compensation, that person has been singled out without any sanction of the political process. Unless she can join others who are simi-

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387. See supra notes 241–243 and accompanying text.
388. See Amar, supra note 297, at 1212–15 (discussing how technological change has made the concerns that were raised at the time of the Constitution about the distance between constituents and the capitol irrelevant by the end of the Civil War).
larly situated, she is poorly positioned to obtain subsequent redress from that process. Thus, the Supreme Court has focused on the "extraordinary and unforeseen" circumstances that give rise to such seizures as both the reason why the seizures are legitimate and the reason why compensation is mandated:

Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.191

In sum, because of changes that have occurred over time, many (although not all) of the property interests that in the late eighteenth century were considered to be inadequately protected by the political process either no longer exist or are now adequately protected by that process. Thus, special protection for possessory property interests no longer serves the principle underlying the Takings Clause. The job of the translator, therefore, is to determine what property interests must now be protected if we are to be consistent with the original purposes of the clause.

3. The Translation. — Public choice theorists have offered a range of ideas about when process failure affects property interests. The constitutional jurisprudence of Professor John Hart Ely indicates that discrete and insular minorities suffer from heightened disadvantages in the political process. This Section draws on these different insights as the basis for its translation of when the Takings Clause currently requires compensation. In addition to mandating compensation in certain situations, a translated Takings Clause, like the original, will also serve an educative function that will be discussed in this Section as well.

a. Public Choice Theory. — In recent years, Professors Farber,392 Fischel,393 and Levmore394 have offered public choice theories of the Takings Clause. Like the original understanding of the Takings Clause,

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191. United States v. Russell, 80 U.S. (13 Wall.) 623, 627–28 (1871); see also United States v. Caltex, 344 U.S. 149, 152 n.3 (1952) (citing Russell as binding precedent and quoting language quoted in text of this Article, although holding that the case did not require compensation when goods were destroyed to keep them from the enemy).

392. See Farber, supra note 6; Farber, supra note 382.

393. See Fischel, supra note 390.

394. See Levmore, supra note 6; Levmore, supra note 154.
these theories treat the central concern of the Takings Clause as protecting those who suffer property losses because of process failure. These public choice theories, however, offer different accounts of what type of process failure needs to be averted. Because of their different focuses, the theories provide useful bases for consideration of how a translated Takings Clause would guard against process failure.\textsuperscript{395}

Fischel's model offers the broadest protection to property owners. He argues that courts construing the Takings Clause should direct compensation when property owners are "victims of democratic excess."\textsuperscript{396} Fischel provides the following test for the identification of such "victims:" "[T]hey are a minority in a jurisdiction in which the usual minoritarian political processes are attenuated—that is, they are subject to local governments or to politically insulated special commissions, and they possess assets whose regulation cannot be escaped by moving them to other jurisdictions or other employments."\textsuperscript{397} The governmental entity making the decision is of critical significance in Fischel’s theory: "[C]ourts can save some of their scarce political capital by ignoring all but the most extreme regulations enacted by larger units of governments, such as the United States Congress, most states, and some large cities and counties."\textsuperscript{398} In our system, larger units of government are characterized by pluralist politics—with logrolling and the opportunity for deal-making—and this gives property owners "a realistic opportunity to politically protect themselves."\textsuperscript{399} In contrast, empirical studies indicate that local government decisionmaking is characterized by majoritarian politics, rather than by deal-making. Because local governments typically have one legislative chamber, rather than two, and because their legislative agenda has a relatively limited number of items, there are fewer opportunities for logrolling. As a result, special interests are likely to lose consistently.\textsuperscript{400} Such interests will not be able to bargain in order to protect themselves, and therefore need judicial protection. When a larger unit of government is involved, such protection is generally unnecessary. In a case like Lucas, for example, where regulation issues at the state level, "there would seem to be little process-theory justification for judicial intervention."\textsuperscript{401} Judi-

\textsuperscript{395}. There are, it should be added, other works that explore the relationship between public choice theory and the Takings Clause. See, e.g., Gregory S. Alexander, Takings, Narratives and Power, 88 Colum. L. Rev. 1752 (1988); Lunney, supra note 100; Marc R. Poirer, Takings and Natural Hazards Policy: Public Choice on the Beachfront, 46 Rutgers L. Rev. 243 (1993); Michael H. Schill, Intergovernmental Takings and Just Compensation: A Question of Federalism, 137 U. Pa. L. Rev. 829 (1989). The works discussed here have been selected because their insights are particularly useful in illuminating what a translated Takings Clause should be.

\textsuperscript{396}. Fischel, supra note 390, at 890.

\textsuperscript{397}. Id.

\textsuperscript{398}. Id. at 911.

\textsuperscript{399}. Id.

\textsuperscript{400}. See id. at 886.

\textsuperscript{401}. Id. at 910.
pecial action directing compensation for decisions made by higher level governmental entities is appropriate only when there has been unfairness—as there was in *Lucas*: “[T]he fairness infirmity of the state legislation challenged in *Lucas* is the disproportionate impact on an owner in a subdivision in which all neighboring lots had been developed and were thus grandfathered by the state legislature.”402

Although Fischel does not claim to offer an originalist vision of any type, his concern with process failure initially appears a good translation of the original understanding. However, his account is ultimately an inadequate translation because it fails to accord enough respect to the Takings Clause's limiting principle—the principle of deference to the political process, except where it is most prone to failure. Fischel's theory imposes a high level of judicial scrutiny on decisions made by most localities and states. While scrutiny is less rigorous when larger governmental entities are involved, even decisions by such entities receive only a limited degree of deference, as Fischel's suggestion that *Lucas* was correctly decided indicates.

The framers, in contrast, recognized that they were establishing a rule that did not bar the government from making incorrect decisions. For example, Madison wrote in Federalist Ten that any "improper or wicked project[s] will be less apt to pervade the whole body of the Union than a particular member of it."403 By using the phrase "less apt," Madison implicitly acknowledged that such "improper or wicked project[s]" would sometimes occur, even at the national level. Nonetheless, the Bill of Rights did not seek to combat such potential intrusions on economic interests. There were substantive constitutional protections only in cases of physical confiscation, where failure was particularly likely.

Given that the framers of the Takings Clause intended it to apply only against the national government, Fischel's theory might nonetheless be a convincing translation if the majoritarian politics that he sees operating at the local level were completely shielded from the operations of pluralist politics. In other words, one might argue that extension of the Takings Clause to the local governments means that, because of the unique nature of local politics, such governments should be subject to a different (and higher) level of scrutiny. The weakness of this argument, however, is that our system affords those who lose local struggles an opportunity for political redress; they can challenge adverse decisions at the state level.404

402. Id.
403. The Federalist No. 10, supra note 301, at 84. For the full quotation, see supra text accompanying note 307.
The recent fate of rent control in Massachusetts is illustrative. Landlords in Boston, Brookline, and Cambridge, Massachusetts were unable to get these municipalities to lift rent control. Rent control was a politically pivotal issue, and landlords were unable to enter into bargains with interest groups to secure the end of rent control. In the most recent state election, however, there was a question on the ballot directing that the rent control restrictions in Boston, Brookline, and Cambridge be lifted. It won.\textsuperscript{405} Thus, recourse to state-level political processes obviated the need for special judicial protection.\textsuperscript{406}

While Fischel's theory is too broad for the translator, it is nonetheless valuable for the task of translation. It shows why special interests, although a minority, will often be able to protect themselves and therefore do not need heightened protection.

Farber's narrower theory of the Takings Clause is a more plausible translation of the original understanding.\textsuperscript{407} Farber argues that the principal purpose of the Takings Clause is "horizontal equity."\textsuperscript{408} Public choice theory shows that even in the absence of a constitutional requirement, democratic legislatures would normally compensate when they physically took property.\textsuperscript{409} Only the politically unprotected will not be compensated: "[I]n a world where government compensation is often available, it is unacceptable that some groups are denied compensation because of their unusual political vulnerability."\textsuperscript{410} This principle re-


\textsuperscript{406} In addition, because of the multitude of interests confronting a municipality, property owners can prevail, even when they are a distinct minority. The recent elections provide an illustrative example of this phenomenon. In Santa Monica, California, although renters make up 72% of the electorate and although rent control has long been firmly established in the city, an incumbent city councillor lost to a little known opponent who was opposed to rent control and ran on a law-and-order platform; concerns about public safety proved more compelling than concerns about retaining rent control. See Nancy Hill-Holtzman, Up Against the Wall, L.A. Times, Dec. 29, 1994 (special "Home Edition," available in LEXIS, News Library, Cumews File).

\textsuperscript{407} Farber's theory is not originalist, although he briefly invokes the history of the clause. He observes that the presence of a takings clause in the Northwest Ordinance suggests that the framers "may have been concerned about protecting non-resident investors," Farber, supra note 6, at 281 & n.8 (citing Treanor, supra note 19), but adds that analysis of the takings problem is changed by the fact that, in the modern context, the property owner is typically a resident. See id. at 281–82.

\textsuperscript{408} Id. at 308.

\textsuperscript{409} Farber's argument on why legislatures would normally compensate is discussed supra text accompanying notes 382–384.

\textsuperscript{410} Farber, supra note 6, at 206.
quires compensation whenever the government physically takes property. In order to ensure that government will not strategically evade the Takings Clause, the principle must be extended to situations in which the government seeks to transfer property from one private citizen to another. For the same reason, it must also extend to “regulations that are functionally equivalent to government acquisitions.” 411 Lucas falls within the last category. Because the government compensates when land is incorporated into national parks, and because the preservation ban challenged in Lucas was effectively the same as if his land had been seized for preservation purposes, Lucas should have been compensated. 412

Farber’s approach parallels the original understanding in that both reflect a view of the Takings Clause as concerned with process failure and, at the same time, both recognize only a limited area in which majoritarian decisions will be overturned. Because of these parallels, Farber’s theory provides a fairly good translation of the original understanding. Its weakness as translation is that its conception of process failure is too broad, for reasons suggested by Fischel’s explanation of how special interests are able to use pluralist politics to protect their property claims. 413 The original interpretation of the Takings Clause (under which physical takings were compensated for) closely matched the underlying end. Farber’s theory embodies a looser match, since the regulations for which he would require compensation will often not be the product of process failure. Lucas is a prime example of this situation.

As discussed, Lucas challenged the Beachfront Management Act, which prevented him from building on his property. However, he was not alone in suffering under the Act, which affected all South Carolina beachfront landowners. As Justice Stevens stated in his dissent:

The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. . . . Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, and what is equally significant, from repairing erosion control devices, such as seawalls. . . . In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike. 414

411. Id. at 304.
412. See id. at 304–05. The result favored by Farber thus parallels the result reached by the majority, although his rationale is different. See id. (criticizing majority rationale). Farber also follows Justice Kennedy’s concurrence in concluding that “the common law of nuisance provides only a partial description of behavior that is considered socially harmful, and hence appropriately banned without compensation.” Id.
413. Fischel’s claim that Lucas was not a case of process failure has previously been noted. See supra text accompanying note 401. This is not a point, however, that Fischel develops in his article. See Fischel, supra note 390, at 910 (observing, without elaboration, that Lucas was not a case of process failure).
Lucas was part of a large (and powerful) group affected by the legislation: beachfront property owners. This is a classic example of a group well-positioned to engage in legislative logrolling. Obviously, that group lost—but that will by definition occur when a takings claim is brought, since only losers will have grounds to complain. There is no evidence of process failure, and yet Farber would compensate Lucas. Farber would provide compensation for regulatory takings that are similar to physical takings, even though this class of regulatory takings as a whole is not one in which process failure is particularly likely.

Professor Levmore has advanced a third public choice approach to the Takings Clause, one that focuses on singling out. He argues that process failure is likely when an individual or small group of people has been singled out and that compensation is particularly appropriate in such situations. When a proposed statute or regulation affects a great many people, they can protect themselves through the political process, engaging in logrolling to ensure that they do not receive an unfair share of the public's burden. But the situation is very different when a proposed governmental action affects only a few people or, worse, a single person. Professor Levmore writes: "It is unlikely that such individuals can compete effectively in the political arena and it would be undesirable for them to try; the transaction cost of individual involvement in politics is, after all, quite great." For example, if the government were to take my home, in the absence of a just compensation clause I would be poorly positioned to go to the legislature or Congress and obtain redress. Thus, Levmore argues that takings law properly protects individual actors and small groups of actors who are affected by governmental actions but cannot effectively engage in interest group politics because they are not repeat players and because they are a tiny part of the polity.

Again, this theory, like Farber's, is an adequate translation of original intent (although it is not offered as such), and for the same reasons: It recognizes that the Takings Clause is concerned with process failure, and it limits the area in which majoritarian decisions involving property will be overturned. However, Levmore's theory represents an imperfect translation because it provides for compensation of a small group whose property interests are affected, even when a larger group would not be compensated. For example, a court will order compensation in the case of an individual whose property suffers a particularly sharp decrease in

415. Levmore, supra note 6, at 307.
416. See id. at 306–07; Levmore, supra note 154, at 1344–45; see also Farber, supra note 156 (public choice view of takings); Farber, supra note 156 (same). As previously noted, Justice Stevens's dissent in *Lucas* also embraces the notion of singling out as one factor to be considered in determining whether a taking has occurred. See supra text accompanying note 414.
417. Levmore explicitly does not base his theory on original intent. See Levmore, supra note 6, at 307. Although he also finds it normatively appealing, he offers his theory principally on the grounds that it is descriptive of current case law, and he says it is simply one of several factors considered by courts. See Levmore, supra note 154, at 1967.
value because of airplane overflights, but not when overflights affect a larger group.\textsuperscript{418} In contrast, the original understanding did not involve making the individuals who were likely to suffer process failure better off than those protected by the political process. Rather, the Takings Clause was intended to put everyone who suffered the same injury on the same footing: Everyone whose property was physically taken received compensation.

Individually, the theories of Farber and Levmore do not accurately translate the original understanding of the Takings Clause. However, by synthesizing the two theories, one can arrive at an appropriate translation. Compensation is due when a governmental action affects only the property interests of an individual or a small group of people and when, in the absence of compensation, there would be a lack of horizontal equity (i.e., when compensation is the norm in similar circumstances). Such a theory does what the Takings Clause was initially interpreted to do; it defers to majoritarian decisionmaking in most instances but defends those most likely to be the victims of process failure.

The Supreme Court's most recent prominent takings cases can illustrate the way in which this test would operate. For reasons suggested in critiquing Farber's theory, \textit{Lucas} would be an easy case. The challenged statute affected a large group of people that could certainly protect itself through the political process. The Court therefore should have found that there was no taking in that case.

\textit{Dolan} is a closer case, but the result should have been the same. Tigard had passed a comprehensive zoning plan. When Dolan sought permission from the City Planning Commission to expand her store, the Commission conditioned its approval with standard terms previously codified in the Community Development Code and imposed on anyone who sought to expand in the Central Business District.\textsuperscript{419} There was no evidence that Dolan was treated differently than anyone else. As Justice Souter noted in dissent:

\begin{quote}
The adjudication here was of Dolan's requested variance from the permit conditions otherwise required to be imposed by the Code. This case raises no question about discriminatory, or "reverse spot" zoning, which "singles out a particular parcel for different, less favorable treatment than the neighboring ones."\textsuperscript{420}
\end{quote}

Thus, the ordinance uniformly affected all owners in Tigard's Central Business District. Again, this group is sizable enough to protect itself through the political process. Contrary to the Court's decision, there was no need for judicial intervention.

\textbf{b: Discrete and Insular Minorities}. — Public choice theory offers one approach to process failure. However, modern legal theory also suggests

\begin{itemize}
\item \textsuperscript{418} See Levmore, supra note 6, at 315–16 (citing cases to this effect).
\item \textsuperscript{419} See Dolan v. City of Tigard, 114 S. Ct. 2309, 2313–14 (1994).
\item \textsuperscript{420} Id. at 2331 n.* (Souter, J., dissenting) (citing Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 132 (1978)).
\end{itemize}
that process failure is particularly likely in cases involving discrete and insular minorities. Recognition of the need for special judicial protection in view of the disadvantages faced by such groups in the political process can be traced back to footnote four of *Carolene Products*, where Justice Stone suggested that heightened scrutiny might be appropriate in "the review of statutes directed at particular religious . . . or national . . . or racial minorities." 421 Professor John Hart Ely, the leading champion of footnote four jurisprudence, has persuasively argued that because other groups are unwilling, for reasons of prejudice, to enter into political coalitions with these groups, judicial aggressiveness is appropriate and consistent with the general principle that courts should defer to majoritarian decisionmaking as long as it proceeds with due regard to those affected. 422

In footnote four, Justice Stone advanced the claim that (contrary to previous Supreme Court decisions) economic rights deserve no special judicial protection, so there is a certain irony in advancing a reading of the Takings Clause that embraces footnote four. Nonetheless, the Takings Clause and the claims of discrete and insular minorities intersect in one area: environmental racism, or, as it is also called, environmental justice. 423 The idea underlying the environmental racism movement is that because minority communities are not full participants in the political process, they are likely to receive more than their share of hazardous waste siting. Professor Vicki Been has recently written:

> Because local protest can be costly, time-consuming, and politically damaging, siting decision makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest effectively. Not surprisingly, many of the neighborhoods selected are populated disproportionately by the poor and by people of color. Indeed, many representatives of low-income and predominantly African American, Latino, or other minority neighborhoods charge that industry and governmental siting officials have adopted a PIBBY—"put it in blacks' backyards"—strategy for siting LULUs [locally undesirable land uses]. 424

424. Been, Fairness, supra note 423, at 1002–03; see also Lazarus, supra note 423, at 808 (explaining environmental racism in terms of political process failure).
Professors Regina Austin and Michael Schill have offered a number of reasons why minority communities are at a political disadvantage:

Poor minority communities face some fairly high barriers to effective mobilization against toxic threats, such as limited time and money; lack of access to technical, medical, or legal expertise; relatively weak influence in political or media circles; and cultural and ideological indifference or hostility to environmental issues. Limited fluency in English and fear of immigration authorities will keep some of those affected, especially Hispanics, quiescent.425

Although these factors suggest that process failure is particularly likely in cases involving minorities, one possible counterargument should be anticipated. The notion that discrete and insular minorities are politically disadvantaged does not command universal assent among academics. Some scholars have argued that minority interest groups in fact have disproportionate influence in the political process. Bruce Ackerman, for example, has observed: "Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics."426

Whatever the logical force of such arguments, discrete and insular minorities have not been able to reap the political benefits suggested by Ackerman. The organizational benefits of being "discrete and insular" are more than offset by the fact that, because of racial prejudice, other groups are less willing to enter into political bargains with discrete and insular minorities.427 Minority groups are dramatically underrepresented in legislative bodies.428 In addition, with respect to land use siting decisions, any organizational benefits that discrete and insular minorities might normally have are substantially (if not completely) offset by the fact that competing groups will be able to organize easily because of the high stakes and the ease of determining who is potentially affected. In other words, if two sites are under consideration for LULUs and one is in a minority neighborhood and the other is in the non-minority neighborhood, the minority neighborhood would not have any obvious organizational advantages but likely would have organizational disadvantages of the types identified by Professors Austin and Schill.

428. See id. at 705–06.
Professor Ackerman's argument is even weaker in the environmental justice context because, as Professor Fischel has pointed out, it presupposes pluralist politics, with its opportunities for logrolling among interest groups, not majoritarian politics. As previously discussed, analyses of local government decisionmaking indicate that they are typically governed by majority rule. Thus, discrete and insular minorities face particularly significant disadvantages at the local level, while, because of racial discrimination, they are not well-positioned to secure redress at the state or national level.

The limited body of empirical work now available is consistent with these theories and indicates that minority communities bear more than their share of locally undesirable land uses. Professor Been has recently completed a preliminary study to determine whether existing data suggested that the disproportionate amount of locally undesirable land use sites in minority communities reflected the initial siting decision or the fact that, after the siting occurred and land dropped in value, minorities moved into the area. She concluded that this evidence indicated that the original siting decision disproportionately located such sites in minority communities. The only previous study of this issue, conducted by Professor James T. Hamilton, reached similar conclusions.

Thus, empirical work and legal theories about the political process and discrete and insular minorities suggest that a translation of the original understanding of the Takings Clause should encompass a second category of cases: environmental justice cases. Like individuals or small groups affected by governmental decisions, discrete and insular minorities are unusually likely to be the victims of process failure. One could conceivably argue for a translation under which all governmental actions that have a disparate impact on the property interests of discrete and insular minorities would be subject to heightened scrutiny under the Takings Clause. Decisions changing government benefits or taxing policies might then be reviewed under the clause. But that would not be a good translation. It would miss the limiting principle of the original understanding—the principle of general deference to majoritarian deci-

429. Fischel, supra note 381, at 893.
430. See supra text accompanying notes 399–400; see also Fischel, supra note 381, at 895 (developing this point).
431. See Been, Undesirable Land Uses, supra note 423, at 1405. Been's analysis uses and expands on data previously obtained by the United States General Accounting Office and Professor Robert Bullard. She also concludes that in the communities studied the percentage of minorities in the affected areas increased after the initial siting decision. See id. Such an increase did not occur, however, in the communities analyzed in the GAO report. See id.; Robert D. Bullard, Solid Waste Sites and the Black Houston Community, 53 Soc. Inquiry 273 (1988).
432. See James T. Hamilton, Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities, 24 Rand J. Econ. 101, 120–22 (1993); see also Been, Undesirable Land Uses, supra note 423, at 1396–97 (discussing Professor Hamilton's study as the only previous work analyzing the "which came first" question).
sionmaking. Limitation of heightened Takings Clause scrutiny of governmental actions that affect discrete and insular minorities to environmental justice cases cabins the judiciary’s ability to overturn majoritarian decisions, just as the initial limitation of the Takings Clause to cases of physical seizure meant that majoritarian decisions concerning property were subject to constraint only in a limited category of cases. Moreover, application of the Takings Clause in environmental justice cases, but not in other cases involving discrete and insular minorities, is consistent with the aim of the translation model of “making the smallest change possible in the outcome or reading to preserve the most possible from the original context.” Environmental justice cases involve physical threats to tangible property and are thus closer in nature to physical seizures than, for example, governmental acts affecting benefits programs.

Previously, administrative siting decisions have been challenged on equal protection grounds, with a uniform lack of success. Under the approach suggested in this Article, they should be brought instead as takings claims. The possibility of process failure permits courts to be aggressive in evaluating environmental justice claims. Because the claims of minority groups are particularly unlikely to receive a fair hearing in the majoritarian process, it falls to courts to consider individual cases, weigh public need against private harm, and determine what remedy, if any, is appropriate.

The teeth in a political process-based takings analysis would lie in the fact that courts, applying such an approach, should begin by looking at whether there has been disparate impact. In contrast, under current caselaw, equal protection analysis turns on whether there has been discriminatory purpose. Disparate impact is appropriate in the takings context because the kinds of process failures at issue in environmental justice claims are not simply that overtly-bigoted decisionmakers will fail to consider fairly the claims of minority communities. Rather, the political process failures giving rise to these claims also reflect the organizational difficulties that minority communities face (as well as more subtle biases of decisionmakers). That said, an anomaly that would be created should courts adopt this approach should be acknowledged: It would mean that, in a limited subset of property cases, minority groups would receive greater protection under the Takings Clause (which was not drafted to protect them) than under the Equal Protection Clause.

433. Lessig, supra note 10, at 1263.
434. See Lazarus, supra note 423, at 829–34 (discussing cases).
435. See Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977) (for equal protection violation, race must have been a motivating factor in decision and decisionmaker must have chosen course of action “because of” adverse effect on the group); Washington v. Davis, 426 U.S. 229, 238–48 (1976) (discriminatory intent or purpose must be shown to make out an equal protection violation).
436. See text accompanying note 417 (enumerating reasons why minority communities are at a political disadvantage).
(which was). This, in turn, suggests a larger point about constitutional law. The argument set forth in this Article suggests that, at least in the takings context, concerns about protecting those who are disadvantaged in the political process have informed our constitutional system from the time of the framing and that courts have not adequately accounted for that concern. Proper regard for it would work a dramatic change in takings law. Although this point is beyond the scope of this Article, the same may be true of equal protection law: concerns about process failure, reflected in constitutional structure as a whole and the specific history of the Equal Protection Clause, may warrant use of a disparate impact test in the equal protection area as well.437

A modern translation of the Takings Clause must also address what standard of review courts should apply in those cases that fall within the ambit of the clause. In other words, once there has been a threshold showing that minority communities in an area are bearing a disproportionate share of locally undesirable land uses, when is a remedy appropriate? In resolving these issues, courts should apply the approach set forth in Armstrong v. United States438—an approach that Chief Justice Rehnquist,439 Justice Scalia,440 and Justice Stevens441 have applied in takings cases.442 Courts should read the Takings Clause "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."443 This approach puts the Court in the position that the majoritarian decisionmaker would occupy if it were not for process failure. The majoritarian decisionmaker normally balances public need against private harm. It decides whether to act against property interests and, if its actions affect property interests, whether to compensate. Under the approach proposed here, the court will have the responsibility for making these judgments in those situations in which the majoritarian decisionmaker is unlikely to consider property claims fairly.

437. See Mobile v. Bolden, 446 U.S. 55, 121 (1980) (Marshall, J., dissenting) (invoking Ely article in support of argument that motivational analysis is not appropriate when applied to distribution of constitutionally protected interest).


442. On the significance of Armstrong in recent Supreme Court takings jurisprudence, see Frank Michelman, Construing Old Constitutional Texts: Regulation of Use as "Taking" of Property in United States Constitutional Jurisprudence 7-16 (Sept. 9, 1994) (unpublished manuscript, on file with Columbia Law Review).

Obviously, the Armstrong approach does not significantly constrain judicial decisionmaking—except that, in the model developed here, courts will only be able to apply the Armstrong approach when there has been evidence of environmental racism. Nonetheless, use of the Armstrong approach in modern cases of process failure reflects a good translation in that it directly parallels the takings approach employed by the framers. Because they feared process failure with respect to majoritarian judgments in cases involving confiscation, the framers imposed a rule that made mandatory what majoritarian decisionmakers typically did when there was no process failure: compensate. Under the modern translation, because we fear process failure in certain situations, we require courts to do what, in the absence of process failure, majoritarian decisionmakers would do: decide the matter in a way that does not reflect bias. It should be added that, apart from the fact that the Armstrong test affords the best approach under a translation model, given the complexity of takings issues and the range of concerns implicated, use of the Armstrong standard or something like it is almost inevitable when courts attempt to balance. Thus, Professor Peterson, in her exhaustive study of takings law, has concluded that while the Court has advanced a wealth of different takings tests, “the Justices evidently are deciding these cases according to their sense of when it is fair for the government to take something of economic value from a private party without paying for it.”

c. Education. — The fidelity of my model to original intent depends on strict limits on the kinds of cases that are potentially occasions for judicially mandated compensation. This model does not give courts broad discretion to award compensation whenever there is political process failure. Instead, courts can award compensation only if there is political process failure in categories of cases in which such failure is most likely. As it was originally, the Takings Clause is interpreted to mandate compensation in only a limited category of cases.

At the same time, the clause, as drafted by Madison, had an educative element. Although its only literal legal effect was to require the federal government to compensate when it physically took property, the Takings Clause also stood as a statement of the principle that both the state and federal government should refrain from acting in a way that arbitrarily redistributed wealth. A translation of the original understanding should reflect this broader aim as well. Although the translated clause will empower courts to direct compensation in only a limited range of cases, it will also stand in political discourse as a statement of

444. Use of the Armstrong approach also does not resolve the question of whom to compensate, if a court were to decide that compensation, rather than an injunction, was the appropriate remedy. For a discussion of different ways to compensate for locally undesirable land uses, see Vicki Been, Compensated Siting Proposals: Is It Time to Pay Attention?, 21 Fordham Urb. L.J. 787 (1994).
445. Peterson II, supra note 154, at 162.
principle against arbitrary redistribution. Outside of a limited category of cases, then, protection of the takings principle should be entrusted to the political process, rather than to the judicial process.

Recent political developments highlight the extent to which the political process can be a forum for the resolution of takings issues. The "property rights" movement has obtained the imposition of requirements at the state and national level that would-be regulators perform takings impact analyses.446 The movement has also sought to require compensation for regulations that do not give rise to a judicially enforceable right to compensation. In thirty-two states, bills have been introduced requiring compensation when a regulation diminishes the value of property by some specified figure (commonly fifty percent).447 Mississippi has enacted the first statute of this kind, requiring compensation for timber harvesting regulations that diminish the value of property by forty percent.448 Most significantly, the Contract with America requires that the federal government compensate any property owner whose property is diminished in value by ten percent as a result of a government regulation,449 and a range of recent proposals in Congress would, if enacted, mandate compensation when regulations affect value.450


The point here is not that such statutes are needed to avoid government arbitrariness with respect to private property. That is a matter for political debate. But the point is that the statement of principle embodied in the Takings Clause—the statement that we as a people are opposed to the arbitrary redistribution of property rights—properly informs the political debate. Just as Madison invoked the clause to criticize Hamilton's economic program, so can an opponent of uncompensated wetlands regulation invoke the clause and argue that the legislation is redistributive. And just as a supporter of Hamilton's could argue that the Secretary of the Treasury's program was not arbitrary or did not involve redistribution, so could a proponent of wetlands regulation argue, for example, that the principle underlying the clause is not violated because the property owner does not have an entitlement to hurt the environment or because the price a property owner pays for wetlands reflects the possibility of future legislation. Moreover, it will also be possible to argue that other constitutional principles trump this constitutional principle in particular circumstances. But in a society that reveres the Constitution, the existence of a relevant statement of constitutional principle powerfully, and appropriately, shapes political debate. Thus, the educative function of the Takings Clause is of critical significance. 451

C. Why a Translated Takings Clause Is Superior to Current Supreme Court Takings Jurisprudence on Non-Originalist Grounds

This Article has shown why a translated Takings Clause is superior to a traditional originalist reading of the clause on both originalist and non-originalist grounds. In this Section, it shows why it is superior to the non-originalist modern Supreme Court jurisprudence on non-originalist grounds. A political process-based reading of the Takings Clause affords a more coherent reading of the text. It is consistent with dominant themes in constitutional law. It is easier to apply, and it accords appropriate deference to majoritarian decisionmakers where they are better equipped to evaluate competing claims. 1. Modern Supreme Court Caselaw. — Modern Supreme Court takings jurisprudence is famous for its incoherence. 452 As Professor Peterson has


452. See, e.g., Gregory S. Alexander, Takings and the Post-Modern Dialectic of Property, 9 Const. Commentary 259, 259 (1992) (noting that Supreme Court has been "confused and confusing"); Farber, supra note 6, at 279 (describing takings law as a
observed, "[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray." The Supreme Court in recent years has employed a remarkable number of tests. It held in *Loretto v. Teleprompter Manhattan CATV Corp.* that, where the government has physically invaded an individual’s land or authorized a third party to do so, compensation is required, even if the harm suffered is trivial. As previously discussed, it held in *Lucas* that the government can regulate an activity that is a common law nuisance without providing compensation, even if such regulation strips the affected property of all value. At the same time, the Court also held that, if a regulation strips property of all value in cases where the activity is not a common law nuisance, then the regulation gives rise to a requirement of compensation, unless the regulation is pursuant to a background principle of state property law.

Although these tests each have an element of manipulability, they are designed to be bright-line tests. The Court has also employed balancing tests. In some cases, it has applied the test it first advanced in *Penn Central Transportation Co. v. New York City*, which requires it to look at the "character of the governmental action," the extent of interference with "investment-backed expectations," and the economic impact of the governmental action on the property owner. In other cases, it has followed the test established in *Agins v. City of Tiburon*, and examined whether the challenged governmental action either "substantially advance[d] legitimate state interests . . . or denie[d] an owner economically viable use of [her property]." Another takings hurdle, initially imposed in *Nollan v. California Coastal Commission* and refined in *Dolan*, arises when the government imposes a condition concerning the use of property in return for granting a property owner permission to use her property in a previously prohibited way. In the absence of compensation, there must be an "essential nexus" between that condition and a legitimate state interest and "rough proportionality" between the harm caused by the new use of the property and the condition imposed.

No unified theory underlies these various tests. Moreover, it is unclear when each of these tests should be applied and what each test

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453. Peterson I, supra note 154, at 1304.
455. See id. (compensation owed because cable ran across apartment building).
457. See id. at 2900–01.
458. See id.
460. Id. at 124.
462. Id. at 260.
465. Id. at 2317, 2319.
means. For example, it is unclear when one or the other of the competing balancing tests of Penn Central and Agins is applicable—the Court has even applied both of them in the same decision—and, with both tests, the factors identified by the Court have been interpreted in dramatically different ways in different opinions.

2. The Text. — The most natural reading of the Takings Clause—"[N]or shall private property be taken for a public use, without just compensation"—is the one that the framers gave it. Compensation was required for physical seizure. Property is defined in its physical sense. The reading suggested in this Article is somewhat less obvious, but still makes sense of the text. Property is defined in terms of value. The government cannot take it for its own purposes unless it compensates. At the same time, the clause has a dual nature. In part, the prohibition is judicially enforceable: Compensation is mandated for certain types of takings. In part, the clause is hortatory. But the takings principle extends to all property.

The various tests developed by the modern Court do not, in contrast, make sense of the text. All reflect a view of property as value. None directs compensation in all cases in which value is diminished. The Court has not offered a convincing textual explanation of why only some actions diminishing the value of property give rise to a compensation requirement. For example, in Lucas, Justice Scalia observes that "the text of the Clause can be read to encompass regulatory as well as physical deprivations." But he does not mount a textual defense for why some regulatory deprivations are takings, while others are not. Thus, from a textual viewpoint, the translation advanced here is superior to current tests; it provides a coherent way to understand the text.

3. Consistency with Larger Themes in Constitutional Law. — Because of its confused character, current takings law fails to reflect consistent themes. In contrast, the political process theory of the Takings Clause—with its special protection for discrete and insular minorities, general deference to majoritarian will, and concern for process failure—reflects dominant themes in modern constitutional law.

The relationship of the translation offered here to footnote four of Carolene Products and the constitutional jurisprudence of John Hart Ely has already been discussed. More broadly, the modern Court has closely scrutinized discriminatory regulations and legislation, while subjecting economic regulation to a low level of scrutiny. Thus, my

469. See supra text accompanying notes 421–480.
approach makes interpretation of the Takings Clause consistent with broader commitments present in our constitutional structure.\textsuperscript{472} It defers to the political process in the types of cases where our constitutional system defers to it—those cases in which the political process generally works fairly. It does not defer to the political process in the types of cases in which our constitutional system considers it suspect.

Moreover, the idea that the clause is hortatory accords with key insights of modern constitutional theorists such as Larry Sager and Cass Sunstein. Professor Sager has argued that the Constitution embodies a commitment to welfare rights, but that that commitment is judicially underenforced.\textsuperscript{473} In making this argument, Sager draws on a line of political and constitutional theory that begins with James Bradley Thayer and contends that judicial enforcement of constitutional rights can be counterproductive for two reasons. First, by giving them partial success, it weakens the political forces sympathetic to those rights. Second, the judicial action provokes the ire of political forces hostile to the constitutional right and thus triggers a counterreaction.\textsuperscript{474} For these reasons, Sager suggests that “judicial enforcement of economic justice [i.e., welfare rights] would . . . inappropriately congest popular political choice.”\textsuperscript{475} Judicial deference to majoritarian deliberations about the provision of economic support to the poor reflects a recognition of “the substantial virtues of ongoing popular participation in the process by which we aspire to identify and achieve the elements of a just politics.”\textsuperscript{476}

Similarly, Sunstein has argued that certain constitutional rights are not wholly judicially enforceable. He has thus taken the position that “Congress, rather than the courts, should be the principal vehicle for enforcement of the Fourteenth Amendment.”\textsuperscript{477} Like Sager, Sunstein con-

\textsuperscript{472} On the importance of structure in constitutional interpretation, see generally Charles L. Black, Jr., Structure and Relationship in Constitutional Law 67-77, 94-98 (1969).


\textsuperscript{474} For Thayer’s theory, see James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893). For recent analyses of Thayer’s work, see One Hundred Years of Judicial Review: The Thayer Centennial Symposium, 88 Nw. U. L. Rev. 1 (1993).

\textsuperscript{475} Sager, Justice, supra note 473, at 417. For a recent empirical study that reaches similar conclusions about the limited efficacy of judicial decisionmaking to effect societal change, see Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 336-43, 339 (1991) (“[N]ot only does litigation steer activists to an institution that is constrained from helping them, but it also siphons off crucial resources and talent, and runs the risk of weakening political efforts.”); see also William Michael Treanor and Gene B. Sperling, Prospective Overruling and the Revival of “Unconstitutional” Statutes, 95 Colum. L. Rev. 1902, 1918-24 (1995) (discussing political consequences of judicial holdings of unconstitutionality).

\textsuperscript{476} Sager, Justice, supra note 473, at 417-18.

tends that broad judicial enforcement of the Constitution can be counterproductive: "Reliance on the courts may impair democratic channels for seeking changes, and in two ways. It might divert energy and resources from politics, and the eventual judicial decision may foreclose a political outcome."\textsuperscript{478} Courts therefore should be aggressive in protecting constitutional rights only in two categories of cases. They need to protect "the background conditions for political deliberation," such as the right to vote, the right to speak, or "the provision of roughly equal educational opportunity."\textsuperscript{479} They also need to protect "groups or interests that are unlikely to receive a fair hearing in the legislative process."\textsuperscript{480} Thus, Sunstein's theory in this regard parallels Ely's \textit{Carolene Products} jurisprudence.\textsuperscript{481}

In advancing the claim that the Constitution recognizes rights that are not judicially enforceable, Sager and Sunstein do not focus on protecting the political vitality of the takings principle.\textsuperscript{482} Indeed, the entire current debate about the existence of judicially nonenforceable rights largely ignores property rights. And yet, if one is concerned, as Sager and Sunstein are, with the possibility that judicial aggressiveness saps the strength of political movements, there is no apparent reason why property rights should be different from other rights. Indeed, the Takings Clause may offer the paradigmatic case. Judicial aggressiveness in this realm has, after all, provided only a limited check. \textit{Lucas} was the first case since \textit{Pennsylvania Coal} in which the Supreme Court invalidated a regulatory taking, a passage of over seventy years.\textsuperscript{483} Although the final answer to the question would require detailed analysis of empirical data, it seems likely that \textit{Pennsylvania Coal} did not ultimately prove beneficial for champions of property interests. The best evidence of this is that in England, where there is no constitutional compensation requirement, property owners have been better protected from regulations than they have been in the United States. As one commentator has observed,

\begin{quote}
[C]ompensation has been and is paid in England for regulations which would have been or are upheld as valid in the United States without payment of compensation. In other words, over the years, the statutes in England have been more
\end{quote}

\textsuperscript{478} Id. at 145.  
\textsuperscript{479} Id. at 142-43.  
\textsuperscript{480} Id. at 143.  
\textsuperscript{481} This point is instructively developed in James E. Fleming, Constructing the Substantive Constitution, 72 Tex. L. Rev. 211, 245 (1993).  
\textsuperscript{482} Sager does, however, offer the Takings Clause as a possible example of an underenforced right. See Sager, Fair Measure, supra note 478, at 1219 & n.22. For Sunstein's view of the clause, see Sunstein, supra note 477, at 128-29 (best reading of Takings Clause comports with historical understanding of its meaning as protecting existing property holdings).  
generous to the property owners than have the American courts. 484

If Sager and Sunstein are right that judicial victories can perversely gut the political movements they sought to advance, defenders of property interests would have been better off relying only on the political process for vindication of their claims. This would seem particularly true since their judicial victories were so few and far between. In other words, defenders of a broad conception of the takings principle would be better off joining the political "property rights" movement than placing their faith in courts.

4. Judicial Competence and Ease and Predictability of Administration. — The model presented here also makes sense because courts are not well equipped to engage in the kind of balancing that current caselaw requires in regulatory takings claims. In a case like Pennsylvania Coal, the loser in a political battle comes to court, says that a government action hurt her severely, and the court weighs the harm to her from that particular governmental act against the societal benefits from that act. What this analysis misses is that interests are repeat players in the political process. That a repeat player has lost a particular game signifies relatively little. The coal companies in Pennsylvania Coal may have used their clout to get anti-union legislation or lower taxes. In short, if affected parties have had a realistic opportunity to enter into political deals on a range of issues, that they lose on one piece of legislation may simply indicate that this was not a particularly salient issue for them or that other issues were more salient. Because they focus on one specific governmental act, traditional balancing tests can lead to a remedy where the loss was merely the product of political give and take. 485 They give the loser an unwarranted second bite at the apple.

In addition, current takings law is unpredictable. It is unpredictable both because of the variety of tests employed and because balancing tests are unpredictable in their results. In contrast, the tests proposed here will generate largely predictable results because they create clearly defined and limited spheres in which courts will be able to order compensation.

The translation proposed here has one weakness: It involves a departure from precedent. For example, if it were adopted, not all physical takings would give rise to a judicially enforceable right to compensation.


485. Courts consistently act as if every political actor fully and vigorously fights every political battle. In fact, political actors invest their political capital where they think it will yield the greatest return. As stated in the text, what this means in the takings context is that parties can lose an individual battle on a regulation or statute, not because they are the victims of majoritarian processes, but because they thought it more appropriate to focus their attention elsewhere. See Treanor & Sperling, supra note 475, at 1917, 1937 (discussing allocation of political capital).
More generally, courts would be employing new tests that reflect an attempt to recapture the original purposes of the Takings Clause, rather than building on the way the clause has evolved. Given the general dissatisfaction with takings doctrine and the advantages offered by the translation, such a departure is justified.

In addition, despite its departure from recent precedent, the proposal advanced here is consistent with a venerable tradition in takings jurisprudence. The early, narrow readings of the state and federal takings clauses reflected a notion of deference to other actors in the political process. Courts did not deny that an injury had occurred, but nonetheless concluded that, outside the very limited area of physical takings, other actors should weigh private harm against public need and decide whether compensation was appropriate. For the Supreme Court, with respect to state governmental actions, the critical concerns necessitating deference were those of federalism. Thus, in an 1850 case in which a state had awarded clearly inadequate compensation in a just compensation proceeding, the Court acknowledged both that a wrong had been done and that it was not the Supreme Court's province to rectify that wrong: "It rests with State legislatures and State courts to protect their citizens from injustice and oppression of this description."486 Outside of the context of federalism, federal courts deferred when they believed the decision whether to compensate was political, not judicial. As Chief Justice Taney said in refusing compensation, "[I]t is a question for the decision of the political department of the government, and not for the judicial; and, consequently, is one upon which this court forbears to express an opinion."487

State courts reached similar conclusions. Thus, in Callendar v. Marsh,488 the Massachusetts Supreme Court observed that the just compensation clause "has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government."489 It further stated that

*[t]here are cases, without doubt, where an individual may suffer by the exercise of this [governmental] power, and thus must be made involuntarily to contribute much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is supposed to be governed by.490

The court observed that the legislature could and should compensate where the harm was disproportionate, but that compensation was discretionary.491

488. 18 Mass. (1 Pick.) 418 (1823).
489. Id. at 429 (emphasis added).
490. Id. at 431.
491. See id. at 433-35.
Such statements indicate that deference to majoritarian decisionmakers in part explains the limited reach of the early judicial decisions concerning takings. Courts consciously read the takings clauses narrowly because they believed that there was a sphere in which the legislature, rather than the courts, bore responsibility for balancing harm to the individual against advancing the commonweal. A process-based theory of the Takings Clause appropriately restores this tradition of judicial deference to majoritarian decisionmakers in those categories of cases in which those decisionmakers can be trusted to consider property claims fairly.

CONCLUSION

As virtually every one of the legion of commentators to discuss takings law has observed, takings law today is incoherent. It lacks a unifying principle, and the Supreme Court's most recent forays into the takings realm—Lucas and Dolan—only highlight the extent to which takings law is plagued by fundamental disagreements.

This Article has proposed a revival of the principle that animated the advocates of the first takings clauses and that informed early interpretations of the Takings Clause and its state counterparts: Compensation should be mandated only in those types of cases where the political process is particularly unlikely to consider property claims fairly and, in general, the question of when the government can affect property interests should be resolved by the political process. Madison believed that the political process was most suspect when dealing with slaveowners and landowners. Others who supported either the federal Takings Clause or its predecessor clauses acted because they saw process failure in, among other things, military seizure of goods or invalidation of a regional minority's land grants.

Today, the cases in which process failure is most likely involve minority groups (as in the area of environmental racism) and the singling out of individuals or small groups of people. This Article has built on that insight to propose a modern translation of the original understanding of the Takings Clause under which courts would protect only those most vulnerable to political process failure. At the same time, it has argued that the clause was intended to serve a broad educative function and that it should inform today, as it did originally, political debate about government actions that affect property interests. This approach is easier to apply than current doctrine. It accords with original intent. It is more consistent with the text of the clause. Finally, it reflects deference to majoritarian decisionmakers where it is appropriate and a judicial check on them where it is necessary.

492. See Horwitz, supra note 89, at 27-31 (history of police power in nineteenth century exemplifies jurists' belief that "there could be a form of neutral legal reasoning that was fundamentally different from political reasoning").