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Matthew P. Harrington

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REGULATORY TAKINGS AND THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE

MATTHEW P. HARRINGTON*

It is black letter law that government must provide compensation to an owner whose property is taken for public use. This rule is most prominently found in the Compensation Clause of the Fifth Amendment to the U.S. Constitution, which provides that “private property [shall not] be taken for public use, without just compensation.”¹ As with all such rules, however, the basic premise is often easier stated than applied. Determining precisely when property has been “taken” by the government has often proven to be something of a challenge.

Courts and commentators have generally agreed that compensation is due when the government physically takes property from a private landowner, as for example, when land is taken for the building of a school or post office. A far more vigorous debate arises, however, when the government regulates private property in such a way as to restrict or eliminate the owner’s right to use property in a particular manner. The circumstances under which compensation ought to be payable in these so-called “regulatory takings” cases have been the subject of a great deal of scholarly comment.

The origin of this debate can be traced to the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon*,² which Chief Justice William Rehnquist once called “the foundation of our ‘regulatory takings’ jurisprudence.”³ In *Mahon*, the Supreme Court was

* Visiting Professor of Law, The Catholic University of America. B.Th., McGill University; J.D., Boston University; S.J.D., University of Pennsylvania.

1. U.S. CONST. amend. V.

2. 260 U.S. 393 (1922).

3. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting). See also *Dolan v. City of Tigard*, 512 U.S. 374, 406-07 (1994) (Stevens, J., dissenting) (stating that *Mahon* “charted a significant new course” and “kindled” the “so-called ‘regulatory takings’ doctrine”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (noting that *Mahon* introduced the concept that overregulation of property could

confronted with the question of whether a Pennsylvania statute limiting a coal company's right to conduct certain mining operations resulted in a regulatory taking.⁴ Writing for the majority, Justice Oliver Wendell Holmes recognized that a state must have some power to regulate property in ways that would not implicate the Compensation Clause.⁵ The difficulty, he noted, was in determining the proper boundary between lawful regulations under the state's police power and regulations that amount to a taking under the Compensation Clause.⁶ "The general rule," Holmes concluded, "is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁷ Holmes himself recognized that this particular formulation did not offer much guidance beyond the statement of a general principle. Instead, he asserted that precise determinations had to be made on the facts of each case.⁸ In Holmes' view, the question of whether a regulatory taking "goes too far" is really one "of degree—and therefore cannot be disposed of by general propositions."⁹

be considered a taking under the Fifth Amendment). A thorough scholarly study of the Court's *Mahon* opinion is found in Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996).

4. *Mahon*, 260 U.S. at 412-13. The case involved a challenge to Pennsylvania's Kohler Act, a 1921 statute that prohibited a coal company from mining when the activity would cause damage to the surface of another's land. See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 818 (1998). Mahon's father purchased the surface rights to the property in question from the Pennsylvania Coal Company in 1878. *Id.* The coal company retained both the mineral and the "support rights." *Id.* Under Pennsylvania law existing at the time of the sale, a coal company with support rights had no duty to the surface owner to protect or repair the surface from damage when its mining operations caused subsidence. *Id.* The Kohler Act effected a dramatic change in the law because it essentially stripped the coal company of its ability to mine without providing support to the owner of the surface rights. *Id.* When Mahon and her husband received notice from Pennsylvania Coal that it intended to begin mining operations under their property, they sought an injunction under the Kohler Act to bar the company from conducting operations "in such a way as to cause subsidence." *Id.* Pennsylvania Coal challenged the constitutionality of the Act, but the state supreme court upheld the statute. See *Mahon v. Pa. Coal Co.*, 118 A. 491 (Pa. 1922). The U.S. Supreme Court reversed the Pennsylvania court's decision and struck down the Kohler Act. *Mahon*, 260 U.S. at 414, 416.

5. *Mahon*, 260 U.S. at 413.

6. *Id.*

7. *Id.* at 415.

8. *Id.* at 413.

9. *Id.* at 415, 416.

Justice Holmes' opinion in *Mahon* has generated an enormous amount of scholarly comment. Although much of this comment has been devoted to attempts to place the opinion in *Mahon* within the context of Holmes' jurisprudence on the proper deference to be accorded to legislative decision making, the real significance of *Mahon* is that "it has become a virtual surrogate for the original understanding of the Takings Clause."¹⁰

As this Article will show, the original understanding of the clause was that compensation for property affected by government action was due only when the government physically took the property in question. Compensation was not required where the value of property had been diminished by government regulation. *Mahon* altered this understanding, however. In advancing what was essentially a diminution in value test, Justice Holmes provided the basis for an entirely new understanding of the Fifth Amendment's compensation requirement. As a result, it is Holmes' opinion in *Mahon*, rather than the founding generation's original understanding, that has become the primary point of reference for those seeking to understand the nature and scope of the Compensation Clause. *Mahon* has become, in other words, a "touchstone from the past that can be used to resolve current controversies."¹¹ Relying on *Mahon*, the Supreme Court has embarked upon an entirely new form of jurisprudence in which it attempts to test the validity of state and federal legislation from the vantage point of whether government regulations go "too far."¹²

Recently, however, a number of scholars have sought to demonstrate that Holmes' opinion in *Mahon* was not as dramatic a departure as is often claimed. They argue instead that the regulatory takings doctrine emerged well before the Supreme Court's opinion in *Mahon*. Some attempt to show that both state and federal courts had already recognized a right to compensation for

10. Treanor, *supra* note 4, at 814.

11. *Id.* at 815.

12. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (applying the "essential nexus" test, whereby a state must show a strong connection between its regulation of the property and the rationale behind its exercise of police power); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992) (looking instead to the magnitude of the effect of regulation on the economic value of the property); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836-37 (1987) (creating the "essential nexus" test).

regulatory takings long before Justice Holmes wrote his now famous opinion.¹³ Other scholars have raised doubts about the traditional view that the Compensation Clause was designed to require compensation only in cases of physical takings.¹⁴ They seek to show that the original understanding of the Compensation Clause was broad enough to encompass precisely the sort of regulatory taking that was at issue in *Mahon*. In the view of these commentators, Justice Holmes' opinion was not groundbreaking insofar as it altered the traditional understanding of the clause.¹⁵ Rather, they argue that in *Mahon*, Holmes merely gave credence to a view of the Compensation Clause that was well within the contemplation of the founding generation at the time the clause was drafted.

This line of inquiry has produced its own scholarly backlash as other commentators have attempted to refute what they perceive to be the creation of a "revisionist" history of the Compensation Clause. Relying on eighteenth century dictionaries and other sources, these scholars make a semantic argument, attempting to show that the words chosen by the drafters of the Fifth Amendment evidence an intent to limit the requirement of compensation only to cases of physical expropriation of property.¹⁶ Consequently, they argue that in drafting the Compensation Clause, the first Congress intended merely to require compensation for physical expropriations of property.¹⁷

13. See, e.g., Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999).

14. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that the proper interpretation of the Takings Clause includes takings by regulation as well as eminent domain); see also Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

15. See EPSTEIN, *supra* note 14; Kmiec, *supra* note 14.

16. See, e.g., Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420-21 (1994) (arguing that the eighteenth century definition "of the verb 'to take'" encompassed only the actual physical "appropriation or acquisition of property"); see also "Take" in SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1756). *But cf.* Gold, *supra* note 13, at 187-90 (arguing that both direct, physical takings as well as regulatory takings might be included in the term).

17. See Schwartz, *supra* note 16, at 420. An interesting exception to this type of examination is found in William Michael Treanor, *The Original Understanding of the Takings Clause and Political Process*, 95 COLUM. L. REV. 782, 834-55 (1995), in which the

This Article will attempt to resolve the debate surrounding the original meaning of the Compensation Clause. It will show that the Compensation Clause was designed to perform the limited function of addressing Anti-Federalist fears that a distant and insular government would expropriate the property of the citizenry without reasonable compensation. Although it might seem strange to us today, the fear that a distant national government would confiscate the property of the people was not an idle one in the early republic. After all, at this point in their short history, the only experience Americans had with a central government was that which was created under the Articles of Confederation. Although this government has often been characterized as weak and impotent,¹⁸ it did not hesitate to engage in widespread confiscations to support the Continental Army during the Revolutionary War.¹⁹ The extent of these confiscations angered many, to the point that even the most ardent patriots worried about the detrimental effect such takings had on public confidence.²⁰

The ratification debate of 1787 to 1788 rekindled these fears as Anti-Federalists repeatedly warned Americans about the dangers posed by the extensive powers granted to the national government in the new Constitution.²¹ As a result, the Compensation Clause became the means by which supporters of the new government attempted to neutralize the fears of those who worried that a powerful central government would engage in widespread expropriations of private property.²²

This Article will begin by briefly outlining the concerns for the protection of property rights that formed the basis of efforts to strengthen the American union during the “critical period” of

author argues that James Madison intended to guard against physical takings because tangible property was uniquely liable to arbitrary confiscation by governmental bodies dominated by majoritarian decision making.

18. See, e.g., Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1138 (characterizing the government as “weak and ineffectual”).

19. E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790*, at 60-63 (1961).

20. See *infra* notes 80-95 and accompanying text.

21. See *infra* notes 71-74 and accompanying text.

22. See *infra* note 97 and accompanying text.

American history between 1781 and 1787.²³ Part II will examine the concerns about the extensive powers of the national government during the course of the ratification debate, and will demonstrate that the drafting of the Compensation Clause, like that of the rest of the Bill of Rights, was designed to address Anti-Federalist fears about the power of a distant and overreaching national government. This Article will conclude in Part III by showing that the original understanding of the Compensation Clause did not encompass a right to compensation for so-called "regulatory takings."

I. PROTECTING PROPERTY RIGHTS

The decade following the outbreak of war between England and her American colonies was marked by severe economic turmoil. Traditional trading patterns and relationships were severed or disrupted; prices of staples and other commodities fluctuated wildly; and the specie necessary for the payment of debts nearly evaporated.²⁴ Faced with the potential collapse of the economic system, state legislatures passed a wide range of laws designed to prop up their economies. These included laws emitting large amounts of paper currency, tender laws, and debtor protection statutes. However, as the decade progressed, commercial interests began to complain about the way in which state legislatures arbitrarily altered existing legal and economic relationships. In time, these complaints grew so loud that political elites expressed concern about the security of property rights. According to James Madison, attacks on property rights by state legislatures had become "so frequent and so flagrant as to alarm the most steadfast friends of republicanism."²⁵

By the latter part of the 1780s, therefore, it seemed clear to many that some means of limiting the power of state government must be devised if the nation's economic situation were to be improved. As a result, in setting about the task of framing a new government, the

23. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 393 (1969).

24. Bruchey, *supra* note 18, at 1137-41.

25. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON* 270, 276 (Julian P. Boyd et al. eds., 1966) (1955).

Constitutional Convention which met at Philadelphia in the summer of 1787 was motivated, in part, by a desire to provide adequate protection for property rights.²⁶ During the course of the convention, the delegates expended a great deal of energy on devising the means by which property rights might be protected. In particular, they sought to prevent state legislatures from passing laws impairing contract rights and issuing paper money.²⁷

Yet while most delegates believed that government was instituted (at least in part) to protect property rights, it should be noted that the Framers were not absolutists on the issue of protecting property. On the contrary, they had a more nuanced view of the protections that ought to be offered property ownership, because they lived in an age when government exercised an impressive degree of control over private economic activity. Moreover, many of those attending the Philadelphia Convention supported a level of government regulation of economic and property rights that modern readers would find shocking. Even Blackstone, who saw property rights as a function of a citizen's "sole and despotic dominion" over the "things of this world," understood that the citizen's dominion was limited in ways that would appear to qualify as takings today.²⁸

Eighteenth century government reserved unto itself the power to regulate almost all aspects of economic activity, and both English and American governments had a long history of imposing severe restrictions on trade and commerce, including restricting the use of land and limiting the right to engage in certain economic activity.²⁹ For example, both colonial and confederation governments made extensive use of the power of eminent domain to take property for the building of public facilities, such as courthouses or forts. Frequently, the various legislatures expected that land for such

26. For example, James Madison noted that the "primary objects of civil society are the security of property and public safety." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 147 (Max Farrand ed., 1966) (1911); *see also id.* at 302 (remarks of Alexander Hamilton) ("The [o]ne great [object] of [government] is personal protection and the security of Property.").

27. Michael McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270-71, 283-85 (1988).

28. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

29. *See, e.g.*, 4 *Id.* ch. 12 (detailing extensive limitations on trade and commerce).

purposes was already held in the public domain or available for purchase on the open market.³⁰ When land was unavailable, legislatures routinely expropriated private property to build courthouses,³¹ forts,³² prisons,³³ lighthouses,³⁴ wharves and docks,³⁵ ship yards,³⁶ custom houses,³⁷ and public warehouses,³⁸ as well as to relocate entire communities.³⁹

30. See, e.g., An Act for Impowering Trustees to purchase a House in the Town of Savannah for the Use of the present and future Governors of this Province (1760), *reprinted in* 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 388 (Allen D. Candler ed., AMS Press, Inc. 1970) (1904); An Act for erecting a new Market-House in the City of Annapolis (May 15, 1751), *microformed on* MARYLAND COLONIAL SESSION LAWS, 1692-1774 (William S. Hein & Co., Inc.).

31. See, e.g., An Act to vest the right of two acres of land, whereof Elizabeth Exum is seized in fee-simple, in the justices of the County of Southampton, to the use of the said county (1752), *reprinted in* 6 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN 1619, at 283 (William Waller Hening, ed., Univ. Press of Virginia 1969) (1819) [hereinafter LAWS OF VIRGINIA].

32. See, e.g., An Act to enable the Inhabitants of Schenectady, to fortify the said Town (1755), *microformed on* NEW YORK COLONIAL SESSION LAWS, 1691-1775 (William S. Hein & Co., Inc.).

33. See, e.g., An Act for Erecting a court-house and public prison for Baltimore county, in the town of Baltimore, and for making sale of the old court-house and prison (1768), *microformed on* MARYLAND COLONIAL SESSION LAWS, 1692-1774 (William S. Hein & Co., Inc.).

34. 6 R.I. COLONIAL RECORDS 516 (1763).

35. See, e.g., An Act for Regulating the Buildings, Streets, Lanes, Wharfs, Docks, and Alleyes of the City of New Yorke (1691), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK 269 (Charles Z. Lincoln et al. eds., 1894).

36. See, e.g., An Act for laying out and erecting a Town at a Place called Long Point on the West Side of North-East River, in Cecil County (1750), *microformed on* MARYLAND COLONIAL SESSION LAWS, 1692-1774 (William S. Hein & Co., Inc.).

37. See, e.g., An Act ... for the Building of an Exchange and Custom House, and New Watch House in Charlestown (1767), *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 257 (Thomas Cooper, ed., Columbia, S.C., A.S. Johnston 1838).

38. See, e.g., An Act for amending the Staple of Tobacco, for preventing Frauds in his Majesty's Customs, and for the Limitation of Officers Fees (1747), *microformed on* MARYLAND COLONIAL SESSION LAWS, 1692-1774 (William S. Hein & Co., Inc.); An Act ... for amending the Staple of Tobacco; and for preventing frauds in his Majesty's Customs (1742), *reprinted in* 5 LAWS OF VIRGINIA, *supra* note 31, at 124, 147.

39. The relocation of state capitals required expropriation of large tracts of land. In 1786, South Carolina authorized the taking of a tract of two square miles so that the state capital might be moved to Columbus. Act of Mar. 22, 1786, No. 1333, 1786 S.C. Acts 56, 56-58 ("An Act to appoint Commissioners to purchase Land for the purpose of building a Town, and for removing the Seat of Government thereto"), *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 37, at 751-53. Virginia took land for government buildings and public squares when it moved the state capital to Richmond. See Act of May 3, 1779, 1779 Va. Acts ch. 21 ("An act for the removal of the seat of government"), *reprinted in* 10 LAWS OF VIRGINIA,

No doubt the most intriguing facet of eighteenth century takings law involved the apparent willingness of both colonial and state governments to appropriate land for economic development ventures. Indeed, the scope of takings for economic development between 1620 and 1787 is quite startling, as legislatures frequently used the power of eminent domain to take land from one private party and transfer it to another in an effort to achieve some desired economic object.⁴⁰ These regulations generally took two forms. The first involved affirmative use requirements, which imposed an obligation upon landowners to take possession and put their land to immediate economic use or risk the forfeiture of that property.⁴¹

supra note 31, at 85, 87; Act of May 4, 1780, 1780 Va. Acts ch. 37 ("An act for locating the publick squares, to enlarge the town of Richmond, and for other purposes"), *reprinted in* 10 LAWS OF VIRGINIA, *supra* note 31, at 317-18.

40. Colonial practice in this regard shows that much of the Supreme Court's modern takings jurisprudence is based on a fallacy concerning the true scope of colonial takings. This is because recent Supreme Court takings law is based largely on the idea that colonial land use regulations were limited to preventing nuisance uses of land. Under this reading, state regulations that unnecessarily burden property ownership are suspect. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-31 (1992). Yet, far from evidencing a laissez-faire attitude toward property rights, colonial governments regulated almost every aspect of property ownership, and did not hesitate to restrict certain land uses when necessary to accomplish a public purpose.

41. For example, a Massachusetts statute of 1634 decreed that "any man that hath any greate quan[tity] of land graunted him & doeth not builde upon it or im[prove it] within three yeares, it shalbe free for the Court to disp[ose] of it to whome they please." Ordinance of Apr. 1, 1634, *reprinted in* 1 THE RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSEETS BAY 114 (Nathaniel B. Shurtleff ed., 1853); *see also* Act of Nov. 15, 1636, *reprinted in* 11 RECORDS OF THE COLONY OF NEW PLYMOUTH 6, 18 (David Pulsifer ed., Heritage Books, Inc. 1999) (1861) (failure to occupy or desert granted lands results in forfeiture). Similar statutes were enacted in most other colonies, including Plymouth, New Netherland, New York, Delaware and South Carolina. *See, e.g.*, Act of Oct. 28, 1633, *reprinted in* 11 RECORDS OF THE COLONY OF NEW PLYMOUTH 14, *supra*; Order of the Governor of Oct. 25, 1678, *reprinted in* RECORDS OF THE COURT OF NEW CASTLE ON DELAWARE, 1676-1681, at 243-44 (Tribune Publishing Co. 1935) (1904); An Act for the Speedier Seating of Land (1669), *reprinted in* 25 THE STATE RECORDS OF NORTH CAROLINA 121 (Walter Clark ed., 1906); Act of Mar. 22, 1786, No. 1333, 1786 S.C. Acts 56, 56-58 ("An Act to Appoint Commissioners to purchase Land for the purpose of building a Town, and for removing the Seat of Government thereto"), *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 37, at 751-53; An Act to Appropriate the Yamosee Lands to the use of such Persons as shall come into and settle themselves in this Province (1716), *reprinted in* 2 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 37, at 641, 643; Act of Feb. 17, 1644, *reprinted in* 1 LAWS OF VIRGINIA, *supra* note 31, at 291. Other colonies retook property from settlers who had earlier seated their lands and subsequently deserted them. After the Revolution, states continued to use their eminent domain powers to encourage economic development projects. For example, the Georgia legislature threatened purchasers of lots in

The second involved aesthetic requirements and were also common.⁴²

Yet, despite the extensive nature of colonial and confederation land use regulations, there generally seems to have been very little opposition to their enactment. While the imposition of particular restrictions or their application in individual cases occasionally sparked controversy, there was simply no widespread movement to challenge the continuing right of legislatures to regulate all aspects of land ownership. As a result, when it came to including protections for property rights in the federal Constitution, the delegates to the Philadelphia Convention devoted most of their attention to the problem of state interference with contracts, and specifically contracts for debt.⁴³ Most of the Framers believed debtor relief laws, tender laws, and paper money schemes presented substantial obstacles to the development of an extended commercial republic. Consequently, the final draft of the Constitution contained

Augusta with forfeiture if they did not build houses on them within two years. *See* Act of Jan. 23, 1780, 1780 Ga. Laws 232 ("An Act for the more speedy and effectual settling and strengthening this State"), *reprinted in* 1 THE FIRST LAWS OF THE STATE OF GEORGIA 232 (John D. Cushing ed., 1981). Georgia law also declared that property owners who had absented themselves from the state would be deemed to have vacated their lands, allowing the state to retake them for distribution to others. *See id.* at 235. In 1777, the Virginia Assembly's committee to revise the laws resolved that lands which had not been improved were to be "lapsed upon Petition." Plan Agreed upon by the Committee of Revisors at Fredericksburg (Jan. 13, 1777), *in* 2 THE PAPERS OF THOMAS JEFFERSON 325, 328 (Julian P. Boyd ed., 1950). Several other statutes authorized town officials to forfeit land on which no house had been built even where there was no express condition contained in the original grant. *See* Act of Oct. 10, 1785, 1785 Va. Acts ch. 94 ("An act for establishing the town of Clarksburg in the county of Harrison"), *reprinted in* 12 LAWS OF VIRGINIA, *supra* note 31, at 208-09; Act of Oct. 3, 1778, 1778 Va. Acts ch. 32 ("An act for establishing the town of Martinsburg, in the County of Berkeley, and for other purposes"), *reprinted in* 9 LAWS OF VIRGINIA, *supra* note 31, at 569-70; Act of Oct. 3, 1778, 1778 Va. Acts ch. 22 ("An Act for establishing a Town at the Courthouse in the county of Washington"), *reprinted in* 9 LAWS OF VIRGINIA, *supra* note 31, at 555, 557; *see also* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1128-29 (2000) (discussing land forfeiture).

42. *See, e.g.*, The General Laws and Liberties of Connecticut Colonie, Home Lotts (1672), *microformed on* CONNECTICUT COLONIAL SESSION LAWS, 1672-1776 (William S. Hein & Co., Inc.) (ordering that houses be "upheld, repaired, maintained sufficiently in a comely way"); An Act for Regulating the Buildings, Streets, Lanes, Wharfs, Docks, and Alleyes of the City of New Yorke (1691), *reprinted in* 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 35, at 269 (authorizing the city of New York to make rules for the "better regulation[,] uniformity[,] and [gracefulness] of such new buildings as shall be Erected for habitations").

43. *See* McConnell, *supra* note 27, at 280-81.

several specific property protections, among which were Article I's prohibitions on the passage of paper money laws, tender laws, and laws "impairing the Obligation of Contracts."⁴⁴ These restrictions were designed to prevent a recurrence of the worst excesses of the state legislatures.⁴⁵

At the same time, however, there is no evidence that anyone at the Constitutional Convention made any attempt to limit the power of state legislatures to impose restrictions on land use. This is probably because very few of the delegates doubted that the states had the power to regulate land. In addition there is not a single reported case in which a colonial or confederation court ever ordered compensation for a so-called regulatory taking. In fact, the almost universal agreement concerning the states' power to regulate physical property means that the concept of a regulatory taking would have been unknown to most eighteenth century legal theorists. In the years leading to the Constitutional Convention in 1787, the bulk of concerns about property rights centered on state interference with rights of contract rather than on land regulation policies.⁴⁶ Given this lack of concern, the Framers' primary focus in including protections for property in the text of the Constitution was directed at preventing a repeat of those practices (e.g., paper money, tender, and debtor relief laws) that generated so much controversy in the 1780s.⁴⁷

II. THE LEGISLATIVE HISTORY OF THE TAKINGS CLAUSE

The proposed Constitution was controversial when published. Opposition to the new frame of government surfaced almost immediately, resulting in a vigorous debate between those who argued for ratification, soon to be called "Federalists," and the so-called "Anti-Federalists," who urged rejection. Anti-Federalists feared that the extensive powers given the national government under the proposed Constitution would allow it to overwhelm and

44. U.S. CONST. art. I, § 10.

45. See McConnell, *supra* note 27, at 283-85.

46. *Id.* at 280-81; see also *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 204-06 (1819).

47. McConnell, *supra* note 27, at 280-81.

endanger the states.⁴⁸ More importantly, they seized upon the fact that the Constitution failed to provide basic protections for individual liberty, and urged rejection unless a bill of rights was incorporated in the constitutional text.⁴⁹ After a long and bitter struggle, the Constitution was ultimately ratified, but only after Federalists were forced to promise that amendments to the Constitution would be taken up once the first Congress convened.⁵⁰

Shortly after the first Congress convened in 1789, James Madison made good on the Federalist promise to offer amendments to the Constitution. Madison's proposals included a number of guarantees for individual liberty, among which were clauses protecting freedom of speech, the free exercise of religion, and the right to jury trials in civil and criminal cases.

It is important to note, however, that Madison did not propose a bill of rights.⁵¹ On the contrary, he put forth a series of amendments to the text of the Constitution, many of which were limitations on the powers given to Congress in Article I and to the courts in Article III.⁵² In other words, Madison seems not to have viewed his proposals as comprising a declaration of rights residing in the people. Instead, he appears to have had a more modest aim in mind: In proposing concrete limits on Congress' power to act in certain areas, Madison sought to answer Anti-Federalist fears that the new national government would subvert the rights of the citizenry. Proposing to revise Articles I and III allowed Madison to avoid having to make general statements about the rights of man, the content and form of which would undoubtedly have generated enormous debate. Even more significantly, Madison largely avoided any statement about the legitimate powers of the states themselves.⁵³

48. WOOD, *supra* note 23, at 516-17 (describing Anti-Federalist opposition to the Constitution).

49. STANLEY M. ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 59 (1993).

50. *Id.* at 60.

51. A close look at Madison's proposals in Congress reveals that he was actually making amendments to the various articles of the Constitution, the effect of which would be to provide protections for individual rights. He did not propose a formal bill of rights asking to supercede those which were appended to many of the state constitutions. See 1 *ANNALS OF CONG.* 448-454 (Joseph Gales ed., 1789).

52. *Id.*

53. An extended discussion of Madison's role and motives in drafting the Fifth

It is also important to note that Madison himself did not really believe that amendments to the Constitution were necessary. Although he may not have been entirely satisfied with the Constitution's current form, Madison clearly believed that any attempt to make significant alterations so soon after its adoption would have been premature.⁵⁴ He was also concerned about the continuing calls for a second constitutional convention, and feared that reopening the document to revision would be disastrous.⁵⁵ At the same time, however, Madison knew that a "great number" of Americans remained dissatisfied with the Constitution, he was sure that "a great body of the people" were "inclined to join their support to the cause of Federalism" if the Constitution were to provide more definite protections for the liberty of the citizen.⁵⁶ The Constitution had, after all, received the approval of a bare majority of the states, and two states still remained outside the union.⁵⁷ Including basic protections for civil liberties would, in Madison's view, go a long way toward disarming Anti-Federalist complaints.⁵⁸

Amendment can be found in Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1278-87 (2002).

54. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: LEGISLATIVE HISTORIES 3 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter DHFFC].

55. During the 1789 debates in the House of Representatives, Madison voiced his fears: I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door was opened, if we should be very likely to stop at that point which would be safe to the government itself.

11 DHFCC, *supra* note 54, at 820.

56. *Id.* at 819.

57. *Id.* at 829 (statement of James Jackson) (remarking that Rhode Island and North Carolina had not joined the Union).

58. Confronting his adversaries directly on this point, Madison stated:

It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities; yet still there is a great number of our constituents who are dissatisfied with it; among whom are many respectable for their talents, their patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive. There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of federalism, if they were satisfied in this one point: We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution.

Many in Congress were loathe to take up the subject of amendments, however, arguing instead that more important business was at hand. By June 1789, the House was already considering several revenue bills, as well as bills establishing the departments of war, state, and treasury. Having spent so much time on this work, the members were not inclined to interrupt it.⁵⁹ Thus, in arguing against taking up Madison's amendments, South Carolina's William Loughton Smith asserted that "in point of propriety [the judiciary bill] deserved the first attention of the house."⁶⁰ Smith simply "could not conceive the necessity of going into any alterations of the government until the government itself was perfected."⁶¹ After all, Smith noted, "[t]he constitution establishes three branches to constitute a whole; the legislative and executive are now in existence; but the judicial is uncreated."⁶² He therefore warned the members that remaining in this state meant "not a single part of the revenue system can operate; no breach of your laws can be punished; illicit trade cannot be prevented."⁶³ In Smith's view, "greater harm will arise from delaying the establishment of the judicial system, than can possibly grow from a delay of the other subject."⁶⁴ Georgia's James Jackson agreed and suggested putting off the subject of amendments to the Constitution "till we have some experience of its good or bad qualities." The Constitution, Jackson said:

is like a vessel just launched, and lying at the wharf; she is untried, you can hardly discover any one of her properties. It is not known how she will answer her helm, or lay her course; whether

Id. at 819 (statement of James Madison); see also Letter from James Madison to Richard Peters (Aug. 19, 1789), in 12 THE PAPERS OF JAMES MADISON 346-47 (Charles F. Hobson & Robert A. Rutland eds., 1979) [hereinafter MADISON PAPERS] (explaining his belief that amendments protecting rights were "less necessary in a republic" but arguing that a bill of rights was necessary to head off calls for a second convention).

59. 11 DHFCC, *supra* note 54, at 830 (statement of James Jackson) ("There are, Mr. Speaker, a number of important bills on the table which require dispatch; but I am afraid, if we enter on this business ... [c]ertainly we shall lose much of our valuable time, without any advantage whatsoever.").

60. *Id.* at 12-18 (statement of William Loughton Smith).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

she will bear with safety the precious freight to be deposited in her hold. But, in this state, will the prudent merchant attempt alterations? Will he employ workmen to tear off the planing and take asunder the frame? He certainly will not. Let us, gentlemen, fit out our vessel, set up her masts, and expand her sails, and be guided by the experiment in our alterations.⁶⁵

In the face of such opposition, Madison knew he had to tread carefully. On the one hand, he was convinced that some amendments were necessary to quiet the clamor for a second convention and secure Rhode Island and North Carolina's entry into the union. At the same time, however, he knew that the Federalist majority in Congress was unwilling to devote too much time to revising a document most believed had not yet been given a fair trial. Satisfying both factions meant choosing a list of proposals and language "limited to points which are important in the eyes of many and ... objectionable in the eyes of none."⁶⁶ He was, after all, keenly aware that "[n]othing of a controvertible nature [could] be expected to make its way thro' the caprice & discord of opinions which would encounter it in [Congress] when 2/3 must concur in each House, & in the State Legislatures 3/4 of which will be requisite to its final success."⁶⁷

With respect to protections for property rights provisions, therefore, Madison had to address the relatively widespread belief that the national government might not adequately protect property interests. Of particular concern to Anti-Federalists was the fact that Congress had been given broad powers to regulate economic activity. As a result, an examination of the history leading up to the inclusion of the Compensation Clause in the constitutional text reveals the clause was less about concerns with land use regulation or confiscation than it was about military impressments. Indeed, it appears that land use policy was of little concern to the founding generation, for no one either in or outside the Philadelphia Convention ever raised concerns about the issue. In fact, although the various state ratifying conventions proposed over two hundred

65. *Id.* at 805 (statement of James Jackson).

66. Letter from James Madison to Edmund Randolph (June 15, 1789), in 11 MADISON PAPERS, *supra* note 58, at 219.

67. *Id.*

amendments to the constitutional text, none suggested including any provision dealing with the national legislature's power to expropriate or regulate land.⁶⁸ The failure to include a compensation clause applicable to either the state or national governments would seem to indicate an expectation that intrusive land use regulation would continue to be the norm under the new Constitution. After all, the nationalists' desire to use the federal government to promote economic development required aggressive use of land development policies, the primary tools of which were traditional expropriations and extensive land use regulation.⁶⁹ Madison's main concern, therefore, was finding a way to negate what he clearly thought were unreasonable fears about an overreaching national government. Consequently, the Compensation Clause seems to have been more about foreclosing the possibility that a distant national government might arbitrarily expropriate property without compensation, than it was an attempt to impose substantive requirements on the government's power to regulate land use. In fact, the Compensation Clause has a very close theoretical connection to the so-called military amendments, which were directed at preventing a large standing army from subverting the rights of the people.⁷⁰

Moreover, in urging rejection of the Constitution, Anti-Federalists repeatedly charged that the new government would have unlimited power to oppress the citizenry through confiscatory taxes and standing armies.⁷¹ Congress, it was said, had the ability to tax "land, cattle, trades, occupations, etc. in any amount."⁷² No matter how oppressive the taxes might be, "the people will have but this alternative[:] ... pay the tax, or let their property be taken, for all

68. 1 ELLIOT'S DEBATES 318-338 (1836) (detailing ratifications of the states and proposed amendments).

69. John F. Hart, *Forfeiture of Unimproved Lands in the Early Republic*, 1997 U. ILL. L. REV. 435, 438-39 (1997). On the drive to use the power of government to promote economic ends, see CATHY D. MATSON & PETER S. ONUF, *A UNION OF INTERESTS: POLITICAL AND ECONOMIC THOUGHT IN REVOLUTIONARY AMERICA* 150-52 (1990).

70. See U.S. CONST. amend. II (guaranteeing right to bear arms to support militia); U.S. CONST. amend. III (prohibiting quartering of troops in private homes without owner's consent).

71. THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 145, 162 (Herbert J. Storing ed., 1981).

72. *Id.*

resistance will be in vain. The standing army and select militia would enforce the collection."⁷³ Anti-Federalists also warned that the failure of the Constitution to provide for jury trials in civil cases meant that military or excise officers would have the ability to abuse the citizenry with impunity because a "lordly court of justice" sitting without a jury would stand "ready to protect the officers of government against the weak and helpless citizen."⁷⁴

The danger that large standing armies posed to liberty was a recurrent theme throughout the Revolutionary and Confederation periods. The Crown had long relied on the British army to protect its dominions in North America while at the same time restraining colonial opposition, and Anti-Federalists repeatedly warned that the national government would attempt to establish a large standing army which would then be used to subvert the liberties of the people.⁷⁵ Moreover, everyone knew that even an army under tight civilian control would still require substantial material support. Indeed, one of the ironies of the American Revolution was that when it came to exercising the power of expropriation, the Confederation Congress often appeared far more oppressive than the British Crown had ever been. This is because throughout the Revolution, Congress' ability to obtain supplies for the troops was repeatedly compromised. Lacking the power to tax the people directly, Congress had to rely on requisitions from the states to support its activities. The states, however, often failed to provide the needed funds. Part of the problem was that with the outbreak of hostilities, "[n]ormal incomes from export and import duties were cut off, and it was scarcely possible to lay taxes on polls or property when men were leaving their occupation to join the army."⁷⁶ British military operations in those states which saw the brunt of the fighting only "added to the disorder."⁷⁷

Even when states had adequate revenues, however, they often attended to their own needs before sending requisitions off to

73. *Id.*

74. Essay of a Democratic Federalist, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 58, 61. A fuller discussion of the jury trial debate can be found in Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 181-99 (2001).

75. See *supra* notes 71-74.

76. FERGUSON, *supra* note 19, at 30.

77. *Id.*

Congress. In time, therefore, Congress abandoned the policy of monetary requisitions and adopted a plan by which states would be called upon to provide support in actual goods.⁷⁸ This new system allowed the states to meet their obligations to the army without having to raise cash, for in theory at least, states might collect the necessary supplies from taxpayers in kind and transfer them to Congress' control. Even this new system failed, however, because without money to purchase the requested items, state receipts of goods in payment of taxes usually had to abide the seasons with the result that supplies for the army were rarely available in time or in the desired quantity.⁷⁹

To meet the needs of maintaining an active fighting force, Congress eventually authorized officers of the armed forces to impress supplies from the surrounding populace.⁸⁰ For example, in September 1777, Congress authorized General Washington "to take, wherever he may be, all such provisions and other articles as may be necessary for the comfortable subsistence of the army under his command, paying or giving certificates for the same."⁸¹ Such impressments caused a great deal of friction, particularly in the middle states, which bore the brunt of the confiscations as they had seen the largest part of the fighting. Apparently, Washington sensed the hostility to the national government that impressments caused and refrained from exercising his power to expropriate property except in the most urgent circumstances. Congress responded with a thinly veiled rebuke, chiding Washington for his "forbearance in exercising the powers vested in him."⁸² In a December 1777 resolution, Congress worried aloud about Washington's "delicacy in exerting military authority on the citizens of these states" and cautioned that such a delicacy "though highly laudable in general, may, on critical exigencies, prove destructive to the

78. *Id.*; see also 15 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1311, 1371, 1377 (Worthington Chauncey Ford ed., 1909) (requesting specific supplies of corn and flour).

79. FERGUSON, *supra* note 19, at 50.

80. One of the earliest of these authorizations was made in November 1775, when Congress directed the Commissary General "to cause cattle and hogs to be driven at proper seasons to the Camp, there to be [slaughtered and] cured; and as to the articles of bread and flour, that he proceed in the way [that] he has done for some time past." 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 78, at 323.

81. 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 78, at 752.

82. *Id.* at 1013, 1014.

army and prejudicial to the general liberties of America.”⁸³ Washington was, therefore, instructed to “endeavour as much as possible to subsist his army from such parts of the country as are in his vicinity,” taking provisions from all persons without distinction, leaving only such quantities as should be necessary for the support of their families.⁸⁴ As a result, beginning in 1779, “military operations in the field were supported almost entirely by impressments.”⁸⁵ Goods taken in this manner were paid for with “certificates,” which were essentially drafts on the national government.⁸⁶ As a result, wherever the army moved, it left a trail of paper in its wake. The local populace saw its barns and fields emptied in exchange for certificates issued by the quartermaster or commissary. Congress was without the money necessary to redeem the certificates, however, and so they became largely worthless, at least in the short term.⁸⁷

83. *Id.*

84. *Id.*

85. FERGUSON, *supra* note 19, at 59.

86. 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 78, at 751-52 (pledging the “public faith” for the payment of provisions taken and for which certificates were given).

87. FERGUSON, *supra* note 19, at 60. Although states frequently complained about the effects of impressment, military exigencies eventually forced them to become willing participants. Unable to provide monetary aid to the national government, states in which military operations were ongoing used the power of impressment in aggressive ways. In March 1779, the New York legislature authorized the governor to appoint agents to purchase or seize any flour in the state and hand it over to Continental agents. Act of Oct. 31, 1778, ch. 5, 1778 N.Y. Laws 92 (“An Act more effectually to provide supplies of flour, meal and wheat to the army.”). The following year, it enacted a law directing assessors to inquire how much wheat was held by the citizenry. Amounts in excess of that required to support a family were to be confiscated. Act of Oct. 1, 1779, ch. 4, 1779 N.Y. Laws 148 (“An Act to revive and amend an act entitled ‘An act to amend an act for regulating impresses of forage and carriages and billeting troops within this State’ and other purposes therein mentioned.”). In 1780, Pennsylvania authorized county officials to seize provisions required by Congress. Act of May 10, 1780, ch. 178, 1780 Pa. Laws 381 (“An Act for procuring an immediate supply of Provisions for the Federal Army, in its present Exigency.”). It later declared all sheep, cattle, and salted provisions in the commonwealth subject to impressment. Act of Sept. 4, 1781, ch. 215, 1781 Pa. Laws 481 (“An Act to make more Effectual Provision for the Defence of this State.”). When the war moved to Virginia, that state’s legislature authorized the governor to appoint commissioners to expropriate supplies for the army as needed. *See, e.g.*, Act of May 4, 1780, 1780 Va. Acts ch. 8 (“An Act for procuring a supply of provisions and other necessaries for the use of the army.”), reprinted in 10 LAWS OF VIRGINIA, *supra* note 31, at 283; Act of Oct. 3, 1778, 1778 Va. Acts ch. 43 (“An Act to enable the Governour and Council to supply the armies and navies of the United States, and of their allies, with grain and flour”), reprinted in 9 LAWS OF VIRGINIA, *supra* note 31, at 584.

Throughout the war years, then, Congress routinely resorted to impressments as a means of supporting the army in the field. The volume and extent of impressments was staggering, with everything from food, wagons,⁸⁸ ships,⁸⁹ and even people⁹⁰ being forcibly appropriated to military use. The extent of these impressments became a frequent source of complaint. For example, in 1779, Pennsylvania's supreme executive council complained to Congress that several Philadelphia men had been impressed into service aboard the Continental frigate *Confederacy*, leaving their families "in a distressed situation."⁹¹ Congress was forced to order the captain of the ship to free the men. Virginia teamsters coerced into driving wagons for the army either committed sabotage or deserted, while Pennsylvania "farmers refused to plant crops in excess of their own needs because the surplus was confiscated."⁹² Often, supplies had to be obtained at the point of a bayonet. In 1780, Virginia governor Benjamin Harris wrote to Robert Morris, the superintendent of finance, and complained that both the American and British armies "lived on free quarter, & ravaged the Country from one end of it to the other."⁹³

Confiscations were so frequent and so extensive that even the most ardent patriot eventually despaired of receiving any justice. In 1778, writing under the pseudonym, "A Freeholder," John Jay complained about "the Practice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land."⁹⁴

88. See 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 78, at 323 (recommending that the New England states pass laws empowering General Washington "to impress carriages, vessels, horses, and other things necessary at a reasonable rate, for the transportation or march of the army").

89. For example, in November 1776, Congress directed General Schuyler "to take such steps as are necessary, for procuring a sufficient number of as large vessels as the navigation of the lakes will admit of, for the service of the states the next campaign, that the command of the lakes may be effectually secured." 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 78, at 862.

90. 16 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 78, at 1204.

91. *Id.*

92. FERGUSON, *supra* note 19, at 64.

93. Letter from Benjamin Harrison to Robert Morris (Mar. 20, 1782) (on file with the author).

94. A Freeholder (John Jay), *A Hint to the Legislature of the State of New York* (1778), in 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY 461-62 (Richard B. Morris ed., 1975).

Comparing the Continental quartermasters to petty tyrants, Jay insisted that expropriations of property be done under colour of law:

It is the undoubted Right and unalienable Privilege of a Freeman not to be divested, or interrupted in the innocent use, of Life Liberty or Property, but by Laws to which he has assented, either personally or by his Representatives. This is the Corner Stone of every free Constitution, and to defend it from the Iron Hand of the Tyrant of Britain, all America is now in arms; every Man in America being most deeply interested in its Preservation. Violations of this inestimable Right, by the King of Great Britain, or by an American Quarter Master; are of the same Nature, equally partaking of Injustice; and differing only in the Degree and Continuance of the Injury.⁹⁵

On the face of it, at least, property owners did receive some compensation when their goods were taken. The reality, however, was that dramatic depreciations in paper currency meant that the certificates, which were redeemable in Continental currency, were largely worthless. Compensation became, then, an illusion.

As a result, by 1789, the traditional fear of large standing armies, along with the Revolutionary experience with impressment, gave rise to concerns about the power of the new national government to requisition supplies without payment. These fears no doubt led Madison to include provisions in his proposed amendments prohibiting the quartering of troops among the populace.⁹⁶ The Compensation Clause added to these protections by preventing the government from taking property to support its troops without payment for goods or services received. St. George Tucker expressed

95. *Id.*; see also *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 358-59 (1788) (summarizing the plaintiff's argument)

[A]s between a state and its own citizens, the principle, with respect to the rights of property, is immutably the same, in war as well as peace. Sometimes, indeed, the welfare of the public may be allowed to interfere with the immediate possessions of an individual Yet, even then, justice requires, and the law declares, that an adequate compensation should be made for the wrong that is done. For, the burthen of the war ought to be equally borne by all who are interested in it, and not fall disproportionately heavy upon a few.

96. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

this view some years later, noting that the Compensation Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever."⁹⁷ Thus, while citizens in the several states may not have had a very strong fear that their lands might be taken for public facilities, their experience during the war may have led a good many to worry about the federal government's ability to requisition supplies for a large standing army.

Madison's Compensation Clause should, therefore, be seen as an attempt to assuage Anti-Federalist fears that a distant and "aristocratical" national government would attempt to subvert long-held property interests. At the same time, however, continuing opposition in Congress to taking up amendments while other business went unfinished left Madison with a very small window of opportunity in which to obtain a hearing for his proposals. It is not surprising, therefore, that in choosing his amendments, Madison attempted to draw on those proposals most likely to gain the support of majorities of both Houses of Congress. As a result, it appears that in drafting the Compensation Clause, Madison borrowed heavily from Article II of the Northwest Ordinance.⁹⁸ This Article contained a due process clause followed immediately by a compensation clause.⁹⁹ Madison's proposal for what was to become the Fifth Amendment was strikingly similar to this formulation. It provided procedural protections for criminal cases and then concluded with a due process and compensation clause in language almost identical to that of the Northwest Ordinance:

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself: nor be deprived of life, liberty, or property, without due process of law;

97. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305-06 (St. George Tucker ed., The Lawbook Exchange, Ltd. 1996) (1803).

98. *Id.*

99. Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1789).

nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.¹⁰⁰

The similarities between Madison's proposed amendment and the Northwest Ordinance should not be all that surprising. Given Madison's desire for quick passage of amendments, it was natural for him to rely on language that had already gained wide acceptance. In this case, this meant relying on a provision of the Northwest Ordinance, which had passed the former Congress with only a single "nay" vote.

To some, however, Madison's Compensation Clause seems somewhat out of place. It is, after all, placed at the end of a rather long paragraph dealing with criminal procedure and thus has the appearance of being an afterthought. Consequently, over the years scholars have had difficulty trying to explain why Madison included the Compensation Clause in his proposed amendment. Some have argued that, while expressing an important value, the Clause was something of an afterthought and did not quite fit in with any other amendment. According to this reasoning, the Compensation Clause is the proverbial "kitchen sink" thrown in with other provisions for good measure.

A more novel explanation comes from Professor Akhil Amar, who argues that Madison was ahead of his time in urging support for property rights.¹⁰¹ According to Amar, Madison recognized that the greatest danger to property rights came from "a possibly overweening majority rather than from self-interested government agents."¹⁰² Unfortunately, however, Madison was "unsuccessful in bringing the needed majorities in Congress around to his way of thinking."¹⁰³ Unable to obtain more explicit protections for the rights of property, Madison was forced to try to "slip the takings clause through."¹⁰⁴ In Amar's view, Madison was thus forced to resort to "clever bundling" to secure passage of the Compensation Clause.¹⁰⁵

100. 4 DHFCC, *supra* note 54, at 10 (outlining the text of Madison's proposed resolution).

101. AKHIL REED AMAR, *THE BILL OF RIGHTS* 77 (1998). Another commentator takes a similar line, arguing that the "ideology underlying the [takings] clause ran counter to the republicanism espoused by the Anti-Federalists." Treanor, *supra* note 17, at 708.

102. AMAR, *supra* note 101, at 77.

103. *Id.*

104. *Id.*

105. *Id.* at 78.

This explanation seems implausible, however. First, it is clear that both Houses of Congress paid rather close attention to Madison's proposals, and did not hesitate to make alterations, additions, or deletions where it suited their purposes. As a result, the idea that vast numbers of congressmen were "asleep at the switch" so as to allow Madison to slip the Compensation Clause through is fantastical in the extreme.¹⁰⁶ Second, and undoubtedly more important, the argument that the Compensation Clause was a novel development is simply without foundation. There is, in fact, very little evidence that anyone in the founding generation thought that government had the power to expropriate property for public use without compensation. On the contrary, compensation for government takings was a well-established feature of American law from the earliest days of settlement.¹⁰⁷

Why, then, did Madison place the Compensation Clause where he did? The answer lies in the fact that the Fifth Amendment speaks to much more than criminal procedure. It is about the rights

106. *Id.* at 77.

107. See Harrington, *supra* note 53, at 1276-77. Until the mid-1960s scholars assumed that Americans were always committed to the principle that government should not take private property without compensating its owner. See also William W. Fisher, III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 95 (1990). Professors Bernard Bailyn and Gordon Wood led other commentators to doubt that hypothesis, however. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 83 (1967); WOOD, *supra* note 23, at 404. Adherents to the "republican revival" argued that at the latter part of the eighteenth century, a sizeable segment of the population was committed only very weakly, if at all, to the idea of just compensation. Fisher, *supra*, at 95. In this view, the Fifth Amendment's Compensation Clause was not a natural outgrowth of the revolutionary experience; rather, it was a means by which Americans became reconciled to an idea which had only minimal adherence. *Id.*; see also MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 63-66 (1977); Morton Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1833 (1987); Treanor, *supra* note 17, at 714-16.

In recent years, the scholarly consensus has shifted again. Further research into the question of compensation has shown that a large majority of Americans were committed to the principle of just compensation from a very early date. See Fisher, *supra*, at 107. Indeed, no matter their ideological orientation—and there were many—Americans of all political outlooks adhered to the idea that takings of property for public purposes required the payment of compensation. *Id.* Different groups placed varying emphasis on the extent to which property ought to be subject to the demands of the state, but there was "virtually universal agreement on the main point: the state ought not to be able to confiscate a man's property without his consent." *Id.* at 99. In fact, "[e]ven during those moments in the Revolutionary struggle and its immediate aftermath when social radicals seemed to be in the ascendance, proposals contemplating compulsory redistribution of property were remarkably rare." *Id.*

applicable when government seeks to deprive a person of liberty or property.¹⁰⁸ The Double Jeopardy, Self-Incrimination, and Due Process clauses certainly provide procedural protections against prosecutorial abuse in the trial process.¹⁰⁹ But, the Due Process Clause also ensures that deprivations of life, liberty, and property are undertaken in accordance with established law.¹¹⁰ In the context of property, this means that forfeitures are pursuant to the terms of the applicable criminal or civil statutes.¹¹¹ In the context of expropriation or taxation, the Compensation Clause means that exactions of property for public use are obtained in a manner consistent with the principle of consent.¹¹² That is to say, it ensures that exactions of property are made pursuant to statute and not by executive fiat.¹¹³

Thus, in putting forth his version of the Compensation Clause, Madison sought to supplement the institutional protections already afforded property in the Constitution. His experience as a member of the Virginia legislature during the Confederation period convinced Madison that protections for property rights were necessary if the new nation was to develop a stable legal and economic regime.¹¹⁴ No doubt Madison hoped that these protections might be provided by the structure of republican institutions.¹¹⁵ Yet, when the call for amendments became too great to resist, Madison used the occasion to ensure that property protections found their way into the final list of amendments.

108. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 54 (1998).

109. *See id.*

110. U.S. CONST. amend. V.

111. Ely, *supra* note 108, at 54.

112. *See* Harrington, *supra* note 53, at 1247.

113. *Id.*

114. *See* Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 226-27 (1865), in which Madison stated:

Another unhappy effect of a continuance of the present anarchy of commerce will be a continuance of the unfavorable balance on it, which, by draining us of our metals, furnishes pretexts for the pernicious substitution of paper money, for indulgences to debtors, for postponement of taxes. In fact, most of our political evils may be traced to commercial ones....

115. *See, e.g.*, *THE FEDERALIST* No. 51 (James Madison) (arguing that the people would "no doubt, [be] the primary control on the government").

Moreover, it also appears that Madison intended the Compensation Clause to have a very narrow reach.¹¹⁶ It was designed to limit the powers of the federal government and to affect only physical takings of property.¹¹⁷ This was in keeping with the majoritarian aspects of Madison's bill of rights, in that Madison was apparently responding to concerns about overreaching by the national government.¹¹⁸ That Madison himself intended a narrow reading seems evident when one considers that the language of his original proposal only required compensation when a person was "obliged to relinquish his property."¹¹⁹

The choice of terminology seems to indicate that Madison sought only to deal with takings of actual property rather than what are now called "regulatory takings" or takings through excessive taxation.¹²⁰ Although both the House and Senate altered Madison's original language, there is nothing in the debates to suggest that the changes were intended to broaden the reach of the amendment. Rather, it seems that the changes were made for stylistic reasons. A year after the Bill of Rights was ratified, Madison himself noted that the effect of the Fifth Amendment was to commit the federal government to the principle that no property, "a man's land, or merchandize" could be taken "*directly* even for public use without indemnification to the owner."¹²¹

116. See Treanor, *supra* note 17, at 708.

117. See *id.*

118. See *id.* at 713-14.

119. 4 DHFCC, *supra* note 54, at 10.

120. Several commentators have argued that the "disproportionate impact" principle incorporated in the Takings Clause might be utilized to determine the constitutionality of both taxation and regulation. See, e.g., Richard Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOOD HALL L.J. 433, 437-38 (1982); see also FRED BOSSELMAN ET AL., THE TAKING ISSUE 236 (1973); Richard Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 360 (1983).

121. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON, *supra* note 58, at 266, 267.

In the years immediately following ratification of the Bill of Rights, courts repeatedly asserted that the Compensation Clause was intended to apply only to direct, physical takings by the national government. In 1832, in *Barron v. Baltimore*, the Supreme Court held that the Fifth Amendment did not apply to takings by state governments. 32 U.S. 243, 250 (1833). Writing for the majority, Chief Justice Marshall noted that while the case was one "of great importance," he did not think the question presented was "of much difficulty." *Id.* at 246. Prior to *Barron*, several state supreme courts took up the issue and all asserted that the Compensation Clause applied only to physical takings by the federal government. See *Enfield Toll Bridge Co. v. Conn. River Co.*, 7 Day 28, 52 (Conn. 1828) (Dagget, J., concurring).

III. THE COMPENSATION CLAUSE AND REGULATORY TAKINGS

The Compensation Clause, like the other provisions of the Bill of Rights, was drafted in response to Anti-Federalist fears about the extensive powers of the national government. It was designed to prevent a distant and potentially self-interested national government from using its powers to take the citizens' property to pursue its own ends.¹²² The fact that no one at the Philadelphia Convention ever suggested the necessity of a compensation clause applicable to either the states or the national government illustrates this point.¹²³ Moreover, although they had proposed over two hundred amendments, none of the state ratifying conventions demanded that such a clause be inserted into the text of the Constitution.¹²⁴

It is also important to note that the Compensation Clause was not about land use regulation or confiscation—at least at the outset. There was, after all, little evidence that anyone thought the government had thus far abused its power to confiscate private land. Neither the Revolutionary nor Confederation experience created any particular concern about the power of eminent domain.¹²⁵ Indeed, not even royal officials were accused of overstepping their bounds in this regard. As one modern commentator put it, “[W]hile the British were scoundrels in a thousand ways, they never abused eminent domain. They surely would have been accused of it if they had.”¹²⁶ It is also clear that the founding generation understood that the state governments had extensive

(suggesting that the Compensation Clause applied only to physical takings of property); *Rentthorp v. Bourg*, 4 Mart. 97, 145 (La. 1816) (holding that the Takings Clause applied only to the federal government); *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (holding that the Fifth Amendment did not apply to the states).

122. See Harrington, *supra* note 53, at 1297.

123. See McConnell, *supra* note 27, at 282-83.

124. See, e.g., Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 17 (1980) (“[E]minent domain was not high among the concerns of those debating the Bill of Rights.”); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 594 (1997) (“[W]hile there was a popular groundswell for a bill of rights, we must frankly conclude that there is no evidence that eminent domain limitations were given much attention.”).

125. See Stoebuck, *supra* note 124, at 594.

126. *Id.* (footnote omitted); see also Meidinger, *supra* note 124, at 17 (“Eminent domain was one prerogative the British had not been charged with abusing in the New World.”).

powers to impose all manner of regulations on the use and disposition of private property.¹²⁷ This included the imposition of affirmative use requirements, zoning rules, and restrictions on noxious uses and aesthetic regulations. Indeed, it appears that the states' extensive power to regulate private property was one of the least controversial aspects of the eighteenth century American legal regime.¹²⁸ Thus, while there might be an occasional debate about the necessity or effectiveness of a particular regulatory scheme, few went so far as to argue as a general matter that the states lacked the power to proscribe the ways in which an owner made use of his land. In short, the power to regulate land, like the power to take property for a public use, was considered inherent in the nature of government itself.

As a result, when it came to limiting the powers of the states, no one at the Philadelphia Convention proposed tampering with the states' power to regulate land. On the contrary, the delegates' greatest fear was that the states would devalue property holdings by emissions of paper money or debtor relief laws.¹²⁹ Consequently, they focused their efforts on ensuring that the constitutional text included provisions prohibiting the states from emitting paper money, passing tender laws, or impairing the obligation of contract.¹³⁰

It is only during the ratification process that the debate began to shift. That a strong central government would use its powers to abuse the citizenry became an article of faith among the Anti-Federalist opposition. More specifically, the fear that a distant and "aristocratical" government would take private property to support a standing army or some other public purpose meant that some

127. See *supra* notes 25-47 and accompanying text.

128. See *supra* notes 43-47 and accompanying text.

129. See McConnell, *supra* note 27, at 280-81 (stating that "many states had passed laws to relieve private debtors including ... laws requiring creditors to accept paper money ... were the specific evils that inspired the contract clause").

130. See U.S. CONST. art. I, § 10 ("No State shall ... coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any ... Law impairing the Obligation of Contracts"); see also Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 128, 128, 156 (Richard Beeman et al. eds., 1987) (discussing Federalist fears of paper money and debtor relief schemes).

protection against arbitrary takings became desirable.¹³¹ For his part, James Madison worried that the national government might become too responsive to democratic factions in spite of the institutional protections included in the constitutional text. He thus sought to include a compensation provision to ensure that a future landless majority would not easily deprive the propertied minority of its rights without payment.

In the final analysis, therefore, few expected the national government to engage in extensive physical takings of property because the national government was created to serve very limited ends.¹³² It also appears that almost no one expected that the national government would take upon itself the power to impose the same sort of regulatory restrictions on land use which the states had long been accustomed to exercising. After all, in urging ratification, Federalists repeatedly asserted that the government created under the new Constitution was one of enumerated powers. The national government would, it was said, operate at the level of interstate and international relations, limiting its sphere of activity exclusively to those places where the states had thus far been unsuccessful in achieving coordinated action. If the Federalists are to be taken at their word, there was no expectation that the national government would have the power to impose land use restrictions because such regulatory schemes were decidedly intrastate in nature. While many Anti-Federalists harbored suspicions about the consolidating tendencies of the new Constitution, they too would have rejected any idea that the national government would legitimately have the power to regulate land use within the states. For both Anti-Federalists and Federalists, therefore, it seems clear that almost no one believed the federal government would have the power to regulate land use and thereby engage in any sort of regulatory taking.

131. See AMAR, *supra* note 101, at 79.

132. See Treanor, *supra* note 17, at 708-09 ("Regardless of political belief, few initially felt that a just compensation requirement was a necessary restraint on a federal government that would have little occasion to take property"). In fact, the federal government seems not to have exerted the power to take land on its own until 1875. Until then, it relied on the states to condemn land and transfer title. See Stoebe, *supra* note 124, at 559 n.18; see also *Kohl v. United States*, 91 U.S. 367, 371-72 (1875) (holding that federal government had eminent domain powers).

It seems logical to assume, then, that in drafting and ratifying a Compensation Clause, the founding generation did not expect the clause to apply to so-called regulatory takings simply because no one believed that the national government would ever possess the power to engage in land use regulation. Indeed, to even assert that the Compensation Clause encompassed regulatory takings would have raised concerns that the national government's sphere of action was far more extensive than previously advertised. In such a case, one would have expected a far more vigorous debate over governmental power than actually took place. The Compensation Clause was relatively uncontroversial precisely because it was designed to clarify one small aspect of the powers of an otherwise very limited government.