

## Articles

# “Public Use” and the Original Understanding of the So-Called “Takings” Clause

by  
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[N]or shall private property be taken for public use, without just compensation . . . .

—U.S. Constitution, Amendment V

### Introduction

Over the years, both state and local governments have attempted to use the power of eminent domain to encourage economically desirable activity. These efforts include expropriations of property to allow for the construction of a wide array of economic facilities. Eminent domain has thus been used to acquire land for the building of manufacturing plants,<sup>1</sup> office complexes,<sup>2</sup> shopping centers,<sup>3</sup> and casinos.<sup>4</sup> In fact, eminent domain has been used to support almost every conceivable type of economic development project. Indeed, in one of the more extreme examples of takings for economic purposes, a California court once held that the City of Oakland might use the

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1. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (transfer of condemned land to build plant for General Motors).

2. *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 190 N.E.2d 402, (N.Y. 1963) (condemnation of private land by public authority for building of office complex and railroad station to be operated by private commercial entities).

3. *People ex rel. City of Urbana v. Paley*, 368 N.E.2d 915 (Ill. 1977) (transfer of land to private developer to build shopping center and commercial offices).

4. *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. App. Div. 1998) (rejecting condemnation for benefit of casino operator).

power of eminent domain to acquire and sell a National Football League franchise.<sup>5</sup>

Opposition to the use of eminent domain for economic development has become more widespread as the number and scope of such takings have expanded.<sup>6</sup> An increasing number of property owners and legal theorists have opposed takings for economic development on the grounds that they are not for a “public use” as that term is used in the Constitution’s so-called Takings Clause. In so doing, they argue that the term, “public use,” as contained in the Fifth Amendment was intended to operate as a substantive limit on the scope and nature of government takings. Thus, they urge courts to invalidate takings involving the transfer of property from one private party to another on the grounds that such takings are not for a “public use.”<sup>7</sup> Other commentators, recognizing that the “public use” doctrine has long been fraught with confusion, have put forth more creative arguments in opposition. They argue that economic expropriations raise problems of rent seeking or abuse of the legislative process, and they urge courts to apply a strict scrutiny analysis when the power of eminent domain is used to transfer property from one private party to another.<sup>8</sup>

At bottom, however, most of the debate over the use of eminent domain for economic development—and indeed, much of the debate about the use of eminent domain in general—revolves around the question of when courts are empowered to strike down statutes authorizing a particular taking. That is to say, much of the debate over the use of eminent domain for economic development is centered on the question of whether a taking is for a “public use” or whether it results in an arbitrary taking of property from one private individual simply to benefit another.

The problem with the various approaches to eminent domain is that they are based on a misconception about the nature of the power. Over the years, courts have often looked to the writings of the seventeenth century civil law theorists to find some basis for exercising judicial review of legislative expropriations. Nineteenth

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5. *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982).

6. *See, e.g.*, Dana Berliner & Scott Bullock, *Eminent Domain Abuses Unchecked*, WASH. TIMES, March 4, 2002, at A16 (detailing complaints about the use of eminent domain for economic development).

7. *See, e.g., id.*

8. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285 (2000); Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998) (arguing for a public choice approach); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978) (arguing for an economic analysis of public use).

century courts, in particular, relied on the works of Hugo Grotius, Samuel Pufendorf, and others, and asserted that the use of eminent domain was limited to cases of "public good" or "public necessity." The result has been the gradual incorporation of a "public use" requirement into the Fifth Amendment. Reliance on this public use requirement has created problems of its own, however, as courts and commentators have struggled to define precisely what is and is not a "public use."

The traditional commentators have been looking in the wrong place, however. As this article will show, the idea that courts had the power to supervise legislative expropriations would have been unfamiliar to the members of the Congress who drafted the so-called Takings Clause. On the contrary, the members of the founding generation generally understood that the power to take property for public use is reserved to the legislature alone and is a function of the principle of consent inherent in a representative government. For, in taking property, the legislature does not deprive an owner of his property against his will. Rather, it acts for the owner, giving his consent to the use of his property for some greater public purpose. In fact, the power of expropriation is akin to the power to tax. Both require the consent of the citizenry which makes a gift of a portion of its property for some public purpose. Indeed, when it comes to legislative expropriation, the term "taking" is a misnomer. The term "giving" is a more appropriate description.

The origins of the power of eminent domain are to be found in the long struggle for legislative supremacy which marked the history of relations between Crown and Parliament, and which culminated in the American Revolution. From a very early date, English law prevented the Crown from divesting a subject of title to property, even when necessary for a public use. Parliament alone had the power to expropriate land, and it did so exercising its right to consent on behalf of the estates of the realm. American political theorists drew on this legal heritage. In the colonial and revolutionary periods, Americans repeatedly declared that the power to expropriate private property for a public purpose rested in the legislature alone. More importantly, American legislatures repeatedly used their power of expropriation to effect all manner of social and economic engineering, frequently transferring property from one private entity to another where it was thought that the transfer would effect some greater economic purpose. Having vested their assemblies with the power to expropriate property for public use, therefore, American political and legal theory left little room for supervision by the judicial branch. For, to challenge the means by which legislative consent was given is to challenge the representative nature of the legislature itself.

The so-called “takings clause” of the Fifth Amendment incorporates this understanding of the power of expropriation. In drafting the clause, James Madison and the members of the first Congress drew upon the principle of legislative consent to ensure that private property would be safe from expropriation by the executive. At the same time, however, they did not attempt to limit the power of the legislature aside from the requirement that an owner receive some compensation when divested of his property. Beyond this limitation, the Congress—exercising its right to consent on behalf of the citizenry—might expropriate property on any terms it saw fit.

As a result, the U.S. Constitution simply does not contain a “takings clause” to the extent that such a clause is thought to be either a grant of power to expropriate property or a substantive limit. On the contrary, that which is commonly thought to be a takings clause is in fact nothing more than a compensation clause. In other words, the Fifth Amendment is not a grant of power to expropriate. Congress, as a representative body already possessed the power to give the citizenry’s consent to the expropriation of its property before the clause was drafted.

More importantly, the so-called “public use” limitation on takings is a contrivance of relatively recent origin. In using the term “public use” in the Fifth Amendment, the drafters did not intend to impose a substantive limit on congressional expropriations. Rather, they intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures). In essence, the drafters merely intended to ensure that compensation was given when a citizen was called upon to contribute more than his fair share to support the government. Thus, takings by expropriation required compensation, while takings by taxation would not. To reiterate, if read properly, the expropriation clause of the Fifth Amendment is nothing more than a compensation clause. Consequently, efforts to use the term “public use” to limit the power of Congress to expropriate land are illegitimate and are a misreading of the drafters’ intent.

This article will show that efforts to find a “public use” limitation on the power of expropriation are a relatively recent misreading of the constitutional history and text. These efforts stemmed from nineteenth century courts’ attempts to curtail what they saw as legislative overreaching in the area of eminent domain. It will begin by examining the civil law theories which form the basis of most modern judicial and academic commentary. Thereafter, it will demonstrate that the origins of eminent domain in the Anglo-American legal tradition are to be found in the theory of consent which forms the essence of representative government. It will then show that the members of the Founding Generation understood and

incorporated this theory of consent into the various constitutional provisions concerning eminent domain. Finally, it will argue that attempts to craft devices to encourage judicial oversight of legislative takings are without warrant in the historical record. It will conclude by showing that the term "public use" as used in the Fifth Amendment was meant to be descriptive, rather than proscriptive, and that the term was not intended to operate as a substantive limitation on Congress' power to expropriate property.

### I. The Civil Law Theory

The exact origins of the power of eminent domain remain something of a mystery. Some claim that the earliest exercise of the power to expropriate land for public use occurred when Israel's King Ahab took Naboth's vineyard,<sup>9</sup> while others argue that the power has been in use "since the days of the Romans."<sup>10</sup> Regardless of the date of its first use, however, the term, "eminent domain," (*dominium eminens*), appears to have been coined by Hugo Grotius in 1625, in his work, *De Jure Belli et Pacis*. According to Grotius,

the property of subjects belongs to the state under the right of eminent domain; in consequence the state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in case of direct need, which grants even to private citizens a measure of right over others' property, but also for the sake of the public advantage; and to the public advantage those very persons who formed the body politic should be considered as desiring that private advantage should yield. But, we

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9. See 1 Kings 21:1-15. Israel's King Ahab desired a vineyard owned by Naboth the Jezreelite. He offered Naboth his choice of either a new vineyard or "the worth of it in money." When Naboth refused to sell, Jezebel, Ahab's wife, conspired with others to put Naboth to death. The theory that this was the first taking by eminent domain was first put forth by Merlin de Douai, a French legal theorist of the nineteenth century. It appears that Douai cannot be correct, however, for if Ahab had such a power it would have been unnecessary to kill the property owner.

10. PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN 1-14 (Julius L. Sackman ed., 1997) [hereinafter NICHOLS]. While Justinian's *Institutes* make no provision for the exercise of such a power, there is some scattered evidence to suggest that compulsory takings existed in some form in Roman law. As one commentator has noted, "it is impossible to believe that the construction of the Roman roads, extending in a straight line from one end of the Empire to the other, or of the Roman aqueducts, was at the mercy of the owners of land through which they were to pass." J. Walter Jones, *Expropriation in Roman Law*, 45 L.Q. REV. 512, 521 (1929). See also Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL L. 1, 8 (1980) (claiming that "there is a good deal of evidence to indicate that the Romans took privately held property to further a variety of public purposes"); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972) (questioning the precise nature of takings under Roman law).

must add, when this happens, the state is bound to make good at public expense the damage to those who lose their property.<sup>11</sup>

Yet, while it is often said that the power of eminent domain is an “attribute of sovereignty,”<sup>12</sup> courts and commentators have disagreed on the origin of the government’s right to take property in the hands of private parties and apply that property to some public purpose. Two different theories have generally held sway. These might be called the “reserved rights” and “inherent powers” theories.

Grotius’ view that the state had an original and absolute ownership of all the property possessed by its individual members antecedent to their possession gave rise to the “reserved rights” theory of eminent domain. According to this theory, a citizen’s possession of property was dependent on a grant by the sovereign and his continued enjoyment of it was subject to an implied reservation that the state might retake the property at any time for a public purpose. In this view, an individual’s ownership of property is limited to a mere possessory right, at least with respect to the government.<sup>13</sup> The right to hold property is, therefore, subject to a tacit agreement between the citizen and the sovereign that the property might be reclaimed by the latter to meet public necessity.<sup>14</sup>

Although the reserved rights theory found its way into a number of nineteenth century court opinions,<sup>15</sup> it has largely proved

11. HUGO GROTIUS, 3 THE LAW OF WAR AND PEACE ch. 20, § 7, at 807 (Francis W. Kelsey trans., Oceana Publ’ns 1964). Grotius’ choice of terminology was not greeted with universal enthusiasm, however. Samuel Pufendorf criticized the use of the term, *dominium eminens*, as being more appropriate to refer to the subject’s power to use land within his control. Instead, Pufendorf suggested that *imperium eminens* was a more accurate expression of a sovereign’s power to take property. SAMUEL PUFENDORF, 1 DE JURE NATURAE ET GENTIUM, def. V, §§ 2, 6, at \*\*24-25, \*27 (C. & W. Oldfather trans., 1934) (1688). Van Bynkershoek agreed, as did Heineccius who suggested, however, that the term *dominium eminens* had come to be too firmly embedded in the literature to admit of any full scale assault. See CORNELIUS VAN BYNKERSHOEK, 2 QUAESTIONEM JURIS PUBLICI \*290-92 (Tenney Frank trans., 1930) (1737); JOHANN GOTTLIEB HEINECCIUS, 2 ELEMENTA JURIS NATURAE ET GENTIUM ch. 8 § 166 (George Turnbull trans., 1764).

12. *Metro. City Ry. v. Chicago W. Div. Ry.*, 87 Ill. 317 (1877).

13. NICHOLS *supra* note 10, § 1.13.

14. PUFENDORF, *supra* note 11, at \*27.

15. See, e.g., *Todd v. Austin*, 34 Conn. 78, 88 (1867) (“The right to take property for public use, or of eminent domain, is a *reserved* right attached to every man’s land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised.”); *Beekman v. Saratoga R.R. Co.*, 3 Paige Ch. 45, 73 (N.Y. 1831) (Eminent domain represents “the highest and most exact idea of property remaining in the government, or in the aggregate body of the People in their sovereign capacity, giving a right to resume possession of the property . . . whenever the public good requires it.”). See also *Shelton v. Shelton*, 83 S.E.2d 176 (S.C. 1954).

Escheat provisions in many state constitutions reflected this theory of reserved rights. See, e.g., N.Y. CONST. art. I, § 10 (repealed 1962) (“The people of the state, in their right

unsatisfactory to many. In America, the most obvious objection stemmed from considerations of republicanism: reservation of rights in the sovereign sounds too much like feudalism. As a New York court once observed, "[s]uch a doctrine is bringing the principles of the social system back to the slavish system of Hobbes, which, however plausible it may be in regard to land once held in absolute ownership by the sovereignty, and directly granted by it to individuals, is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments."<sup>16</sup>

The federal nature of America's unique political structure also posed difficulties for the theory of reserved rights. After all, two different sovereigns, state and national, could not both be vested with the ultimate title to land, which is the essence of the reserved right of eminent domain. More importantly, in the original thirteen colonies, grants of land, predated the founding of the national government in 1789, so there could be no tacit agreement giving it a power of eminent domain. As for states created in the nineteenth century, lands were often granted to inhabitants by the federal government long before the states came into being. How, then, could these new states rely on a reservation of rights antecedent to their own existence?<sup>17</sup>

Faced with these theoretical problems, many courts eventually rejected the theory of reserved rights and came to view eminent domain simply as an inherent right of sovereignty. The state's power to take land for public use came to be regarded as a power which inheres in the right of the state to govern the *polis*—which is to say, inherent in its "police powers"—and was not dependent on any pre-existing property right. According to this view, governments have the sovereign power to enact any regulation affecting persons or property located within their borders, subject only to such restrictions as might be imposed by their constitutions.<sup>18</sup>

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of sovereignty, possess the original and ultimate property in and to all lands within the jurisdiction of the state."). See also S.C. CONST. art. XIV, § 3; WIS. CONST. art. IX, § 3.

16. *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 58 (N.Y. 1837).

17. See, e.g., *New York, Housatonic & N. R.R. Co. v. Boston, Hartford & Erie R.R. Co.*, 36 Conn. 196 (1869); *State v. Severson*, 261 N.W. 469 (Minn. 1935); *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451 (1837); *Bloodgood*, 18 Wend. 9 (N.Y. 1837).

18. *Shoemaker v. United States*, 147 U.S. 282 (1892). In the case of both the state and federal governments, therefore, the power of eminent domain exists apart from any specific grant in their respective constitutions; for indeed, neither the federal nor the state constitutions contain any explicit grant. *New Orleans v. United States*, 35 U.S. 662 (1836); *Heyward v. New York*, 7 N.Y. 314 (1852); *City of Newport v. Newport Water Corp.*, 189 A. 843 (R.I. 1937). Nonetheless, in an effort to avoid the apparent arbitrariness of a doctrine which gives the appearance of making property rights insecure, courts have relied on a theory of implied consent slightly reminiscent of Locke. According to this theory,

### Defects in the Civil Law View

Although these two competing theories of eminent domain provide conceptual justification for the existence of the power, they suffer from the same defect. Both have the effect of making property rights insecure and wholly dependent on the will of the government. In essence, both start from the proposition that the sovereign has a superior right to property held by the citizen, with the result that the citizen's interest in property is less a title right than a mere possessory interest. If the proponents of the inherent powers or reserved rights view are correct, the citizen's continued enjoyment and possession of property is always subject to being extinguished by the sovereign without his consent. Even more important is the fact that both the inherent powers and reserved rights theories permit no real restraint on the sovereign's exercise of the power of eminent domain. Because both theories vest the ultimate right to dispose of property in the sovereign, the citizenry has no grounds for complaint when the sovereign takes property by eminent domain. This is the case whether the sovereign acts arbitrarily or not. Such a view would seem to be incompatible with traditional concepts of democracy and property rights.

Over the years, therefore, courts and commentators have attempted to counter the obvious harshness of this conclusion by imposing a "public purpose" limitation on the use of eminent domain. This limitation requires that government takings of private property be for a "public use," which has been variously defined as "a public good,"<sup>19</sup> "public benefit,"<sup>20</sup> or "public necessity."<sup>21</sup> At the same time, however, a great deal of judicial energy has since been expended attempting to establish when a particular taking is for a public purpose. What most have overlooked, however, is the fact that the so-called "public use" requirement is really a rather late innovation in the law of eminent domain and is found mainly in nineteenth and twentieth century American cases. In fact, none of the civil law writers were willing to go so far as to assert absolute limitations on the sovereign's prerogative powers.<sup>22</sup> Moreover, neither established practice nor doctrine limited the exercise of eminent domain to

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every member of civilized society is said to have consented to the government's right to take property when necessary to achieve an important public purpose. *Secombe v. R.R. Co.*, 90 U.S. 108 (1874); *Embury v. Connor*, 3 N.Y. 511 (1850); *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. 501 (Mass. 1836); *Livingston v. Mayor*, 8 Wend. 85 (N.Y. 1831). This theory has been criticized, however. *Garrison v. New York*, 88 U.S. 196 (1874).

19. *In re Forsstrom*, 38 P.2d 878 (Ariz. 1934).

20. *Filbin Corp. v. United States*, 265 F. 354 (E.D.S.C. 1820).

21. *Griffith v. S. Ry. Co.*, 131 S.E. 413 (N.C. 1926).

22. *See, e.g., GROTIUS, supra* note 11, at 385; *PUFENDORF, supra* note 11, at \*25 *BYNKERSHOEK, supra* note 11, at \*\*291-98.



purely public uses prior to the American Revolution.<sup>23</sup> On the contrary, both the colonial and confederation governments made extensive use of the power to expropriate property for all manner of social and economic ends, many of which involved the transfer of land from one private party to another.

In the early years of the Republic, judges often limited their scrutiny of legislative takings to ensuring that some form of compensation was available to those whose property had been expropriated.<sup>24</sup> This is most likely because the scale of most takings remained within the range already long practiced in both the colonial and confederation period.<sup>25</sup> However, the increase in industrialization in the early part of the nineteenth century led to an expansion of the

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23. Meidinger, *supra* note 10, at 16.

24. In the latter part of the eighteenth and early part of the nineteenth century, state court judges frequently used the principle of just compensation to restrain legislative takings. William Fisher, *Ideology, Religion and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 104 (1990). In most cases, courts simply relied on provisions already contained in the relevant state constitution. Where no explicit provision existed, however, courts did not hesitate to impose a compensation requirement out of a sense of "natural justice" or "equity." J.A.C. Grant, *The Higher Law Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71 (1931). The most famous example of this jurisprudence is found in Chancellor Kent's decision in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816). Here, Kent struck down a New York statute authorizing without compensation the diversion of a stream on plaintiff's property in spite of the fact that the state's constitution lacked a specific compensation requirement. *Id.* at 166. In so doing, Kent argued that requiring compensation was "a clear principle of natural equity" that was "adopted by all temperate and civilized governments, from a deep and universal sense of justice." *Id.* Kent's decision was followed through the years by a number of decisions invalidating a variety of state statutes for failing to provide compensation. *See, e.g.*, *People v. Platt*, 17 Johns. 195 (N.Y. 1819) (striking down criminal statute requiring dam owners to build or maintain a fish ladder); *Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. 1822) (act authorizing building of canal over turnpike road declared void for failure to provide compensation); *Piscataqua Bridge Co. v. N.H. Bridge Co.*, 7 N.H. 35 (1834) (striking down statute appropriating a bridge franchise without payment of compensation); *Parham v. The Justices*, 9 Ga. 341 (1851) (invalidating statute authorizing the taking of land for roads without payment of compensation). This was the case even in jurisdictions where the state constitution lacked a specific compensation provision. Even when they did uphold statutes, many courts still acknowledged the force of Kent's reliance on natural law. *See, e.g.*, *Sinnickson v. Johnson*, 17 N.J.L. 129 (N.J. 1839) (upholding statute but noting that the right to compensation was "a settled principle of universal law"); *Bonaparte v. Camden & Ambor R.R. Co.* 3 F. Cas. 821 (C.C.D. N.J. 1830) (No. 1617) (requirement of compensation was a "universal principle"); *Petition of Mt. Washington Road Co.*, 35 N.H. 134 (1857); *Young v. McKenzie*, 3 Ga. 31, 44 (1847) (asserting that the Fifth Amendment "does not create or declare any *new principle of restriction* . . . but simply recognized the existence of a great common law principle founded in natural justice") (italics in original); *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248 (1848).

25. Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205-07 (1978) (discussing the limited use of eminent domain for economic development in the early Republic).

role of eminent domain in the economy. The mill acts, which throughout most of the colonial period had been used to encourage the building of grist mills, were now used to transfer property for the building of saw mills, cotton mills, pulp mills, and foundries. What had once been statutes for providing a public convenience—a place where “all the inhabitants of the neighborhood should be entitled to have their grinding done in turn and at fixed rates”<sup>26</sup>—had been redirected to what appeared to be increasingly private interests.<sup>27</sup> In time, therefore, the use of eminent domain to accomplish a wide range of purposes gave rise to concerns about legislative overreaching.<sup>28</sup> Fearful that legislatures were overstepping their bounds, later judges began to rely on the concept of “public use” to impose limits on legislative power. After all, merely requiring compensation did little to restrain takings of land for the building of railroads, mills, and other economic development projects. Judges thus sought to breathe life into the term, “public use,” thereby injecting substantive content into a phrase that most people in the founding generation thought to be merely descriptive. In so doing, however, courts wound up altering the focus of eminent domain. Lacking any warrant in the historical record requiring that takings be for an actual public use, courts began to rely on natural law theories as espoused by writers such as Grotius, Vattel, and Pufendorf to support their desired restrictions.

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26. *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 15 (N.Y. 1837).

27. Meidinger, *supra* note 10, at 23.

28. This expansion of the use of eminent domain was first challenged in 1832, when a group of New Jersey property owners contested the legislature’s right to take their land to build mills along the Delaware River. In *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 729 (1832), the New Jersey chancery court rejected the challenge, noting that “[t]he ever varying condition of society is constantly presenting new objects of public importance and utility.” Consequently, “what shall be considered a public use or benefit, must depend somewhat on the situation and wants of the community for the time being.” In essence, to the *Scudder* court the overall benefits to the community from the increased economic activity provided adequate justification for the legislature’s action. Courts in other states followed the reasoning of *Scudder* and advanced the principle that a taking which contributed to the overall benefit of the community was permissible use of the eminent domain power. See, e.g., *Olmstead v. Camp*, 33 Conn. 532 (1866); *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467 (Mass. 1832); *Great Falls Mfg. Co. v. Fernald*, 47 N.H. 444 (1867); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 73 (N.Y. 1831). The result was the widespread use of statutes designed to delegate the state’s eminent domain power to private interests for the creation of a wide variety of manufacturing projects designed to achieve desirable economic ends. The ruling in *Scudder* and other cases gave some manufacturing enterprises the status of public utilities in order to allow them to expropriate some of America’s choicest water power sites. At the same time, however, legislatures anxious to attract private investment did not attempt to regulate these enterprises as public utilities. Manufacturers thus enjoyed the best of both worlds. Harry N. Scheiber, Comment, *Public Rights and the Rule of American Law in American Legal History*, 71 Cal. L. Rev. 217, 225 (1984).

The earliest statement of this view is found in a concurring opinion by Senator Tracy in *Bloodgood v. Mohawk & Hudson Railroad Co.*<sup>29</sup> Concerned about the power of the legislature to authorize almost any taking for an economic purpose, Tracy questioned whether any limit might be put on the government's power to expropriate property:

When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property?<sup>30</sup>

Although he was less certain of the force of his concerns on takings by state legislatures by virtue of their police powers, Tracy was sure that the Fifth Amendment imposed a requirement that expropriations by the federal government be for a direct public use. In his view, the federal constitution required "a direct use by the government itself through its officers, and for the purposes of the government as a political being . . . and it may be doubted whether the national government has the power by virtue of sovereignty, to take private property, without the consent of its owner, for the purpose of dedicating it to a popular public use, by which is meant a use by the people generally as individual beings."<sup>31</sup> Indeed, Tracy's view of public use in the federal context was so narrow that he did not contemplate the power to take land for the building of a highway.<sup>32</sup>

For Tracy, the use of the phrase "public use" in the Fifth Amendment was "designed to be as well a limitation as a definition of the right of the [federal government] as sovereign . . . to interfere with the otherwise absolute right of the citizen to the undisturbed possession and enjoyment of his own property."<sup>33</sup> The expropriation clause of the Fifth Amendment could only be construed "as equivalent to a constitutional declaration, that private property without the consent of the owner, shall be taken only for the public use," by which he meant "*direct* possession, occupation and enjoyment by the public."<sup>34</sup> Tracy did not cite any authority for this proposition, however. Instead, he simply assumed that the drafters of the Fifth Amendment consciously intended to take the law of expropriation much farther than the civilians ever dared. In other

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29. *Bloodgood*, 18 Wend. at 56-62 (Tracy, J., concurring).

30. *Id.* at 60.

31. *Id.* at 59.

32. *Id.*

33. *Id.*

34. *Id.* (italics in original).

words, Tracy's view was based on the assumption that in drafting the Fifth Amendment, the first Congress intended to make a bold new statement of property rights.

Tracy's opinion in *Bloodgood* marked the start of a long struggle to define the precise limits of the power of eminent domain. Throughout the nineteenth and twentieth centuries, American courts came to accept the view that the power of eminent domain rested on the civil law doctrines of inherent and reserved rights, and as a result, were left with the problem of finding some means by which the legislatures' ability to expropriate land for economic development schemes might be constrained. The so-called public use doctrine was settled upon as the primary means by which that restraint might be imposed. Much of this effort was wasted, however, as no clear rule distinguishing "public" from "private" takings has ever emerged. Moreover, the courts themselves often disagreed as to the proper standard. Some courts adopted a quite narrow view of public use, requiring that there be a direct "use by the public," while others took a broader view and allowed expropriations of property wherever there was a "public advantage" or "benefit."<sup>35</sup> Consequently, by the beginning of the twentieth century, the public use doctrine was "in a shambles" so that predictability of result was impossible.<sup>36</sup> The "use by the public" standard competed with the broader "public advantage" rule leaving courts and commentators in hopeless confusion about the correct state of the law. This was particularly true where the proposed condemnation was undertaken for the immediate benefit of a private party.<sup>37</sup> Some courts rejected private condemnations unless the public had the right to use or enjoy the appropriated property.<sup>38</sup> Others, adhering to the public advantage test, approved condemnations for private enterprise where the

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35. Meidinger, *supra* note 10, at 41-42. See, e.g., Philip Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 618-24 (1940) (detailing "evasions" of the narrow view of public use limitations on eminent domain).

36. Berger, *supra* note 8, at 209.

37. Cf. *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 178 P. 150 (Cal. Ct. App. 1918) (invalidating condemnation for right of way to build irrigation ditch to privately owned land) and *Nash v. Clark*, 7 P. 371 (Utah 1904), *aff'd*, 198 U.S. 361 (1905) (upholding condemnation to create right of way for irrigation ditch to privately owned parcel).

38. See, e.g., *Gravelly Ford*, 178 P. at 153.

There can be no question as to the position of our Supreme Court upon this question. It has consistently held that "public use" means "use by the public," and that to make a use public a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken.

*Id.*

proposed improvement would "promote the productive power of all citizens."<sup>39</sup>

In fact, however, the difficulty the courts face in attempting to define the limits of eminent domain stems from the fact that they have misconstrued the origins of the power of expropriation. The desire to right perceived injustices in the use of eminent domain for economic development led early courts to use civil law doctrines in an effort to restrain what they saw as legislative overreaching. Thus, nineteenth century courts seized on civil law concepts of "public use" in an effort to limit legislative expropriations. These courts overlooked the fact that the civilians' attempts to limit the sovereign's power of eminent domain were mere contrivances designed to constrain a power which they ultimately recognized had no limits. After all, the civilian concept of eminent domain arose in the context of unlimited sovereignty, one outcome of which is the principle that the king could do no wrong. Thus, the civil law writers' discussions concerning public use were mere admonitions, for they recognized that the king was immune from challenge on this point: In the final analysis, the king might take property for a good purpose, or no purpose at all. No action would lie against the king and no legal right to compensation would accrue.

As a result, while the public use requirement has a certain intellectual appeal, it is a doctrine of quite recent origin and was confected in an attempt to avoid the logical implications of the two civil law theories of eminent domain. Lacking any coherent basis for distinguishing between "public" and "private" uses, modern courts have left confusion in their wake; for, in attempting to manufacture limitations on the civil law power of eminent domain, American courts have tried to fit the square peg into the round hole.

## II. A Consent Theory of Eminent Domain

It is important to note that while civilians, such as Grotius, Pufendorf, and Vattel, wrote extensively about the power of eminent

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39. See, e.g., *Jacobs v. Clearview Water Supply Co.*, 69 A. 870, 872 (Pa. 1908).

It is not essential that the whole community, or any considerable portion thereof, should directly enjoy or participate in an improvement, to make the use public. If the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public. The building of reservoirs for the storage of water, and the laying of mains for the purpose of supplying and transporting water and water power for commercial and manufacturing purposes, would tend to increase the industrial enterprises and promote the productive power of all citizens who desire to avail themselves of water or water power for these purposes in that community.

*Id.* (internal quotations omitted).

domain, there is little evidence that their writings had any significant impact on English practice. On the contrary, the power to take land or other property for public use appears to have existed in England long before Grotius ever coined the term, "eminent domain."<sup>40</sup> In fact, a form of compulsory taking was a feature of English law at least as early as the sixteenth century, and its origin and exercise appear wholly unrelated to the institution described by the civilians. Indeed, the rather unique development of takings in England is a reminder of the danger inherent in assuming there must always be a connection when similar rules exist in successive legal regimes. For, in point of fact, the power of eminent domain did not exist at common law. Relying on the Magna Carta's injunction that no man be deprived of his freehold except by the lawful judgment of his peers,<sup>41</sup> Blackstone asserted that the Crown had no inherent power to take land, even for a public purpose:

So great . . . is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain it may be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights.<sup>42</sup>

Strictly speaking, therefore, the Magna Carta prevented the operation of any doctrine akin to Grotius' description of eminent domain. The English king simply had no power to take private property without compensation, even when the taking was for public use.

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40. In fact, the term, "eminent domain," was unknown to the common law, and neither the colonial charters nor the early state constitutions made use of it. *George v. Consol. Lighting Co.*, 89 A. 635, 637 (Vt. 1914). As a result, early American cases do not utilize the phrase, and it is not until the second decade of the nineteenth century that courts or commentators use the term "eminent domain" with any regularity. *See, e.g., In re Wellington*, 16 Pick. 87 (Mass. 1834) (referring to "that sovereign power over all property, inherent in all governments, sometimes called the right of *eminent domain*").

41. Magna Carta, 1215, c. 39 ("No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, or send upon him, except by the legal judgment of his peers or by the law of the land.").

42. 1 WILLIAM BLACKSTONE, COMMENTARIES \*139.

### A. Prerogative Takings

As with all rules, however, there are bound to be exceptions, and the one stated by Blackstone had several. In certain limited instances, the king had the power to take private property without compensation or consent where necessary to defend the realm or where he was thought to have some special property right. These takings had their origins in the period before Parliament achieved its ascendancy, and should more properly be seen as exercises of the king's prerogative rather than takings by eminent domain. The prerogative takings fall into two categories. In the first were takings justified by the doctrine of necessity. The second encompassed takings where the Crown was thought to have a superior title.

Takings by necessity usually arose in matters of defense. The Crown had long possessed the power to enter upon land to erect protections against foreign invasion or incursions of the sea. Such intrusions were grounded on the principle that "the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted."<sup>43</sup> The king might, therefore, erect bulwarks and other fortifications on private land, tear down houses in the suburbs of a city, or dig in private land for saltpetre to make gunfire, if necessary to wage war.<sup>44</sup> Necessity also justified the king in razing houses to prevent the spread of fire,<sup>45</sup> or building walls or dikes to protect lands from imminent flooding.<sup>46</sup> The king also had the power to erect beacons or lighthouses on private property to warn against the approach of the enemy and to guide vessels at sea.<sup>47</sup> In essence, the prerogative enabled the king to act in the public interest and without making compensation to private parties for property taken or destroyed. In so doing, however, the king made *use* of a subject's property but did not necessarily take title in fee simple (or retake title under a "reservation of rights" theory). The subject was still considered the owner of the soils. Although modern American jurisprudence might consider such intrusions to be takings sufficient to require the payment of compensation, English law did not.

The Crown might also take property by virtue of its prerogative in ways that did not implicate the doctrine of necessity. In this second class of takings, the king was said to have a superior property right in

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43. *Isle of Ely*, 77 Eng. Rep. 1139, 1139 (K.B. 1609).

44. *The King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294, 1295 (K.B. 1606).

45. *Id.*

46. *Isle of Ely*, 77 Eng. Rep. at 1141. See also HENRY E. MILLS & AUGUSTUS L. ABBOTT, *MILLS ON THE LAW OF EMINENT DOMAIN* § 4 (2d ed. 1888) (discussing takings by virtue of "overruling necessity").

47. 1 WILLIAM BLACKSTONE COMMENTARIES \*265. See also An act concerning Sea Marks and Mariners, 8 Eliz., c. 13, § 2 (1565) (Eng.).

the objects seized. Thus, the Crown had a right to all royal fish (whales and sturgeon), abandoned shipwrecks, waifs (goods stolen and thrown away by a thief in his flight), estrays (wandering animals whose ownership is unknown), and treasure trove (goods unclaimed by the owner).<sup>48</sup> Compensation was not required for the taking of these categories of property because they were considered *bona vacantia*, or goods in which no one else could claim a property right. The king also had title to all gold and silver found in the ground so that he might have metal to produce coin for circulation.<sup>49</sup>

Yet, while they might be extensive, the Crown's prerogatives never extended to the right to take property by eminent domain. Although the king might enter upon, take, or destroy land or tenements out of necessity, he could never take title to them, or do any act "tend[ing] to the disinheritance of the subject."<sup>50</sup> In those instances where the king took possession of property from a subject, his title was considered superior to that of the owner on whose lands the goods were found.<sup>51</sup>

## B. Parliamentary Takings

The power to take land for a public purpose did not become a matter of great concern until the middle part of the seventeenth century. After all, until this point in its history, England's government remained relatively small, and its need for public works rather limited. The nation's economy was largely agricultural, and thus the government did not envision a vast expanse of internal improvements beyond such as were necessary for defense and basic communication. Hence, roads, sewers, waterworks, and fortifications against the sea or foreign enemies were the primary focus of land acquisition policy.

From a very early date, however, it was clear that Parliament alone could divest an owner of his property. The first recorded exercise of the power to expropriate property appears to have been a statute of 1421, in which Parliament declared the road and bridges running between Abingdon and Dorchester to be common highways, and authorized the inhabitants of the area to take gravel, trees, or loam for the repair of the structures along the way.<sup>52</sup> Later statutes

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48. 1 WILLIAM BLACKSTONE COMMENTARIES \*280-89.

49. *Id.* at \*284-85.

50. The King's Prerogative in Saltpetre, 77 Eng. Rep. 1294, 1295 (K.B. 1606). *See also* SIR EDWARD COKE, 2 INSTITUTES OF THE LAWS OF ENGLAND \*34-35 (1794).

51. Compensation was not required, for no owner had been deprived of a property interest.

52. 9 Hen. 5, St. 2, c. 11 (1421) (Eng.). In particular, the Statute of Sewers of 1427, which granted certain commissioners the power to take land for reconstructing drainage systems, is often argued to be the first example of eminent domain in English law. 6 Hen.



allowed condemnation for navigation improvements and sewers. For example, in 1544, the City of London was authorized to take private property for the erection of a public water system,<sup>53</sup> while a statute of 1514 authorized the City of Canterbury to make improvements along the river, but required that anyone whose mill, bridge or dam might be damaged or removed to be "reasonably satisfied."<sup>54</sup> Similarly, a statute of 1531 allowed commissioners of sewers to take wood or timber from private property to repair seawalls and erect sewers, provided that the owners be paid a reasonable price to be determined by the commissioners.<sup>55</sup>

The increasing urbanization which marked the progress of the seventeenth and eighteenth centuries resulted in the need for more sophisticated public facilities. Parliament responded with a series of statutes authorizing condemnation for roads,<sup>56</sup> bridges,<sup>57</sup> fortifications,<sup>58</sup> navigation improvements,<sup>59</sup> and drainage projects.<sup>60</sup>

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6, c. 5 (1427). See, e.g., William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 565-67 (1972). However, this statute seems more an attempt to aid in the king's prerogative to protect against incursions against the sea rather than an attempt to take lands for public use. Although it permits the building of new trenches and dikes "as often and where shall be needful," it notes the imminent danger of destruction by the sea, and recites the Crown's fear "that much more Hurt within a short time will happen, unless some speedy Remedy be provided." The original statute was for ten years, but was renewed on several occasions. See Act for Commission of Sewers, 18 Hen. 6, c. 10 (1439) (Eng.); 23 Hen. 6, c. 8 (1444-45) (Eng.); Act for Commission of Sewers, 12 Edw. 4, c. 6 (1472) (Eng.); Act for Commission of Sewers, 4 Hen. 7, c. 1 (1487) (Eng.); Act for Commission of Sewers, 6 Hen. 8, c. 10 (1514) (Eng.). Similarly, a statute of 1512 allowed the taking of lands along the Cornish coast for the building of fortifications, but it specifically cites the danger of French invasion. Act concerning the Making of Bulwarks at the Seaside, 4 Hen. 8, c. 1 (1512) (Eng.). Neither of these early statutes provided for compensation for the lands taken or used. A similar statute was enacted a few years later, permitting the mayor and bailiffs of Exeter to clear the River Exe, provided that they "shall pay to the Owners and Farmers of so much ground as they shall dig, the Rate of twenty Years Purchase, or so much as shall be adjudged by the Justices of the Assize in the County of Devon." Act concerning Amending the River and Port of Exeter, 31 Hen. 8, c. 4 (1539) (Eng.).

53. 2 Kent 340.

54. Act for Cleaning the River of Canterbury, 6 Hen. 8, c. 17 (1514) (Eng.).

55. Bill of Sewers with a New Proviso, 23 Hen. 8 c. 5 (1531) (Eng.).

56. Act for Enlarging Common Highways, 8 & 9 Will. 3, c. 16 (1697) (Eng.).

57. 14 Geo. 2, c. 33, § 1 (1741) (Eng.); 12 Geo. 1, c. 36 (1725) (Eng.); 1 Geo. 2, c. 18 (1728) (Eng.); 9 Geo. 2, c. 29 (1736) (Eng.); 12 Geo. 2, c. 33 (1739) (Eng.); 13 Geo. 2, c. 16 (1740) (Eng.); 23 Geo. 2, c. 37 (1750) (Eng.).

58. 7 Ann., c. 26 (1708) (Eng.); 31 Geo. 2, c. 39 (1758) (Eng.); 32 Geo. 2, c. 30 (1759) (Eng.); 33 Geo. 2, c. 11 (1759) (Eng.).

59. 6 Hen. 8, c. 17 (1514) (Eng.) (clearing mills and obstructions from Canterbury to the sea); 31 Hen. 8, c. 4 (1539) (Eng.) (removing dams and weirs on the River Exe); 7 Jam. 1, c. 19 (1609) (Eng.) (building Exeter weir).

60. These acts differed slightly from earlier statutes in that the drainage projects at issue appeared to have been undertaken for economic development, rather than to abate

These statutes followed a similar formula: A government official was authorized to survey property needed for the prospective improvement.<sup>61</sup> Thereafter, the statute would often—but not always—set out some mechanism by which the landowner would receive compensation for his loss.<sup>62</sup>

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an incursion of the sea. Parliament, therefore, set forth a means of providing compensation, a feature which was absent from legislation designed to assist the prerogative. *See, e.g.*, 16 & 17 Car. 2, c. 11 (1664-65) (Eng.) (draining Deeping Fen) (reciting the “great profitt that would arise to all persons concerned and to the Commonwealth in generall if the same might be drayned”). *See also* 15 Car. 2, c. 17 (1663) (Eng.) (Bedford Levell); 21 Geo. 2, c. 18 (1748) (Eng.); 2 Geo. 3, c. 32 (1762) (Eng.) (Lincoln Fens).

61. It appears, however, that when it came to erecting public improvements, Parliament did not always divest the owners of title. For example, in the 1421 statute noted above, Parliament specifically decreed that the Abbot of Abingdon would retain all the “Liberties and Franchises” which he had before in the “said Road, Soil, and Water, and also all the Fishery in the Water beneath the said Bridges, and in the Ditches aforesaid for ever.” 9 Hen. 5, St. 2, c. 11 (1421) (Eng.). For example, most road statutes made a distinction between the taking of the right to ground rents and the taking of the fee, so that, in time, it could be said that “in a highway the king has nothing except the passage for himself and his people, but that the freehold, and all the profits, as trees, &c., appertain to the lord of the soil.” HUMPHRY W. WOOLRYCH, *A TREATISE ON THE LAW OF WAYS* 4 (1834). *See also* *Goodtitle v. Alker*, 1 Burr. 133, 143. Earlier treatise writers agree on this point. *See* WILLIAM STYLE, *REGESTUM PRACTICALE, OR, THE ACCOMPLISH'D ATTORNEY* 256 (1657) (“He that hath the Land on both sides of the Highway, hath the property of the soils of the Highway in him, although the King hath the priviledge for his people to pass through it at their pleasures.”); WILLIAM NOY, *THE PRINCIPAL GROUNDS OR MAXIMS WITH AN ANALYSIS OF THE LAWES OF ENGLAND* (Fred B. Rothman & Co. 1980) (1641) (“In the king’s highway the king has only passage for himself and his people; and the freehold and all the profits are in the lord of the soil, as they are presented at the leet.”). Thus, road acts passed during latter part of the seventeenth and early part of the eighteenth century provided that “Recompence” be made “to the Owners and others interested in the said Ground Rent or Charge . . . for their Interest . . . not exceeding Five & twenty Yeares Purchase.” Upon payment of these sums, the “Interest of the said Persons *in the said Ground-Rent or Charge* shall be for ever divested out of them.” 8 & 9 Will. 3, c. 16 (1696-1697) (Eng.) (italics added). Consequently, it appears that while Parliament might have possessed the power to divest owners of land absolutely, it retained a healthy aversion to doing so unless absolutely necessary.

62. The payment of compensation was never an absolute requirement of takings by statute, although Parliament usually ensured that the owner was compensated in some way for his loss. While most statutes authorizing takings provided that an owner would be compensated for lands taken from him, a landowner might be without a remedy where Parliament failed to specify a right to compensation. *See, e.g.*, 1 NICHOLS, *supra* note 10, § 1.22[1]. (“[I]t must be remembered that even in England, if an injury to property is expressly authorized by act of Parliament, the courts of justice can give no redress, no matter how grossly the provisions of the Magna Carta have been violated.”). In most cases, Parliament provided that the amount be determined by appraisers or by a jury. The earliest method of redress lay in the use of the writ *ad quod damnum*. This writ issued out of the chancery and was directed to the sheriff of the county to summon a jury to inquire whether it would be to the damage of the king or any other person to grant a liberty or

### C. The Need for Parliamentary Consent

By the time of the American Revolution, therefore, it had long been established that the taking of land for public purposes was a power that could be exercised by Parliament alone. In this principle one finds the most important distinction between the use of eminent domain in England and the kind of takings described by Grotius and the civilians. The civil law writers' belief that the sovereign retained the right to take back lands or property granted to the subject had very little currency in English law, at least after the Magna Carta, and certainly none at all after the Glorious Revolution. Thus, while it is clear that Parliamentary supremacy was not a universally acknowledged fact until the fall of the Stuarts,<sup>63</sup> there is little evidence that the Crown ever claimed the right to seize property belonging to the subject on basis of an implied reservation of title. Moreover, while the exercise of the prerogative in the creation of fortifications and defenses appears to have some basis in an inherent rights theory, any pretense that the prerogative was unlimited would have been contradicted by the express terms of the Magna Carta and the centuries of practice which followed. Simply put, the power of eminent domain described by Grotius and others would have been an alien concept to English courts or legal commentators.

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franchise. Beginning about the middle of the seventeenth century, it was used to determine the amount of compensation due an owner of property when a road or highway was built over his land. By use of the writ, the owner sought to have a jury determine the damage to him of land taken for public use. *See, e.g.*, 14 Car. 2, c. 6 (1662) (Eng.). Some later statutes prescribe a similar procedure without specific mention of the precise writ. *See* 8 & 9 Will. 3, c. 16 (1696-1697) (Eng.). *See also Ex parte Armitage*, 27 Eng. Rep. 199 (K.B. 1756); *Isle of Ely*, 77 Eng. Rep. 1139 (1606); *The King v. Warde*, 79 Eng. Rep. 832 (K.B. 1632). In time, the use of the writ declined as it was thought too fraught with difficulty and expense. Instead, most later statutes allowed the taking of private property upon payment of compensation determined by appraisers appointed by the judges of the assizes. *See, e.g.*, 7 Jam., c. 19, § 3 (1609) (Eng.) (providing that payment for damages be offered by the corporation, with a right of appeal to the assizes in the event the parties cannot reach agreement on the amount). Parliament often took private property without payment, however. In the road acts, the legislature authorized the surveyors of roads to enter upon land and take gravel or other soils to repair the king's highways. Such takings were to be made "without Licence, Controllement, or Empeachment of the Owners" of the lands from which the material was taken. 9 Hen. 5, c. St. 2, c. 11 (1421) (Eng.) (authorizing taking of clay, gravel, or trees); 5 Eliz., c. 13 (1562-63) (Eng.) (permitting taking of gravel from nearby quarries or lands); 14 Car. 2, c. 6 (1662) (Eng.) (authorizing taking of gravels, etc.).

63. The seventeenth century was marked by a long struggle between Crown and Parliament over the king's right to govern without parliamentary consent. The struggle came to a head in the Civil War, and was then ultimately concluded by the Glorious Revolution. J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 5-6 (1966).

It appears instead that the power to expropriate property in England is best understood as being a function of the theory of consent inherent in a representative government. That is to say, the power to take property for public use resides in the legislature, and not the executive, because such takings require the consent of the owner and that consent can only be given directly or through his legal representatives. In this respect, takings by eminent domain are on the same footing as takings through taxation. Just as the sovereign lacks the power to levy taxes without consent of the legislature, so, too, does it lack the power to take property from a subject without similar consent.

The principle of consent was well established in English law even before the Civil War. Parliament itself had its origins in the medieval tradition of baronial counsel and consent, which was based on the "feudal idea that [the magnates] could speak for their tenants-in-chief, who could in turn speak for their tenants, and so on."<sup>64</sup> By the middle of the fourteenth century, consultation and participation in law-making had been extended from the earls and barons to representatives of the counties and towns.<sup>65</sup> These representatives were regarded as "having full power (*plena potestas*) to bind their communities to whatever decisions were made in Parliament, which were consequently regarded as being made by 'common consent.'" It was thus assumed that "the consent of every individual within each community was merged in the consent of that community, and that the common consent of every community was merged in the common consent of the whole community of England."<sup>66</sup> Through a principle of "virtual representation," all members of the community were said to have consented to whatever had been done by the king, lords and commons gathered in Parliament.<sup>67</sup>

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64. JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT* 28 (1999).

65. *Id.* at 29.

66. *Id.*

67. The medieval and renaissance English concept of representation thus differed from more modern conceptions of representative government in that members of the Commons were said to give consent "on behalf of those *for* whom, rather than *by* whom, they were sent." *Id.* at 69. They were supposedly elected for their superior wisdom, and were to be guided "by their own judgments, after full discussion in Parliament, rather than by the preferences of those they represented." *Id.* Years later, Edmund Burke advanced this idea when writing to his British constituents in 1774. Parliament was not "a *congress* of ambassadors from different and hostile interests, against other agents and advocates; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole." EDMUND BURKE, *SPEECH AT THE CONCLUSION OF THE POLL (1774)*, in 2 *THE WORKS OF EDMUND BURKE* 12-13 (1865-71). Sir William Blackstone concurred, and asserted that:

every member [of the Commons], though chosen by one particular district, when elected and returned serves for the whole realm[,] . . . [f]or the end of his coming

The Magna Carta's prohibitions against the taking of property without due process of law meant that the king was forced to treat with Parliament over the grants and taxes necessary to fund his adventures and maintain his household. As a result, Sir John Fortescue, (c. 1395-1477) Chief Justice of England and sometime Lord Chancellor, was able to argue that the king could neither impose taxes on his subjects "nor change their laws, nor make new ones, without the concession or assent of his whole realm expressed in his parliament."<sup>68</sup> For Fortescue and later thinkers, the idea of consent was wrapped up in the idea that in Parliament, "everie Englishman is entended to bee there present . . . [a]nd the consent of Parliament is taken to be everie mans consent."<sup>69</sup> Consequently, Parliament's decision to impose a tax or to take property from a subject was made with the consent of all the realm.<sup>70</sup>

As a result, "[t]he fiction that the consent of Parliament was tantamount to the consent of every subject meant that property rights could be transferred or altered by the King in Parliament, but not by the King alone."<sup>71</sup> In 1533, Chief Justice Montague justified Parliament's powers in this regard by noting that "when a gift is made by Parliament, every person in the realm is privy to it, and assents to it, but yet the thing shall pass from him that has the most right and authority to give it."<sup>72</sup> There was apparently little fear that Parliament would abuse its powers in this regard because property interests were well-represented within its ranks. As between king and Parliament, the latter was thought "fittest for the preservation of that

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thither is not particular, but general; not barely to advantage his constituents, but the *common* wealth." Therefore, a representative "is not bound . . . to consult with, or take the advice, of his constituents upon any particular point, unless he himself thinks it proper or prudent to do so.

1 WILLIAM BLACKSTONE COMMENTARIES \*159.

68. SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 87 (S.B. Chrimes ed. & trans., 1949).

69. SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM* 49 (L. Alston ed., 1906) (1583).

70. To be sure, the idea that Parliament represented every man seems odd to readers steeped in modern theories of representation. Indeed, it became a prime point of contention between the American colonists and the British government in the years leading to the American Revolution. See, e.g., GORDON S. WOOD, *REPRESENTATION IN THE AMERICAN REVOLUTION* 2-12 (1969) (describing American objections to the theory of virtual representation). Yet, it is likely that the members of the early parliaments were a "reasonable representation of the 'political nation,'" because they were largely composed of that body of landowners who might be expected to take part in public affairs and whose assets would most likely be called upon to meet any tax, tallage, or taking. Goldsworthy, *supra* note 64, at 69. As a result, the principle that takings of property required the "common consent" of the realm obtained in Parliament was "almost universally accepted" by the middle part of the fifteenth century. *Id.*

71. *Id.*

72. *Wimbish v. Tailbois*, 75 Eng. Rep. 63, 95 (K.B. 1533).

fundamental propriety which the subject has in his lands and goods, because each subject's vote is included in whatsoever is there done."<sup>73</sup>

Moreover, the assumption that every subject was represented in Parliament gave rise to the doctrine of infallibility with respect to Parliamentary enactments. In advancing this theory, Sir John Fortescue observed that rules enacted by the king alone might be corrupted by selfishness or carelessness:

But the statutes of England cannot so arise, since they are made not only by the prince's will, but also by the assent of the whole realm, so they cannot be injurious to the people nor fail to secure their advantage. Furthermore, it must be supposed that they are necessarily replete with prudence and wisdom, since they are promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men . . . with such solemnity and care.<sup>74</sup>

Not only does this mean that judges have no power to void a statute,<sup>75</sup> it also meant that the king in Parliament was omniscient and might legislate over any matter that might come before it.<sup>76</sup> Indeed, as Christopher St. German observed, Parliament "has an absolute power as to the possession of all temporal things within this realm, in whose hands soever they be . . . to take them from one man, and give them to another without any cause of consideration, that it binds the law of conscience."<sup>77</sup>

And, while royalists often espoused a more limited role for Parliament than that contended for by Fortescue and others, the long struggle in the seventeenth century over the Crown's right to levy taxes without parliamentary consent established the principle that no man's property could be taken for a public purpose in the absence of consent by his representatives. Thus, in delivering the judgment in the Ship Money Case in 1637, Sir George Croke declared that "[t]he common law of England sets a freedom in the subjects in respect of

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73. S.R. GARDINER, *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION* 114 (3d ed. 1906).

74. FORTESCUE, *supra* note 68, at 41. Fortescue did recognize, however, that statutes might be drafted so as not to give full effect to Parliament's intention. In such case, they could be amended "in the manner in which they first originated." *Id.* It might "be rightly concluded [therefore] that all the laws of this realm are the best in fact or potentiality, since they can easily be brought to it in fact and actual reality." *Id.* at 135.

75. English judges "are all bound by their oaths not to render judgement against the laws of the land, even if they should have the commands of the prince to the contrary." SIR JOHN FORTESCUE, *DE NATURA LEGIS NATURAE* 205 (C. Fortescue trans., Garland Pub. 1980) (1869).

76. CHRISTOPHER SAINT GERMAN, *DOCTOR AND STUDENT* 327 (William Muchall ed., The Lawbook Exchange 1998) (1531).

77. CHRISTOPHER SAINT GERMAN, *A TREATISE CONCERNING THE DIVISION BETWEEN SPIRITUALITY AND TEMPORALITY*, in 9 *THE COMPLETE WORKS OF ST. THOMAS MORE* 177-212 (J.B. Trapp ed., 1979) (1532).

their persons, and gives them a true property in their goods and estates; so that without their consent (that is to say their actual consent or implicitly in Parliament) it cannot be taken from them."<sup>78</sup> Moreover, much of the debate over the king's right to levy taxes without consent were equally applicable to expropriations of land. Later writers often put taxation and takings on an equal footing, insisting that both were based on a theory of consent. In essence, the principle of "no taxation without representation" became "no expropriation without representation."<sup>79</sup>

John Locke put the matter rather succinctly:

The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property* . . . 'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still, it must be with his own Consent, *i.e.*,

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78. Sir George Croke, *Notes of the Judgment Delivered by Sir George Croke in the Case of Ship-Money*, reprinted in W.J. JONES, *POLITICS AND THE BENCH: THE JUDGES AND THE ORIGINS OF THE ENGLISH CIVIL WAR 186, 187-88* (1971). See also *Rex v. Hampden*, 3 St. Tr. 825, 846 (Ex. 1637).

79. After the Glorious Revolution, it was fairly well decided that the theoretical basis for taxation of the subject was founded on the principle of gift, rather than taking. FORREST McDONALD, *NOVUS ORDO SECLORUM* 25 (1985). In fact, it had long been recognized that Parliament's consent to taxation had to be obtained. Communities in different parts of the kingdom had originally been required to select reliable persons, to whom they would depute the power to treat with the king and commit their communities to grants of taxes. Property could not be legally seized but must be given. POLE, *supra* note 63, at 4. In the early years, however, the "initiative had always come from the king, an initiative that included the basic decision to call a parliament, the purposes in view, the scope and limits of discussion, and the termination of the meeting." *Id.* As time went on, however, tensions arose over whether Parliament owed its legal existence to the "initiative" or whether it existed by natural right, thus setting the stage for the seventeenth century struggle. According to Blackstone, taxation arises from the fact that "few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend to their private concerns." 1 WILLIAM BLACKSTONE *COMMENTARIES* \*307. As a result, it is necessary that the citizenry "contribute a portion of their private gains, in order to support that government, and reward that magistracy, which protects them in the enjoyment of their respective properties." *Id.* In making such contributions, however, "the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising, the necessary supplies; by contriving to do both in such a manner as may be most consistent with economy and the liberty of the subject." *Id.* at \*\*308-09. Wisdom and moderation were achieved by having all three branches of the legislature (king, commons, and lords) be engaged in the decision-making process. In most instances, this meant that tax bills were initiated in the commons and then approved by the lords. The reasoning behind this was that "such supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves." *Id.* at \*169.

the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.<sup>80</sup>

To be sure, there is an important difference between a taking by eminent domain and one by taxation. As Locke notes, a taking by eminent domain requires some form of compensation, while the latter does not. Taxation does not implicate a right of compensation, because in levying a tax, the legislature merely charges the citizenry for its fair share of the cost of running the government. Takings by eminent domain, on the other hand, might require the payment of compensation, although the right was never thought to be absolute. This is because at its most elemental level, a taking by eminent domain implies nothing more than that a property owner has made a gift or sale of his property for the benefit of the public. In other words, through his representatives, a property owner has consented to giving up a portion of his property for some greater public purpose. The legislature might, therefore, consent to the transfer on behalf of the owner for a price or without any compensation at all.

In this way, then, statutory transfers of property for the public good were made with or without compensation, and it was left to Parliament to determine (on the owner's behalf) whether fairness required some value for the taking. In most cases, Parliament required that some form of payment be made when property was taken for public use. The exceptions were usually in cases where the thing taken was thought to be of negligible value, as for example when gravel taken from the "wastes" of private lands.<sup>81</sup> As a result, by the middle part of the eighteenth century, Blackstone was able to discuss the compensation requirement in the language of a sale of property (albeit a forced one) from its owner to the body politic, with the legislature acting as the intermediary.

[Where land is required for the public good,] the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of a power, which the legislature indulges with caution, and which nothing but the legislature can perform.<sup>82</sup>

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80. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 378, 380 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1967) (1690).

81. 1 WILLIAM BLACKSTONE COMMENTARIES \*140.

82. *Id.*



While Blackstone's use of the forced sale stretches the concept of consent, it reinforced the idea that, in English law at least, the taking of land for public use could only be effected by the legislature acting on behalf of the property owner. Blackstone's description also shows that the power of eminent domain was a well established feature of English law by the time of the American Revolution. More importantly, the English justification for the exercise of the power was markedly different than that put forward by the civilians. The English theory of expropriation owed its existence to the growth and maturation of the theory of parliamentary consent, rather than to the concepts of inherent or reserved rights. Indeed, the civil law theories of eminent domain, with their basis in the absolute rights of kings, would have had little attraction for Englishmen who had just spent the better part of a century fighting to restrain royal prerogative. Instead, Englishmen believed that Parliament alone had the power to take land for public use. And, as the highest court of the land, it was left to Parliament to determine the right and extent of any compensation. As a result, without constitutional restrictions on Parliament's power, the use of eminent domain was limited only by those restraints the legislature imposed on itself.

### III. Revolution and the Principle of Consent

The seventeenth century in England was marked by a long struggle between Crown and Parliament over the extent of the royal prerogative. Parliament and the king often disagreed about who had the right to consent on behalf of the subject, a debate which effectively ended in the Glorious Revolution. The lines of argument shifted dramatically when the debate moved to the colonies, however. By the middle part of the eighteenth century, questions about the Crown's prerogative to take property had all but been resolved. Instead, the primary issue was now whether Parliament itself was the appropriate agency to provide the colonists' consent to the expropriation of their property. Thus, in the colonies, the debate over the right to take property for public use was transformed from one over royal prerogative into one about whether Parliament was adequately representative of the people. And, as time passed, colonial political theorists moved tentatively, but inexorably, to the position that Parliament lacked the ability to consent on behalf of the colonists because that body did not adequately represent their interests. Colonial political leaders soon came to argue that their local assemblies were more representative of their interests and were the primary locus of colonial consent in matters of taxation and takings. The debate over which body—Parliament or the colonial assemblies—had the right to exercise the power of consent in the

takings context thus became part and parcel of the larger struggle over Parliament's right to govern the colonies generally. As in England, this question, too, was ultimately settled by a dramatic reconfiguration of the constitutional scheme.

At the outset, American thinking about property rights in the revolutionary era was neither original nor very distinctive.<sup>83</sup> When it came to discussing the right of the state to take property for public use, Americans often hewed quite closely to traditional English doctrine. Like the parliamentary political theorists of the sixteenth and seventeenth centuries, colonial pamphleteers placed their faith in the doctrine of consent. Relying on both common law precedent and Locke's theory of the social compact, the colonists made two assertions about the government's right to take property for public use. First, they repeated the well-established principle that the taking of property from a subject was a legislative act, rather than a prerogative of the Crown.<sup>84</sup> Second, they asserted that a citizen was entitled to compensation for takings of property that were in excess of his proportionate share of taxation.

In time, however, the colonists also raised concerns about the adequacy of Parliament as a representative institution in such a way as to implicate the question of whether parliamentary takings were as arbitrary and oppressive as those of the Crown, a question which was itself tied up in the debate over the theory of virtual representation.<sup>85</sup> In the end, the colonists came to reject the idea of "virtual representation" on which parliamentary power was based, thereby foreclosing the possibility that Parliament had any power to consent on their behalf, and in so doing, ensured that a break with the mother country was inevitable.

### **The Debate over Parliamentary Authority**

The end of the Seven Years' War brought about a change in British colonial policy. Now invested with a vast North American empire, London cast about for some means to defray the expenses of maintaining the far-flung military and governmental apparatus necessary for administering its expanded territorial holdings. In 1764,

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83. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 16 (1992).

84. This principle was invoked in *Bate's Case*, 145 Eng. Rep. 267 (1606), as well as the *Ship Money Case*, 3 St. Tr. 825 (Ex. 1637). Parliament asserted its rights in this regard in both the *Petition of Right*, 3 Car., c. 1 (1627), and the *Bill of Rights*, 1 W. & M., c. 2 (1688).

In *The Petition of Right*, Parliament advanced the argument that no man could be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common consent by act of Parliament, and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof. 3 Car., c. 1 (1627).

85. See *infra* notes 108-12 and accompanying text.

Parliament implemented a new scheme of taxing the colonies to help defray the costs of the war now ended, as well as providing for their continued defense.<sup>86</sup> This new system created a number of new taxes and imposts as well as a more extensive, and efficient, new enforcement mechanism.<sup>87</sup> The Crown's attempt to solidify its control forced the colonies to carefully consider their place in the constitutional scheme.

In the years between 1760 and 1776, the colonists engaged in a series of increasingly more vigorous protests against the new system, each of which was met in turn with more vigorous attempts to assert parliamentary power.<sup>88</sup> At the same time, colonial political thinkers produced a number of documents in which they attempted to justify their grievances against Crown policy. As they did so, these writers gradually focused their attention on constitutional theory, and framed their arguments in the language of fundamental law. The bulk of the colonists' complaints against British rule centered on the problem of taxation, which in turn implicated the principle of representation. But, in many respects, the rhetoric of representation employed by the colonists to oppose parliamentary taxation applied with equal force to the expropriation of property for public use.

Much of the debate centered on the constitutional question of whether Parliament had the right to impose "internal" taxes on the colonies. Opponents of the policy argued that the new taxes violated fundamental law and were unconstitutional because, "[a]ccording to prevailing English doctrine, taxation of the subject required consent—at least in the fictional sense that it required approval by a body in which the subject was represented."<sup>89</sup> The colonists argued that Parliament could not rightfully levy taxes upon them because Americans were not actually represented there.<sup>90</sup> Perhaps the best known defense of this position was James Otis' pamphlet, *The Rights of the British Colonies Asserted and Proved*. Written in anticipation of passage of the Sugar Act in 1764, Otis declared that taxation without representation was contrary to "the law of God and nature" and contrary to property rights that "no man or body of men, not excepting Parliament . . . consistently with . . . the constitution can

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86. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 869 (1978).

87. *See id.* at 877 n. 182-83.

88. *See id.* at 874, 878.

89. *Id.* at 870.

90. Although considered as subjects of the Crown, residents of the American colonies did not have the right to send members to the House of Commons.

take away.”<sup>91</sup> Other colonists took up Otis’ arguments. Connecticut Governor Thomas Fitch asserted that the “right” of self-taxation was “the chief excellency of the British Constitution,”<sup>92</sup> while Otis’s friend Oxenbridge Thacher claimed that the right to self-taxation was “the birthright of every subject.”<sup>93</sup> Colonial assemblies joined in this chorus, and drafted petitions to the Crown and Commons attacking Parliament’s right to lay taxes on the colonies. The New York legislature declared that the right of self-taxation was “the natural Right of Mankind,”<sup>94</sup> while the Virginia House of Burgesses asserted that such taxes as were proposed by the Commons were “inconsistent with the fundamental Principles of the [English] Constitution.”<sup>95</sup>

Passage of the Stamp Act in 1765, brought forth even stronger complaints. Daniel Dulany repeated the claim that the right of self-taxation was an essential principle of the English Constitution, derived from the common law and “enforced by the declaration of the *Great Charter* and *the Bill of Rights*, neither the one nor the other introducing any *new* principle.”<sup>96</sup> Dulany’s assertions were repeated in still more petitions from colonial assemblies<sup>97</sup> and in resolutions adopted by extra-legal associations such as the Sons of Liberty.<sup>98</sup> The Stamp Act Congress of October 1765, ultimately expressed its opposition to the policy of internal taxation by declaring that “no Taxes be imposed on them, but with their own Consent, given personally, or by their representatives.”<sup>99</sup>

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91. James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), in PAMPHLETS OF THE AMERICAN REVOLUTION 409, 444 (Bernard Bailyn ed., 1965) [hereinafter PAMPHLETS].

92. Thomas Fitch, *Reasons Why the British Colonies in America Should Not Be Charged with Internal Taxes* (1764), in PAMPHLETS, *supra* note 91, at 379, 386.

93. Oxenbridge Thacher, *The Sentiments of a British American* (1764), in PAMPHLETS, *supra* note 91, at 492.

94. *New York Petition to the House of Commons* (Oct. 18, 1764), reprinted in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766, 9, 10 (Edward Morgan ed., 1959) [hereinafter PROLOGUE].

95. The Remonstrance to the House of Commons (Dec. 18, 1764), in PROLOGUE, *supra* note 94, at 17.

96. Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies* (1765), in PAMPHLETS, *supra* note 91, at 635.

97. See, e.g., *The Virginia Resolves* (1765), in PROLOGUE, *supra* note 94, at 46; *Rhode Island Resolves* (1765) in PROLOGUE, *supra* note 94, at 52; *Pennsylvania Resolves* (Sept. 21, 1765), in PROLOGUE, *supra* note 94, at 51.

98. *The Sons of Liberty, Wallingford, Conn.* (Jan. 13, 1766), in PROLOGUE, *supra* note 94, at 114; *The Sons of Liberty, New York* (Jan. 11, 1766), in PROLOGUE, *supra* note 94, at 115; *The Sons of Liberty, New Brunswick, N.J.* (Feb. 25, 1766), in PROLOGUE, *supra* note 94, at 115.

99. The Declarations of the Stamp Act Congress (Oct. 1765), in PROLOGUE, *supra* note 94, at 63.

The debate over representation was broadened with passage of the Quartering Act in 1766. This act required the colonies to provide supplies to British troops stationed in America. The colonial legislatures considered this requirement a taking of property without consent, and none complied. The ministry of Lord Townshend retaliated by suspending the New York assembly, which had been among the most vehement of the act's opponents.<sup>100</sup> This action, combined with imposition of more taxes in the form of the Townshend duties of 1767, prompted spirited opposition. The following year, John Dickinson's *Letters of a Pennsylvania Farmer*,<sup>101</sup> castigated the Townshend government, asserting that Parliament lacked the legal authority to require the colonies to provide supplies for the troops because the Quartering Act amounted to a tax. The people of New York could not be "legally taxed but by their own representatives," and thus could not be punished for insisting on their right to self-taxation.<sup>102</sup> Samuel Adams took up Dickinson's line of attack in the Massachusetts *Circular Letter of 1768*. In terms reminiscent of Locke, Adams deftly stated the prevailing American view of property rights:

[I]t is an essential unalterable Right in nature, ingrafted into the British Constitution as fundamental Law & ever held sacred & irrevocable by the Subjects within the Realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent.<sup>103</sup>

Defenders of British policy admitted the force of the American argument, but responded that the colonists were "virtually" represented in Parliament, because each member of the House of Commons was said to represent all British subjects, not just those who actually sent him to Westminster.<sup>104</sup> The colonists rejected the idea of virtual representation, however, and thereby transformed the debate about consent into one about nature of representative institutions. Both sides agreed that property could not be taken from the subject without his consent, given either directly or by his legal representatives. The real question, therefore, was whether Parliament was sufficiently representative of the colonists such that it had the capacity to give their consent. American political leaders contended that representation was itself dependent on suffrage. In their view, Parliament did not represent the colonies, because

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100. MERRILL JENSEN, *THE FOUNDING OF A NATION* 225-26 (1968).

101. 1 *THE WRITINGS OF JOHN DICKINSON* 279 (P. Ford ed., 1895).

102. *Id.* at 309-10.

103. 1 *THE WRITINGS OF SAMUEL ADAMS* 185 (Harry Alonzo Cushing ed., Octagon Books 1968) (1904).

104. Thomas Whately, *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed upon Them* (1765), in *PROLOGUE supra* note 94, at 20-21.

Americans had no say in the election of its members. For the colonists, consent was a function of *actual*, rather than *virtual* representation.

Having discarded the theory of virtual representation, it was only a short step to rejecting all parliamentary authority. What had started out as a debate over the right of Parliament to tax the colonies without their consent, ended with the colonists asserting that only those bodies to whom they actually sent members could properly represent them. The American consensus was expressed in the pamphlets of Jefferson, Adams, and Wilson,<sup>105</sup> and finally declared by the First Continental Congress in its resolves of 1774. Americans, Congress said, had “by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts [the right] to life, liberty & property” that no sovereign power had “a right to dispose of without their consent.”<sup>106</sup> Congress also asserted that Americans had “a free and exclusive power of legislation in their several provincial legislatures . . . in all cases of taxation and internal policy, subject only to the negative of their sovereign.”<sup>107</sup> In making these assertions, Congress suggested a theory of “federalism” for the British empire: American legislatures would have control over internal legislation and taxation, while Parliament would retain power over internal and external trade. The colonies would remain tied to the English king as distinct states under one monarch.<sup>108</sup> London’s refusal to entertain this radically new conception of empire ushered in the American Revolution.

#### IV. Republican Limits on the Power of Consent

According to Thomas Jefferson, the “whole object” of the revolutionary struggle was to determine the proper means by which the people should be represented in their government. While the focus of much of the debate was on the legitimacy of virtual and actual representation, all sides were agreed that “the only moral foundation of government is, the consent of the people.”<sup>109</sup> For the

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105. Thomas Jefferson, *A Summary View of the Rights of British America* (1774), in *TRACTS OF THE AMERICAN REVOLUTION* 256 (Merrill Jensen ed., 1967); John Adams, *Novanglus*, in 4 *THE WORKS OF JOHN ADAMS* 11 (Charles Adams ed., 1851); James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in 2 *THE WORKS OF JAMES WILSON* 501 (James DeWitt Andrews ed., 1896).

106. 1 *JOURNALS OF THE CONTINENTAL CONGRESS* 67 (Worthington Chauncey Ford ed., 1904).

107. *Id.* at 68.

108. Grey, *supra* note 86, at 888.

109. Letter from John Adams to James Sullivan (May 26, 1776), in 9 *THE WORKS OF JOHN ADAMS* 375 (Charles F. Adams ed., 1850-56). Some of the flavor of the argument over the principle of virtual representation can be found in Wood, *supra* note 70, at 2-12.

colonists, the theory of consent required that the "people should be consulted in the most particular manner that can be imagined" whenever they were to be called upon to surrender their property for a public purpose.<sup>110</sup>

The drafters of the early state constitutions took great pains to put this principle into practice. Their language reflected Lockean concepts of property rights as well as Locke's theory of representative government. Among the earliest constitutions, that of Pennsylvania made the connection most explicit. Its 1776 declaration of rights contained language that might have been lifted directly from the *Two Treatises*:

[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives.<sup>111</sup>

Virginia's constitution contained similar language, making an even more direct connection between suffrage and the protection of property rights:

[E]lections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled, for the public good.<sup>112</sup>

Together, these two formulations affirmed the principles advanced by the colonists in the debate over virtual representation. The new states declared the taking of property, either by taxation or by expropriation, to be a function of consent given by the actual owner or through representatives in whose election the property owner had a right to participate.<sup>113</sup> The Virginia and Pennsylvania provisions were to serve as models for other states as well. Delaware (1776), Vermont (1777 & 1786), Massachusetts (1780), and New Hampshire (1784), adopted one of the two formulations almost

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110. Essay (Philadelphia, June 22, 1774), 1 AMERICAN ARCHIVES 442 (Peter Force ed., 1840).

111. PA. DECLARATION OF RIGHTS art. VII (1776).

112. VA. DECLARATION OF RIGHTS § 6 (1776).

113. It is interesting to note that Americans never really abandoned the theory of virtual representation. Women, slaves and children never participated in elections, yet they might conceivably have been required to surrender property through taxation or eminent domain.

verbatim.<sup>114</sup> In fact, the consent theory soon became the dominant textual formula for protecting property rights from arbitrary takings, existing in some form in eight of fourteen state constitutions.<sup>115</sup>

It is important to note, however, that most state constitutions omitted any specific mention of a right to compensation.<sup>116</sup> But, the absence of an explicit provision requiring compensation for the taking of property should not be seen as evidence of a rejection of the compensation principle. On the contrary, compensation was a well-established feature of takings by eminent domain in both England

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114. Delaware, Massachusetts and New Hampshire adopted the Pennsylvania formula. Vermont's 1777 constitution adopted a portion of the Virginia language. VT. CONST. art. II, cl. 1 (1777). The Vermont constitution of 1786 adopted a version of Pennsylvania's provision. VT. CONST. art. X, cl. 1 (1786). The North Carolina and Maryland constitutions advanced the same principles, although the language here was more limited, focusing mainly on taxation. The Maryland Declaration of Rights repeated the language of compact, declaring that every person "ought to contribute his proportion of public taxes, for the support of government." It then affirmed the principle of legislative consent asserting that "no aid, charge, tax, fee, or fees, ought to be set, rated, or levied, under any pretence, without consent of the Legislature." MD. DECLARATION OF RIGHTS arts. XII, XIII (1776). See also N.C. DECLARATION OF RIGHTS art. XVI (1776) (declaring that the people "ought not to be taxed or made subject to the payment of any impost or duty without the consent of themselves or their Representatives").

115. A number of commentators have asserted that only three states had provisions concerning eminent domain. These writers have generally focused on provisions concerning compensation, however, and have overlooked the many provisions detailing the consent theory of property rights. See, e.g., Stoebuck, *supra* note 10, at 591 (asserting that "the commonest language respecting property rights was what may be called the Magna Carta or due process formula"); William Michael Treanor, Note, *The Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698 (1985) ("Only three [state constitutions] had clauses concerning takings."); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 69 (1931) (asserting that only the Massachusetts, Vermont, and Pennsylvania constitutions contained provisions concerning eminent domain). Other state constitutions lacked a provision specifically relating to takings of property, relying, it seems, on the Magna Carta's due process formula to ensure that property rights would be protected. See, e.g., S.C. CONST. art. XLI (1778).

116. While Massachusetts and Vermont expressly required the payment of just compensation when land was taken for public use, most other state constitutions lacked any such guarantee. Indeed, an express right to compensation did not appear in even a majority of the constitutions of the original thirteen states until well into the nineteenth century. Thus, by 1800, only three states (Massachusetts, Vermont, and Pennsylvania, which had revised its 1776 constitution) contained compensation guarantees. The rest adopted such provisions rather slowly. These included Connecticut (1818), New York (1821), Rhode Island (1842), and New Jersey (1844), Maryland (1851), and South Carolina (1868). Five states still had no compensation requirement at the time the Fourteenth Amendment was ratified—Delaware, New Hampshire, North Carolina, and Virginia. (Georgia's 1865 constitution had a compensation guarantee, but the provision was deleted in its 1868 constitution.)



and America long before the Revolution.<sup>117</sup> This is not to say that compensation was awarded in every case, for the various state legislatures often expropriated property without offering the owner any monetary compensation. Rather, the lack of compensation in most of these cases most likely stemmed from the legislatures' determination that the thing taken was of negligible value, rather than from a belief that compensation was unnecessary.

More importantly, the textual silence on the issue of compensation merely reflected the widespread faith in legislative virtue prevalent in the years immediately following the revolution.<sup>118</sup> Caught up in the euphoria of republicanism, most Americans thought there was little danger that a popularly elected assembly would oppress the citizenry. As the "voice of the people," state legislatures "could be trusted to perceive the common good and define the limits of individual rights."<sup>119</sup> In drafting new constitutions, therefore, most states concentrated on placing limits on the executive, rather than confining the powers of the legislature. Republicans "brooded almost obsessively about the corruption that they believed great individual power had produced in England."<sup>120</sup> Consequently, most state constitutions severely cabined the powers of the executive in an effort to ensure that similar abuses would not occur in the new nation. As a result, the earliest expropriations clauses should be more properly regarded as limits on the power of the executive, again making clear the principle that the taking of property for public use was a function of legislative power and not an executive prerogative. They did not, in other words, attempt to place any restrictions on the power of the people's representatives. In this respect, the early clauses merely codified the conventional understanding of property rights in the area of taxation and eminent domain, and served as models for the inclusion of similar protections in the U.S. Constitution.

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117. See *supra* notes 81-82 and accompanying text. See also Stoebuck, *supra* note 10, at 579 ("In the colonies themselves the granting of compensation was established and extensively practiced at and before the time of the Revolution."); ELY, *supra* note 83, at 5-17 (cataloging evidence of compensation in colonial and confederation takings statutes).

118. Nevertheless, some commentators have argued that the failure to include compensation clauses in state constitutions was a function of the fact that Americans of the revolutionary generation did not regard the payment of compensation as important. In the view of these scholars, the absence of a just compensation clause "accorded with the faith in legislatures that was a common element of republican thought and with the position held by many prominent republicans that the property right could be compromised in order to advance the common good." Treanor, *supra* note 115, at 695. See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 63-64 (1977).

119. Treanor, *supra* note 115, at 701.

120. *Id.*

## V. The Fifth Amendment

While the Revolutionary War produced dramatic economic dislocations, state legislatures added to the wartime difficulties by enacting a number of measures which made property rights look less secure. Large emissions of paper money by the Continental Congress and the state governments subjected property values to rapid erosion.<sup>121</sup> Within a few years after the start of the war, paper money issues had increased to produce rapid inflation so severe that the value of currency had nearly evaporated.<sup>122</sup> Following the war, however, American importers found themselves closed out of British markets in the Caribbean, thus preventing them from making indirect remittances to pay for goods received. The combined downward pressure on prices caused by both the loss of foreign markets and the scarcity of specie resulted in severe deflation throughout the latter part of the 1780s. State governments again responded, this time with a series of tender laws, which required creditors to accept depreciated paper currency in full satisfaction of pre-existing obligations. In so doing, state governments ensured that debtors would largely escape paying the full value of their debts.<sup>123</sup>

These measures alarmed the commercial elite. Writing in 1780, Gouveneur Morris cautioned that the stability of the American system of government was being jeopardized by the states' repeated violations of property rights. Morris wrote:

The whole system of commerce hath been inverted the laws of property invaded, the laws of justice infringed, every absurdity practised, and every impossibility tried, to get a little beef and a little bread which would almost have come forward of themselves if things had been left to their natural course, if honest labour had been permitted to reap the blushing clusters of plenty in the lap of freedom.<sup>124</sup>

In the view of many, paper money emissions and tender laws were attacks on the sanctity of property, and the inevitable result would be economic chaos. More importantly, for a new nation

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121. 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, 1137 (1980).

122. Prices rose so fast that a wholesale price index of seventy-eight in 1775 rose to a level of 10,544.1 in 1780. *Id.* During the war years, state governments enacted a number of measures designed to stabilize the local economy, but which proved both controversial and ineffective in the end. Among these were paper money and tender laws. A scarcity of specie during the early years of the war caused many states to issue large amounts of paper currency. In essence, these emissions allowed states to borrow money for the war effort. The states offered notes to investors in return for specie or tradesmen in return for supplies. Over time, however, states began to issue larger amounts of notes causing earlier emissions to decline in value.

123. *Id.* at 1139-40.

124. PA. PACKET & GEN. ADVERTISER (Phila., Mar. 23, 1780).

attempting to attract foreign investment, laws infringing property rights would drive investors away. In Morris' view, foreigners would look at state legislation and ask, "If your government so little respects the Property of their own Citizens . . . how can our Property be safe among you?"<sup>125</sup> Similarly, James Madison worried about the "present anarchy of commerce" and cautioned that "most of our political evils may be traced to our commercial ones."<sup>126</sup>

The desire to put property rights on a more secure footing thus became an important factor in the drive for a new frame of government in the years leading to the Convention of 1787.<sup>127</sup> However, in proposing the creation of a stronger union, the framers of the Constitution excited fears and suspicions about the extensive powers given the national government. As a result, ratification of the Constitution came only after a long and bitter struggle, and even then many anti-federalists refused to be reconciled to the new Constitution without the incorporation of amendments that would protect the states. Consequently, over two hundred amendments were proposed by the various state ratifying conventions. Although many federalists opposed any substantial revision of the Constitution, they were willing to accept some modest amendments in the hope that addressing anti-federalist fears would stem the calls for a second constitutional convention. In fact, the promise of amendments was all

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125. GOUVERNEUR MORRIS, ADDRESS TO THE PENNSYLVANIA ASSEMBLY (1785), reprinted in JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 73 (1990). Morris was referring to attempts by the Pennsylvania General Assembly to revoke the charter of the Bank of North America.

126. LETTERS AND OTHER WRITINGS OF JAMES MADISON 226-27 (1865). Ironically, the economic policies pursued by the state legislatures had the effect of encouraging the forces of centralized government. Alexander Hamilton asserted that one of the main arguments in favor of adopting the federal Constitution was that it would afford "precautions against the repetition of those practices on the part of the state governments, which have undermined the foundations of property and credit." FEDERALIST NO. 85 (Alexander Hamilton). Writing a few years after ratification of the Constitution, Hamilton observed that:

the sacred rights of private property have been too frequently sported with from a too great facility in admitting exceptions to the maxims of public faith, and the general rules of property. A Desire to escape from this evil was a principal cause of the Union which took place among good men to establish the National Government.

Alexander Hamilton, *The Vindication of the Funding System*, No. III (May-Aug. 1792), reprinted in 11 THE PAPERS OF ALEXANDER HAMILTON 470 (Harold C. Syrett ed., 1966).

127. See, e.g., ELY, *supra* note 83, at 41.

By 1787 many political leaders were convinced that only a more energetic national government could sufficiently protect property ownership, regulate commerce, and restore public credit. Ironically, the assaults on property rights during the Confederation period stimulated greater constitutional safeguards for property holders.

*Id.*

that stood between ratification and rejection in many states. In addition, many members of Congress—James Madison among them—were forced to promise that they would support amendments to the Constitution if elected.<sup>128</sup> Madison thus introduced a proposed list of amendments in the House of Representatives on June 8, 1789.<sup>129</sup> Although many in Congress were loathe to take up the subject of amendments at that point in time,<sup>130</sup> the House eventually agreed to refer Madison's proposals to a select committee composed of one member from each of the states then represented in Congress.<sup>131</sup>

In drafting his amendments, Madison did not attempt to achieve any systematic statement of the fundamental rights of citizens. On the contrary, Madison himself seems not to have believed that amendments were necessary. Although he might 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 was premature. He was also concerned about the continuing calls for a second constitutional convention, and feared

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128. Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 98 IOWA L. REV. 145, 222 (2001).

129. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: HOUSE OF REPRESENTATIVES JOURNAL 84 (Linda Grant DePauw ed., 1977) [hereinafter 1789 HOUSE JOURNAL].

130. Many members argued that the House had more important business at hand. At this point in time, the House was considering several revenue bills, as well as bills to establish the treasury, war, and state departments. One member complained that it would be "extremely impolitic to go into the consideration of amending the Government, before it is organized, [and] before it has begun to operate." THE CONG. REG. (June 8, 1789) (statement of Rep. Smith), reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DEBATES IN THE HOUSE OF REPRESENTATIVES 811 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter 11 DHFFC].

131. The question of how to deal with Madison's amendments generated a great deal of debate. Madison envisioned a series of amendments incorporated into the text of the Constitution itself, which would clarify the powers of the various branches. It was important, he said, that amendments be interwoven into the text. Otherwise, "it will be difficult to ascertain to what parts of the instrument the amendments particularly refer; [and] will create unfavorable comparisons." Incorporating amendments would allow them to "stand upon as good foundation as the original work." THE CONG. REG. (Aug. 13, 1789) (statement of Rep. Madison), reprinted in 11 DHFFC, *supra* note 130, at 1222. Roger Sherman opposed this suggestion on the grounds that "the constitution is the act of the people and ought to remain entire." Amendments, on the other hand, were the work of the state governments, and, while proper under the terms of Article V, stood on a different footing than the original document. In his view, the act of the people in ordaining a government in convention was markedly different than that of the state legislatures in proposing amendments. To include the amendments in the text would "repeal the old [constitution], and substitute a new one." *Id.* at 1221, 1229 (Aug. 13, 1789) (statement of Rep. Sherman). In the end, the House voted to leave the body of the Constitution unaltered and append a bill of rights at the end of the text. *Id.* at 1308 (Aug. 19, 1789).

that reopening the document to revision would be disastrous.<sup>132</sup> At the same time, however, Madison knew that a "great number" of Americans remained dissatisfied with the Constitution. But, 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.<sup>133</sup> The Constitution had, after all, received the approval of a bare majority of the states, and two states still remained outside the union. Including basic protections for civil liberties would, in Madison's view, go a long way toward disarming anti-federalist complaints.<sup>134</sup>

For Madison, then, amendments were an attempt to quiet objections to the current form of the Constitution and "satisfy the public mind that their liberties will be perpetual."<sup>135</sup> At the same time, he knew that attempting a grand synthesis of rights and protections would be doomed to failure, since "nothing of a controvertible nature [could] be expected to make its way thro' the caprice & discord of opinions which would encounter it in Congs."<sup>136</sup> As a result, Madison sought to craft a document which would reflect a consensus about widely shared values in a form that would be

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132. 11 DHFFC, *supra* note 130, at 820 (June 8, 1789) (statement of Rep. Madison).

I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a reconsideration 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.

*Id.*

133. *Id.* at 819.

134. *Id.*

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.

*Id.* See also Letter from James Madison to Richard Peters (Aug. 19, 1789), in 12 THE PAPERS OF JAMES MADISON 347 (Robert Al. Rutland & Charles F. Hobson eds., 1979) [hereinafter MADISON PAPERS] (acknowledging 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).

135. 11 DHFFC, *supra* note 130, at 821.

136. Letter from James Madison to Edmund Randolph (June 15, 1789), in 11 MADISON PAPERS, *supra* note 134, at 219.

guaranteed to achieve the widest possible acceptance.<sup>137</sup> Indeed, Madison repeatedly asserted that his choice of amendments was “limited to points which are important in the eyes of many . . . and objectionable in those of none.”<sup>138</sup>

### A. Drafting an Amendment

Madison suggested two amendments which were relevant to the protection of property rights. The first was a revision of the Constitution’s preamble which would have added to the Constitution a declaration:

That all power is originally vested in, and derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and security.

That the people have an indubitable, unalienable, and inalienable right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.<sup>139</sup>

Madison’s proposed wording echoed the language of the Virginia Declaration of Rights, which was itself expressive of John Locke’s compact theory of government.<sup>140</sup> Even more importantly, Madison’s

137. ELY, *supra* note 83, at 83.

138. Letter from James Madison to Edmund Randolph (June 15, 1789), in 11 MADISON PAPERS, *supra* note 134, at 219. See also Letter from James Madison to Thomas Jefferson (June 30, 1789), in 12 MADISON PAPERS, *supra* note 134, at 272 (explaining that “every thing of a controvertible nature . . . was studiously avoided” so as to increase the chances of passing a bill of rights); Letter from James Madison to Edmund Randolph (Aug. 21, 1789), in 12 MADISON PAPERS, *supra* note 134, at 348-49:

It has been absolutely necessary, in order to effect anything, to abbreviate debate, and exclude every proposition of a doubtful and unimportant nature. Had it been my wish to have comprehended every amendment recommended by Virginia, I should have acted from prudence the very part to which I have been led by choice. Two or three contentious additions would even now prostrate the whole project.

*Id.*

139. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: HOUSE OF REPRESENTATIVES JOURNAL 84 (Linda Grant De Pauw ed., 1977) [hereinafter 3 DHFFC]; 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: LEGISLATIVE HISTORIES 9 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 4 DHFFC].

140. Cf. VA DECLARATION OF RIGHTS §§ 1-3 (1776):

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

*Id.* § 1. “That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amendable to them.” *Id.* § 2.

language, like Jefferson's Declaration of Independence, stressed the importance of acquiring property and not merely the protection of existing property arrangements.<sup>141</sup> In this way, Madison attempted to use the Constitution's preamble as a means of calling attention to the fundamental principles on which America's republican form of government was established.

While no single representative contested Madison's claim on substance, many thought his additions to the preamble unnecessary.<sup>142</sup> Indeed, Madison's proposal did not survive long. The House committee charged with considering amendments deleted most of Madison's Lockean language and substituted the comparatively modest assertion that "[g]overnment [was] intended for the benefit of the people, and the right establishment thereof [was] derived from their authority."<sup>143</sup> However, even this was too much for most of the members of the House. James Jackson of Georgia opposed any alteration to the preamble, arguing that "the words as they now stand speak as much as it is possible to speak, it is a practical recognition of the right of the people to ordain and establish governments, and is more expressive than any other mere paper declaration."<sup>144</sup> Connecticut's Roger Sherman agreed and asserted that "the words 'We the people' in the original constitution are copious and expressive as possible; and any addition will only drag out the sentence without illuminating it."<sup>145</sup>

Madison's second proposal would have amended Article I of the Constitution to provide that "[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."<sup>146</sup> The select committee to whom the resolution on amendments had been referred altered Madison's proposal slightly. The committee's draft read as follows:

No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be

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That government is, or ought to be, instituted for the common benefit, protection, and security of the people[;] . . . and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judges most conducive to the public wealth.

*Id.* §3.

141. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 29 (1998).

142. AKHIL REED AMAR, *THE BILL OF RIGHTS* 27 (1998).

143. H.R. COMM. REP. (July 28, 1789), *reprinted in* 4 DHFFC, *supra* note 139, at 27.

144. THE CONG. REC. (Aug. 13, 1789) (statement of Rep. Jackson), *reprinted in* 11 DHFFC, *supra* note 130, at 1228.

145. THE CONG. REC. (Aug. 14, 1789) (statement of Rep. Sherman), *reprinted in* 11 DHFFC, *supra* note 130, at 1242.

146. 4 DHFFC, *supra* note 139, at 10.

compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.<sup>147</sup>

This omnibus amendment came before the House sitting as a committee of the whole on August 17, 1789. After a brief debate concerning the double jeopardy clause, the committee of the whole unanimously approved the amendment as written, and numbered it as article eight. Apparently, no one made the slightest comment about the part of the amendment dealing with expropriation.<sup>148</sup> A similar silence greeted the amendment when put forward in the whole House, for observers of the day noted that the proposal was “adopted without debate.”<sup>149</sup> The House approved the articles of amendment on August 24, 1789, and forwarded them to the Senate for its consideration.<sup>150</sup>

The Senate first considered the eighth article on September 4.<sup>151</sup> After revising the double jeopardy clause, it agreed to the remaining part of the amendment without debate.<sup>152</sup> A few days later, the Senate combined portions of the eighth article with portions of the House’s tenth article.<sup>153</sup> This combined article dealt primarily with

147. H.R. COMM. REP. ¶ 8 (July 28, 1789), *reprinted in* 4 DHFFC 27, *supra* note 139, at 29.

148. THE CONG. REC. (Aug. 17, 1789), *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 1283, 1288-89 (Kenneth R. Bowling and Helen E. Veit eds., 1998) [hereinafter 9 DHFFC].

149. THE CONG. REC. (Aug. 21, 1789), *reprinted in* 9 DHFFC, *supra* note 148, at 1309, 1310. *See also* 1789 HOUSE JOURNAL, *supra* note 129, at 158, 159.

150. 1789 HOUSE JOURNAL, *supra* note 129, at 165, 166 (Aug. 24, 1789).

151. The articles of amendment were read in the Senate on August 25, 1789. The Senate agreed to consider the House’s proposals on September 2 after a motion to defer consideration of the amendments until the next session of Congress was defeated. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: SENATE LEGISLATIVE JOURNAL 135, 138 (Linda Grant De Pauw ed., 1972) [hereinafter 1789 SENATE JOURNAL]. The Senate then proceeded to debate and amend the various amendments throughout the early part of September. *Id.* at 148-52. The eighth article, which was the precursor to the present Fifth Amendment, was first considered on September 4. *Id.* at 153, 154.

152. The Senate broadened the reach of the double jeopardy clause by deleting the words, “except in case of impeachment to more than one trial or one punishment,” and substituting the phrase, “be twice put in jeopardy of life or limb by any public prosecution.” *Id.* at 154.

153. The tenth article provided:

The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of War or public danger) shall be by an impartial Jury of the Vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherways infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection



rights available in criminal cases. Specifically, it required a grand jury indictment for criminal prosecutions and contained prohibitions on multiple prosecutions and self-incrimination. These protections were supplemented by the two property rights provisions contained in the House version.<sup>154</sup>

After making several revisions to other articles, the Senate renumbered the amendments and returned them to the House for its concurrence.<sup>155</sup> The House balked at accepting many of the Senate's proposals, and for a time it seemed that the whole business might be put off until the next session of Congress. Virginia's Richard Henry Lee complained that the amendments had passed the Senate "with difficulty, and [only] after being much mutilated and enfeebled."<sup>156</sup> Madison, in particular, felt the Senate had done a poor job. Writing to Edmund Pendleton, Madison complained that the Senate's alterations struck at "the most salutary articles"<sup>157</sup> and, as a result, the amendments had lost "much of their sedative Value."<sup>158</sup> Indeed, one observer claimed that Madison would "rather have [no amendments] than those agreed to by the Senate."<sup>159</sup>

Although the House agreed to several of the alterations proposed by the Senate, it refused to concur in others.<sup>160</sup> A

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may prevail, the indictment and trial may by law be authorised in some other place within the same State.

H.R. RES. AND ARTS. OF AMEND. (Aug. 24, 1789), *reprinted in* 4 DHFFC, *supra* note 139, at 35, 37-38.

154. The Senate's amendment read as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment on indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be twice put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation.

1789 SENATE JOURNAL, *supra* note 151, at 166-67 (Sept. 9, 1789).

155. *Id.* at 166-68.

156. Letter from Richard Henry Lee to Francis Lightfoot Lee (September 13, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 294 (Helen E. Veit et al. eds., 1991) (hereinafter CREATING THE BILL OF RIGHTS).

157. Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *in* 12 MADISON PAPERS, *supra* note 134, at 402.

158. Letter from Fisher Ames to Caleb Strong (Sept. 15, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 156, at 297.

159. Letter from Paine Wingate to John Langdon (Sept. 17, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 156, at 297.

160. Specifically, the House refused to agree to the Senate's attempt to delete the fourth article of amendment which would have contained protections for speech and the

conference committee was eventually appointed to consider the differences between the House and Senate versions.<sup>161</sup> A resolution was eventually agreed to on September 24, and the amendments forwarded to the states for ratification.<sup>162</sup>

The final version of what was to become the Fifth Amendment read as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; Nor shall private property be taken for public use, without just compensation.<sup>163</sup>

Although the language of Madison's original proposal was altered as it moved through the Congress, neither the Senate nor the House made any substantial change in substance. Madison's eminent domain clause clearly implicated the principle of consent, and its compensation requirement was, in effect, a recognition of the Lockean idea that government could not require a property owner to contribute more than his fair share of the government's expense. To the extent a citizen is required to surrender more than his proportionate share, he is entitled to compensation.

Madison's language on this point echoes similar language in Locke's *Second Treatise* as well as that contained in state bills of rights.<sup>164</sup> In this respect, it might fairly be said that the so-called

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press. See S. AMENDS. (Sept. 9, 1789), reprinted in 4 DHFFC, *supra* note 139, at 43, 44. See also 1789 HOUSE JOURNAL, *supra* note 129, at 217 (Sept. 21, 1789).

161. 1789 HOUSE JOURNAL, *supra* note 129, at 217-18 (Sept. 21, 1789); 1789 SENATE JOURNAL, *supra* note 151, at 180, 181-82 (Sept. 2, 1789).

162. 1789 HOUSE JOURNAL, *supra* note 129, at 229 (Sept. 24, 1789).

163. U.S. CONST. amend. V.

164. Cf. Madison's Resolution (June 8, 1789), reprinted in 4 DHFFC, *supra* note 139, at 10 ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."); John Locke, *An Essay Concerning Civil Government*, reprinted in TWO TREATISES OF GOVERNMENT 378-80 (Paul Laslett ed., 1960) ("[T]is fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, i.e., the Consent of the Majority, giving it either by themselves, or their Representatives."). See also VT. CONST., ch. 1, art. II (1777) ("That private property rights 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."); MASS. CONST., pt. 1, art. X (1780) ("[Every citizen] is obliged, consequently, to contribute his share to the expense of his protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people . . . . And whenever the public

"takings clause" should more properly be regarded as a "compensation clause." For, the use of the term "takings clause" would seem to denote a grant of power to the legislature, as, for example, in the use of the term "commerce clause" to describe the granting of a power to regulate commerce. However, far from being a grant of power, Madison's eminent domain clause was an attempt to define the nature of a power already inhering in the national legislature. The Fifth Amendment is, after all, concerned with process. It sets forth the procedures by which already-existing powers, such as the power to try offences against the government or the power to deprive a citizen of liberty or property, may be exercised. Seen in this context, the eminent domain clause is not a grant of a power to expropriate property. On the contrary, it is primarily concerned with the manner by which the national government exercises its power to expropriate.

### B. A Compensation Clause

One of the more interesting aspects of the compensation clause is the fact that it seems to arise almost *ex industria* to address a problem about which there seems to have been no discussion during the course of the ratification debates. Although anti-federalists repeatedly complained about the lack of a bill of rights, there is no evidence that anyone considered the problem of eminent domain to be a serious concern. At first glance, therefore, the compensation clause appears to be a solution in search of a problem. Indeed, while many state constitutions contained provisions declaring that private property could not be taken without the owner's consent,<sup>165</sup> only two had clauses requiring the payment of compensation.<sup>166</sup> Moreover, while at least two states had requested amendments akin to every other provision eventually incorporated into the Bill of Rights, none put forth an amendment requiring the payment of compensation for takings by eminent domain.<sup>167</sup>

The relative silence on this point has led some commentators to assert that in proposing the compensation clause, Madison attempted a radical alteration in the concept of individual liberty. According to this view, the clause "reflected the liberalism of its author" and was designed to be "a statement of national commitment to the preservation of property rights."<sup>168</sup> However, the assumption

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exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").

165. See *supra* notes 114-15 and accompanying text.

166. MASS. CONST., pt. 1, art. X (1780); VT. CONST., ch. 1, art. 11 (1777).

167. Treanor, *supra* note 115, at 708.

168. *Id.* See also HORWITZ, *supra* note 118, at 63-64.

underlying such an assessment is based on the false premise that Americans of the early national period lacked a commitment to the principle of just compensation for property expropriated by the government. But, as other writers have shown, Americans had long understood that compensation was a necessary incident of legislative expropriations.<sup>169</sup> As a result, Madison's amendment did not tread any new ground in constitutional theory. On the contrary, the compensation clause, like the rest of Madison's Bill of Rights, merely "reflected a consensus about widely shared values."<sup>170</sup> It "simply ratified and gave constitutional status to a long-settled principle."<sup>171</sup> After all, both federalists and anti-federalists opposed uncompensated takings and were all agreed that property must be secured against government intrusion.<sup>172</sup>

Others have noted the apparent lack of interest in ensuring the inclusion of a compensation provision in the Bill of Rights.<sup>173</sup> This lack of concern might be explained by the fact that there was little evidence that government had thus far abused its power to take property for public use. Neither the revolutionary nor confederation experience created any particular concern about the expropriation power.<sup>174</sup> Indeed, not even royal officials were accused of overstepping their bounds in this regard. As one commentator put it, "[W]hile the British were scoundrels in a thousand ways, they never abused eminent domain. They certainly would have been accused of it if they had."<sup>175</sup> For their part, federalists did not fear that government would engage in confiscation of private holdings. Rather, their greatest fear was that government would devalue property holdings by emissions of paper currency or debtor-relief laws. Consequently, they focused their efforts on insuring that the

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169. See *supra* note 24 and accompanying text. See also 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, 293 (1988) ("[T]here is no evidence that the Framers believed property should ever be taken without compensation.").

170. 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, 17 (1992).

171. *Id.* at 18.

172. *Id.* See also William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 100-01 (1990) (noting that anti-federalists "were even more concerned with protecting property against government interference than their opponents").

173. See, e.g., Meidinger, *supra* note 10, at 17 ("[E]minent domain was not high among the concerns of those debating the Bill of Rights."); Stoebuck, *supra* note 10, at 594 ("[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.").

174. Stoebuck, *supra* note 10, at 594.

175. *Id.* (footnote omitted). See also Meidinger, *supra* note 10, at 17 ("Eminent domain was one prerogative the British had not been charged with abusing in the New World.").

constitutional text included provisions prohibiting the states from impairing the obligation of contract.<sup>176</sup> Anti-federalists, on the other hand, were afraid that a strong central government would use its taxing powers to impose confiscatory taxes on land.<sup>177</sup> Congress's power to lay direct taxes thus became a source of anti-federalist opposition.<sup>178</sup> Eminent domain did not occupy a very prominent place in the ratification debate simply because other concerns seemed more pressing. Moreover, few expected the national government to engage in extensive takings of property.<sup>179</sup> A provision creating limitations on takings or requiring compensation might, therefore, seem superfluous.

At the same time, there were always lingering suspicions about the power of a strong national government. Among these were the fear that the government might attempt to establish a large standing army, which would then require substantial material support. Many in the founding generation recalled all too well the depredations on colonial property made possible by the Quartering Act, and were determined to prevent the federal government from having the opportunity to recreate the experience. Others noted that uncompensated expropriations to support military operations were not confined to the colonial period. During the Revolution, several writers expressed concern with the states' practice of taking supplies for the army without compensation. For example, in 1778, writing under the pseudonym, "A Freeholder," John Jay complained about

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176. 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*, reprinted in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 128 (Richard. Beeman et al. eds., 1987) (discussing federalist fears of paper money and debtor relief schemes).

177. See, e.g., *Philadelphiensis*, reprinted in 3 *THE COMPLETE ANTIFEDERALIST* 118 (Herbert J. Storing, ed., 1981).

Figure to yourselves, my brethren, a man with a plantation just sufficient to raise a competency for himself and his dear little children; but by reason of the immoderate revenue necessary to support for the emperor, the illustrious well born Congress, the standing army, &c. &c. he necessarily fails in the payment of his taxes; then a hard-hearted federal officer seizes, and sells, his cows, his horses, and even the land itself must be disposed of to answer the demands of government.

*Id.*

178. Fisher, *supra* note 24, at 104.

179. Treanor, *supra* note 115, 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 of take land on its own until 1875. Until then, it relied on the states to condemn land and transfer title. Stoebeuck, *supra* note 10, at 559 n.18. See also *Kohl v. U.S.*, 91 U.S. 367, 371-72 (1875) (holding that federal government had eminent domain powers).

“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.”<sup>180</sup> Comparing the continental quartermasters to petty tyrants, Jay insisted that expropriations of property be done under color of law:

It is the undoubted Right and unalienable Priviledge 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.<sup>181</sup>

Jay’s complaint is interesting in two respects. First, his description of the means by which property could be taken from the subject paralleled the provisions in the various state bills of rights which require the owner’s consent, given either directly or through his representatives.<sup>182</sup> Second, it echoed the barons’ complaints against King John and follows the limits on the expropriation of supplies contained in the Magna Carta.<sup>183</sup>

The traditional fear of large standing armies combined with the revolutionary experience gave rise to added concern about the power of the national government to requisition supplies without payment. These fears led to the inclusion of a provision in the Bill of Rights

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180. John Jay, *A Hint to the Legislature of the State of New York* (1778), in 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY, UNPUBLISHED PAPERS 1745-1780 461-62 (Richard B. Morris ed., 1975).

181. *Id.* See also *Republica v. Sparhawk*, 1 Dall. 357, 358-59 (Pa. 1788) (Ingersoll for the plaintiff).

[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.

*Id.*

182. See *supra* notes 111-12.

183. The English king long had the power to requisition supplies for his household. However, the Magna Carta and the statutes which followed required the payment of just compensation. See Magna Carta, 1215, ch. 28 (allowing the king to take corn or other provisions only on payment of compensation); 13 Car. 2, c. 8 (1661) (allowing the compulsory use of horses, oxen and carriages with payment of a specified rate per mile); 13 & 14 Car. 2, c. 20 (1662) (Eng.) (authorizing compulsory land or water transport for the army with payment of a specified rate).

prohibiting the quartering of troops among the populace.<sup>184</sup> The compensation clause added to this protection by preventing the government from taking property to support its troops without payment for goods or services received. St. George Tucker admitted as much some years later when he wrote 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."<sup>185</sup>

This view of the compensation clause conforms to the general tenor of the remaining parts of the Bill of Rights. As has been often noted, the Bill of Rights was something of an anti-federalist antidote to what was thought to be the Constitution's centralizing tendencies. In the main, it was designed to provide safeguards against the arbitrary exercise of power by a distant national government. 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.

### C. Restraining Government Overreaching

While Madison may not have intended to make "a statement of national commitment to the preservation of property rights,"<sup>186</sup> he was concerned about the ability of legislative bodies to use their power to subvert the individual rights. Throughout the ratification struggle, Madison argued that the greatest danger to liberty in a Republic came from "the violence of faction" which he defined as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or the permanent and aggregate interests of the community."<sup>187</sup> During his career in the Virginia legislature, Madison saw first hand the way in which a faction might override the rights of a part of the citizenry. He found himself

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184. 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."

185. 1 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 app. at 305-06 (St. George Tucker ed., Rothman Reprints 1969) (1803).

186. Treanor, *supra* note 115, at 708.

187. THE FEDERALIST NO. 10 (James Madison). See also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 316 (1990) (describing Madison's theory of faction).

opposing the seizure of loyalist property,<sup>188</sup> forestallment acts,<sup>189</sup> and paper money laws.<sup>190</sup> Madison expressed his disgust with legislative overreaching in a letter to Thomas Jefferson:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is a mere instrument of the major number of the constituents.<sup>191</sup>

Although he himself was unconvinced of the need for a bill of rights—and indeed, remained unconvinced of its effectiveness in preventing oppression—having committed himself to the venture, he was determined to include protections for the rights of property.<sup>192</sup> The compensation clause may, therefore, also be seen as an attempt to guard against the possibility that interests hostile to property rights might gain a foothold in the national legislature.<sup>193</sup>

188. See, e.g., *A Bill Prohibiting Further Confiscation of British Property* (introduced Dec. 3, 1784), reprinted in 8 MADISON PAPERS, *supra* note 134, at 173.

189. Letter from James Madison to James Madison, Sr. (Nov. 1, 1786), in 9 MADISON PAPERS 205, *supra* note 134, at 205.

190. See Notes for a Speech Opposing Paper Money (Nov. 1 1786), in 9 MADISON PAPERS, *supra* note 134, at 158.

191. THE FEDERALIST NO. 48 (James Madison).

192. Madison dismissed the effectiveness of bills of rights as mere “parchment barriers” and warned that “restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 MADISON PAPERS, *supra* note 134, at 299.

193. By the latter part of the 1780’s, it had become clear to Madison and others that property and persons were two distinct interests in American society, and the rights of each required certain protections. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 503 (1969) [hereinafter *CREATION OF THE AMERICAN REPUBLIC*]. “In future years,” Madison noted, “a great majority of the people will not only be without landed, but any other sort of, property.” This propertyless class

would combine under the influence of their common situation; in which case, the rights of property & the public liberty will not be secure in their hands; or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side.

MAX FARRAND, 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 204 (1966). Madison recognized that the greatest threat to liberty in a republic would not come from a minority attacking a majority. Rather, the greatest dangers originated in a legislature which represented the majority of the people. Finkelman, *supra* note 187, at 312.

Since property and personal liberty were “both essential objects of government,” government must be structured to provide protection to both. *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 193, at 503. One way to do that would be to make suffrage dependent upon property; another way was to enlarge the sphere of representation “so that no one common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit.” THE FEDERALIST No. 39 (James Madison). See also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 277 (Julian P. Boyds et al. eds., 1955). As a result,



Madison's concerns about the tyranny of the majority have led some to conclude that many in Congress did not understand the need to include explicit protections for property in the Bill of Rights. Madison, it is said, was ahead of his time in urging support for his version of the compensation clause. This view finds expression in Professor Akhil Amar's book, *The Bill of Rights*. 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." Unfortunately, however, Madison was "unsuccessful in bringing the needed majorities in Congress around to his way of thinking." Unable to obtain more explicit protections for the rights of property, Madison was forced to try to "slip the takings clause through."<sup>194</sup> Another commentator takes a similar line, arguing that the "ideology underlying the [takings] clause ran counter to the republicanism espoused by the Anti-Federalists."<sup>195</sup> Both views seem to be based on the idea that large portions of the American public still had not been reconciled to the principle that compensation was required when property was taken for public use.<sup>196</sup> In Amar's words, "[p]roperty protection, it seems, was more central to Madison than to some of his contemporaries."<sup>197</sup>

This assumed hostility to the right to compensation allegedly caused Madison to resort to "clever bundling" as a means of putting one over on every body else. By tying the compensation clause to other, less controversial provisions guaranteeing due process in criminal cases, Madison secured its passage.<sup>198</sup> However, while it is clear that the compensation clause does not fit easily with the

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in crafting a new system of government, Madison thought the best means of protecting personal and property rights lay in using "faction" to control competing interests. See, e.g., THE FEDERALIST NO. 51 (James Madison). As one commentator has put it, Madison's scheme was founded on the idea that "[d]iversity begets jealousy, and jealousy begets security." Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 259 (1990). See also Finkelman, *supra* note 187, at 316-18 (describing Madison's reliance on faction rather than a bill of rights as a means of securing liberty).

194. AMAR, *supra* note 142, at 77.

195. Treanor, *supra* note 115, at 708.

196. See, e.g., *id.* at 713.

The Anti-Federalists apparently voiced no opposition to the just compensation clause. Since the amendment was intended to bind only the federal government, these critics of the Constitution had no reason to oppose the compensation requirement: Their fear was that the federal government would be too strong, not too weak. At the same time, in their campaign for limitations on federal power, they had not tried to secure a compensation requirement: As republicans, their theory of the polity legitimized uncompensated government takings.

*Id.*

197. AMAR, *supra* note 142, at 79.

198. *Id.* at 78.

remainder of his original amendment,<sup>199</sup> there is little reason to believe that anyone was deceived by so obvious a device. Indeed, members of both houses of Congress demonstrated a willingness to make alterations and deletions to Madison's proposed amendments. The Senate, in particular, had no problem deleting language and joining portions of amendments to others, and it did so with what was to become the Fifth Amendment. In effect, therefore, Amar's thesis assumes that members of Congress were either too lazy or too stupid to understand the implications of the compensation clause. If Amar and others are correct about the reluctance of both federalists and anti-federalists to support a compensation requirement, there seems little reason to believe that members of the House and Senate would sit by passively while a proposal they abhorred passed without opposition.

#### D. A Commitment to Property Rights

What, then, was Madison attempting? A precise answer is, of course, difficult to formulate from this distance in time. Nonetheless, it seems likely that in putting forth his version of the compensation clause, Madison sought to provide additional protections for property rights. His experience as a member of the Virginia legislature during the confederation period convinced Madison that such protections were necessary if the new nation were to develop a stable legal and economic regime.<sup>200</sup> No doubt Madison originally hoped that these protections might be provided by the structure of republican institutions.<sup>201</sup> 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.

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199. Madison's original amendment provided:

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

Madison's Resolution, *supra* note 164, at 9, 10.

200. See, e.g., Letter from James Madison to Thomas Jefferson (March 18, 1786), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 226-27 (1865).

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 . . .

*Id.*

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

With regard to the compensation clause in particular, it seems that Madison intended it to have a very narrow reach. It was designed to limit the powers of the federal government and only to physical takings of property.<sup>202</sup> 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 federal government. 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."<sup>203</sup> 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.<sup>204</sup> 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. On the contrary, it seems that the changes were made for stylistic reasons.<sup>205</sup> 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 land or merchandize" could be taken "*directly* even for public use without indemnification to the owner."<sup>206</sup>

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202. Treanor, *supra* note 115, at 708.

203. 4 DHFFC, *supra* note 139, at 10. Madison's Resolution, *supra* note 164, at 10.

204. Several commentators have argued that the "disproportionate impact" principle incorporated in the eminent domain clause might be utilized to determine the constitutionality of both taxation and regulation. *See, e.g.*, Richard Epstein, *Taxation, Regulation and Confiscation*, 20 OSGOODE HALL L.J. 433 (1982). *See also* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 106-07 (1973); Richard Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351 (1983) [hereinafter *Not Deference*].

205. *See supra* notes 163-64 and accompanying text.

206. James Madison, *Property*, NATIONAL GAZETTE (March 27, 1792), reprinted in 14 MADISON PAPERS, *supra* note 134, at 266, 267 [hereinafter Madison, *Property*].

In the years immediately following ratification of the Bill of Rights, courts repeatedly asserted that the compensation clause was intended only to apply 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. (7 Pet.) 243 (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 247. 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 Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816) (holding that the Fifth Amendment did not apply to the states); *Renthorp v. Bourg*, 4 Mart. 97 (La. 1816) (holding that the takings clause applied only to the federal government); *Enfield Toll Bridge Co. v. Conn. River Co.*, 7 Day 28, 52 (Conn. 1828) (Dagget, J., concurring) (suggesting that compensation clause applied only to physical takings of property).

At the same time, however, it also seems certain that Madison intended the clause to be a statement of fundamental values. His earlier opposition to a bill of rights did not prevent Madison from suggesting that such a declaration might serve an important purpose. Foremost among these was the idea that amendments would have an “educative function.”<sup>207</sup> “[P]olitical truths” declared in “a solemn manner” would “acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with national sentiment, counteract the impulses of interest and passion.”<sup>208</sup> The compensation clause, in particular, would serve as “a statement of national intent” and “impress upon the people the sanctity of property.”<sup>209</sup> In his 1792 essay on property, Madison asserted that the compensation clause was important in “maintaining the inviolability of property.”<sup>210</sup>

In essence, then, the compensation clause of the Fifth Amendment was intended to accomplish three very important tasks:

First, at its most basic level, it was designed to constrain the power of the federal government and limit the ability of a faction to use its influence in the legislature to interfere with private property rights. This was so whether that faction constituted a majority or minority of the legislature. In this respect, then, Madison’s compensation clause is consistent with the majoritarian tenor of the remainder of the Bill of Rights. As Akhil Amar has noted, “the main thrust of the Bill [of Rights] was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.”<sup>211</sup> Thus, in requiring compensation whenever the

207. Treanor, *supra* note 115, at 711.

208. Letter from James Madison to Thomas Jefferson, *reprinted in* 11 MADISON PAPERS, *supra* note 134, at 298 (1788).

209. *Id.* at 712.

210. Madison, *Property*, *supra* note 206, at 267. In the same essay, Madison asserted that a government committed to the protection of property rights would dishonor that commitment if it were to

*directly* violate[] the property which individuals have in their opinions, their religion, their persons, and their faculties . . . [or] *indirectly* violate[] their property, in their actual possessions, in the labour that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares.

*Id.* at 267-68 (emphasis in original).

Madison uses the word, “property” here in its Lockean sense, and includes within its purview the concept of rights in general. This broad conception of property has led some commentators to conclude that the compensation clause should apply to both regulatory takings and excessive taxation. *See, e.g., Not Deference*, *supra* note 204. While it is clear that Madison was concerned with ensuring that government respected a wide range of property rights, there is no indication that Madison ever intended such a broad reading of the compensation clause itself.

211. AMAR, *supra* note 142, at 276.

national government took private property for public use, the compensation clause addressed anti-federalist fears of strong centralized government, by limiting the circumstances under which the national government would be able to deprive the citizenry of their property. It prevented a distant and "lordly" legislature from expropriating the property of their lowly constituents without payment.<sup>212</sup> After all, it must be remembered that the "extraordinary powers of the Senate were vested in twenty-six men, fourteen of whom would constitute a quorum, of which eight would make a majority."<sup>213</sup> At the same time, however, the compensation clause was protective of minority rights, and thus satisfied federalist fears that a landless majority might gain control of the national legislature and impose confiscatory regulations on property in the way state legislatures had done during the confederation. Madison's amendment thus had the benefit of appealing to both sides of the constitutional controversy.

Second, on a more theoretical level, the compensation clause served an educative function in that it was to be a "national declaration of respect for property rights."<sup>214</sup> In essence, the "primary purpose" of the provision was to "stimulate popular appreciation of the dangers of expropriation."<sup>215</sup> Indeed, some years later, Chancellor Kent observed that the Fifth Amendment's compensation clause was "absolutely decisive of the sense of the people of this country" such that "a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property."<sup>216</sup>

Finally, far from establishing a new principle, Madison's amendment did nothing more than incorporate a longstanding

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212. Richard Henry Lee, *Letters from the Federal Farmer, Letter II*, reprinted in 2 THE COMPLETE ANTIFEDERALIST 233 (Herbert J. Storing, ed., 1981) (Lee's authorship is disputed). See also 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, 292 (1988) ("Since the federal government is more remote, and more likely to develop interests separate from and in tension with the people, it is important that private property not be exposed to confiscation for the benefit of the government.").

213. AMAR, *supra* note 142, at 287. Although the make-up of the House looked somewhat better, with an initial allocation of sixty-five members, Patrick Henry noted that the limitation on representatives contained in the Constitution allowed for a progressively smaller ratio of representation as the nation increased in size. JONATHAN ELLIOT, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 287 (2d ed., 1888).

214. Treanor, *supra* note 115, at 714.

215. FISHER, *supra* note 24, at 101-02.

216. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816). In actuality, Kent was confronted with the question of whether a state was required to pay compensation for a taking of property in the absence of any specific provision in its constitution.

principle of property rights into the constitutional text.<sup>217</sup> In many respects, it merely reconfirmed the long-held commitment to consent that was a mainstay of the law of expropriation since the Magna Carta.

## VI. "Public Use" as a Limitation on Takings

What, then, of the public use requirement? The short answer is that no such requirement ever explicitly existed—at least as it has since been framed by the American judiciary.

In 1789, no provision in either the state or federal constitutions directly limited takings to "public uses." On the contrary, the language contained in the various constitutional formulations appears to be descriptive rather than prescriptive. Certainly, actual practice in the years leading up to the drafting of the compensation clause evidenced a belief that private property might be taken to support a wide range of activities, some of which might arguably be seen as being only tangentially related to any government function. Thus, takings of land by private parties for the building of mills or ferries were thought to be every bit as legitimate a use of the eminent domain power as takings to build forts or post offices. This is most probably because the scope of government regulation in both the colonial and confederation period was arguably wider than is commonly thought. Although political economists and others in the commercial classes frequently called for less government regulation, few dared to assert that the states lacked the power to regulate the local economy.<sup>218</sup> Consequently, as long as the requirement of consent was met, takings of property to achieve economic ends were accomplished without great controversy.

Given this state of affairs, it is not surprising that few in the founding era seem to have thought it necessary to define the phrase, "public use," as used in the various compensation clauses. On the contrary, most drafters of early constitutions emphasized the Lockean notion of representation and effective consent, rather than the

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217. *But cf.* Treanor, *supra* note 115, at 711-16 (asserting that the Fifth Amendment helped legitimize the principle of compensation).

218. *See, e.g.*, CATHY D. MATSON & PETER S. ONUF, A UNION OF INTERESTS: POLITICAL AND ECONOMIC THOUGHT IN REVOLUTIONARY AMERICA 37-38 (1990).

Anglo-Americans were no strangers to domestic economic regulation. By 1750 the colonial legislatures had long experience collecting their own revenues, taxing citizens, operating land banks and paper currencies, distributing land and arguing over deeds, contracts, riparian rights, and regulating the flow of inhabitants and goods within their boundaries. The colonial assemblies jealously defended these privileges.

*Id.*

substantive aspects of takings.<sup>219</sup> Moreover, the debate over Madison's proposed amendments to the federal constitution reveals that most members of Congress were tied up with "due process" concerns. Both Madison and the various committees charged with making revisions to the compensation clause seemed always to view the clause as one in a series of necessary procedural protections for life, liberty and property. The unstated assumption was simply that representative government—subject to appropriate procedural requirements—would be enough to protect against abuses of the power of eminent domain.

More importantly, it seems clear that the phrase, "public use" as found in the Fifth Amendment was not meant to serve as a substantive limitation at all. On the contrary, the term was meant to be *descriptive*, rather than prescriptive. It distinguished that category of takings which required compensation from those that did not.

At the end of the eighteenth century, Anglo-American law recognized three different types of direct takings. These included takings by taxation, expropriation and forfeiture. As has been noted already, takings by taxation or expropriation were based on the principle of consent and were more properly regarded as "givings." Forfeitures, on the other hand, were purely involuntary takings, and were usually imposed as a penalty for violating the law. While most English theorists agreed that the right to hold property was founded upon natural law, a man's property might be subject to forfeiture if "a member of any national community violates the fundamental contract of his association, by transgressing the municipal law."<sup>220</sup> In such a case, "the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him."<sup>221</sup>

English law imposed various forfeitures as punishment for criminal offences. For example, real property belonging to traitors and capital felons reverted to the Crown upon conviction and attainder, while in the colonies, heavy fines amounting to total forfeiture were routinely imposed on felons. Lesser forfeitures were imposed for minor crimes, particularly in New England, where fines were imposed for a wider variety of offences, such as failing to attend church on Sunday, overpaying workers, possessing playing cards or scolding a husband.<sup>222</sup> Even after the Revolution, the American states continued to impose various forfeitures for a variety of "political" offences. Most states passed laws confiscating the property of

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219. Meidinger, *supra* note 10, at 17.

220. 1 WILLIAM BLACKSTONE COMMENTARIES \*\*138, 299; 2 WILLIAM BLACKSTONE COMMENTARIES \*11.

221. 1 WILLIAM BLACKSTONE COMMENTARIES \*299.

222. McDONALD, *supra* note 79, at 20.

loyalists, while some went so far as to fine those who uttered wicked opinions.<sup>223</sup> Forfeiture was not merely a criminal sanction, however. Enforcement of the trade and navigation acts was only made possible by the Crown's ability to declare uncustomed goods or vessels used in smuggling forfeit. Actions for forfeiture might be brought in personam or in rem, with the result that violations of the revenue or trade laws might result in both forfeiture of property or fines to the offenders.<sup>224</sup>

As a result, the use of the phrase "public use" in the Fifth Amendment was most likely designed to ensure compensation when property was taken for a public use in a manner that imposed a disproportionate burden on the property owner. Thus, takings by taxation do not require compensation because the burden of the tax theoretically falls proportionately on all. Similarly, takings by forfeiture do not require compensation because forfeitures are essentially fines imposed for violation of law. Forfeiture is, in effect, the deprivation of those benefits which are derived from an observance of the social contract. Requiring compensation for taxation or forfeiture would defeat the purpose of those exactions. On the other hand, expropriations require compensation because this sort of taking imposes a disproportionate burden on the property owner. Those whose property has been taken for a public purpose, as in the taking of land for the building of a fort or post office, are asked to contribute more than their fair share. It is just, therefore, that the rest of the citizenry make up the loss.

The principle of consent dictates this conclusion. After all, to use the term "public use" as a limit on the types of cases in which Congress could expropriate property would be to impose a limit on the power of Congress to consent on behalf of the people. Such a limit would have been a monumental alteration in the nature of representative government as understood by the members of the founding generation. That is to say, read as a limit on the power of expropriation, the term "public use" would effectively change the relationship of Congress as a representative institution to the body politic, thereby preventing Congress from giving consent in an important category of cases. This might have been the aim, but there is simply no evidence that any one in the First Congress understood

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223. For example, Virginia enacted a law provided a fine of up to £20,000 and five years imprisonment against any person who "by any word, or open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony." 9 Va. Stat. 170 (1776).

224. A fuller discussion of the law of forfeiture in connection with trade and navigation cases may be found in Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL. REV. 281 (1994).



that the Fifth Amendment was designed to limit the principle of consent. Indeed, one would have expected far more debate on so momentous a question. Moreover, if Congress had really intended this reading, it might have gone about the business far more directly. After all, the drafters of the Fifth Amendment might have accomplished that end simply by declaring that "private property shall not be taken *except for a public use.*" And, while arguments from silence are often troublesome, it seems clear that the First Congress freely made revisions to the amendments as they moved toward passage.<sup>225</sup> That no one sought to make clear the limit on Congress's power to consent is probably the best evidence that no such limit was intended. As a result, it appears that in proclaiming that private property shall not be taken for "public use," without just compensation, the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not.

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225. See *supra* notes 148, 152 and accompanying text concerning the double jeopardy clause also contained in the Fifth Amendment.

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