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# The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment

William Michael Treanor

*Georgetown University Law Center*, [wtreanor@law.georgetown.edu](mailto:wtreanor@law.georgetown.edu)

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# The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment

The principle that the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America. Uncompensated takings were frequent and found justification first in appeals to the crown and later in republicanism,<sup>1</sup> the ideology of the Revolution. The post-independence movement for just compensation requirements at the state and national level was part of a broader ideological shift away from republicanism, which stressed the primacy of the common good, and toward liberalism.<sup>2</sup> At the time the Bill of Rights was adopted, that shift had not been completed, but the trends of the revolutionary era received coherent expression in the thought of James Madison, the author of the Fifth Amendment's just compensation clause.<sup>3</sup> Madison believed it necessary to erect strong safeguards for rights in general and for property rights in particular. His just compensation clause—although intended to have relatively narrow legal consequences—was such a safeguard. Its ratification represented the translation of liberal ideology into constitutional principle.

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1. Historians have proposed a number of slightly different models of republicanism. The two most influential models are set forth in B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34–93 (1967) and in G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 46–90 (1969). For a comparison of these models with each other and with that of Professor J.G.A. Pocock, see Pocock, *The Machiavellian Moment Revisited: A Study in History and Ideology*, 53 *J. WORLD HIST.* 49 (1981).

In republican ideology, society is conceived of in organic terms. The promotion of virtue and the advancement of the common good are among the primary ends of government. In recent years, historians have persuasively argued that, to the extent the American Revolution was motivated by ideology, it was motivated principally by republicanism: Republicanism led Americans to see British government as corrupt and a threat to American virtue. See, e.g., B. BAILYN, *supra*, at 85–104; J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 507–08 (1975); G. WOOD, *supra*, at 16–17, 22–33, 30–36, 40–43. For further discussion of republicanism, see *infra* pp. 699–701.

2. For the purposes of this Note, liberalism is the ideology that, conceptualizing society in atomistic rather than organic terms, holds the end of government to be the security of individual liberty; this school of thought received its classic embodiment in the writings of John Locke. For discussion of liberalism in revolutionary America, see *infra* pp. 704–05, 709–10. See also C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263–71 (discussing the contributions of Locke and Hobbes to liberal thought).

3. The just compensation clause of the Fifth Amendment declares: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

## Just Compensation Clause

### I. TAKINGS LAW BEFORE THE JUST COMPENSATION REQUIREMENT

Neither colonial statutes nor the first state constitutions recognized a right to receive compensation when the government took property from an individual. Crown officials justified uncompensated takings by appealing to royal prerogative and limitations contained in original land grants. The absence of a just compensation clause in the first state constitutions accorded with the faith in legislatures that was a central element of republican thought and with the position held by many republicans that the property right could be compromised in order to advance the common good.

#### A. Colonial Statutes and the First State Constitutions

Eighteenth-century colonial legislatures regularly took private property without compensating the owner. In some cases where the owner had failed to develop his property, ownership was simply transferred to another person.<sup>4</sup> The most common type of uncompensated taking, however, was the taking of private land for public roads. Except for Massachusetts,<sup>5</sup> no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land.<sup>6</sup>

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4. Among the individuals who suffered this fate were those who had built bridges and let them fall into disrepair, An Act to regulate the Expence of private Bridges, Mass. Stats. ch. X (1743), and those who did not settle their land, An Act for the laying out of Land, and erecting a Town at a Place called Broxen's Point, in Cecil County, Md. Stats. (1730); An Act for enlarging the Town of Alexandria, in the County of Fairfax, Va. Stats. ch. XXV (1762); An Act enlarging the Town of Petersburg . . . , Va. Stats. ch. XXIV (1762); see also P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 38 (1968) (escheat of undeveloped land in colonial Virginia); Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635, 664-65, 669 (1982) (confiscation of undeveloped land in New York).

5. Massachusetts compensated landowners even for unimproved land taken for state-owned roads. See, e.g., An Act in addition to the several Laws of this Province relating to common Roads and private Ways, Mass. Stats. ch. III (1739); An Act in addition to an Act Intituled, An Act for High-Ways, Mass. Stats. ch. III (1736); An Act for High-ways, Mass. Stats. (1693). When, however, a jury assessing damages decided that the road benefited the owner's estate more than the loss of land for the road harmed it, no compensation was given. See J. PARSONS, A CONSIDERATION OF SOME UNCONSTITUTIONAL MEASURES, ADOPTED AND PRACTICED IN THIS STATE 17 (Newbury-port, Mass. 1784). On the role of juries generally in determining damages, see *infra* note 6.

6. See, e.g., *M'Clenachan v. Curwin*, 3 Yeates 362, 371-73 (Pa. 1802) (in colonial Pennsylvania, no compensation due owner when road built across his unimproved land); *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 47-51 (1796) (in colonial South Carolina, no compensation paid when government took unimproved land); An Act for regulating, clearing and further laying out public Highways throughout the City and County of Albany, N.Y. Stats. ch. CXCIX (1760) (compensation only for "cleared or improved Lands"); An Act for the better clearing and further laying out public High-Roads in the County of Ulster, N.Y. Stats. ch. XII (1743) (same); An Act for Making, Clearing, and Repairing the Highways, and for Clearing the Rivers and Creeks, Va. Stats. ch. xxxix (1705) (no provision for compensation for land taken for roads).

There was only one colony in which improved land appears to have been regularly taken for roads without compensation. Colonial Virginia road building statutes have no compensation provisions. See, e.g., An Act for clearing a Road from the Warm Springs in Augusta, and for other Purposes therein

Such governmental takings generally promoted economic growth: Uncompensated taking of unimproved land reduced the cost of road build-

mentioned, Va. Stats. ch. XXIV (1772); An Act for Making, Clearing, and Repairing the Highways, and for Clearing the Rivers and Creeks, Va. Stats. (1705). Furthermore, in his *Notes on the State of Virginia*, Thomas Jefferson indicated that in colonial Virginia individuals received no indemnification when public roads were built on their land. See T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 148 (2d ed. Richmond, Va. 1853) (1st ed. London 1787).

Two recent commentators have offered differing interpretations of the general failure to compensate when unimproved lands were taken for roads. See M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 63-64 (1977); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 582-83 (1972). Horwitz cites this failure to provide payment as indicating that the just compensation principle had not won general acceptance in colonial America. M. HORWITZ, *supra*, at 63-64. In contrast, Stoebuck contends, "In effect, the colonials made an 'irrebuttable presumption' . . . that a new road would always give more value than the unenclosed land it occupied had. . . . The colonial practice of paying only for unenclosed [sic] land did not deny the general right of compensation." Stoebuck, *supra*, at 583.

There are two problems with Stoebuck's position. As has been indicated, see *supra* note 4 and accompanying text, property was taken without compensation in contexts other than road building. In addition, the statutes of the colony with the most detailed road building statutes—New York—do not support Stoebuck's thesis: Colonists did not simply assume that the benefit of a road would exceed the loss occasioned by taking unimproved land. According to standard New York highway acts, when a county road was built across unimproved land, the timber on that land could be used, without compensation to the owner, in road building; that timber could not be taken, however, for use in building a private road. See, e.g., An Act for the better laying out, regulating and keeping in Repair, common, publick and private High-ways . . . in the County of Orange, N.Y. Stats. ch. CCCLXV (1765); An Act for regulating, clearing, and further laying out public Highways throughout the City and County of Albany, N.Y. Stats. ch. CXCIX (1760). The decisive variable explaining the difference in practice was not benefit to the former owner: He would be benefited by any road that linked his farm to markets. The decisive variable was the importance of the state interest. Although a county and a private citizen might confer the same benefit on an owner by building a road through his land, the county would enjoy the privilege of taking timber without compensation, while the citizen would not.

Colonial governments, of course, recognized a large sphere within which they did not challenge private property rights. Compensation for takings was regularly made. For example, at least four New York statutes passed between 1745 and 1755 had compensation provisions: An Act to enable the Inhabitants of Schenectady, to fortify the said Town, N.Y. Stats. ch. LIII (1755) (allowing town residents to take private land to be used for construction of fortifications); An Act further to empower the Justices of the Peace in the County of Albany . . . to drain the Water out of the Streets thereof, N.Y. Stats. ch. XXVIII (1753) (empowering the justices to build gutters and drains across private property); An Act for . . . publick High-Roads in the County of Westchester, N.Y. Stats. ch. XIV (1745); An Act for . . . publick Highways in Kings County, Queens County, Richmond County, and Orange County, N.Y. Stats. ch. XIII (1745).

While compensation mechanisms varied somewhat from colony to colony, juries were in general empowered by statute to determine the value of property taken. See, e.g., An Act in addition to the several Laws of this Province relating to common Roads and private Ways, Mass. Stats. ch. III (1739); An Act for the better laying out, regulating, and keeping in Repair, common, publick, and private High-ways . . . in the County of Orange, N.Y. Stats. ch. CCCLXV (1765); An Act to enable the Inhabitants of Schenectady, to fortify the said Town, N.Y. Stats. ch. LIII (1755). None of the statutes surveyed provided for judicial appeal of compensation awards, but it appears that, at least in Massachusetts, the individual could petition the legislature if denied compensation or if given an amount he deemed inadequate. See J. PARSONS, *supra* note 5, at 17. In addition, trespass suits could be brought against individuals who took private property for a public use without proper legislative authorization. See, e.g., *Emmons v. Brewer* (Mass. Super. Ct. 1772), reprinted in 2 LEGAL PAPERS OF JOHN ADAMS 9 (L. Wroth & H. Zobel eds. 1965); *Giddings v. Brown* (Essex County Court 1657), reprinted in READINGS IN AMERICAN LEGAL HISTORY 232 (M. Howe ed. 1952); J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 328-33 (1950) (discussing trespass suits against individuals purportedly acting under Naval Stores Act in cutting trees on private property for use by the Royal Navy).

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ing<sup>7</sup>; the transfer of ownership of land and bridges to individuals who would use such property productively aided development.<sup>8</sup> A powerful strand of English legal thought, a strand that had its origins in feudal notions of property and kingship, legitimized such redistributions. According to this theory, property was held from the state; the state could therefore limit the individual's ownership claims.<sup>9</sup> The terms of the original crown or legislative grant generally provided the source of those limitations. Many land grants, for example, required settlement as a condition for validation. When stripping individuals of title to undeveloped land, colonial officials were able to justify their actions by maintaining that the owners (and their predecessors in interest) had failed to honor that condition.<sup>10</sup>

Express grant conditions were not, however, the only limitations on individual property ownership. In colonial America, takings were also justified by appeals to the inherent powers of the sovereign. For example, in his campaign for the seizure of undeveloped land that had been issued

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7. For examples of these takings, see *supra* note 6.

8. For examples of such transfers, see *supra* note 4. These takings suggest the prevalence in colonial America of a labor theory of value. Possession alone did not create a protected interest. Only the investment of labor in inherited or purchased possessions created a compensable interest.

9. For discussions of English legal history that illustrate the continuing force of this conception of property, see 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 318 (3d ed. 1945); 10 *id.* at 364-68, 384-88 (1st ed. 1938); S. MOORE, *A HISTORY OF THE FORESHORE AND THE LAWS RELATING THERETO* 420-33 (1888).

At the time of the American Revolution, the principle that the state was obligated to compensate individuals when it took their property had not won general acceptance in England. Parliament routinely provided payment to a person whose property was taken for a public use, see Stoebuck, *supra* note 6, at 579, but whether the individual had a right to such payment was disputed. Though (uncharacteristically) unable to provide historical support for his position, William Blackstone declared that compensation was a necessity. Parliament acts, he wrote:

[n]ot 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. . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

1 W. BLACKSTONE, *COMMENTARIES* \*140.

Citation to Blackstone did not, however, impress the bench in *British Cast Plate Mfrs. Co. v. Meredith*, [1792] 100 Eng. Rep. 1306, a road building case and apparently the only 18th-century English opinion to address the issue of government takings of private property, see *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All E.R. 348, 354-55 (Reid, J.). The *Meredith* court noted in dicta that neither reason nor precedent supported the argument that the judiciary could impose compensation that Parliament had not authorized. Chief Justice Kenyon declared, "If the Legislature think it necessary, as they do in many cases, they enable the [road] commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction . . ." 100 Eng. Rep. at 1307. Justice Buller noted, "There are many cases in which individuals sustain an injury, for which the law gives no action . . . This is one of those cases to which the maxim applies, *salus populi suprema est lex.*" *Id.* at 1307-08.

10. See P. GATES, *supra* note 4, at 38 (escheat in Virginia); S. LIVERMORE, *EARLY AMERICAN LAND COMPANIES* 23-24 (1939) (in colonial New England, settlement or cultivation required to validate land grants); Mensch, *supra* note 4, at 664 (threatened confiscation in colonial New York though current owner not original grantee).

under grants containing no explicit condition of settlement, New York Governor Bellomont successfully argued that the absence of such a restriction undermined royal authority and was "very presumptuous and unnatural"; lack of an explicit restriction thus did not bar revocation.<sup>11</sup>

Although independence ended appeals to royal authority as sanctioning takings, it did not immediately lead to general acknowledgment of the principle of just compensation. Uncompensated takings of private property occurred regularly in the revolutionary era. Loyalist property was seized.<sup>12</sup> Undeveloped land was taken for roads.<sup>13</sup> Goods of all types were impressed for military use.<sup>14</sup> None of the first state constitutions featured a just compensation requirement. Only three had clauses concerning takings,<sup>15</sup> and these three simply adopted a principle of the Magna Carta: Property could not be taken without the consent of either the owner or the legislature.<sup>16</sup> In practice, it was the legislature, rather than the owner, which authorized the taking.<sup>17</sup>

11. Letter from Governor Bellomont to the Lords of Trade (Jan. 2, 1701), *quoted in* Mensch, *supra* note 4, at 667.

A series of early eighteenth century parliamentary statutes provides another striking invocation of a power not contained in grants. *See* 2 Geo. II, ch. 35 (1729); 8 Geo. I, ch. 12 (1721); 9 Anne, ch. 17 (1710). Under these acts, white pines growing on certain categories of undeveloped land became crown property. For a discussion of the effect of these laws, see Mayo, *The King's Woods*, 54 MASS. HIST. SOC'Y PROC. 50 (1920). For an analysis of the case of Leighton v. Frost (P.C. 1739), in which a Massachusetts citizen whose pine trees had been cut down by a crown agent unsuccessfully sued that agent, see J. SMITH, *supra* note 6, at 328-33.

Though not a takings case, *Winthrop v. Lechmere* also suggests the state's power to overturn previously respected ownership claims. There, the King in Council declared "Null and Void" the Connecticut intestate act, even though the act had been in place for thirty years and many colonial residents traced their ownership claims to distributions made under the act. *Winthrop v. Lechmere* (P.C. 1728), *reprinted in* 7 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 578, 578 (1873); *see also* J. SMITH, *supra* note 6, at 537-51 (discussing the case). For a discussion of the "hierarchical" element in colonial thinking about property, see Mensch, *supra* note 4, at 644-46.

12. All of the states, except South Carolina, passed acts confiscating loyalist estates. A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION* 507 (1924).

13. *See, e.g.*, An Act to declare and ascertain the rights of citizens of this state to private roads or ways, Md. Stats. ch. XLIX (1785); An Act for the better laying out, regulating and keeping in Repair, all common and public Highways and private roads, N.Y. Stats. ch. LII (1784).

14. *See, e.g.*, *Republica v. Sparhawk*, 1 Dall. 357 (Pa. 1788) (denying compensation for such a seizure); 1 S. TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA*, Book 1 at 305-06 (Philadelphia 1803) (during revolutionary war, supplies for army "too frequently obtained" through uncompensated takings).

15. The states that had takings clauses were Maryland, New York, and North Carolina. For the relevant clauses, see 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 1688 (1909) (Maryland); 5 *id.* at 2632 (New York); 5 *id.* at 2788 (North Carolina).

16. The relevant Magna Carta provision holds, "No free man shall be . . . disseised . . . except by the lawful judgement of his peers or by the law of the land." *MAGNA CARTA* art. 39.

17. *See, e.g.*, An Act to declare and ascertain the rights of citizens of this state to private roads or ways, Md. Stats. ch. XLIX (1785); An Act for the better laying out, regulating and keeping in Repair, all common and public Highways and private roads, N.Y. Stats. ch. LII (1784).

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### B. *Republican Ideology and the Right to Property*

The failure to establish this safeguard for property rights was consistent with central tenets of republicanism, the reigning ideology of 1776.<sup>18</sup> At the center of republican thought lay a belief in a common good and a conception of society as an organic whole. The state's proper role consisted in large part of fostering virtue, of making the individual unselfishly devote himself to the common good.<sup>19</sup> Individual rights played no more than a secondary role in republican thought.<sup>20</sup> As one historian has noted, "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism . . . ."<sup>21</sup>

The role of property in this school of thought was complex. Ownership of a certain amount of property—such as a farm or a workshop—was necessary for participation in the polity. A man dependent on others for his livelihood did what they wanted him to do. He lacked the independence necessary to pursue the common good.<sup>22</sup> At the same time, the possession and pursuit of property could corrupt and lead the individual to place personal before public interest. Celebrations of self-denial and denunciations of commerce, of luxury, and of speculation were common elements in republican rhetoric.<sup>23</sup> Many republican thinkers pilloried great wealth: Wealth encouraged greed in its possessors and enabled them to wield undue power. Moreover, the monopolization of possessions by a few denied to others the minimum of property that they needed to be full participants in the republican polity.<sup>24</sup>

Drawing on these premises, a major strand of republican thought held

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18. As J.G.A. Pocock has observed, "Not all Americans were schooled in this [the republican] tradition, but there was (it would almost appear) no alternative tradition in which to be schooled." J. POCOCK, *supra* note 1, at 507. Republicanism provided the intellectual basis for the American challenge to British rule, *see supra* note 1, and many who at other times rejected traditional republican thought embraced it during the first years of the war. *See* D. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 69–70 (1980); G. STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 68–69 (1970); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 484 (1976).

19. *See* D. MCCOY, *supra* note 18, at 69–70; G. WOOD, *supra* note 1, at 118–124.

20. *See* G. WOOD, *supra* note 1, at 53–65; Shalhope, *Douglass Adair and the Historiography of Republicanism*, in D. ADAIR, *FAME AND THE FOUNDING FATHERS* at xxv, xxv (T. Colbourn ed. 1974). According to Professor Wood:

[T]he important liberty in . . . [republican] ideology was public or political liberty. In 1776 the solution to the problems of American politics seemed to rest not so much in emphasizing the private rights of individuals against the general will as it did in stressing the public rights of the collected people against the supposed privileged interests of their rulers.

G. WOOD, *supra* note 1, at 61.

21. G. WOOD, *supra* note 1, at 53.

22. *See* D. MCCOY, *supra* note 18, at 68; J. POCOCK, *supra* note 1, at 462–64.

23. *See* J. CROWLEY, *THIS SHEBA SELF: THE CONCEPTUALIZATION OF ECONOMIC LIFE IN EIGHTEENTH-CENTURY AMERICA* 101–10 (1974); G. WOOD, *supra* note 1, at 413–25.

24. *See* J. CROWLEY, *supra* note 23, at 108–110; D. MCCOY, *supra* note 18, at 67–68; *see also* G. WOOD, *supra* note 1, at 418 (republicanism "essentially anti-capitalistic").

that the state could abridge the property right in order to promote common interests. Thus, in framing the Declaration of Independence's list of inalienable rights, Jefferson did not use the standard Lockean-liberal formulation of "life, liberty, and property." Because he did not consider property an inalienable right, he employed instead the phrase "life, liberty and the pursuit of happiness."<sup>25</sup> This notion that the state could abridge the property interest underlay Benjamin Franklin's declaration that "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its contributions therefore to the public Exigencies are . . . to be considered . . . the Return of an obligation previously received, or the Payment of a just Debt."<sup>26</sup> In what Professor Gordon Wood has described as a manifestation of one aspect of "classical Whig republicanism,"<sup>27</sup> a draft of the Pennsylvania Declaration of Rights directed that state laws discourage concentrations of wealth because "an enormous Proportion of Property vested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness, of Mankind."<sup>28</sup>

The idea that state claims could trump private ownership claims legitimized the uncompensated taking of property. As a Pennsylvania judge upholding an uncompensated taking of goods by the military wrote, "[I]t is better to suffer a private mischief, than a public inconvenience . . ."<sup>29</sup> Such statements hark back to earlier expressions of crown officials: Property was viewed in significant ways as the creature of the state and as subject to its demands. In combination with this statism, however, was an emphasis on the common good, rather than a reliance on royal will.<sup>30</sup>

### C. *Faith in Legislatures*

The fact that the first state constitutions lacked just compensation clauses is only in part attributable to republican conceptions of property and of rights. It is also evidence of the faith in legislatures that was a

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25. For discussions of Jefferson's views of property and their influence on the Declaration of Independence, see G. WILLS, *INVENTING AMERICA* 229-39 (1978); Katz, *supra* note 18, at 467-81.

26. B. FRANKLIN, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 54, 59 (A. Smythe ed. 1907).

27. G. WOOD, *supra* note 1, at 89.

28. *AN ESSAY OF A DECLARATION OF RIGHTS* 1 (Philadelphia 1776).

29. *Republica v. Sparhawk*, 1 Dall. 357, 362 (Pa. 1788).

30. Jefferson manifested this point of view in a letter that he wrote from France in 1785. "Whenever there is in any country uncultivated lands and unemployed poor," he wrote, "it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on." He suggested that America might eventually reach the stage where it would be necessary "to say that every man who cannot find employment but who can find uncultivated land shall be at liberty to cultivate it, paying a moderate rent." Letter from Thomas Jefferson to Rev. James Madison (Oct. 28, 1785), in 8 T. JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 681, 682 (J. Boyd ed. 1953).



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central tenet of republican thought.<sup>31</sup> Possessed of relatively little individual power, the legislator was seen as largely immune from the temptations to which a governor was exposed. As the voice of the people, the legislature could be trusted to perceive the common good and to define the limits of individual rights. Operating on these assumptions, the authors of the constitutions made the legislature the dominant branch of state government. The ability to take property and provide compensation as it saw fit was a typical example of the enormous discretionary power that the first constitutions gave legislative bodies.<sup>32</sup> Through the legislature, the people would govern themselves wisely. “All property,” Thomas Paine asserted, “is safe under their [the people’s] protection.”<sup>33</sup>

While republicans believed that a body of legislators would act wisely, they brooded almost obsessively about the corruption that they believed great individual power had produced in England.<sup>34</sup> By emasculating the executive, the framers of the first state constitutions sought to ensure that similar abuses would not occur in this country.<sup>35</sup> The first takings clauses—which barred the executive from taking property<sup>36</sup>—did not reflect a changing view of property rights. Rather, they represented only one of many limitations imposed on gubernatorial action.<sup>37</sup>

## II. THE BIRTH OF THE JUST COMPENSATION REQUIREMENT

The Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787 all required just compensation for governmental taking of private property. Adoption of these clauses evidenced a growing rejection of traditional republican ideology, a decline of faith in legislatures, and a new concern for individual rights—particularly property rights.

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31. For a discussion of republican faith in legislatures, see G. WOOD, *supra* note 1, at 162–73.

32. For a discussion of powers granted the legislatures, see A. NEVINS, *supra* note 12, at 167–70. In every state, the legislature was the dominant branch of government. Each constitution, except for New York’s, specified that the legislature would elect the governor. In most cases, it also elected the judges and could easily remove any judge of whom it disapproved. *Id.* at 166–67. Moreover, there was a “general assumption during the years 1776–1787 that they [the legislatures] were the sole judges of their constitutional powers.” *Id.* at 168.

33. Thomas Paine, *quoted in* G. WOOD, *supra* note 1, at 62.

34. See B. BAILYN, *supra* note 1, at 51, 130–38.

35. See A. NEVINS, *supra* note 12, at 166–67.

36. See *supra* notes 15–16 and accompanying text.

37. Among the other significant limitations on gubernatorial power were the absence in all states of a veto, patronage, and the ability to adjourn the legislature. A. NEVINS, *supra* note 12, at 166.

A. *The Vermont Constitution*

Vermont, the first state<sup>38</sup> whose constitution required just compensation, had a tangled history of property holdings. It was settled primarily by men who held grants from New Hampshire. In 1764, King George III awarded the area to New York, whose governors refused to recognize the land claims of New Hampshire settlers.<sup>39</sup> After 1774, the legislature of colonial New York actively supported gubernatorial attempts to oust the New Hampshire claimants.<sup>40</sup> Even after the Revolution, the New York legislature was unwilling to recognize the New Hampshire titles.<sup>41</sup> Focusing on such legislative actions, the preamble of the Vermont Constitution of 1777<sup>42</sup> bemoaned the fact that "the legislature of *New-York* ever have, and still continue to disown the good people of this State, in their landed property . . . ."<sup>43</sup>

The constitution went on to provide that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."<sup>44</sup> Although there are apparently no surviving records of the constitutional convention,<sup>45</sup> the reason for this provision seems clear. A state legislature had attempted to deprive most of the citizens of Vermont of their land. Vermonters wanted to ensure that they would never again face such a threat.<sup>46</sup> The clause, however, also had an effect on day-to-day government operations. Breaking with the practices of New Hampshire and New York, the Vermont legislature paid compensa-

38. While a convention of Vermont residents proclaimed statehood in 1777, Vermont was not recognized as a state until 1791, when it was admitted into the Union. C. MORRISSEY, VERMONT 89, 100 (1981).

39. Slade, *Introduction to VERMONT STATE PAPERS* at xv, xvii (W. Slade ed. 1823).

40. In 1774, the New York legislature issued a proclamation demanding that named Vermont leaders surrender promptly to New York authorities; failure to surrender was punishable by death. An Act for preventing tumultuous and riotous Assemblies . . . and effectual punishing [of] the rioters, N.Y. Stats. (1774), *reprinted in* VERMONT STATE PAPERS, *supra* note 39, at 77.

41. See Public Letter from Ethan Allen (Aug. 9, 1778), *reprinted in* VERMONT STATE PAPERS, *supra* note 39, at 85.

42. This constitution's legitimacy is unclear. It was not submitted to the people, see Public Letter of Thomas Chittenden, President of the Council of Safety (Feb. 6, 1778), *reprinted in id.* at 81, and the legislature twice felt it necessary to proclaim its continuing force, see An Act establishing the Constitution of Vermont and securing the Privileges of the People, Vt. Stats. (1782), *reprinted in id.* at 449; An Act for securing the general privileges of the people . . . , Vt. Stats. (1779), *reprinted in id.* at 287.

43. VT. CONST. of 1777, *reprinted in id.* at 241, 242 (emphasis in original).

44. VT. CONST. of 1777, ch. I, art. II, *reprinted in id.* at 244.

45. It is unlikely that there was much discussion. In the face of an expected British attack, the convention on the same day convened, voted to accept the proposed constitution, and adjourned. *Editor's Note*, in *id.* at 79.

46. Vermont citizens had been represented in the legislatures that refused to honor their grants. Four New York legislative districts were located completely or partially in Vermont. See An Act for preventing tumultuous and riotous Assemblies . . . and effectual punishing [of] the rioters, N.Y. Stats. (1774), *reprinted in id.* at 42.

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tion even when it built roads on unimproved land.<sup>47</sup> The constitutional provision that compensation was due “whenever any particular man’s property is taken for the use of the public” meant precisely that: Whether the man had developed that property or not was irrelevant.<sup>48</sup>

Vermont’s relations with New York had led Vermonters to rethink traditional assumptions about the relationship between government and citizenry. The development of Vermont political ideas about property is clearly linked to the actions of the New York legislature. Initially, in defending their land claims against actions by New York’s executive, Vermont landowners had advanced a traditional argument: Governors, it was said, could not take property without the owner’s consent.<sup>49</sup> After 1774, however, when the New York legislature became involved in the land dispute, Vermont’s leaders developed a new position: All uncompensated governmental takings of property were invalid.<sup>50</sup>

Disillusionment with legislatures also had ramifications beyond the realm of property questions. Unlike the citizens of other states, Vermont residents realized at the start of the revolution that they could not trust the legislature with the definition and protection of rights. As a result, the Vermont Constitution of 1777 was far more protective of individual rights than were other early constitutions.<sup>51</sup>

Vermont’s experience thus led to increased concern for individual freedom. Significantly, the Vermont constitution was the only constitution to abolish slavery.<sup>52</sup> Passage of the just compensation requirement was only

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47. See *An Act to settle and establish all Highways that are laid out within this State*, Vt. Stats. (1781), reprinted in *id.* at 422; *An Act for laying out and altering Highways*, Vt. Stats. (1779), reprinted in *id.* at 328.

48. Other than the statutes, see *supra* note 47, there is little evidence regarding the reach of the clause. The first reported Vermont compensation cases date from the 1830’s. The courts in those cases required that compensation be paid to individuals on whose lands roads were built, but the opinions are brief and unilluminating. See *Warren v. Bunnell*, 11 Vt. 600 (1839); *Patchen v. Morrison*, 3 Vt. 590 (1831).

49. See, e.g., Letter from Ethan Allen, et al., to William Tyron (June 5, 1772), reprinted in *VERMONT STATE PAPERS*, *supra* note 39, at 24, 27 (“[T]he transferring or alienation of property is a sacred prerogative of the true owner.—Kings and Governors cannot intermeddle therewith.”).

50. See, e.g., Remonstrance of Ethan Allen, et al. (April 26, 1774), reprinted in *id.* at 49, 49: [I]t appears, by a late set of laws passed by the legislature thereof [the New York legislature], that the lives and properties of the *New-Hampshire* settlers are manifestly struck at . . . [B]e it known to that despotic fraternity of law-makers and law-breakers, that we will not be fooled or frightened out of our property. (emphasis in original).

51. The Vermont Constitution was one of ten state constitutions adopted in either 1776 or 1777. Other than the Pennsylvania Constitution, it was the only one to protect free speech and guarantee public trials; it alone abolished slavery and required governmental compensation for the taking of property. It also recognized the freedom to travel and the conscientious objector’s right not to serve in the military. For the provisions of Vermont’s bill of rights, see *VERMONT STATE PAPERS*, *supra* note 39, at 244–46. For a discussion of the rights provisions of the first constitutions, see B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 67–91 (1977). On the significance of Vermont’s abolition of slavery, see *infra* note 52.

52. B. SCHWARTZ, *supra* note 51, at 77. For the emancipation clause, see Vt. CONST. of 1777,

one manifestation of a broad ideological shift, as disenchantment with legislatures led to increased attention to the protection of individual rights against all branches of government.

### B. *The Shift from Republicanism to Liberalism*

Vermont's situation was unique. In no other state were residents faced with a challenge to property of similar magnitude. But to a lesser, though still significant, extent property rights were challenged in other states, and conservative reaction in these states mirrored the earlier response of Vermont settlers: That reaction manifested itself in a loss of faith in legislatures, an increased concern for individual rights, and the demand for just compensation when property was taken.

Faith in legislatures and belief in the existence of a community of interests among citizens had developed at a time when local legislatures opposed crown officials and defended the common causes of the colonists. Once the state legislatures came to rule in their own right, however, social divisions that had been masked during the struggle with royal governors were exposed.<sup>53</sup> Revolutionary legislatures confiscated the land of loyalists; through stay laws and the issuance of paper money, they aided debtors at the expense of creditors.<sup>54</sup>

As legislatures began to take actions with such redistributive consequences, many individuals reexamined and rejected the republican orthodoxy.<sup>55</sup> Loss of faith in legislatures was common,<sup>56</sup> but the critique of

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ch. I, art. I, reprinted in VERMONT STATE PAPERS, *supra* note 39, at 244. The other two important revolutionary era documents in the movement toward a just compensation requirement—the Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787—also provided significant triumphs for the antislavery movement. The Massachusetts Constitution of 1780 was judicially determined to require total manumission. See R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 43–50 (1975). The Northwest Ordinance of 1787 barred slavery from the territories. B. SCHWARTZ, *supra* note 51, at 102. These parallels provide support for the view that the just compensation movement was part of a larger ideological shift, and an important part of that shift was increased concern with individual rights. Apparently, that concern could manifest itself in opposition to slavery, as well as in support for a just compensation requirement. Moreover, since in none of these cases was compensation provided for freed slaves, in this instance general support for individual rights was more powerful than specific support for just compensation.

53. For a discussion of emerging tensions, see J. POLE, *Property and Law in the American Republic*, in PATHS TO THE AMERICAN PAST 75, 86–87 (1979); G. WOOD, *supra* note 1, at 396–403.

54. See A. NEVINS, *supra* note 12, at 507, 569–72.

55. The resultant shifts in ideology were sometimes dramatic. For example, at the start of the Revolution John Adams enthusiastically declared that “a democratical despotism is a contradiction in terms.” Adams, *Novanglus*, quoted in G. WOOD, *supra* note 1, at 63. By the end of the revolutionary era, his optimistic faith in popular government had disappeared. “Where the people have a voice, and there is no balance,” he wrote, “there will be everlasting fluctuations, revolutions, and horrors.” 1 J. ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA 382 (London 1787). For an excellent discussion of the transformation in Adams' thought, see J. HOWE, THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS (1966).

56. Judge Alexander Hanson expressed the thoughts of many when he wrote in 1784, “[T]he acts of almost every legislature have uniformly tended to disgust its citizens and annihilate its credit

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republicanism went beyond attacks on legislatures. When the diversity of economic interests manifested itself in political struggle, many rejected the idea that a readily discernible common good existed.<sup>57</sup> Republicans stressed the harmony in American society and the role of self-denial and austerity in promoting public welfare. The emerging non-republican school of thought, to which such politicians as John Adams,<sup>58</sup> Benjamin Lincoln,<sup>59</sup> James Madison,<sup>60</sup> and Theophilus Parsons<sup>61</sup> belonged, emphasized societal tensions and the benefits to be derived from self-interest.<sup>62</sup>

Non-republicans had a more expansive view than republicans of which rights could not be undermined by the state.<sup>63</sup> They sought to create a large sphere within which the individual could exercise privileges and enjoy immunities free from state interference. Their focus on individual rights and their essentially atomistic view of society characterized these non-republicans as liberal thinkers.

These liberals stressed the fundamental characters of the property right. The first state constitutions, they argued, had ignored that right. The history of the revolutionary era demonstrated that the right deserved recognition and needed special protection from legislative interference.<sup>64</sup>

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. . . ." A. HANSON, POLITICAL SCHEMES AND CALCULATIONS, ADDRESSED TO THE CITIZENS OF MARYLAND 1 (Annapolis 1784). On the loss of faith in legislatures, see G. WOOD, *supra* note 1, at 403-09.

57. James Madison, for example, attacked the belief that individuals in a society "have all precisely the same interests, and the same feelings in every respect." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 J. MADISON, THE PAPERS OF JAMES MADISON 212 (R. Rutland ed. 1977). John Adams came to believe that societies were inevitably divided into the many and the few, each with its own conflicting ends. See 1 J. ADAMS, *supra* note 55, at 372-382. See generally J. POCOCK, *supra* note 1, at 522 (preconditions of common good no longer seen as realizable).

58. The best example of Adams' thought at the end of the revolutionary era is J. ADAMS, *supra* note 55.

59. For the political philosophy of Lincoln, a general and Massachusetts politician, see his ten articles that appeared weekly under the title *The Free Republican* in the *Independent Chronicle* from November 24, 1785 through February 9, 1786.

60. For a discussion of Madison's philosophy, see *infra* pp. 709-10.

61. The most important work of Parsons, who later became Chief Justice of the Massachusetts Supreme Judicial Court, is Parsons, *Essex Result*, reprinted in T. PARSONS, MEMOIR OF THEOPHILUS PARSONS 359 (Boston 1859).

62. For an analysis of this emphasis on tensions in society, see J. POCOCK, *supra* note 1, at 522-23; G. WOOD, *supra* note 1, at 606-15.

63. Definition of this new rights theory is beyond the scope of this Note, but it had manifestations other than the demand for just compensation. For example, the religious freedom clause of the Massachusetts Constitution of 1780 provoked a debate between traditional republicans, who advocated public funding of certain religious groups as a way of promoting morality, and individuals who rejected the traditional viewpoint and argued that such support infringed religious freedom. See S. PATTERSON, POLITICAL PARTIES IN REVOLUTIONARY MASSACHUSETTS 224-25 (1973). See also *supra* notes 51-52 (discussing rights recognized by Vermont Constitution of 1777).

64. See Lincoln, *The Free Republican*, *Independent Chron.*, Dec. 29, 1785, at 1 (the propertied should elect the upper house of the legislature); Madison, Observations on Jefferson's Draft of a Constitution for Virginia, in 8 T. JEFFERSON, *supra* note 30, at 308, 310; Parsons, *supra* note 61, at 372 (laws affecting property should receive the assent of those "who possess a major part of the property in the state").

C. *The Massachusetts Constitution and the Northwest Ordinance*

The inclusion of just compensation clauses in the Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787 took place against this backdrop of fear of legislatures and heightened concern for individual rights. Concern about the potential for legislative attacks on property was particularly intense in Massachusetts, where battles between interest groups dominated state politics.<sup>65</sup> The turmoil left its imprint on men of conservative inclination. For example, in 1778 Theophilus Parsons argued in his influential *Essex Result* that a polity inevitably consisted of two groups with sharply conflicting interests: men with property and men without it.<sup>66</sup> Fear that an unrestrained legislature would undermine property interests animated Parsons and many others in mercantile eastern Massachusetts.<sup>67</sup> Failure to provide adequate protection for property was a major reason why Massachusetts voters rejected the proposed state constitution of 1778.<sup>68</sup>

The Massachusetts Constitution of 1780 embraced the new insight that society was composed of groups whose interests irreconcilably diverged. This constitution, whose ratification has generally been regarded as a victory for propertied interests,<sup>69</sup> contained numerous safeguards for property rights,<sup>70</sup> including a just compensation clause.<sup>71</sup>

65. In the years preceding the state constitutional convention of 1780, the rural western part of the state was near rebellion against eastern authorities because of the perceived unfairness of the debtor-creditor laws. S. PATTERSON, *supra* note 63, at 136-37. The issue of confiscation of loyalist property was a divisive political question for years; passage of broad confiscation acts in 1779 was a triumph for agrarian and liberal forces and a source of outrage for merchants. *Id.* at 208-10.

66. Parsons, *supra* note 61, at 372.

67. See R. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1780*, at 143-47 (1978), for an analysis of these fears.

68. Handlin & Handlin, *Introduction* to *THE POPULAR SOURCES OF POLITICAL AUTHORITY* 1, 22 (O. Handlin & M. Handlin eds. 1966). The Lenox town meeting, for example, pilloried the framers of that constitution for their failure to recognize that "[a]ll Men were born . . . having certain natural and inherent and unalienable Rights, among which are the enjoying and defending life and liberty and acquiring, possessing and protecting Property of which Rights they cannot be deprived but by injustice . . ." *Report of Lenox*, in *id.* at 253, 254.

69. See, e.g., S. PATTERSON, *supra* note 63, at 218-33; Morison, *The Struggle over the Adoption of the Constitution of Massachusetts, 1780*, 50 *MASS. HIST. SOC'Y PROC.* 353, 401 (1917).

70. The constitution, for example, based representation in the Senate on property holdings and established property requirements for voting and officeholding. *MASS. CONST. OF 1780*, ch. I, reprinted in *JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION FOR THE GOVERNMENT OF MASSACHUSETTS BAY* 224, 230 (Boston 1832).

71. Article X of the constitution reads in relevant part:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . . And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

*MASS. CONST. OF 1780*, part I, art. X, reprinted in *id.* at 225.

The convention journal entry for the date on which the amendment was proposed provides neither the identity of the amendment's author nor the debate on the proposal. *Proceedings of the Convention*, reprinted in *id.* at 7, 38.

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The fear of the legislature that led to the compensation clause in the Northwest Ordinance<sup>72</sup> was both more speculative and more focused than the fear that had motivated Massachusetts' constitution makers. Powerful members of Congress had earlier blocked bills for the governance of the Northwest Territories because they had feared the creation of a territorial legislature that would rescind land grants. The inclusion of a just compensation clause in the Northwest Ordinance of 1787 apparently addressed these concerns and thus contributed significantly to the bill's passage.<sup>73</sup>

Neither the Massachusetts Constitution's nor the Northwest Ordinance's just compensation clause appears to have engendered much argument either in support or opposition. Nonetheless, as the continued pat-

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Champions of the constitution apparently did not explore the implications of the just compensation requirement in their speeches or writings either before or after ratification. Abstract declarations that the constitution protected property rights, however, were frequent. Thus, Dr. Samuel Cooper, preaching to the Massachusetts legislature on the day the constitution took effect, asserted that the document helped ensure that Massachusetts would have "an untainted honour . . . in all laws respecting property . . ." S. COOPER, A SERMON PREACHED . . . THE DAY OF THE COMMENCEMENT OF THE CONSTITUTION, AND INAUGURATION OF THE NEW GOVERNMENT 42 (Boston 1780).

After ratification, the Massachusetts Constitution's just compensation clause was held to require compensation for the taking of real property, *Gedney v. Tewksbury*, 3 Mass. 306 (1807) (land taken for public road), and personal property, *Perry v. Wilson*, 7 Mass. 393 (1811) (logs taken for use in canal construction). It was held not to apply in cases of consequential damages. *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823) (government official weakened the foundation of plaintiff's house by lowering the level of adjoining road). In the revolutionary era, however, the compensation clause did not serve to bar all uncompensated takings of physical property. See *infra* p. 708.

72. The ordinance declared:

[N]o man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared; that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.

Northwest Ordinance of 1787, art. 2, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 340 (R. Hill ed. 1936).

73. Congressman Manasseh Cutler, a crucial figure in securing passage of the bill, was a lobbyist for the Ohio Company. B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 7 (1938). During the debate about territorial governance, he had worked hard to ensure that the territorial government would be unable to invalidate any land grants his employer might receive from the federal government. The draft eventually adopted secured his enthusiastic support despite the fact that it granted the territorial government extensive powers. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 103 (1955). Cutler apparently believed that the combination of the ordinance's contracts clause, see B. WRIGHT, *supra*, at 7 (Cutler desired the contracts clause to ensure that land grants would not be revoked), and the compensation clause would adequately protect land grants.

Similarly, Richard Henry Lee, another powerful member of Congress, wrote approvingly of the protection that the ordinance gave property rights: "It seemed necessary for the security of property among uninformed, and perhaps licentious people, as the greater part of those who go there [the Northwest Territories] are, that a strong toned government should exist and the rights of property be clearly defined." Letter from Richard Henry Lee to George Washington (July 15, 1787), in 2 R. LEE, *THE LETTERS OF RICHARD HENRY LEE* 425, 425 (J. Ballagh ed. 1914).

On the legal ramifications of the clause, see *Renthorp v. Bourg*, 4 Mart. 97, 132-33 (La. 1816) (Northwest Ordinance required compensation for the taking of physical property, such as the taking of land for roads).

tern of takings by state legislatures suggests,<sup>74</sup> the principle of just compensation had not won general acceptance. Moreover, even constitutional recognition of the principle did not necessarily affect governmental practice. In 1784, for example, one Massachusetts writer bitterly complained that the state's just compensation clause had not affected its road-building policies: As in the colonial period, under certain circumstances private property was taken without compensation.<sup>75</sup>

### III. THE FIFTH AMENDMENT

The just compensation clause of the Fifth Amendment reflected the liberalism of its author, James Madison, who in synthesizing revolutionary era trends gave them substance and coherence. Madison intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings. But he meant it to have broad moral implications as a statement of national commitment to the preservation of property rights. The ideology underlying the clause ran counter to the republicanism espoused by the Anti-Federalists, the opponents of the Constitution. In the years after ratification of the Constitution, however, Madisonian liberalism came to dominate American legal and political thought.

#### A. *Liberalism, Property, and Madison*

While at least two states had requested every other provision contained in the ratified Bill of Rights, none had sought the imposition of a just compensation requirement.<sup>76</sup> In fact, to the extent that the compensation issue entered the ratification debate at all, the concern was on the other side: Some opponents of the Constitution expressed their fear that federal courts would make the states pay individual claims.<sup>77</sup> Regardless of politi-

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74. For examples of these takings, see *supra* notes 12-14 and accompanying text. At the same time, however, proponents of compensation secured important victories other than those mentioned in the text. In 1785, Vermont ratified a new constitution, which had a just compensation clause. VT. CONST. of 1785, art. II, reprinted in VERMONT STATE PAPERS, *supra* note 39, at 516, 517. Statutes in other states began to provide for compensation in cases where owners had previously been without remedy. Virginia in 1785 for the first time passed a law providing compensation for unimproved land taken for roads. An Act concerning Public Roads, Va. Stats. ch. LXXXV (1785) (jurors to "levy on their County, at their next levy laid, the damages to be found, . . . and direct them to be paid to those respectively entitled"). But see M. HORWITZ, *supra* note 6, at 289 n.3 ("[I]t was asserted by a judge of the Virginia high court in 1831 that there was no payment for rights of way 'until a very late period.'") (quoting Stokes & Smith v. Upper Appomatox Co., 30 Va. (3 Leigh) 318, 337 (1831)). The first Pennsylvania statute granting such compensation was passed in 1790. M. HORWITZ, *supra* note 6, at 290 n.12.

75. See J. PARSONS, *supra* note 5, at 21.

76. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 161-63 (1957) (listing amendments proposed by the states).

77. See J. MAIN, THE ANTIFEDERALISTS 157 (1961); *Essays of Brutus*, in 2 THE COMPLETE



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cal 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,<sup>78</sup> and political leaders moving toward liberalism had only begun to work out the implications of this ideology. But Madison, a committed defender of property rights, realized the significance of national ratification of a compensation requirement, and included it among the amendments he proposed to Congress.

During his legislative career in Virginia, Madison had championed the interests of property. He had opposed state seizure of loyalist property,<sup>79</sup> pushed through the first road bill providing compensation for unimproved land,<sup>80</sup> fought against the introduction of paper money to aid debtors,<sup>81</sup> and opposed attempts to forestall debt collection.<sup>82</sup> The fact that other state legislatures passed laws similar to those he had fought in Virginia filled Madison with disgust and led him to reject ideas widely held at the beginning of the Revolution.<sup>83</sup> As he wrote to Jefferson:

The necessity of . . . guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution. . . . In the existing state of American population and American property, the two classes of rights were so little discriminated that a provision for the rights of persons was supposed to include of itself those of property, and it was natural to infer from the tendency of republican laws that these interests would be more and more identified. Experience and investigation have however produced more correct ideas on this subject.<sup>84</sup>

Madison was a liberal:<sup>85</sup> The ideas of a readily discernible common

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ANTI-FEDERALIST 358, 429 (H. Storing ed. 1981).

78. The federal government did not, in fact, exercise its eminent domain power until the 1870's; before that time, state, rather than federal, officials had apparently condemned the land used by the national government. Stoebeck, *supra* note 6, at 559 n.18.

79. See, e.g., Bill Prohibiting Further Confiscation of British Property (submitted Dec. 3, 1784), reprinted in 8 J. MADISON, *supra* note 57, at 173 (R. Rutland & W. Rachal eds. 1973).

80. Madison introduced this bill, which Jefferson had drafted. *Editor's Note*, in *id.* at 208 n.1. For the text of the bill as adopted, see An Act Concerning Public Roads, Va. Stats. ch. LXXV (1785).

81. See Notes for Speech Opposing Paper Money (ca. Nov. 1, 1786), in 9 J. MADISON, *supra* note 57, at 158-59 (R. Rutland ed. 1975).

82. See Letter from James Madison to James Madison, Sr. (Dec. 12, 1786), in *id.* at 205, 205-06.

83. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 J. MADISON, *supra* note 57, at 206, 212 (complaining of the "injustice" and "evils" produced by state laws affecting property).

84. Madison, Observations on Jefferson's Draft of a Constitution of Virginia, reprinted in 8 T. JEFFERSON, *supra* note 30, at 308, 310.

85. For an excellent treatment of Madison's political thought, see D. ADAIR, *supra* note 20, at 75-106. It is noteworthy, although not directly relevant to the history of the Fifth Amendment, that Madison, like the proponents of the state just compensation clauses, feared legislatures. See THE FEDERALIST NO. 48, in 10 J. MADISON, *supra* note 57, at 456.

interest and of property rights subject to government abridgment were alien to him. For Madison, society was characterized by conflicts among interest groups, and those conflicts were often over property. "[T]he most common and durable source of factions," he wrote, "has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."<sup>86</sup>

Although Madison did not believe property was a natural right—it depended for its existence on positive law<sup>87</sup>—its protection was of critical importance. The diversity of interests that possession of property occasioned prevented tyranny, and the acquisition of property was a necessary by-product of the freedom of action he deemed an essential part of liberty.<sup>88</sup> "Government," he wrote, "is instituted no less for protection of the property, than of the persons of individuals."<sup>89</sup>

### B. Madison's Fifth Amendment

Madison believed that his Bill of Rights would provide a standard for judicial review of the actions of the federal government.<sup>90</sup> Perhaps more important, it would have an educative function. "[P]aper barriers," he declared, "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community."<sup>91</sup>

Madison's rationale for the Bill of Rights suggests two reasons for his proposal of the just compensation clause. First, the clause would explicitly bar the uncompensated taking by the national government<sup>92</sup> of chattel and

86. THE FEDERALIST NO. 10, in 10 J. MADISON, *supra* note 57, at 263, 265.

87. See *Property*, Nat'l Gazette, Mar. 27, 1792, in 14 J. MADISON, *supra* note 57, at 266, 267 (R. Rutland & T. Mason eds. 1983); Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 13 J. MADISON, *supra* note 57, at 18, 20 (C. Hobson & R. Rutland eds. 1981) (response to Jefferson's "earth belongs to the living" letter).

In these writings, Madison declared that there could be no property rights without positive law. Stoebuck contends that the theoretical justification for the just compensation requirement came from such natural law thinkers as Grotius and Pufendorf, see Stoebuck, *supra* note 6, at 583-84. Madison, of course, was familiar with this school of thought; he even included works of Grotius and Pufendorf on his list of books to be obtained for the Continental Congress library. G. WILLS, EXPLAINING AMERICA 20 (1981). But Madison clearly believed that the property right, for all its importance, was a creature of positive law.

88. See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION 204 & n. 17 (M. Farrand ed. 1911); *Property*, *supra* note 87, at 266, 267.

89. THE FEDERALIST NO. 54, in 10 J. MADISON, *supra* note 57, at 499, 502.

90. See Speech Proposing the Bill of Rights (June 8, 1789), in 12 J. MADISON, *supra* note 57, at 197, 207 (C. Hobson & R. Rutland eds. 1979) ("[I]ndependent tribunals of justice will consider themselves in a peculiar manner guardians of those rights . . ."); see also B. SCHWARTZ, *supra* note 51, at 200 (Madison intended that the rules embodied in Bill of Rights be enforceable by the courts).

91. Speech Proposing the Bill of Rights, *supra* note 90, at 204-05.

92. With one exception, Madison intended all of his amendments to apply exclusively to the federal government. *Editor's Note*, in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1053 (B. Schwartz ed. 1971). See Speech Proposing the Bill of Rights, *supra* note 90, at 197, 198-99, 205-06. The exception was an amendment, rejected by the Senate, that would have prohibited states from

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real property; this bar was the same one that had earlier been imposed in Vermont, Massachusetts, and the Northwest Territories.<sup>93</sup> Although a broader reading would not do violence to the text,<sup>94</sup> the reading suggested here is fairly narrow in terms of legal consequences. Madison seems to have taken a rather limited view of what legal rights such a clause created: He intended the clause to apply only to direct, physical taking of property by the federal government.<sup>95</sup> Contemporaneous observers also viewed the Fifth Amendment in this way: It applied only to the federal government,<sup>96</sup> it concerned direct takings of property,<sup>97</sup> and did not, for example, bar the federal government from interfering in contracts.<sup>98</sup>

On a second level, though, Madison saw the clause as serving a broader purpose. He hoped that it would have a far-reaching educative function.

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infringing freedom of the press and freedom of conscience and from denying jury trials. *Editor's Note*, in 2 *THE BILL OF RIGHTS*, *supra*, at 1053. Madison considered this amendment of "equal if not greater importance than" the others. Speech Proposing the Bill of Rights, *supra* note 90, at 208. Its rejection highlights the widespread desire to preserve state freedom of action.

Madison proposed only amendments that would not "displease the adverse side [the Anti-Federalists]," Letter from James Madison to Samuel Johnson (June 21, 1789), in *id.* at 249, 250; his decision to act in this fashion may explain his failure to include a just compensation clause in the rejected amendment.

93. See *supra* notes 47-48, 71-73 and accompanying text.

94. As a matter of textual interpretation, an argument could be made that the just compensation clause establishes a standard of judicial review of legislation concerning taxation and regulation. See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 106-07 (1973); *infra* note 99.

95. The version of the clause that Madison proposed is more clearly limited to physical takings than the version that Congress eventually sent to the states: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." Speech Proposing the Bill of Rights, *supra* note 90, at 201. The accounts of the congressional debate over the Bill of Rights provide no evidence as to why the change in language was made. For evidence that Madison did not intend the Fifth Amendment to apply to state government actions, see sources cited in note 92, *supra*.

96. See *Editor's Note*, in 2 *THE BILL OF RIGHTS*, *supra* note 92, at 1053. In 1832, the Supreme Court held that the Fifth Amendment did not apply to state government takings. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Writing for the Court, Chief Justice Marshall observed that the issue presented in the case was one "of great importance, but not of much difficulty." *Id.* at 247. In the years before *Barron*, apparently only one state court opinion directly addressed the question of whether the Fifth Amendment's compensation clause was binding on the states. In *Renthorp v. Bourg*, 4 Mart. 97 (La. 1816), the Supreme Court of Louisiana held that the amendment applied only to takings by the federal government. *Id.* at 131-32. But see *infra* pp. 714-15 (in requiring state governments to provide compensation for takings, courts invoked the Fifth Amendment as evidence of a national commitment to the protection of property rights).

97. St. George Tucker offered an even narrower reading of the clause. In 1803, he wrote that it "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 practiced during the revolutionary war, without any compensation whatever." 1 S. TUCKER, *supra* note 14, Book 1 at 305-06. Judges, however, consistently suggested in dicta that the Fifth Amendment governed the peacetime taking of land. See, e.g., *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Day 28, 52 (Conn. 1828) (Dagget, J., concurring); *Renthorp v. Bourg*, 4 Mart. 97, 130-32 (La. 1816); *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816).

98. The argument that the just compensation principle extended to the taking of incorporeal property seems to have been made for the first time in a case involving state law. See *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Day 28 (Conn. 1828). The majority did not reach the issue. See *id.* at 48-49. The concurrence suggested that the federal and state just compensation provisions applied only to the taking of physical property. See *id.* at 52 (Dagget, J., concurring).

The "paper barrier[]" would—as a statement of national intent—impress on the people the sanctity of property. It would thus curb the popular desire to enact laws favoring debtors, imposing unequal taxes, or producing cheap money in order to undermine the position of creditors.<sup>99</sup>

Madison's essay *Property*,<sup>100</sup> written shortly after the ratification of the Bill of Rights, supports this reading of his intentions. He argues on two levels for the "inviolability"<sup>101</sup> of property, beginning on the level of legal requirements. Because of the Fifth Amendment, he indicated, the federal government was committed to observe the proposition that "no land or merchandize" "shall be taken *directly* even for public use without indemnification to the owner."<sup>102</sup>

Madison then moved from legal to moral argument. The requirement of just compensation evidenced "pride[] . . . in maintaining the inviolability of property."<sup>103</sup> Consistency with that underlying purpose required observance of a wide range of personal and property rights. A government that provided compensation when it took real or personal property demonstrated its commitment to personal freedom; it 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 labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares.<sup>104</sup>

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99. The connection between these different kinds of governmental actions was clear to Madison. For example, he thought stay laws and the inflationary issuance of paper money "affect[] Rights of property as much as taking away equal value in land." Notes for Speech Opposing Paper Money, *supra* note 81, at 158. By appealing to the "paper barrier[]" of the Fifth Amendment, he tried to convince others of the illegitimacy of a variety of laws affecting property.

Recently, Professor Richard Epstein has argued for a broad reading of the Fifth Amendment. See Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351 (1983); Epstein, *Taxation, Regulation and Confiscation*, 20 OSGOOD HALL L.J. 433 (1982) (arguing that the "disproportionate impact" principle of eminent domain law be applied in analyzing the constitutionality of taxation and regulation). Epstein's analysis is at once too broad and precisely accurate. It is too broad in the sense that Madison never intended that the judiciary review tax legislation, to use one of Epstein's examples, for compliance with the Fifth Amendment; Madison would have limited such review to cases concerning the physical taking of real and personal property. At the same time, Madison thought the amendment had symbolic importance. It demonstrated a national commitment to property rights and to the proposition that laws affecting property would not single out particular groups and impose unfair burdens on them. Thus, in his essay *Property*, Madison suggested that "unequal taxes that oppress one species of property and reward another species" violated the underlying principle of the Fifth Amendment: the "inviolability" of property. *Property*, *supra* note 87, at 267. Epstein's view of the legal ramifications of the Fifth Amendment accords with Madison's view of its moral implications.

100. *Property*, *supra* note 87, at 267.

101. *Id.*

102. *Id.* (emphasis in original).

103. *Id.*

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

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In Madison's view, then, enunciation of the just compensation principle in the Bill of Rights had extremely broad ramifications.

### C. *The Reaction to the Bill of Rights*

Passage of the Bill of Rights has traditionally been seen as an Anti-Federalist victory.<sup>105</sup> According to such interpretations, the opponents of the constitutions feared a strong national government and demanded a bill of rights in order to ensure that the government did not undermine individual liberties. After initial hesitation, the Federalists complied with these demands.<sup>106</sup>

Ratification of the amendments should, then, have been rapid and uneventful. It was not. When it was proposed, Madison's Bill of Rights met with an unenthusiastic response. Congressional reaction was mixed,<sup>107</sup> opponents at the state level delayed ratification for two years,<sup>108</sup> and three of the states failed to ratify it.<sup>109</sup>

A reexamination of Anti-Federalist rights theory may offer an explanation for the relatively unfavorable reception accorded Madison's amendments. Various historians have suggested that the Anti-Federalists remained largely faithful to traditional republican ideology.<sup>110</sup> If this is true, the history of just compensation suggests that the philosophy of the Bill of Rights dramatically differed from the philosophy of the Anti-Federalists.<sup>111</sup>

The Anti-Federalists apparently voiced no opposition to the just compensation clause. Since the amendment was intended to bind only the federal government,<sup>112</sup> 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.<sup>113</sup> At the same time, in

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105. See, e.g., J. MAIN, *supra* note 77, at 255; R. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788*, at 32-34 (1966); H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 65 (1981). Countless historical works accept this interpretation and differ only in nuances.

106. See, e.g., J. MAIN, *supra* note 77, at 158-62, 255; R. RUTLAND, *supra* note 105, at 32-35, 297-300; H. STORING, *supra* note 105, at 64-70.

107. See R. RUTLAND, *supra* note 73, at 204-15.

108. *Id.* at 217.

109. Massachusetts, Connecticut, and Rhode Island did not ratify the Bill of Rights until 1941. *Id.* at 217 n.65.

110. See, e.g., G. WOOD, *supra* note 1, at 499-500; Kenyon, *Men of Little Faith, The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. (3d ser.) 3, 38-43 (1955).

111. Of course, some opponents of the Constitution welcomed the Bill of Rights. For example, Madison's proposal of the amendments appears to have been a major reason why the Constitution was eventually ratified in North Carolina and Rhode Island. R. RUTLAND, *supra* note 73, at 204, 213.

112. See *supra* note 92.

113. For an excellent discussion of Anti-Federalist arguments for the primacy of state govern-

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.

The Anti-Federalists wanted constitutional amendments that would protect the states against the federal government. Instead, they got Madison's Bill of Rights, whose ratification they delayed while they campaigned for the adoption of amendments affording such protection.<sup>114</sup> When proposed, Madison's guarantees of personal rights did not in themselves seem troubling to these individuals; they seemed instead largely irrelevant.<sup>115</sup>

In the years after ratification, however, the full ramifications of Madison's "paper barriers" became clear. In addition to limiting the national government's freedom of action, the just compensation clause served an educative role: It inculcated the belief that an uncompensated taking was a violation of a fundamental right. Lawyers representing individuals whose property had been taken by a state without payment contended that the Fifth Amendment was a national declaration of respect for property rights. They argued that courts should honor that declaration and require state governments to provide compensation.<sup>116</sup> By the 1820's, the principle of just compensation had won general acceptance<sup>117</sup>; in five states that requirement was originally judicially, rather than constitutionally, man-

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ments, see H. STORING, *supra* note 105, at 15-23.

114. Thus, in Massachusetts, which failed to ratify the Bill of Rights, see *supra* note 109, a joint committee of the Massachusetts House and Senate drew up its own set of amendments. All 12 of these amendments concerned the division of power between state and federal governments. None provided protection for individual rights. See *Report of the General Court on Further Amendments, reprinted in D. MYERS, MASSACHUSETTS AND THE FIRST TEN AMENDMENTS TO THE CONSTITUTION* 25 (1936).

Similarly, for two years Anti-Federalists in Virginia's Senate blocked ratification of the Bill of Rights. See B. SCHWARTZ, *supra* note 51, at 187-89. A statement issued by a majority of the state senators bemoaned the fact that Congress had failed to adopt amendments proposed at Virginia's constitutional convention. See *JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA* 63 (Richmond 1827). The Senators urged the imposition of additional checks on the national government: "Unrestrained by the constitution or these [Madison's] amendments, Congress might, as the supreme rulers of the people, assume those powers which properly belong to the respective States, and thus gradually effect an entire consolidation." *Id.* at 64.

115. Thus, although Anti-Federalist Richard Henry Lee approved of the guarantees the Bill of Rights gave to the right to a jury, the right to a free press, and the right to religious worship, he professed himself unable to understand why the Bill of Rights protected other individual rights: "I am grieved," he wrote, "to see too many look at the rights of the people as a miser examining a security to find a flaw in it." Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in 2 R. LEE, *supra* note 73, at 501, 502.

116. For examples of cases in which such arguments were made either by attorneys or the court, see *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.D.N.J. 1830) (No. 1,617); *People v. Platt*, 17 Johns. 195 (N.Y. 1819); *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816); *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38 (1796).

117. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 132, 133 (L. Friedman & H. Scheiber eds. 1978).

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dated.<sup>118</sup> The rationale for many of these opinions was well expressed by Chancellor Kent in *Gardner v. Trustees of Newburgh*.<sup>119</sup> After citing the compensation clauses of several state constitutions, he declared:

But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States*, “that private property shall not be taken for public use, without just compensation.” I feel myself, therefore, not only authorized, but bound to conclude, 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>120</sup>

Defenders of uncompensated takings invoked images and arguments that had in the past proven compelling. They contended that a state government could abridge property rights in order to promote the common good. As one court declared in 1802, citizens “were bound to contribute as much of it [land] as, by the laws of the country, were deemed necessary for the public convenience.”<sup>121</sup> But this was increasingly a minority position.

In the first years after ratification of the Constitution, opponents of compensation reminded the courts of the novelty of the idea that the state necessarily owed the individual payment when it took his property. When South Carolina property holders demanded compensation for the land on which roads were built, the state attorney general responded that this was “a new claim, because it was the first time in the history of our country, that ever such a claim was made. . . .”<sup>122</sup> As courts more and more found a right to compensation, however, such arguments lost their force. With the passage of time, that right came to seem an important and long-honored part of the Anglo-American legal tradition. The counter-tradition

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118. Stoebeck, *supra* note 6, at 573 n.66.

119. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

120. *Id.* at 167 (emphasis in original).

121. *M’Clenachan v. Curwin*, 3 Yeates 362, 373 (Pa. 1802) (Shippen, J.). Similarly, in *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38 (1796), the South Carolina Attorney General claimed that the uncompensated taking of unimproved land was “one of the inherent prerogatives of the majesty of the people, and a power which the supreme authority of the state had a right to exercise, for the general good and convenience of the whole, and that it resulted from the very nature and ends of civil society.” *Id.* at 49. An equally divided court upheld the taking: The power of the legislature to take unimproved land without providing compensation was sanctioned by “ancient rights and principles.” *Id.* at 57 (Grimke, J.). See also *Commonwealth v. Fisher*, 1 Pen. & W. 462, 465 (Pa. 1830) (compensation a “bounty given . . . by the state” for reasons of “kindness”); *Feree v. Meily*, 3 Yeates 153, 155 (Pa. 1801) (upholding uncompensated taking of improved land for public road) (“[L]et the evils attendant in the law be what they may, the legislature only are competent to give relief.”).

122. *Lindsay*, 2 S.C.L. at 53.

of legitimized takings was all but forgotten.<sup>123</sup> At least in the historical short term, the future belonged to liberalism and just compensation.<sup>124</sup>

—*William Michael Treanor*

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123. Thus, in 1833 Joseph Story was able to maintain that the Fifth Amendment's just compensation clause represented "an affirmance of a great doctrine established by the common law for the protection of private property." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (Cambridge, Mass. 1833).

124. The heyday of the compensation principle was brief. In order to foster economic growth, courts in the second quarter of the century limited the circumstances in which compensation had to be made. For example, they fashioned a distinction between consequential and direct damages; only direct damages were held to be a taking. See M. HORWITZ, *supra* note 6, at 70-85.