Property, Power and Personal Freedom

Jeffrey B. Teichert
This article discusses the right to just compensation for regulatory takings of private property in the context of the history of the right to property in England and the founding generation in the United States. It challenges the conclusions of an influential 1964 Yale Law Journal article by Professor Joseph L. Sax, demonstrating that Professor Sax’s misplaced reliance on continental writers rather than English writers lead him to adopt a more statist understanding of the Takings Clause of the Fifth Amendment than is warranted by its history.

This article demonstrates how the Magna Carta was intended to strengthen tenure in land by insisting on due process requirements for the taking of land and compensation for the taking of certain classes of chattels, and shows how the control of land was a significant source of political power and personal liberty. The article continues by demonstrating the importance of property in the turbulent political developments of the seventeenth century, including King Charles’ creative methods of taxation without the consent of the people through Parliament, and the importance of property in the Petition of Right that was forced on the King. The article compares the Petition of Right and surrounding events with the justifications given by America for separating from the British Crown in the Declaration of Independence. It also discusses the role of property during the interregnum and the important political writing of that time.

The article further discusses the importance of property during the American Revolutionary era, including opposition to taxation without representation, and demonstrating the relationship between takings and taxation in that period. The article also discusses the historical problems of Professor Sax’s approach to regulatory takings and modern misconceptions about the history of the Takings Clause. The paper concludes that the right to property is fundamentally defined by control and, therefore, regulation of property can take property by depriving the owner of control. This paper further concludes that the distinction between taxation that applies universally and takings that apply more narrowly is critical to determining whether a regulatory taking has occurred. This means that a regulation that is more general is less likely to constitute a taking than one that is more specific. The article also concludes that a taking may occur where the executive is provided with significant discretion to direct the use of property.

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At Runnymede, at Runnymede,
Your rights were won at Runnymede!
No freeman shall be fined or bound,
Or dispossessed of freehold ground,
Except by lawful judgment found
And passed upon him by his peers.
Forget not, after all these years,
The Charter signed at Runnymede.'

–Rudyard Kipling, *What Say the Reeds at Runnymede*

Justice Scalia’s majority opinion in *Lucas v. South Carolina Coastal Council*\(^1\) sparked renewed interest in and spirited debate over the Fifth Amendment’s requirement of “just compensation” for regulatory takings of private property. The *Lucas* opinion includes references\(^2\) to an influential 1964 article by Professor Joseph Sax.\(^3\) While the *Lucas* opinion does not embrace Professor Sax’s conclusions, it relies heavily on his analysis and summary of prior takings jurisprudence.

Perhaps the most subtle element of the *Lucas* Court’s reference to the Sax article is its neglect of Professor Sax’s interpretation of the history of the right to compensation for takings in the seventeenth and eighteenth centuries. Professor Sax argued that the right was intended only to deter oppressive conduct and not to protect property ownership, and that this could be achieved by affording compensation for regulation only when some government enterprise was enhanced. By contrast, the *Lucas* decision embraced the familiar rule that government regulation results in a taking of private property where that regulation deprives the owner of all

\(^1\) 505 U.S. 1003 (1992).
\(^2\) *Id.* at 1023, 1025.
\(^3\) *Id.* at 36.
The purposes of this paper are to: (1) review the history and underlying purposes of the right to property in English law; (2) in the context of this history, compare the \textit{Lucas} approach to regulatory takings with Professor Sax’s theory; and (3) suggest an approach to the regulatory takings problem based on the historical values of the Takings Clause of the Fifth Amendment.

This paper will demonstrate that private property is a foundation of personal freedom. Magna Carta and the tradition flowing from it established the principle that specific property could not be taken by the Crown without the \textit{individual consent} of the owner (or as a sanction for criminal conduct when established by due process of law); and that property could not be taken through general taxation without the \textit{common consent} of the people through Parliament. Under the English constitution, Parliament (unlike the Crown) had the authority to take specific property from specific individuals. However, by the time of the American Revolution, a normative tradition had developed wherein Parliament provided compensation when it took private property from individuals. As an absolute personal right, property even overrode the interests of the community. This paper will conclude that the Takings Clause should apply to regulatory activity diminishing the value of private property where the regulation affects an individual or small group; causes an invasion or a nuisance; or involves significant discretion by executive authority.

I. \textbf{HISTORICAL ANALYSIS OF THE RIGHT TO PRIVATE PROPERTY}

A. \textit{Professor Sax’s Historical Analysis}

I. \textit{Professor Sax’s Fundamental Premise}
Professor Sax claims that his article presents the history of the Takings Clause “in some detail.” Sax concludes that “[w]hat seemed to concern the early writers was not the fact of loss, but the imposition of loss by unjust means. It was the exercise of arbitrary or tyrannical powers that were [sic] sought to be controlled.” Although Sax admits that his evidence is “[s]canty,” he concludes that: “there is at least some basis in the early writers for finding that their real concern was a protection of values only as against government conduct which raised the dangers of arbitrary or tyrannical treatment.” From this premise, Sax reasons that the primary concern of the Takings Clause was preventing government from benefiting by confiscating property and “not the danger or extent of private loss[.]” This paper will demonstrate, however, that the early writers believed that government imposed loss was, itself, tyrannical.

2. Professor Sax’s Reliance on Continental Writers Conflicts With John Locke’s View of Property Rights

When Professor Sax refers to the “early writers” supporting his conclusions, he means “Grotius, Pufendorf, Bynershoek, Burlamaqui, and Vattel,” and actually credits Grotius with being “the father of the compensation clause.” Grotious is, in fact, the only author that Sax cites for a statement resembling the Takings Clause.

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4 Id. at 54.

5 Id. at 57.

6 Id. at 57 (emphasis supplied).

7 Id. at 60.

8 Id. at 54.

9 A king may two ways deprive his subjects of their right, either by way of
John Locke is conspicuously absent from Professor Sax’s bibliography and, in fact, receives no mention whatever in his paper. Yet Locke’s *TWO TREATISES OF GOVERNMENT* is an essential seventeenth century work on the subject of property,¹⁰ and clashes sharply with Pufendorf and Grotius in its conception of property rights.¹¹ Locke believed that property rights originated from *personal labor*, which multiplied the usefulness of raw materials,¹² whereas Pufendorf and Grotius believed that rights in property originated from “universal agreement.”¹³ This theoretical disagreement is important, since Locke’s view is that property rights are inherently located in the individual, whereas Grotious and Pufendorf believe that property rights derive from the community. In our own time, Professor Richard Epstein argued that “all theories of natural rights reject the idea that private property and personal liberty are solely creations of the state,” and that “the end of the state is to protect liberty and property . . . independent and of and prior to the formation of the state.”¹⁴ By way of analogy, “the state should prohibit murder because it is wrong; murder is not wrong because the state prohibits it.”¹⁵ The English


¹¹ Peter Laslett, *editorial footnote to Locke, supra* note 10, at 288 n.28.


¹³ Peter Laslett, *editorial footnote to Locke, supra* note 10, at 288 n.§ 28 (emphasis supplied); 2 WILLIAM BLACKSTONE, *COMMENTARIES* *8*.

notion of liberty rests on a pre-government notion of right, and is fundamentally at odds with the continental view, held by Grotius and others, that standards of morality derive from the state.

Locke, more than any other political writer, inspired the American Revolution. Revolutionary statesman James Otis said that “[t]hose who expect to find anything very satisfactory . . . with regard to the law of nature in general in the writings of such authors as Grotius and Pufendorf will find themselves much mistaken” and suggested consulting “the purer fountains of one or two of our English writers, particularly from Mr. Locke[.].” Professor Sax neglected Locke and other English writers in favor of Grotius and Pufendorf.

Locke believed that “[t]he great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property. To which in the State of Nature there are many things wanting.” Locke went so far as to say that “[g]overnment has no other end but the preservation of property.” It may be noted that Locke often used the term “property” loosely, stating that society is formed by people who “unite for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property.” This was a “normal usage” of the term “property” for Locke’s contemporaries as well.

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15 Id. at 5.


17 LOCKE, supra note 10, at 350-51. Locke makes this same point throughout the work. Id. at 209, 268, 329, 412, 417, 427.

18 Id. at 329.

19 Id. at 250.

20 Peter Laslett, Introduction to LOCKE, supra note 10, at 3, 102-03 n. Interestingly, Madison also sometimes used Locke’s broad conception of “property” stating that “as a man is said to
The careful reader will not make too much of Locke’s broad conception to weaken property as we conceive of it today. Locke clearly believed that the safeguarding of personal wealth was a primary purpose for the individual to leave the state of nature and join with others to form a community, and government takings of property would defeat this purpose:

The Suprem Power cannot take from any Man any part of his Property without his own consent. *For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property, without which they must be suppos’d to lose that by entering into Society, which was the end for which they entered into it,* too gross an absurdity for any Man to own. Men therefore in Society having Property, they have such a right to the goods, which by the Law of the Community are theirs, that no Body hath a right to take their substance, or any part of it from them, without their own consent; without this, they have no property at all. For I have truly no Property in that, which another can by right take from me, when he pleases, against my consent. Hence it is a mistake to think, that the Suprem or Legislative Power of any Commonwealth, can do what it will, and dispose of the Estates of the Subject arbitrarily, or take any part of them at pleasure.\(^{21}\)

Locke’s theory of property is incompatible with Professor Sax’s assertion that the early writers’ “real concern was a protection of [property] values only as against government conduct which raised the dangers of arbitrary or tyrannical treatment.”\(^{22}\) For Locke, the preservation of property was a central purpose of government; and a government that interfered with property defeated its purpose. Locke believed that regulating property was, itself, tyrannical, except to create “good and equitable laws for the regulation of Property between the subjects one amongst another[.]”\(^{23}\)

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22 Sax, *supra* note 9, at 57 (emphasis supplied).

23 LOCKE, *supra* note 10, at 361.
According to Locke, property rights spring from each person’s status as “[p]roprietor of his own Person, and the Actions or Labour of it,” and each person has “still in himself the great Foundation of Property[].”\textsuperscript{24} For Locke and his American disciples, property was a personal right, flowing from the wellspring of natural law; and its protection was the primary purpose of government. Locke’s theory envisions a stronger and more independent individual claim to property than the continental writers Professor Sax relies upon, because those writers believed that property existed only by the generosity of the community.

B. The Development of Property Rights From the Time of Magna Carta

One of the primary aims of Magna Carta was to secure greater independence from royal authority by increasing security of tenure in land. Professor Sax argues for a limited interpretation of Magna Carta as cited by Blackstone in support of the “absolute” nature of the property right, and cites Irving Brant for the proposition that James Madison favored redistributions of property for “restraining concentrations of wealth and . . . power[].”\textsuperscript{25} These arguments are best debated in the context of the larger history of property law.

1. Limitations on Government Takings of Private Property Imposed by Magna Carta

England’s first statute providing comprehensive rules for the compensable taking of

\textsuperscript{24} Id. at 298. Similarly, Oliver Wendell Holmes, Jr., relied on Immanuel Kant’s view that “freedom of the will . . . is the essence of man” for the proposition that “[p]ossession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object.” Oliver Wendell Holmes, Jr., The Common Law 206-07 (Dover 1991) (1881).
property was the Lands Clauses Consolidation Act of 1845.\textsuperscript{26} Prior to that time, the power to acquire each individual piece of property was accomplished by a separate act of Parliament.\textsuperscript{27} A taking of property from an innocent subject, without consent of Parliament, would have violated English law, dating back to Magna Carta.

In a forerunner to the Due Process Clauses of the United States Constitution, Magna Carta provided that:

\begin{quote}
No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.\textsuperscript{28}
\end{quote}

Professor Sax interprets this provision as follows:

Magna Charta itself merely holds that no freeman shall be disseized of his freehold “but by lawful judgment of his peers or by the law of the land.” And the interpretation put upon that mandate made it no more than a guarantee of rational treatment in procedure and substance.\textsuperscript{29}

This assertion that Magna Carta guarantees only “rational treatment” in “substance” implies that a “law of the land” could be fashioned to take property rights from an innocent individual as long as it provides that individual with “rational treatment.”\textsuperscript{30} This interpretation misunderstands the term “law of the land.” Historian, Theodore F. T. Plucknett, explained that this provision of Magna Carta is procedural:

\textsuperscript{25} Sax, supra note 9, at 58-59 (emphasis supplied).

\textsuperscript{26} 8 & 9 Vict. cc. 18-19 (1845) (Eng.).

\textsuperscript{27} 8(1) HALSbury’S LAWS of ENGLAND 4\textsuperscript{th} § 6 (Lord Hailsham, ed., Butterworths 1996).


\textsuperscript{29} Sax, supra note 9, at 59 (quoting MAGNA CARTA, c. 39 (1215)(Eng.)).

\textsuperscript{30} Id. at 59.
Originally, it seems, “the law of the land” covered all usual modes of trial, whether it be by indictment, petty jury, appeal, or compurgation. “Trial by peers” on the other hand, was undoubtedly an importation from continental feudal law, and was the solemn trial of a vassal by his fellow vassals in a court of their lord. It has always been rare and is apt to have a political aspect.\(^{31}\)

An accurate understanding of the term “law of the land” reveals that it is not the *substantive* counterpart to the “lawful judgment of his peers”; but is, in fact, merely an alternative set of trial procedures for taking property as a sanction for crime or failure to perform required services. It is a guarantee that punishment will not be imposed without the protection of law. Another early forerunner of the Due Process Clause, enacted by Parliament in 1354, supports this explanation:

ITEM, That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, or put to death, without being brought in answer by due process of law.\(^{32}\)

This provision quite clearly prohibits the dispossession of land without a criminal conviction.

\(^{31}\)THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 24 (Little, Brown & Co. 1956) (footnotes omitted). Interestingly, Magna Carta required lands taken prior to be restored where a trial by peers was not had, without reference to the law of the land:

If any one has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing peace.

**MAGNA CARTA**, c. 52 (1215), *reprinted in MCKECHNIE, supra* note 28, at 448 (emphasis supplied).

If we have disseised or removed any Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers; for tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

**Id.** c. 56, *reprinted in MCKECHNIE, supra* note 28, at 456 (emphasis supplied).

\(^{32}\)28 Edw. 3 c. 3 (1354) (Eng.).
Blackstone interpreted this statute and Magna Carta as providing:

[T]hat no man’s land or goods shall be seised into the king’s hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none.  

Considered together, these authorities demonstrate that the law of medieval England did not permit the King to take land from the innocent without consent, even if he provided compensation. However, Magna Carta recognized a right of compensation for the taking of certain classes of chattels by the King’s officers, implying that less important property interests might be expropriated:

No constable or other bailiff of ours shall take the corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

The barons of Runnymede, not Grotious, are the true fathers of the Takings Clause.

2. **Medieval Land Tenures**

Magna Carta becomes a more remarkable document than is often thought when one

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33 1 *William Blackstone, Commentaries* *134-35.*

34 *Magna Carta*, c. 28 (1215), *reprinted in* McKechnie, *supra* note 28, at 329. Compare this provision with the following provisions of Magna Carta enumerating the traditional requirement of consent:

No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of said freeman.


Neither we nor our bailiffs shall take, for our castles or for any work of ours, wood which is not ours, against the will of the owner of the wood.
understands the context of land tenures in medieval England, and particularly during the reign of King John when Magna Carta was conceived.

a. The Macro View: Control of Wealth as a Source of Political Power

At the top of the feudal ascension, the King held all of the land as ultimate proprietor. The defining feature of property in medieval England was “dependent and derivative land tenure.” Indeed, “[a]ll rights in land can be expressed by the formula of dependent tenure.” Dependant tenures probably began with the invading armies of Celts, Goths, Hunns, Franks, and Vandals who sought to secure their holdings by making grants of land called “feoda, feuds, fiefs, or fees” to their subordinate commanding officers on condition of “fealty” (loyalty), and pledges of military service. Violating the fealty oath by failing in these services would result in reversion of the lands to the granting lord.

William the Conqueror applied this technique, albeit with greater sophistication, to solidify political control after the Norman Conquest. Norman England also sought to

Id. c. 31, reprinted in McKechnie, supra note 28, at 336.


36 1 Pollock & Maitland, supra note 35, at 66-67, 406

37 1 Id. at 431.

38 2 William Blackstone, Commentaries *45. It appears possible that some rudiments of the dependant land tenure system were present in the seventh century. John Blair, The Anglo-Saxon Period, in The Oxford History of Britain 60, 76 (Kenneth O. Morgan, ed., 1999).

39 2 William Blackstone, Commentaries *45.

40 1 Pollock & Maitland, supra note 35, at 252; Winston S. Churchill, The Birth of
strengthen royal government by enmeshing centralized religious authority, land tenure, and military service.\textsuperscript{41} In medieval England there was no “hard line . . . between ownership and rulership, between private right and public power[.]”\textsuperscript{42}

In one notorious twelfth century example, King Henry II’s quarrels with Archbishop Thomas Becket lead to Becket’s conviction on trumped up charges, his sentence to forfeiture of his estates and, ultimately, his murder in Canterbury Cathedral by four of the King’s knights.\textsuperscript{43} Any clergy found obeying Becket’s interdict against the King forfeited their property.\textsuperscript{44} As Richard Barber explained, “any trouble-making baron could easily be coerced into submission by the confiscation of his fiefs in one or other half of the realm.”\textsuperscript{45} Henry reallocated many disputed lands and titles in order to ensure that his earls were indebted to him for their wealth and power.\textsuperscript{46} Control of wealth, particularly in lands, was thus used to maintain political power.

Even after it became clear that a part-time military, tied to the land, was inadequate to the offensive campaigns desired by the Crown, the King began to accept scutage (payment of money in lieu of compulsory knight service) to finance a professional army less attached to the land.\textsuperscript{47}

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\textsuperscript{41} CHURCHILL, THE BIRTH OF BRITAIN, supra note 40, at 155.
\textsuperscript{42} 2 POLLOCK & MAITLAND, supra note 35, at 3.
\textsuperscript{43} John Gillingham, The Early Middle Ages, in THE OXFORD HISTORY OF BRITAIN, supra note 38, at 120, 144-45.
\textsuperscript{44} RICHARD BARBER, HENRY PLANTAGENET 138 (Barnes & Noble 1964).
\textsuperscript{45} Id. at 26.
\textsuperscript{46} Id. at 86.
\textsuperscript{47} I POLLOCK & MAITLAND, supra note 35, at 252-53, 273. In one interesting twelfth century example, King Henry II was forced to interrupt a campaign because harvest season was upon his army, and the troops had completed their forty days of required service. BARBER, supra note 44, at 89-90.
\end{flushright}
King John provided a fascinating and illustrative example of derivative tenure principles. After being excommunicated for confiscating Church lands and retaliating by confiscating more lands, John became the target of an alliance threatening to invade England.\(^4\) To divide this alliance, John orchestrated the ultimate example of a feudalistic union of land tenure, military authority, and religious devotion (or homage) by reconciling with the Pope and offering “to make England a fief of the Papacy, and to do homage to the Pope as his feudal lord.”\(^5\) The Pope accepted John as his vassal, which succeeded in thwarting the King’s enemies.\(^6\) The Pope sought to consolidate his position by repudiating Magna Carta and excommunicating the barons for challenging the King, a “crusader and vassal of the Church of Rome” for trying to diminish his rule of England, “a fief of the Holy See.”\(^7\) (However, the Charter was reissued in 1216 during the reign of King Henry III\(^8\) and thirty-seven times thereafter.\(^9\)) The system of dependant and derivative land tenure was a method to control persons by making livelihood contingent on personal submission.

The purpose of feudal tenures for controlling persons was well understood by leading members of the founding generation in America. For example, in a reply of the Legislature to a message by Governor Hutchinson, John Adams denied that “as English subjects” the colonists were under “the Doctrine of the Feudal Tenure” where “all our lands are held mediately or

\(^{48}\) CHURCHILL, THE BIRTH OF BRITAIN, supra note 40, at 250-51.

\(^{49}\) Id.; Gillingham, supra note 43, in THE OXFORD HISTORY OF BRITAIN, supra note 38, at 120, 150.

\(^{50}\) CHURCHILL, THE BIRTH OF BRITAIN, supra note 40, at 251.

\(^{51}\) McKECHNIE, supra note 28, at 44-46 (quoting Pope Innocent in Rymer & Belmont, Chartes XXV).

\(^{52}\) Id. at 139.

\(^{53}\) CHURCHILL, THE BIRTH OF BRITAIN, supra note 40, at 254.
immediately of the Crown.” Adams called feudal tenures a “most iniquitous and absurd Form of Government by which human Nature was so shamefully degraded” and argued that it was designed “for Military Purposes . . . and to serve the Purposes of Oppression and Tyranny.”

b. The Micro View: Independent Control of Wealth as a Source of Personal Freedom

Just as the King benefited by granting lands to knights in return for either service or financial obligations, his knights made similar grants of portions of their properties, while retaining rights to money or services. These grants were known as “subinfeudation.” Over time, wealth generated from these grants became a source of aristocratic power.

Magna Carta requires that rents be “reasonable,” and an action to dispossess a freeman of lands (for failure to provide services or other reasons) must be supported by “the lawful judgment of his peers or [and] by the law of the land.” It included restoration of lands for

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55 Id. Although a full discussion is beyond the scope of this paper, it is interesting to note that a number of the British colonies in America were founded on proprietary land grants to individuals. However, the feudalistic nature of these arrangements appears to have been short lived. For example, by 1703 William Penn had concluded that governments based on proprietary interests in land were doomed, and entered into negotiations to resign his political authority without giving up his proprietary interests in the lands of Pennsylvania. Charles M. Andrews, 4 The Colonial Period of American History 395, see generally 368-428 (Yale Univ. Press 1938).

56 1 Pollock & Maitland, supra note 35, at 273.


58 2 William Blackstone, Commentaries *65, (citing Magna Carta c. 15 (1225)(Eng.)).

59 Magna Carta, c. 39 (1215), reprinted in McKechnie, supra note 28, at 375.
those who had been “disseised” or “dispossessed” without trial.\footnote{Id. cc. 52, 56, \textit{reprinted in} McKechnie, \textit{supra} note 28, at 448, 456 (emphasis supplied).} The terms “disseised” and “dispossessed” are literally synonymous. “Seisin is possession” and the “suggested peace and quiet” arising from that condition.\footnote{2 Pollock \& Maitland, \textit{supra} note 35, at 29-30.} According to the eminent historians Pollock and Maitland, “[i]n the history of [English] law there is no idea more cardinal than that of seisin.”\footnote{Id.} However, not every possession was seisin. A “seisin of freehold” was defined as “the intent to hold” land in the capacity of a “tenant for life or a tenant in fee holding by some free tenure.”\footnote{Id. at 40.}

Among an ascending series of lords, more than one person may be seised of the same land. For example, where a person holds property in free socage (meaning in consideration of clearly defined and socially respectable services) of an earl, who holds in consideration of knight’s service to the King, both the socage tenant and the earl are seised of the land.\footnote{Id. at 38.} The socage tenant is seised in demesne (dominion of the land itself), whereas, the earl is seised of the socage tenant’s service.\footnote{Id.} “[T]he tenant in demesne, he who has no freeholder below him, is indubitably seised of the land, however distant he may be in the feudal scale from the King.”\footnote{Id. at 30.} The demesne tenant has a right of possession superior to his lord.\footnote{Id.} The tenant seised in demesne may have “villein tenants” (having tenure in consideration of whatever services the lord may

\footnote{60 Id. cc. 52, 56, \textit{reprinted in} McKechnie, \textit{supra} note 28, at 448, 456 (emphasis supplied).}

\footnote{61 2 Pollock \& Maitland, \textit{supra} note 35, at 29-30.}

\footnote{62 Id.}

\footnote{63 Id. at 40.}

\footnote{64 Id. at 38.}

\footnote{65 Id.}

\footnote{66 Id.}

\footnote{67 Id.}
require) beneath him who, although on the land, have no seisin in it.  

Even a wrongful possessor was thought to have a seisin in the land because he had an intention to possess the land in his own right, unlike a villein tenant who only intended to sub-serve the possession of his lord. This principle survives in the law of adverse possession today.

Pollock and Maitland described unfree tenure as subjection to the substantial discretion of one’s lord:

The tenure is unfree, not because the tenant ‘holds at the will of the lord,’ in the sense of being removable at a moment’s notice, but because his services, though in many respects minutely defined by custom, can not be altogether defined without frequent reference to the lord’s will. This doctrine has good sense in it. The man who on going to bed knows that he must spend the morrow working for his lord and does not know to what kind of work he may be put, though he may be legally a free man, free to fling up his tenement and go away, is in fact for the time being bound by his tenure to live the same life that is led by the great mass of unfree men; custom sets many limits to theirs; the idea of abandoning his home never enters his head; the lord’s will plays a large part in shaping his life.

The difference between “free” and “unfree” tenure was that the labor required to sustain free tenure was relatively certain, whereas, the labor required to sustain un-free tenure was uncertain and subject to the arbitrary will of the lord. Magna Carta sought to further stabilize free tenures by guaranteeing that “[n]o one shall be distraint for performance of more service for a knight’s fee, or for any other free tenement, than is due from therefrom.” This provision

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68 Id. at 38. In 1086, villein tenants comprised approximately forty-one percent of the population and held approximately forty-five percent of the land. Gillingham, supra note 43, in THE OXFORD HISTORY OF BRITAIN, supra note 38, at 120, 181.

69 2 Pollock & Maitland, supra note 35, at 38-40.

70 Id. at 371-72. Vilein tenancy was not the only tenancy without seisin. Tenancies at will, for terms of years, and guardianships were all unfree tenancies either because they existed at the sufferance of the lord or because they were of a fixed duration. Id. at 40.

71 Id. at 371-72.

72 Magna Carta, c. 16 (1215), reprinted in McKechnie, supra note 28, at 260 (emphasis supplied).
sought to fix the performance required to maintain tenure so that it was predictable and not subject to the arbitrary will of the lord.

c. *The Magna Carta and Medieval Tenure Principles Demonstrate the Political Importance of Controlling Wealth*

The foregoing summary of feudal principles of dependant estates demonstrates the connection, well understood in medieval England, between the control of wealth and: (1) political power; and (2) freedom from the political control of others.

William the Conqueror first secured his fragile hold on power by trading land for loyalty and military services. When this system became inadequate to the needs of the Crown, military obligations evolved into financial obligations, which provided for a professional army. Considering the importance of property rights to human freedom, fixed service obligations were less burdensome than tenures providing the demesne lord with substantial discretion to arbitrarily alter the services performed in exchange for the tenancy. The more definite service obligations were, the more secure the tenure and means of livelihood would be. The more secure the tenancy, the more free the tenant was from the arbitrary will of his superiors. Indeed, the quality of land tenure in medieval society was significantly more important to personal freedom than rank or noble status.  

For example, it was an advantage to downgrade one’s tenancy from chivalry (knight service) to free socage, because knight services were “unavoidably uncertain in respect to the time of their performance”; whereas free socage requirements “were liquidated and reduced to absolute certainty” and were, thus, “the most free and independent species of any.”

Knight service was thought to be “more burdensome” than free socage, even while being

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74 2 William Blackstone, *Commentaries* *78*-81.
considered “more honourable[.]”\textsuperscript{75} Eventually, King Charles I imposed fines on persons failing to take up knighthood.\textsuperscript{76}

Magna Carta was a remarkable moment in the quest for human freedom because it recognized the autonomy provided by the private control of wealth, and sought to strengthen seisin (possession) in the demesne estate against the overreaching of higher authority. It was an assertion of autonomy from the subservience that had previously governed people. The framers of Magna Carta asserted this independence by restoring lands to persons who had been, or would thereafter be, disseised without the customary procedures to demonstrate criminal guilt. Magna Carta was also remarkable because it established a right of compensation for the taking of certain classes of chattels.

3. \textit{Property Rights in the Seventeenth Century}

The Stuart age was one of revolution and sweeping social change. Property rights in Stuart England must be understood in the larger context of political turmoil and the English Civil War, followed by the trial and beheading of King Charles I, which were, perhaps, the most momentous events in the history of English liberty. It was a century of innovation in political systems marked by upheaval and instability.

As the Stuart age dawned, landowning gentlemen of various classes dominated England.\textsuperscript{77} This class was increasing in numbers and wealth.\textsuperscript{78} However, by that time, even

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textsc{Samuel Rawson Gardiner}, \textit{Constitutional Documents of the Puritan Revolution} 1625-1660, xxv (3d ed. 1927).


\textsuperscript{78} \textit{Id.} at 151.
peasant farmers in copyhold (originally holding land “at the will of the lord”) with estates of one life or more were “technically and legally, freeholders.” The great Stuart period historian G. M. Trevelyan explained that “[t]he evolution of all villeins and serfs into freeman of the status of farmers, yeoman, or agricultural labors, had in the Tudor epoch been completed without strife and almost without notice.” A proliferation of farmhouses and buildings indicates that there was a growing class of yeoman farmers (generally holding 100 to 200 acres) in the late sixteenth and early seventeenth centuries, who were involved in county affairs. These tenants, accounting for approximately forty-two percent of land occupants, “enjoyed complete security of tenure,” and paid “only a fixed ‘chief’ rent which was only a nominal sum[.]” Improvements in agriculture were transforming the yeoman class of freeholders into a class of substantial capitalist farmers.

During the seventeenth century:

Society in England was based on the stable and prosperous foundation of a very large number of small farms and estates. The evils inseparable from private property in land, the loss of liberty which it too often inflicts on those who have to live and work on the land of others, were in those days limited by the high

79 COMPACT OXFORD ENGLISH DICTIONARY 335 (2d ed., 2000).

80 COWARD, supra note 77, at 52; G. M. TREVELYAN, ENGLAND UNDER THE STUARTS 37 (Methuen & Co. 1972) (1904).

81 TREVELYAN, supra note 80, at 33.

82 COWARD, supra note 77, at 54-55.

83 Id. at 100.

84 Id. at 52. At the end of the Stuart period, after their decline had begun, approximately 180,000 families (approximately one-sixth of the country) were tenant farmers. The number of yeoman families was approximately 160,000. TREVELYAN, supra note 80, at 35 n.1.

proportion of landowners to the total population.\textsuperscript{86}

Trevelyan’s foregoing statement is premised on the idea that individuals have more liberty working for themselves than for an employer. This economic conception of liberty, which probably grew out of the abuses of dependant tenure in the middle ages, is essential to understanding property in seventeenth century England, and the effect of the propertied class on the American Revolution.\textsuperscript{87} Seventeenth century Britain was founded on a large class of small, independent freeholders, perhaps similar to the yeoman that Madison and Jefferson hoped would form their ideal republican commonwealth.\textsuperscript{88}

\textit{a. The Importance of “Consent” in Taking Private Property in the Early Reign of King Charles I}

From Magna Carta onward, England’s law recognized that land tenure was to be secured by due process requirements for appropriations by the Crown. The existence of a large and increasingly wealthy class of free landowners in early Stuart England is necessary to understand its defining event: the English Civil War and the overthrow of King Charles I. The principal

\textsuperscript{86} Trevelyan, \textit{supra} note 80, at 337, 414.

\textsuperscript{87} \textit{Id.} at 37. Trevelyan explained that the personal relation between master and apprentice in the trades could be “little more than personal bondage under an ill-tempered master trying to check the decline of his small business by truck payments, long hours, hard words, and cruel blows. For the employer had complete control, legally of his apprentices, economically of his journeyman.” \textit{Id.} at 43. Again, Trevelyan seems to be equating economic independence with human freedom.

complaint leading to the feud between King Charles and Parliament was the King’s illegal exercise of royal prerogative to interfere with his subjects’ property rights.

Charles became frustrated with his first Parliament’s refusal to finance an expensive war in Europe.\textsuperscript{89} Parliament blamed the immensely unpopular Duke of Buckingham for Charles’ misguided policy and began impeachment proceedings. The King threatened to dissolve Parliament to protect Buckingham.\textsuperscript{90} Charles further fueled concerns by using emergency powers to force the people to lend him money and imprison, without trial, those who refused to make the forced loan.\textsuperscript{91} Sir John Eliot spoke against the forced loan in Parliament, saying:

\begin{quote}
Upon this dispute not alone our lands and goods are engaged, but all that we call ours. These rights, these privileges, which made our fathers freemen are in question. If they not be the more carefully preserved, they will I fear render us to posterity less free, less worthy than our fathers. For this particular admits a power to antiquate the laws.\textsuperscript{92}
\end{quote}

Eliot astutely observed that if the King could take people’s property he could take their freedom. Eliot died as a martyr due to the cold and unhealthy conditions of the Tower of London, where he was condemned to remain until he apologized for asserting Parliament’s privilege.\textsuperscript{93}

In addition to the forced loan, Charles responded to war exigencies by declaring martial law over large areas and billeting soldiers in the homes of civilians.\textsuperscript{94} “Like King John, Charles was probing the wall of law and custom which protected his subjects’ purses, hoping to find a

\textsuperscript{89} COWARD, supra note 77, at 160.

\textsuperscript{90} Id. at 160-61.

\textsuperscript{91} Id. at 162-63.

\textsuperscript{92} Sir John Eliot, quoted in TREVELYAN, supra note 80, at 134 n.2.

\textsuperscript{93} TREVELYAN, supra note 80, at 151-52.

\textsuperscript{94} J. P. KENYON, THE STUART CONSTITUTION 52 (2d ed., 1987).
gap through which he could press." 95 When military disasters and financial problems forced Charles to summon his third Parliament in 1628, he struck a highhanded tone that would characterize his reign and eventually cost him his life:

[I]f you (which God forbid) should not do your duties in contributing what [finances] this state at this time needs I must in the discharge of my conscience use those other means which God hath put into my hands to save that the follies of particular men may otherwise hazard to lose. Take not this as a threatening (for I scorn to threaten any but my equals). 96

In response, Parliament presented the King with the Petition of Right. 97 The Petition accused the King of violating Magna Carta and other statutes by requiring loans to the Crown without consent from Parliament, imprisoning persons who refused without trial, and quartering soldiers and mariners in private homes. 98 Trevelyan recalls that arbitrary imprisonment “was being applied on a far more extensive scale [than ever before], not in defense of the State but in an attack on the property of all classes.” 99 Accordingly, the Petition of Right demanded that the King promise:

That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament; (2) and that none be called to make answer, or take such oath, or give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for the refusal thereof; (3) and that no freeman, in any such manner as is before-mentioned, be imprisoned or detained; (4) and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; (5) and that the aforesaid commissions for proceeding by martial law be revoked and annulled; and that hereafter no

95 Id.

96 SPEECH BY KING CHARLES I TO PARLIAMENT (March 17, 1628), in KENYON, supra note 94, at 67.

97 KENYON, supra note 94, at 52-53 (2d ed., 1987); The Petition of Right, 3 Car. 1, c. 1 (1627) (hereinafter “Petition of Right”) (Eng.).

98 Petition of Right, §§ 1-9.

99 TREVELYAN, supra note 80, at 133.
commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by color of them any of your Majesty’s subjects be destroyed, or put to death contrary to the laws and franchise of the land.  

Charles reluctantly agreed to these demands in return for a parliamentary subsidy for his war and to avoid further action against Buckingham. The Petition of Right was a monumental achievement in the protection of property and personal freedom. However, the ink on the Petition was barely dry before disputes as to its interpretation arose. Since the Petition did not explicitly mention tonnage or poundage (customs duties), Charles claimed that he could levy them without parliamentary consent.

The House of Commons responded by directing the people not to pay the tax. Acting without the House of Lords or the King, the Commons passed the following resolutions:

2. Whosoever shall counsel or advise the taking and levying of the subsidies of tonnage and poundage, not being granted by parliament, or shall be an actor or instrument therein, shall be likewise reputed an innovator in the government, and a capital enemy to the kingdom and Commonwealth.

3. If any merchant or person whatsoever shall voluntarily yield, or pay the said subsidies of tonnage and poundage, not being granted by parliament, he shall likewise be reputed a betrayer of the liberties of England, and an enemy to the same.

These resolutions illustrate the conceptual unity between liberty and property, stating that paying unconstitutional taxes was a betrayal of the liberties of England. In response to these resolutions,
the King dissolved Parliament and did not call another for eleven years.  

During his personal rule, Charles raised money by collecting tonnage and poundage, granting monopolies and levying taxes on the pretext of fines for persons failing to take up knighthood or encroaching on the forests. Fines for trespassing the forests revived long abandoned claims of ancient forest lands, which had actually been corn fields for generations. Pym complained against the king for, “enlarging the bounds of the Forest.” While these fines held a greater pretext of legality than the forced loan, they were widely seen as “less equitable and more dangerous to property.”

Additionally, in 1634 Charles revived the ancient ship money tax (on ports and maritime towns to provide ships), and extended its application to inland counties, effectively transforming ship money into a general land tax. The King consulted his Court of Exchequer in 1637 and received a favorable opinion that, “the king of mere right ought to have, and the people of mere duty are bound to yield unto the king, supply for the defense of the kingdom.” This result was, perhaps, unsurprising, because the judges remained beholden to the Crown for their continuation on the bench, a situation that was understood during the period of the

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106 KENYON, supra note 94, at 54.
107 GARDINER, supra note 76, at xxv.
108 TREWEYLAN, supra note 80, at 153.
109 JOHN PYM, PYM’S SPEECH ON GRIEVANCES (April 17, 1640), reprinted in KENYON, supra note 94, at 183, 187.
110 TREWEYLAN, supra note 80, at 153.
111 GARDINER, supra note 76, at xxv; COMPACT OXFORD ENGLISH DICTIONARY 1746 (2d ed., 2000).
112 COWARD, supra note 77, at 168.
113 Rex v. Hampden, excerpted in KENYON, supra note 94, at 98.
American Revolution.\textsuperscript{114} Ship-money was offensive because it was a direct tax and a new imposition.\textsuperscript{115} It was considered a violation of the Petition of Right and a way for the King to raise all of the money he might require without Parliament.\textsuperscript{116} In 1640, one of Pym’s grievances against the Crown was “ship-money, and although there be a judgment for it, yet I dare be bold enough to say it’s against all former precedents and laws, and not one judgment ever maintained it.”\textsuperscript{117}

One of the first orders of business for the Long Parliament (the first Parliament in eleven years) was to impeach the judges in the ship-money case.\textsuperscript{118} Parliament declared ship-money illegal in 1641, and stated that it was “contrary to and against the laws and statutes of this realm, the right of property, the liberty of the subjects, former resolutions in Parliament and the Petition of Right[].”\textsuperscript{119}

In the same year that Parliament declared ship-money illegal, it also granted the King a subsidy of tonnage and poundage, but clarified that these violated the “ancient right of the citizens” in the absence of parliamentary consent.\textsuperscript{120} Similarly, in 1641, the Long Parliament


\textsuperscript{115} GARDINER, supra note 76, at xxv; COMPACT OXFORD ENGLISH DICTIONARY 1746 (2d ed., 2000).

\textsuperscript{116} GARDINER, supra note 76, at xxv.

\textsuperscript{117} PYM, supra note 109, reprinted in KENYON, supra note 94, at 183, 187.

\textsuperscript{118} COWARD, supra note 77, at 191.

\textsuperscript{119} Act Declaring the Illegality of Ship-Money, 17 Car. 1, c. 14 (1641).

\textsuperscript{120} The Tonnage and Poundage Act, 17 Car. 1 c. 14 § 1 (1641) (Eng.) (emphasis supplied).
withdrew the King’s revenue from knighthood fines and fines for encroachment on the ancient forests. In 1644, Parliament demanded the “turning of all [land] tenures by knight service . . . into free and common socage” to separate rights in land from homage to the King, which was the basis of feudal tenures for centuries.

A 1641 statute had previously done away with fines for failure to take up knighthood. In abolishing the Court of Star Chamber and limiting the power of the Privy Council, Parliament withdrew the jurisdiction of the King and the Privy Council to “question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any the subjects of this kingdom,” other than as punishment for crimes. Among the most important reasons for this law was that the King’s Privy Council had:

[A]dventured to determine the estates and liberties of the subject contrary to the law of the land and the rights and privileges of the subject, by which great and manifold mischiefs and inconveniences have arisen and happened, and much uncertainty by means of such proceedings hath been conceived concerning men’s rights and estates.

Taken together, these acts of the Long Parliament indicate a strong intention to close the asserted loopholes in the Petition of Right, in order to deprive the King of any pretext of authority to tax or otherwise disturb property rights without the consent of Parliament. The idea of “uncertainty” in tenure was contrary to the traditional English concept of liberty.

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121 Act Prohibiting the Exaction of Knighthood Fines, 17 Car. 1, c. 20 (1641) (Eng.).

122 Act for the Limitation of Forests, 17 Car. 1, c. 16 (1641) (Eng.).

123 The Propositions of the Houses Presented to the King at Oxford, 7 H.L. JOUR. 54 (1644) (Eng.), reprinted in GARDINER, supra note 76, at 277.

124 An Act for the Prevention of Vexatious Proceedings Touching the Order of Knighthood, 17 Car. 1 c. 20 (1641) (Eng.).

125 Act for the Abolition of the Court of Star Chamber, 17 Car. 1, c. 10 § 3 (1641) (Eng.).

126 Id. c. 10 § 1.
The Long Parliament was not concerned exclusively with property. The period following Charles’ personal rule is characterized by dramatic constitutional reforms in response to eleven years of royal absolutism. Parliament enacted legislation to: abolish the courts of Star Chamber\textsuperscript{127} and High Commission;\textsuperscript{128} to limit the powers of the Privy Council;\textsuperscript{129} to require triennial meetings of Parliament,\textsuperscript{130} to prevent dissolution of the Long Parliament without its consent,\textsuperscript{131} and to strengthen and eliminate loopholes in the Petition of Right.\textsuperscript{132} Among these purposes, however, the foregoing history shows that abuses of property rights were a central concern.

The English Civil War was not prompted only by concerns for property. The reign of Charles I is marked by a power struggle between Crown and Parliament, where both institutions ultimately fought for their very existence. Religious controversy prompted by Charles’ marriage to a devout Catholic and the machinations of his controversial Archbishop William Laud (a history beyond the scope of this paper) also provided fuel for the fires of war. Nonetheless, it was King Charles’ proclamation of a compulsory loan, and his high-handed methods of enforcing it, that started the King’s feud with Parliament and prompted Parliament to force the Petition of Right on him. The House of Commons’ effort to close the loophole against the King’s unilateral imposition of customs duties prompted the King to dissolve Parliament for

\textsuperscript{127} Id. c. 10.

\textsuperscript{128} The Act for the Abolition of the Court of High Commission, 17 Car. 1, c. 11 (1641) (Eng.).

\textsuperscript{129} Act for the Abolition of the Court of Star Chamber, 17 Car. 1, c. 10 (1641) (Eng.).

\textsuperscript{130} The Triennial Act, 16 Car. 1, c. 1 (1641) (Eng.).

\textsuperscript{131} The Act Against Dissolving the Long Parliament Without its Own Consent, 17 Car. 1, c. 7 (1641) (Eng.).

eleven years. Additionally, among Parliament’s most important achievements was legislation to close the loopholes permitting the King to levy taxes or otherwise confiscate property without Parliament. Finally, Parliament’s concerns about Catholicism were interwoven with property and other rights. One of Parliament’s central complaints was that the King had armed “great numbers of Papists” and, thus, “many grievous oppressions, rapines and cruelties have been, and are daily exercised upon the persons and estates of [his] people[.]”\footnote{In the Grand Remonstrance of 1641, the Commons accused the Catholic Church of being “so bold as to counsel the King to supply himself out of his subjects estates by his own power, at his own will, without their consent.”}

After the King was executed and the monarchy abolished, the new constitution, known as the “Instrument of Government,” confirmed the principle:

That the laws may not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge or imposition laid upon the people, but by common consent of Parliament[.]

\footnote{The Instrument of Government § 6 (1653), \textit{reprinted in} KENYON, \textit{supra} note 94, at 13, 14 (emphasis supplied).}

In sum, among the most important constitutional developments of the turbulent seventeenth century was to secure property against invasions of royal prerogative.

\textit{b. The Impact of The English Civil War on American Thinking About Property at the Time of the American Revolution}

\footnote{The Humble Desires and Propositions of the Lords and Commons in Parliament Assembled, Tendered to His Majesty, Feb. 1642, 5 Rushworth 165 (1642), \textit{reprinted in} GARDINER, \textit{supra} note 76, at 262-63.}

\footnote{The Grand Remonstrance, With the Petition Accompanying it, 4 Rushworth 437 (1641), \textit{reprinted in} GARDINER, \textit{supra} note 76, at 218. The Grand Remonstrance also specifically complained about tonnage and poundage, \textit{Id.} at 210, enlargement of the forests and the ship money tax, \textit{Id.} at 211, 217, the King’s forced loan, \textit{Id.} at 218, and punishments for failure to take up knighthood. \textit{Id.} at 223.}

\footnote{The Grand Remonstrance also specifically complained about tonnage and poundage, \textit{Id.} at 210, enlargement of the forests and the ship money tax, \textit{Id.} at 211, 217, the King’s forced loan, \textit{Id.} at 218, and punishments for failure to take up knighthood. \textit{Id.} at 223.}
To place the English Civil War in historical context, it is interesting to note that in 1764, American Statesman James Otis complained of taxation without representation, stating that nothing “of this kind taken place since the [English] Revolution. King Charles I his shipmoney everyone has heard of.”\textsuperscript{136} A century after Charles’ execution his abuses of property rights would become precedent for Revolution against King George III.

All five of the concessions demanded from Charles in the Petition of Right are also present in the Declaration of independence against George III as follows:\textsuperscript{137}

“(1) That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament[.]”\textsuperscript{138} The familiar complaint in the Declaration that the King had imposed “taxes on us without our consent”\textsuperscript{139} applied to Charles’ unilateral impositions of forced loans, tonnage and poundage, ship-money taxes, and other creative methods of raising revenue.

“(2) and that none be called to make answer, or take such oath, or give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for the refusal thereof[; (3) and that no freeman, in any such manner as is before-mentioned, be imprisoned or detained[.]]”\textsuperscript{140} The colonists’ complaint that George III was guilty of “depriving us in many cases of the benefits of trial by jury,”\textsuperscript{141} applied equally well to Charles' actions imprisoning,


\textsuperscript{137} See, Petition of Right, § 10 (emphasis supplied).

\textsuperscript{138} Id.

\textsuperscript{139} DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

\textsuperscript{140} Petition of Right, § 10 (emphasis supplied).

\textsuperscript{141} DECLARATION OF INDEPENDENCE para. 12.
without trial, those who had failed to provide his forced loan.

“(4) and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; (5) and that the aforesaid commissions for proceeding by martial law be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by color of them any of your Majesty’s subjects be destroyed, or put to death contrary to the laws and franchise of the land.”\textsuperscript{142} The colonists complaint that the King had “sent hither swarms of new officers to harass our people and eat out their substance” and “quarter[ed] large bodies of armed troops among us;”\textsuperscript{143} applied to Charles’ actions declaring martial law and billeting soldiers in civilian homes.

At least two additional points of the Declaration of Independence were not mentioned in the Petition of Right, but were also very important during the English Civil War. First, King George III had “dissolved representative houses repeatedly for opposing with manly firmness his invasions of the rights of the people. He has refused for a long time after such dissolutions to cause others to be elected[.].”\textsuperscript{144} This complaint applied equally well to Charles’ dissolution of Parliament, and his lengthy personal rule. Second, Jefferson’s famous refrain that “[w]e hold these truth’s to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights,”\textsuperscript{145} could easily have served as a philosophical argument against Charles’ pretensions to be placed above others by the will of God.

These parallels are not coincidental. The importance of these ancient rights was elevated

\textsuperscript{142} Petition of Right, § 10 (emphasis supplied).

\textsuperscript{143} \textit{DECLARATION OF INDEPENDENCE} para.’s 12, 15 (U.S. 1776).

\textsuperscript{144} \textit{Id.} para.’s 7-8.

\textsuperscript{145} \textit{Id.} para. 2.
in the political discourse against Charles’ absolutist philosophy and the revolution that overthrew him. In rallying people to the American Revolution, the parliamentary example provided both a precedent for rebellion. In his Discourse Concerning Unlimited Submission and Non-Resistance to the Higher Powers, American Revolutionary Pamphleteer, Jonathan Mayhew used Charles I as an example:

He levied many taxes upon the people without the consent of Parliament, and then imprisoned great numbers of merchants and gentry for not paying them.—He erected, or at least revived, several arbitrary courts, in which the most unheard-of barbarities were committed with his knowledge and approbation. . . . . —He refused to call any Parliament at all for the space of twelve years together, during all which time he governed in an absolute lawless and despotic manner. . . . . —He sent a large sum of money, which he had raised by his arbitrary taxes, into Germany, to raise foreign troops in order to force more arbitrary taxes upon his subjects.146

Mayhew further complained that King Charles had desired:

[T]hat the clergy would be the tools of the crown, that they would make the people believe that kings had God’s authority for breaking God’s law, that they had a commission from heaven to seize the estates and lives of their subjects at pleasure and that it was a damnable sin to resist them, even when they did such things as deserved more than damnation.147

Mayhew’s famous sermon quickly became a popular argument in the colonies for resisting oppression and, ultimately, helped to solidify the resistance to George III.148 The English Civil War and the abuses of property that fueled it were well known to the American Revolutionary generation and provided powerful arguments for American resistance.

c. Political Movements and Private Property During and After the English Civil War

146 JONOTHAN MAYHEW, DISCOURSE CONCERNING UNLIMITED SUBMISSION AND NON-RESISTENCE TO THE HIGHER POWERS (1750) reprinted in 1 PAMPHLETS, supra note 16, at 204, 239.

147 Id., reprinted in 1 PAMPHLETS, supra note 16, at 245.

148 Bernard Bailyn, Introduction to MAYHEW, supra note 146, reprinted in 1 PAMPHLETS, supra note 16, at 204, 209.
The influence of seventeenth century thinking on the founding generation in America should not be underestimated. As discussed elsewhere in this paper, the political theory of John Locke provided philosophical justification for the American Revolution. Professor Sax quotes one secondary source asserting that Madison favored a redistributionist view of private property.\(^{149}\) However, Madison’s own statements belie this claim:

> An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life and secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence . . . . No agrarian attempts have yet been made in this country, but symptoms of a levelling spirit . . . have sufficiently appeared in a certain quarters [sic] to give warning of the future danger.\(^{150}\)

Madison’s reference to “agrarian attempts” and a “levelling spirit” are interesting. These terms may have acquired more general meanings by Madison’s time. However, they appear to have originated with movements in the mid-seventeenth century.\(^{151}\) Madison’s reference to “agrarian attempts” probably refers to his dislike of wealth equalization laws. In his Notes on Suffrage, Madison said:

> [T]he danger to the holders of property cannot be disguised, if they be undefended against a majority without property. Bodies of men are not less swayed by interest than individuals, and are less controlled by the dread of reproach and the other motives felt by individuals. Hence the liability of rights of property, and of the impartiality of laws affecting it, to be violated by legislative majorities having an interest, real or supposed, in the injustice. Hence agrarian laws or other levelling schemes.\(^{152}\)

\(^{149}\) Sax, supra note 9, at 58 (emphasis supplied).


\(^{151}\) Compact Oxford English Dictionary 30 (definition B of “agrarian”), 965 (second definition of “levelling”) (2d ed. 2000).

\(^{152}\) James Madison, Notes on Suffrage (1829), reprinted in 4 Letters and Other Writings of James Madison, 1829-1836 (hereinafter “Letters”) 21, 22-23 (1865) (emphasis supplied).
The ensuing portions of this paper discuss the leveller and agrarian movements of the seventeenth century, and further demonstrate that its thinkers understood property to be a source of political power and personal freedom.

1) *The Levellers and Private Property*

    London was “a hothouse for the growth of radical ideas in the 1640s.”\(^{153}\) The Levellers demanded dissolution of the Long Parliament, a formal social contract where all persons would participate in a decentralized democratic state, and religious freedom.\(^{154}\)

    The army of Parliament had defeated Charles Stuart by the spring of 1646.\(^ {155}\) However, in March, 1647, a serious dispute arose over Parliament’s demands that the Army disband, and the Army’s demands for back pay, indemnity for acts done during the war and other benefits for its service.\(^ {156}\) In 1647 political ideals became connected to the Army’s grievances as many members embraced the cause of the Leveller movement.\(^ {157}\) Many officers and men were drawn to the Levellers’ desire for religious freedom and outrage over the corruptions of the Long Parliament, such as attempts to continue itself in office without elections.\(^ {158}\)

    The Leveller controversy came to a head during the Putney debates, where Leveller

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\(^{153}\) *Coward, supra* note 77, at 228.


\(^{155}\) *Churchill, The New World*, *supra* note 143, at 260.

\(^{156}\) *Id.* at 264-65.

\(^{157}\) *Coward, supra* note 77, at 228; *Trevelyan, supra* note 80, at 269-70.

\(^{158}\) Morrill, *supra* note 166, in *The Oxford History of Britain*, *supra* note 38, at 327, 371.
Colonel Thomas Rainsborough had a spirited exchange with conservative Commissary General, Henry Ireton, a son-in-law of Oliver Cromwell. The Putney debates were a sort of military parliament, composed of delegates elected from each regiment. A central issue in debate was whether Parliament should be elected by universal suffrage or voting limited to persons with property producing at least forty shillings per year. During this debate, Rainsborough expressed what must have been a popular sentiment:

[I]n what a miserable distressed condition would many a man who has fought for Parliament in this quarrel be? I will be bound to say that many a man whose zeal and affection to God and this kingdom has carried him forth in this cause, has so spent his estate that, in the way the state, the army, are going this way, he shall not hold up his head, and when his estate is lost, and not worth forty shillings a year, a man shall not have any interest. . . . . And therefore I do, and am still of the same opinion, that every man born in England cannot, ought not, neither by the law of God nor the law of nature, to be exempted from the choice of those who are to make laws for him to live under, and for him (for aught I know) to lose his life under[.] Rainsborough repeatedly made the argument that “the chief end of government is to preserve persons as well as estates,” and that those without property needed the vote to protect their persons.

General Ireton believed that eliminating the property requirement would destroy

159 COWARD, supra note 77, at 232-33.

160 CHURCHILL, THE NEW WORLD, supra note 143, at 269.

161 The Putney Debates: The Debate on the Franchise (Oct. 29, 1647) (statement of Col. Thomas Rainsborough), reprinted in DAVID WOOTON, DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND 285, 289 (Penguin 1986) [hereinafter Putney Debates]; see also Id. at 302 (statement of Mr. Sexby). The sentiment of many army officers found a similar expression in the United States during Shay’s Rebellion of 1786, where the rebels’ “creed is that the property of the United States has been protected from confiscation of Britain by the joint exertions of all and therefore ought to be the common property of all.” BANNING, supra note 88, at 104-05 (quoting Letter from George Washington to James Madison, November 5, 1746, 9 PAPERS OF JAMES MADISON 161 (William T. Hutchinson, et. al., ed.’s 1962)).

property. His argument illustrates the view of many in the Stuart period who held that a person was not truly free without economic self-sufficiency:

[I]f you do extend the latitude that any man shall have a voice in election who has not an interest in this kingdom that is permanent and fixed, who has not that interest upon which he may have his freedom in this kingdom without dependence, you will put it into the hands of men to choose, of men to preserve their liberty, who will give it away.

. . . .

[I]f there be anything at all that is a foundation of liberty, it is this: that those who shall choose the lawmakers shall be men freed from dependence on others. I think if we, from imaginations and conceits, will go about to hazard the peace of the kingdom, to alter the constitution in such a point, I am afraid we shall find the hand of God will follow it; we shall see that liberty, which we so much talk of and contended for, shall be nothing at all by this our contending for it, by putting it into the hands of those men that will give it away when they have it.163

Ireton believed that the exclusive nature of property rights was an important element of human liberty and an essential limitation upon the absolute freedom of the state of nature.164 Ireton lived in an England that was emerging from a feudal society that used land tenures to control persons, and the “foundation of liberty” if not its essence was to be “freed from dependence on others.” Similarly, Colonel Rich argued that:

[T]hose who have no interest in the kingdom will make it their interest to choose those that have no interest. It may happen that the majority may by law, not in a confusion, you [sic] may destroy property. There may be a law enacted that there should be an equality of goods and estate[s].165

The main body of the Levellers did not necessarily believe in an enforced equality of wealth. In

163 Id. at 285, 314 (statement of Gen. Henry Ireton).

164 Id. at 285, 305, 311 (statements of Gen. Henry Ireton). A careful review of Ireton’s speeches during the October 29 debate reveals a positivist conception of the origins of property with the statement that “[t]he law of God does not give me property, nor the law of nature, but property is of human constitution.” Id. at 301-02. In this respect he is notably different from the opinions of Locke, considered elsewhere in this paper. However, Ireton does seem to have a moral notion of property, stating that the abolition of property “is a thing evil in itself,” Id., though “divine law determines not particulars but generals, in relation to man and man, and to property.” Id. at 294.

165 Id. at 285, 296-97 (statement of Col. Rich) (last set of brackets original).
fact, the Humble Petition, a key statement of Leveller principles and demands to Parliament in 1648, suggested that Parliament should have, “bound [itself] and all future Parliaments from abolishing propriety, levelling mens Estats, or making all things common.”

Rich’s language suggests that an equality of goods and estates would amount to a destruction of property, rather than a mere redistribution. Rich’s statement is consistent with the English understanding that freedom derives from security of tenure. If Parliament is empowered to redistribute wealth for the sake of equality, there is no security of tenure and, thus, no property.

Ireton’s argument is partly a collective appeal that propertied persons “have the interest of England in them” because they are “the fixed and settled people of [that] nation[.]” His argument is also partly individualistic. He had a sense that spreading the franchise beyond propertied men would destroy property rights because “those that have interest in the land may be voted out of their land” by those without property, upon the assertion that Parliament may “make use of any thing that any man has for the necessary sustenance of me.” According to Ireton, the property holder would become a mere tenant at the will of Parliament, which was inconsistent with “freedom . . . without dependence,” which Ireton viewed as a “foundation of liberty[.]”

Cromwell ultimately concluded that the aims of the Levellers were dangerous, and sent them back to their regiments, replacing them with a carefully selected military council. The

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169 Id. at 285, 314 (statement of Gen. Henry Ireton).

170 CHURCHILL, THE NEW WORLD, supra note 143, at 271.
Putney debates are a powerful illustration of the diversity of views about property after the war, even within the victorious army. The debates also illustrate the important connection between liberty and property in seventeenth century thinking.

Some of the more radical Levellers disliked property rights.171 Prominent Leveller Gerrard Winstanley, in describing Jesus Christ as “the truest Leveller” and “the head Leveller,” wrote that “[p]roperty came in, you see, by the sword, therefore the curse; for the murderer [the devil] brought it in, and upholds him by his power, and makes a division in the creation, casting many under bondage”; and that a “community of the earth, for the quiet livelihood in food and rainment without using force . . . is that true levelling spirit which Christ will work at his more glorious appearance.”172 This is almost certainly the “levelling spirit” that Madison feared173 when he described “an equal division of property” as an “improper or wicked project[.]”174

Madison was not opposed to broad suffrage as discussed in the Putney Debates. While arguing for liberalizing the property criteria for suffrage at the Virginia Constitutional Convention Madison said that “[a] government resting on a minority is an aristocracy and not a Republic . . . and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace.”175 Echoing Colonel Rainsborough, Madison argued against “[c]onfining the right of suffrage to freeholders and to such as hold an


173 NOTES OF THE DEBATES, supra note 162, at 194 (Speech by James Madison) (emphasis supplied).

174 THE FEDERALIST NO. 10 (James Madison).

175 KETCHAM, supra note 88, at 640 (quoting 6 IRVING BRANT, JAMES MADISON 466-7 (Indianapolis 1941-61); and James Madison, James Madison’s Autobiography, 2 WM. & MARY Q. 208 (1945)).
equivalent property” because “the vital principle of free Government” is “that those who are to be bound by laws ought to have a voice in making them.”

In addition to rejecting limitations on suffrage, Madison denied that an equality of suffrage would produce wealth levelling:

Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

Madison saw political equality inadequate to remedy the inequalities of wealth and other differences because people could still form factions to advance their distinct interests and oppress minorities. Because of the dangers of “an interested and overbearing majority,” Ireton’s arguments during the Putney debates cannot be entirely discounted. While Madison thought that “the freeholders of the Country would be the safest repositories of republican liberty,” he also held to “the fundamental principle that men can not be justly bound by laws in making of which they have no part” and that “it is politic as well as just that the interests & rights of every class should be duly represented & understood in the public councils.” However, a society committed to universal suffrage is particularly vulnerable to policy that would expropriate the property of political minorities in the execution of its programs.

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176 Madison, Notes on Suffrage, supra note 152, at 21, 25 (emphasis supplied).

177 The Federalist No. 10 (James Madison).

178 Id.

179 Id.

180 Ketcham, supra note 88, at 330 (quoting James Madison).

181 Notes of the Debates, supra note 162, at 375 (Speech by James Madison) (emphasis supplied).
2) The Agrarians and Private Property

When Madison said that “No agrarian attempts have yet been made in this country,”\(^\text{182}\) and wrote of “the injustice [of] agrarian laws”\(^\text{183}\) he possibly referred to the “agrarian law,” an upper limit on annual income, made famous by James Harrington’s advocacy of it in OCEANA, published in 1656.\(^\text{184}\) Harrington’s work was known to such prominent leaders of the American Revolution as James Otis, who called him “the great, the incomparable Harrington” and referred to “Oceana and other divine writings[.]”\(^\text{185}\) “‘Oceana’ is England as Harrington hoped that Cromwell would remake it.”\(^\text{186}\) After 1653, Harrington and almost all other lines of opinion in England had combined to denounce the radical Levellers.\(^\text{187}\)

In 1647 soldiers had demanded that nobles receive no more than £2000 per year in income, and that the other classes be proportionately restricted in their incomes.\(^\text{188}\) Harrington defended this idea and desired to limit the accumulation of land.\(^\text{189}\) When Madison decried “agrarian attempts” at creating “a more equal distribution” he was disapproving of

\(^{182}\) Id. at 194 (Speech by James Madison) (emphasis supplied).

\(^{183}\) Madison, Notes on Suffrage, supra note 152, reprinted in 4 LETTERS, supra note 152, at 21, 22-23.


\(^{185}\) OTIS, supra note 16, reprinted in 1 PAMPHLETS, supra note 16, at 409, 423.

\(^{186}\) DURANT, supra note 184, at 564.

\(^{187}\) HILL, supra note 89, at 279.

\(^{188}\) Id. at 93. An agrarian law had been unsuccessfully attempted in one of Edward VI’s parliaments, and would have set an upper income limit of 100 marks per year for all landowners. Id.

\(^{189}\) HILL, supra note 89, at 280; DURANT, supra note 184, at 565.
redistribution. Similarly, Gouvernor Morris argued, in a letter to De Witt Clinton, that “plenty, power, numbers, wealth, and felicity will ever be in proportion to the security of property”; and “by agrarian laws the fabric of society [would] be demolished[].”

Harrington is more interesting for his carefully reasoned argument than for his proposals. His account of the role of property in political life is an important illustration of seventeenth century thinking, notwithstanding the rejection of his agrarian idea by America’s founders.

Harrington’s fundamental premise was that political power follows property:

The over-balance of land, three to one or thereabouts, in one man against the whole people, creates absolute monarchy, as when Joseph had purchased all the lands of the Egyptians for Pharaoh. The constitution of a people in which, and like cases, is capable of entire servitude: ‘Buy us and our land for bread, and we and our land will be servants unto Pharaoh.’

The over-balance of land, unto the like proportion, in the few against the whole people creates aristocracy, or regulated monarchy, as of late in England; and hereupon says Samuel unto the people of Israel when they would have a king: ‘he will take your fields, even the best of them, and give them unto his servants.’ The constitution of people in this and in like cases is neither capable of entire liberty, nor of entire servitude.

The over-balance of land, unto the like proportion, in the people, or where neither one nor the few over-balance the whole people, creates popular government; as in the division of the land of Canaan unto the whole people of Israel by lot. The constitution of a people in which, and like cases, is capable of entire freedom, nay, not capable of any other settlement[].

Harrington believed that control of the land and its resources was the primary origin of political power. He held that the location of political authority must correspond to the distribution of property or the system would be unstable. Part of Harrington’s rationale for this argument

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190 NOTES OF THE DEBATES, supra note 162, at 194 (Speech by James Madison) (emphasis supplied).


192 James Harrington, The Art of Lawgiving (1659), reprinted in WOOTON, supra note 164, at 395, 397-98.

193 C. B. Macpherson, Harrington’s Opportunity State, reprinted in INTELLECTUAL REVOLUTION,
was that “[w]herever the balance of the government be, there naturally is the militia of the same; and against him or them where the militia is naturally, there can be no negative vote.”

Harrington thought that “[g]overnment against the balance, in one, is tyranny . . . in the few, is oligarchy . . . in the many, is anarchy.”

To illustrate his argument that power follows property, Harrington compared the reign of Queen Elizabeth with those of her two Stuart successors and observed that Elizabeth had governed by “humoring and blessing her people” more upon principles of “principality in a commonwealth than of sovereign power in a monarchy.” Harrington argued that the balance of property had shifted from the nobility to the people by the time of Elizabeth, that her governance reflected where power in the realm actually lay, and that her understanding of this made her reign successful. Harrington contrasted Elizabeth with her successors James, who tried to govern by “peerage” and Charles, who was “too secure in that undoubted [divine] right whereby he was advanced unto a throne that had no foundation.” Harrington argued that Charles’ signature on the Petition of Right was an implicit recognition that the King had “discovered himself to stand of parliament,” meaning that, in the real world, the King was

**supra** note 184, at 23, 26.

194 Harrington, **supra** note 205, reprinted in WOOTON, **supra** note 164, at 395, 398.

195 *Id.*, reprinted in WOOTON, **supra** note 164, at 395, 399.

196 *Id.*, reprinted in WOOTON, **supra** note 164, at 395, 401.

197 Macpherson, **supra** note 206, reprinted in INTELLECTUAL REVOLUTION, **supra** note 184, at 23, 28.

198 Harrington, **supra** note 205, reprinted in WOOTON, **supra** note 164, at 395, 402. Interestingly, despite disliking monarchy, Harrington knew and loved King Charles I, the self-proclaimed divine monarch, and nearly died of grief after attending his execution. DURANT, **supra** note 184, at 564.
subject to Parliament. Harrington believed that Charles brought his fall upon himself by failing to base his regime on “the popularity of government” where the balance of property lay, rather than on assertions of divine right.

Harrington’s enduring contribution to political thought is his understanding of the connection between the control of the land and political power. Harrington understood that power dispersed as people became independent of feudal tenures and held lands in their own right. William the Conqueror understood this principle when he rewarded those loyal to him with land to secure his government. While Madison rejected the agrarian program of limiting accumulations of wealth, he believed that the power of “creditors . . . on one side and debtors on the other” needed to be carefully balanced, as with “questions which would be differently decided by the landed and manufacturing classes.” Harrington’s suggestion that government could fix the balance of property ownership by limiting wealth has long since been rejected. However, his understanding that power follows property remains important, and was known to leaders of the American Revolution. James Otis praised Harrington for explaining that

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199 Harrington, supra note 205, reprinted in WOOTON, supra note 164, at 395, 402. One of Charles’ Bishops, Roger Manwaring, preached a controversial sermon in 1627, espousing the idea that “as a lord over God’s inheritance, he exacts it.” ROGER MANWARING, A SERMON PREACHED BEFORE THE KING AT OATLANDS (1627), reprinted in KENYON, supra note 94, at 13, 14. He said, further, that “no subject may, without hazard of his own damnation, in rebelling against God, question or disobey the will and pleasure of his sovereign” and that “[t]o kings therefore in all those respects nothing can be denied . . . that may further the supply of their urgent necessities.” Id. Manwaring further argued that Parliament had no right to “challenge tributary aids and subsidiary helps[.]” Id. These views lead to Manwaring’s impeachment in 1628. KENYON, supra note 94, at 13, 14; JOHN PYM, SPEECH AT MANWARING’S IMPEACHMENT (1627), reprinted in KENYON, supra note 94, at 14-16.

200 Harrington, supra note 205, reprinted in WOOTON, supra note 164, at 395, 402-03.

201 Macpherson, supra note 206, reprinted in INTELLECTUAL REVOLUTION, supra note 184, at 23, 34.

202 THE FEDERALIST NO. 10 (James Madison).
“property in fact generally confers power, though the possessor of it may not have much more wit than a mole or a musquash[.]”\textsuperscript{203} The Takings Clause of the Fifth Amendment is an essential safeguard for keeping power with the people. It is particularly important to the less wealthy property owners, because they are the least able to defend themselves in the political process.

4. Private Property in the Revolutionary War Era

a. The Principle of Consent in English Takings Law at the Time of the American Revolution

Professor Sax cites English authorities only to explain them away. His explanation of Blackstone is as follows:

But the authorities [Blackstone] cites for his famous statement that the law will not authorize the least violation of property, not even for the general good of the whole community, are the Magna Charta and a series of statutes of the reign of Edward III. \textit{None of these authorities contradicts} the thesis put forward here. Indeed, the Magna Charta itself merely holds that no freeman shall be disseized of his freehold “but by lawful judgment of his peers or by the law of the land.” And the interpretation put upon that mandate made it no more than a guarantee of rational treatment in procedure and substance. Indeed, the example of the requirement of compensation selected by Blackstone is quite in accord with Grotius, Pufendorf, and Bynkershoek; he \textit{merely argues} that compensation would be due when a highway is put across private land. The property owner in that case is subjected to an economic burden under circumstances presenting the same dangers as those singled out by early writers — appropriation of property by the state for its own account to finance its own enterprise . . . \textsuperscript{204}

Professor Sax’s treatment of Blackstone attempts to convince the reader that Blackstone does not really disagree with Sax’s limited view of property rights as he appears to. However, the contention that Blackstone “merely argues that compensation would be due when a highway is put across private land,” requires a tortured interpretation. Blackstone’s actual statement is as

\textsuperscript{203} OTIS, supra note 16, reprinted in 1 PAMPHLETS, supra note 16, at 409, 423.
follows:

[T]hat no man’s land or goods shall be seised into the king’s hands, against the
great charter, and the law of the land; and that no man shall be disinherited, nor
put out of his franchises or freehold, unless he be duly brought to answer, and be
forejudged by course of law; and if any thing be done to the contrary, it shall be
redressed and holden for none.

So great moreover is the regard of the law for private property, that it will
not authorize the least violation of it; no, not even for the general good of the
community. If a new road, for instance, were to be made through the grounds of a
private person, it might perhaps be extensively beneficial to the public; but the
law permits no man or set of men to do this without consent of the owner of the
land. In vain may it be urged, that the good of the individual ought to yield to that
of the community; for it would be dangerous to allow any private man, or even
any public tribunal, to be the judge of 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, as modelled
by the municipal law. In this, and familiar cases the legislature alone can, and
indeed frequently does, interpose, and compel the individual to acquiesce. But
how does interpose and compel? Not by absolutely stripping the subject of his
property in an arbitrary manner; but by giving him a full indemnification and an
equivalent for the injury thereby sustained. The public is now considered as an
individual, treating with an individual for an exchange. All that the legislature
does is to oblige the owner to alienate his possessions for a reasonable price; and
even this is an exertion of power, which the legislature indulges with caution, and
which nothing but the legislature can perform.205

This statement merely uses the imposition of a public road on private land as one non-exclusive
example of a taking that must be compensated. Blackstone explains that English law will not
tolerate even the “least violation” of property rights without the “consent” of the owner, even if
the violation would be “extensively beneficial to the public.”206 Blackstone referred to “the right
of property” as “that sole and despotic dominion which one man claims and exercises over the
external things of the world, in total exclusion of the right of any other individual in the

204 Sax, supra note 9, at 59 (emphasis supplied) (footnotes omitted).

205 1 WILLIAM BLACKSTONE, COMMENTARIES *135 (emphasis supplied).

206 Id.
Blackstone is extremely important, considering that Volume 1 of his *Commentaries* (where his statements on due process, takings, and taxation appear) was published in 1765, only eleven years prior to the American Revolution, and was widely read in the colonies.  

It is important that, in the foregoing quotation, a discussion of due process protections for property rights directly precedes Blackstone’s discussion of the right to compensation for takings of private property from the innocent. Similarly, the Due Process Clause directly precedes the Takings Clause in the text of the Fifth Amendment to the United States Constitution as follows:

> No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

This pattern of coupling due process requirements with protection against takings was also followed in the Northwest Ordinance, which uses a due process clause copied from Magna Carta:

> [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 public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same[.]

The appearance of these two clauses together in Blackstone’s writings, the Northwest Ordinance, and in the Constitution, is not mere coincidence. The Takings Clause builds on the protection of

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207 Id., at #2.


209 U.S. CONST. amend. V.

the Due Process Clause.\textsuperscript{211} Dating back to Magna Carta, the law protected individuals from royal takings of private property absent criminal conduct. However, when a legislative taking was necessary for the common good, Parliament had to consent, and Parliament traditionally compensated the owner.

Contrary to Sax’s interpretation, Blackstone embraces an expansive and individualistic notion of property rights. He states that impositions on property may occur only with “consent of the owner of the land” and that the most essential public interest is “the protection of every individual’s rights[.].”\textsuperscript{212} Blackstone also believed that property was an “absolute right, inherent in every Englishman[.].”\textsuperscript{213} Similar to Blackstone, Locke articulated the requirement of “consent” for takings. He began with principle that “[t]he Supream power cannot take from any man any part of his Property without his own consent.”\textsuperscript{214}

\textit{b. The Connection Between Takings and Taxation in Seventeenth and Eighteenth Century English Law}

Blackstone argued that the law of his time provided that Parliament was the only government actor that could expropriate private property for public use under any circumstances.\textsuperscript{215} The right of property was a complete prohibition to the King. Immediately following his comments about takings, Blackstone addressed the implications of taxation for

\textsuperscript{211} \textit{But see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction} 77-78 (Yale Univ. Press 1998).

\textsuperscript{212} \textit{1 William Blackstone, Commentaries} *135.

\textsuperscript{213} \textit{1 Id.} at *134.

\textsuperscript{214} \textit{Locke, supra} note 10, at 361.

\textsuperscript{215} \textit{1 William Blackstone, Commentaries} *135.
private property rights:

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject in England can be constrained to pay any *aids or taxes*, even for the defense of the realm or the support of the government, but such as are imposed by *his own consent*, or that of *his representatives in parliament*.216

Volume 1 of Blackstone’s *Commentaries* (where his statements on taking and taxation appear) was published in 1765, only eleven years prior to the American Revolution. In the same pattern followed by Blackstone,217 Locke argued that “*[t]he Prince or Senate . . . can never have a Power to take to themselves the whole or any part of the Subjects Property without their own consent.*”218 Locke apparently meant that not even Parliament could take property from a specific person without that person’s “own consent.” Locke followed his discussion of non-consensual takings with a discussion of non-consensual taxation:

> ‘*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., *the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them*. For if any one shall claim a Power to lay and levy Taxes on the People, he thereby invades *the Fundamental Law of Property*, and subverts the end of government.*219

Blackstone defends the principle of common consent to taxation by reference to a variety of statutes invoking language that “*the king shall not*” levy any taxes without the “*common assent of the realm*” through Parliament.220 As early as 1297, the leading magnates of the realm of

216 *Id.* (emphasis supplied).

217 *Id.*

218 LOCKE, *supra* note 10, at 361 (360-61) (emphasis altered).

219 *Id.* at 362. Thomas Paine argued, as did Locke, that the solitary individual “finds it necessary to surrender up a part of his property to furnish means for the protection of the rest[.]” THOMAS PAINE, *COMMON SENSE* 2 (Buccaneer Books 1976)(1776).

220 1 WILLIAM BLACKSTONE, *COMMENTARIES* *135-36.*
England invoked Magna Carta to argue to King Edward I “against taxation without the payers’ consent[].”\textsuperscript{221}

It is interesting to note the prominent role of this argument almost 500 years later in colonial America. For example, John Adams and the Massachusetts legislature carried forward the use of “Great Charter” to argue against taxation “because they were not ‘represented in Parliament.’”\textsuperscript{222}

c. \textit{The Relationship Between Takings and Taxation in Pre-Revolutionary America}

The foregoing statements of Locke, Blackstone and others regarding taxation ring with the clarion call of the American Revolution: “taxation without representation is tyranny!” The traditional requirement of “consent” was expressed in the Declaration of Independence, blasting the King for “imposing taxes on us without our consent[].”\textsuperscript{223} Thomas Jefferson embraced the direct election of the House of Representatives even though he believed its members would be “very illy qualified to legislate for the Union . . . yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves.”\textsuperscript{224}

While the taxes imposed on the colonies were enacted by Parliament, Revolutionary statesman, James Otis, asked:

\begin{quote}
Are we not as really deprived of that right [to be free of non-consensual taxation] by the Parliament assessing us before we are represented in the House of
\end{quote}

\begin{footnotes}
\textsuperscript{221} Griffiths, supra note 57, in \textsc{The Oxford History of Britain}, supra note 38, at 192, 202-03.

\textsuperscript{222} Adams, supra note 54, at 339-40.

\textsuperscript{223} Declaration of Independence para. 15 (U.S. 1776).

\textsuperscript{224} Letter from Thomas Jefferson to James Madison, December 20, 1787, in \textsc{Banning}, supra note 88, at 150.
\end{footnotes}
The connection between property and human freedom was well understood by pre-revolutionary America, as explained by Stephen Hopkins, Governor of Rhode Island and a signer of the Declaration of Independence:

[I]t must be confessed by all men, that they who are taxed at pleasure by others, cannot possibly have any property, can have nothing to be called their own; they who have no property can have no freedom, but are indeed reduced to the most abject slavery; are in a condition far worse than countries conquered and made tributary.

The early American understanding of the importance of property followed the English idea that private wealth provided freedom from royal control and an independent reservoir of political power to the owner.

At the outset of the Revolution George Washington asked, rhetorically, “[i]s it against paying the duty of three pence per pound on tea because burthensome? No, it is the right only we have disputed.” In support of his assertion that Parliament had no right to tax the colonies, Washington refuted Bryan Fairfax’s suggestion that the colonies merely petition Great Britain

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227 Letter from George Washington to Bryan Fairfax (July 20, 1774) reprinted in 3 Writings of George Washington 230, 231 (John C. Fitzpatrick, ed., U.S. Govt Printing Office 1934-44). It is interesting to note that, in Washington’s time, a penny was worth 1/240 of a pound. Compact Oxford English Dictionary 1303 (2d ed., 2000). The tax described by Washington was, therefore, only 1.25 percent. Thomas Fitch argued in an important pre-revolutionary pamphlet that “the same principles which will justify such a tax of a penny will warrant a tax of a pound, a hundred, or a thousand pounds, and so on without limitation . . . without [the people’s] consent.” Thomas Fitch, Reasons Why the British Colonies in America Should Not Be Charged With Internal Taxes (1764), reprinted in 1 Pamphlets, supra note 16, at 379, 393. James Otis Echoed this fear in his pamphlet entitled, The Rights of The British Colonies Asserted and Proved, stating that “[i]f a shilling in the pound be taken from me against my will, why may not twenty shillings; and if so, why not my liberty or my life?” Otis, supra note 16, reprinted in 1 Pamphlets, supra note 16, at 409, 461.
for relief rather than imposing trade sanctions:

If I was in any doubt, as to the right which the Parliament of Great Britain had to tax us without our consent, I should most heartily coincide with you in opinion, that to petition, and petition only, is the proper method to apply for relief; because we should then be asking a favor and not claiming a right, which, by the law of nature and our constitution, we are, in my opinion, indubitably entitled to. I should even think it criminal to go further than this under such an idea; but none such I have. I think that the Parliament of Great Britain hath no more right to put their hands in my pocket, without my consent, than I have to put my hands into yours for money.\textsuperscript{228}

Washington’s statement captures well the attitude of his times toward the importance of property rights, and the equivalence between taxation and government takings.

The difference between a taking and a tax in seventeenth and eighteenth century England was not always perfectly clear, since there was no need to distinguish them to apply a specific constitutional provision. Nonetheless, the writings of Blackstone and Locke suggest that a taking was specific and, thus, traditionally required specific consent (or compensation to the owner); whereas, a tax was general and only required common consent (meaning an Act of Parliament).\textsuperscript{229} Daniel Dulany argued in his influential 1765 pamphlet that “[w]hen on a particular occasion some individuals only were to be taxed, and not the whole community, their consent only was called for.\textsuperscript{230} This is the most likely reason why Parliament traditionally compensated owners that were asked to bear particular burdens apart from the taxation required of the general public, and why takings and taxation are distinguished under the Constitution.

\textsuperscript{228} Letter from George Washington to Bryan Fairfax (July 20, 1774) \textit{reprinted in 3 Writings of George Washington, supra} note 227, at 230, 233.

\textsuperscript{229} 1 William Blackstone, Commentaries *135; Locke, supra note 10, at 360-62.

\textsuperscript{230} Daniel Dulany, \textit{Considerations on the Propriety of Imposing Taxes in the British Colonies} (1765), \textit{reprinted in 1 Pamphlets, supra} note 16, at 599, 614. While Dulany’s statement appears to refer to the American Colonies as a smaller subset, he appears to be articulating a general principle of English law as he understands it, and applying it to the specific situation of taxation of a colony. For this reason, his statement may reveal important ideas about his understanding of the law of consent in his time.
This formulation is consistent with the rule announced by the modern Supreme Court in *Armstrong v. United States* that:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.  

The *Armstrong* rule is consistent with the core purposes of the Takings Clause. In the case of a specific exaction, it is manifestly unjust for the government to use private property to achieve its goals without compensation.

The principle of common consent for general taxation finds its origins in Chapter 12 of Magna Carta, which provides (with a few exceptions) that “[n]o scutage or aid shall be imposed on our kingdom, unless by common counsel of our kingdom[.]” Taxation by common consent evolved because obtaining the individual consent of each taxpayer was impractical. As Fitch said, taxation was accomplished through representation “because such consent (by reason of the great inconvenience and confusion attending numbers in such transactions) cannot be given by each individual man in person[.]” This analysis suggests that, from an early date, a minority could not prevent the tax by withholding consent. Where the King needed the specific property of individuals, however, specific consent was needed. For example, Magna Carta provided that:

> No constable or other bailiff of ours shall take the corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

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232 MAGNA CARTA, c. 12 (1215), reprinted in McKechnie, supra note 28, at 232.

233 McKechnie, supra note 28, at 254.

234 Fitch, supra note 227, reprinted in 1 PAMPHLETS, supra note 16, at 379, 386.

235 MAGNA CARTA, c. 28 (1215), reprinted in McKechnie, supra note 28, at 329 (emphasis supplied). Compare this provision with the following provisions of Magna Carta stating the traditional requirement of consent:
In 1215, English law was developing around the idea that specific consent was necessary for
government takings of specific property, while general consent was needed for general taxation.

While property rights under the Fifth Amendment have sometimes been “relegated to the
status of a poor relation”\textsuperscript{236} to other protections in the Bill of Rights, George Washington saw
violations of property rights (through externally imposed taxation and trade restrictions) as
“endeavoring by every piece of Art and despotism to fix the shackles of slavery upon us.”\textsuperscript{237} Washington’s objection demonstrates that protection against externally imposed taxation was not
a bare legalism, but offended the blood of patriots spilled during the English Civil War:

\begin{quote}
[A]n innate spirit of freedom first told me, that the measures, which
administration hath for some time been, and now are most violently pursuing, are
repugnant to every principle of natural justice; whilst much abler heads than my
own hath fully convinced me, that it is not only repugnant to natural right, but
subversive of the laws and constitution of Great Britain itself, in the establishment
of which some of the best blood in the kingdom hath been spilt.\textsuperscript{238}
\end{quote}

Similarly, Connecticut Governor Thomas Fitch argued in a 1764 pamphlet, quoting the Petition

\begin{quote}
No sheriff or bailiff of ours, or other person, shall take the horses or carts of any
freeman for transport duty, against the will of said freeman.
\end{quote}

\textit{Id.}, c. 30, \textit{reprinted in} MCECHNIE, \textit{supra} note 28, at 334.

\begin{quote}
Neither we nor our bailiffs shall take, for our castles or for any work of ours,
wood which is not ours, against the will of the owner of the wood.
\end{quote}


\textsuperscript{236} Dolan \textit{v}. Tigard, 129 L.Ed 2d 304, 321 (1994). Although the Dolan Court indicated that the
Takings Clause should not be treated as a “poor relation,” this statement seems to imply that it
often is.

\textsuperscript{237} Letter from George Washington to George William Fairfax (June 10, 1774), \textit{reprinted in} 3
\textsc{Writings of George Washington}, \textit{supra} note 227, at 221, 224.

\textsuperscript{238} Letter from George Washington to Bryan Fairfax (August 24, 1774), \textit{reprinted in} 3 \textsc{Writings of George Washington}, \textit{supra} note 227, at 237, 240.
of Right, that none of the rights “which in an especial manner denominate the British subjects a free people” is more carefully protected than the right to be free of any “tax, loan, or benevolence” except “with their own consent by their representatives in Parliament.” Like Washington, Fitch recognized that this right was:

of ancient date[240], and whenever it hath been encroached upon has been claimed, struggled for, and recovered as being essential for the preservation of the liberty, property, and freedom of the subject. For if the privilege of not being taxed without their consent be once taken from them, liberty and freedom are certainly gone with it. That power which can tax as it shall think proper may govern as it pleases; and those subjected to such taxation and government must be far, very far from being a free people. They cannot, indeed, be said to enjoy even so much as the shadow of English liberties.241

Fitch further argued that:

Parliament (although hath a general authority, a supreme jurisdiction over all His Majesty’s subjects, yet as it is also the high and safe guardian of her liberties) doth not extend its taxations to such parts of the British dominions as are not represented in that grand legislature of the nation[.][242

Interestingly, two years after the Declaration of Independence was signed, Parliament passed a law declaring that it would no longer tax British colonies.243

While this is not a paper about taxation, non-consensual invasions of property rights were, in no small measure, the popular justification for the American Revolution and the reason for sensitivity to property abuses during the founding era. As Fitch argued, taxation without representation denied the people “that fundamental privilege of Englishmen whereby, in special,

239  Fitch, supra note 227, reprinted in 1 PAMPHLETS, supra note 16, at 379, 386.

240  Fitch’s language expressing this right closely resembles language in the Petition of Right, stating “[t]hat no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament[.]” Petition of Right, § 10.

241  Fitch, supra note 227, reprinted in 1 PAMPHLETS, supra note 16, at 379.

242  Id., reprinted in 1 PAMPHLETS, supra note 16, at 379, 387.

243  Taxation of Colonies Act, 18 Geo. 3, c. 12 (1778) (Eng.).
they are denominated a free people” and reduced them to “no other freedom, estates, or
privileges than what may be called a tenancy at will.” Similarly, recalling medieval times,
James Otis poignantly reminded his countrymen of the relationship between property and
political freedom:

[Subordination of the colonies to the law of England without representation]
never will nor can be done without making the colonists vassals of the crown.
Subjects they are; their lands they hold of the crown by common socage, the
freest feudal tenure by which any hold their lands in England or anywhere else.
Would these gentlemen carry us back to the state of the Goths and Vandals, and
revive all the military tenures and bondage which our forefathers could not
bear?245

The American revolutionaries understood that the requirement for common consent in taxation
was an extension of the requirement of individual consent for the taking of specific property.
Otis used the more basic requirement of individual consent for an individual taking of property
to explain the requirement of common consent for taxation:

[I]n a state of nature no man can take my property from me without my consent: if
he does, he deprives me of my liberty and makes me a slave. If such a proceeding
is a breach of the law of nature, no law of society can make it just.246

Taken alone, this statement says nothing about taxation or common consent. However, Otis
continued by saying that, “[t]he very act of taxing exercised over those who are not represented
appears to me to be depriving them of one of their most essential rights as freemen[.]”247

d. Abuse of Property Rights by Executive Authorities in Pre-Revolutionary America

As Oxenbridge Thacher said, it was “not only by taxation itself that the colonists

244 Fitch, supra note 227, reprinted in 1 Pamphlets, supra note 16, at 379, 393.
246 Id. at 447.
247 Id.
The colonists had serious concerns about the abridgement of the “common law [which] is the birthright of every subject” and “trial by jury a most darling privilege” by the empowerment of “courts of admiralty”; and the insulation of executive officers from sanctions for unlawful seizures of property. In his pre-revolutionary pamphlet, The Rights of Colonies Examined, Stephen Hopkins criticized the 1764 Parliament for the Sugar Act, “greatly enlarging the power and jurisdiction of the courts of admiralty in the colonies.”

Thacher explained that sanctions upon executive officers, which had served as a deterrent to abuse, were repealed by an act of Parliament applicable only in America. This argument refers to the Sugar Act, which imposed customs duties and provided for the forfeiture and seizure of contraband by officers of the Crown in America. When such penalties and forfeitures were collected, the spoils were divided half to the King and half to the prosecutor. Thacher complained that the judges were taking “a commission of five percent” on “all seizures condemned.” He asked, rhetorically, “[w]hat chance does the subject stand for his right upon the best claim when the judge, condemning, is to have a hundred or perhaps five hundred pounds, and acquitting, less than twenty shillings?”

Under a 1707 statute, to which Thacher

248 Oxenbridge Thacher, The Sentiments of a British American (Boston, 1764), reprinted in 1 Pamphlets, supra note 16, at 484, 492.

249 Id., reprinted in 1 Pamphlets, supra note 16, at 484, 492, 494-495.

250 Hopkins, supra note 226, at 35.

251 Thacher, supra note 248, reprinted in 1 Pamphlets, supra note 16, at 484, 494-95.

252 An Act for Granting Certain Duties in the British Colonies and Plantations in America, 4 Geo. 3 c. 15 §§ 16-38 (1764) (Eng.).

253 Id. c. 15 § 30.


255 Id., reprinted in 1 Pamphlets, supra note 16, at 484, 493.
referred approvingly, judges were limited in their opportunity to share in the prize and subjected to penalties for neglect of duties, and unsatisfied claimants were provided a right of appeal to the crown.

Additionally, the Sugar Act provided that in a case where “any information shall be commenced and brought to trial” if probable cause had existed, “the defendant shall not be intitled to any costs of suit whatsoever; nor shall the persons who seized the said ship or goods, be liable to any action, or other suit or prosecution, on account of such seizure.” Even in a case where no charges or forfeiture resulted from a seizure, the aggrieved party “shall not be intitled to above two pence damages, nor to any costs of suit; nor shall the defendant in such prosecution be fined above one shilling.” The foregoing provisions created large incentives to violate property rights, with limited risk of financial repercussions. Hopkins again lamented that:

a custom-house officer may make a seizure in Georgia, of goods ever so legally imported and carry the trial to Halifax, at fifteen hundred miles distance; and thither the owner must follow him to defend his property; and when he comes there, quite beyond the circle of his friends, acquaintance[s], and correspondents, among total strangers, he must there give bond, and must find sureties to be bound with him in a large sum, before he shall be admitted to claim his own goods; when this is complied with, he hath a trial, and his goods acquitted. If the judge can be prevailed on, (which it is very well known may too easily be done) to certify, there was only probable cause for making the seizure, the unhappy owner shall not maintain any action against the illegal seizor, for damages, or obtain any other satisfaction; but he may return to Georgia quite ruined and undone in conformity to an act of parliament.

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256 THACHER, supra note 248, reprinted in 1 PAMPHLETS, supra note 16, at 484, 493.

257 An Act for the Encouragement of the Trade to America, 6 Ann. c. 37 § 7-8 (1707) (Eng.).

258 An Act for Granting Certain Duties in the British Colonies and Plantations in America, c. 15 § 36.

259 Id.

260 HOPKINS, supra note 226, at 40-41.
Hopkins’ statement demonstrates the concern of the Revolutionary War era regarding government seizures of private property.

It is noteworthy that the seizures Hopkins complained of were theoretically temporary until the status of the goods was ascertained. They were measures for enforcing trade regulations. In the 1987 case of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, the Supreme Court similarly recognized that “‘temporary’ takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.” However, in a 2002 case, the Supreme Court disregarded this principle and held that a lengthy building moratorium imposed for land use planning purposes was not necessarily a temporary taking. However, time is a vital element of the enjoyment of property because, as Justice Thomas observed in dissent, “[i]n the long run we are all dead.”

The complaints of the colonists demonstrate how, by burdensome procedures and regulations, an innocent property owner could have his estate “quite ruined” regardless of his ultimate innocence. One of the principal defenders of the trade regulations imposed on the Colonies by Parliament was Daniel Dulany, who argued that:

[T]here is a clear and necessary distinction between an act imposing a tax for the single purpose of revenue, and those acts which have been made for the regulation of trade and have produced some revenue in consequence of their effect and operation as regulations of trade.

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263 Id. at 356 (Thomas, J., dissenting) (quoting JOHN MAYNARD KEYNES, MONETARY REFORM 88 (1924)).

264 DULANY, supra note 230, reprinted in 1 PAMPHLETS, supra note 16, at 599, 637.
Upon this premise, Dulany argued for “the right of the British Parliament to \textit{regulate} the trade of the colonies” while arguing that Parliament could not “\textit{tax} them without their own \textit{consent}.”\footnote{Id., \textit{reprinted in} 1 \textsc{Pamphlets}, \textit{supra} note 16, at 599, 637-38.} Dulany’s argument is interesting because it parallels the modern debate over regulatory takings. As Dulany argued that custom’s duties were simply trade regulations, many today argue that a diminution in the use or value of property is acceptable if it is incident to a regulation, rather than an outright taking of property. However, Dulany’s argument was not successful. He disapproved of the American Revolution and ended up on the wrong side of history.\footnote{Bernard Bailyn, \textit{Introduction to} \textsc{Dulany}, \textit{supra} note 230, at 599, 605-06.} Instead, the colonists found the definition of taxation to be sufficiently broad to include regulatory exactions as well as taxes for revenue. If that logic is followed in our time, significant diminutions in the value of private property, imposed for the purpose of regulation, ought to be considered takings of property.

Uses of the Sugar Act to invade property rights in the colonies were, undoubtedly, responsible for language in the Declaration of Independence charging the King with abuses:

\begin{quote}
He has erected a multitude of new offices and sent hither swarms of new officers to harass our people and eat out their substance.
\end{quote}

\begin{quote}
. . . . He has combined with others to . . . [deprive] us in many cases of the benefits of trial by jury; for transporting us beyond the seas to be tried for pretended offenses[.]
\end{quote}

\begin{quote}
. . . . He has plundered our seas, ravaged our coasts, burnt our towns, & destroyed the lives of our people.
\end{quote}

\begin{quote}
. . . . He has incited treasonable insurrections of our fellow-citizens, with the allurements of forfeiture & confiscation of our property.\footnote{\textsc{Declaration of Independence} \textsc{para.’s} 12, 15, 17, 21 (U.S. 1776).}
\end{quote}

In addition to complaints about taxation without representation, the Declaration of Independence
confirms that forfeitures and confiscation to enforce trade regulations were also important grievances of the American colonies.

e. The Importance of Representative Bodies in the American Approach to the Protection of Property

There is an essential, but little understood, difference between the traditional English and the American view of rights. The English view sought to protect the rights of the people by empowering Parliament and limiting the powers of the Crown. There was a rhetorical fusion between freedom and Parliament. Unlike the American Bill of Rights, Magna Carta was “a treaty extorted” from King John and applied against the King and not against Parliament. As Blackstone said, “the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority without consent of Parliament, is illegal.” This limitation forbade the King to “determine or dispose of the lands or goods of any subject of this kingdom” unless the subjects’ rights were “tried and determined in the ordinary courts of justice, and by course of law.” Acts of Parliament secured these protections for the people against the Crown.

Sir Edward Coke expressed the English Constitution thus: “[t]he power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.” According to Blackstone, among the “auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three primary rights of personal security, personal liberty, and private property” against royal

\[1\] Pollock & Maitland, supra note 35, at 171.

\[2\] 1 William Blackstone, Commentaries *138.

\[3\] Id.

oppression, the first is the “constitution, powers, and privileges of parliament[.]”272 Blackstone explained that the taking of private property with “a full indemnification and equivalent” was an act of political power, which “nothing but the legislature can perform.”273 Blackstone further explained that taxes could only be collected by the “common assent of the realm,” expressed through Parliament.274

Locke also believed that:

[I]t is a mistake to think, that the Supream or Legislative Power of any Commonwealth, can do what it will, and dispose of the Estates of the Subject arbitrarily, or take any part of them at pleasure. This is not much to be fear’d in Governments where the Legislative consists, wholly or in part, in Assemblies which are variable, whose Members upon the Dissolution of the Assembly, are Subjects under the common Laws of their Country, equally with the rest.275

James Madison did not share Locke’s optimistic view of representative assemblies; but thought that factions separated by property interests divided society and polarized the legislative process:

The most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.276

Madison worried that, in legislative contests, “the most numerous party, or, in other words, the most powerful faction must be expected to prevail.”277 Madison believed that the power to regulate these various interests, if not checked, would lead to “[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked

272 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

273 1 Id. at *135; LOCKE, supra note 10, at 362.

274 1 WILLIAM BLACKSTONE, COMMENTARIES *135.

275 LOCKE, supra note 10, at 361.

276 THE FEDERALIST, No. 10 (James Madison).

277 Id.
Property was a paradox for Madison. Its protection was the primary purpose of government. But the jealousy and political divisions created by property made its protection an elusive goal.

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

More to the point, Madison feared that “the danger to the holders of property cannot be disguised, if they be undefended against a majority without property.”

Unlike the rights of English subjects, which are protected by empowering Parliament; the American Bill of Rights limits the authority of Congress.

Failing to understand that rights in England were to be protected against the crown and not against Parliament lead one influential commentator to erroneously cite English cases denying compensation as evidence that Blackstone erred in writing that Parliament provided compensation when it expropriated private property. In the tradition of Magna Carta and subsequent enactments, the Crown lacked the authority to take private property absent consent of the owner or a criminal conviction obtained by due process of law. Parliamentary supremacy was seen as the institutional guarantor of those rights against royal oppression. With respect to

278 Id.

279 Id.


the right of property, Oxenbridge Thatcher said, “[t]he British Parliament have many times vindicated this right against the Kings to invade it.”

Judge A.V. Dicey explained that, “[i]n England we are accustomed to the existence of a supreme legislative body, i.e. a body which can make or unmake every law; and which, therefore, cannot be bound by any law.” In describing the practice of Parliament to compensate owners for takings, Blackstone was not suggesting that the right to compensation was judicially enforceable against Parliament. He was simply describing a legislative tradition, arising from the natural law principle that property rights may not be breached “even for the general good of the whole community.” Isolated judicial cases failing to require Parliament to adhere to this tradition prove little because rights were protections against the Crown, not against Parliament—and it was very clear that the Crown could not take private property without the owner’s consent. Additionally, the English tradition of compensating owners for takings was formally codified as a Constitutional right in America where the Bill of Rights, unlike such bills of rights in England, applies against legislative bodies as well as the executive.

f. Why Protect Individual Property Rights?

The foregoing analysis raises the question why Madison opposed wealth equalization. First, following Locke, Madison likely believed that if property could be arbitrarily taken and given to another it was “no Property at all.” Second, Locke believed that rights in property arose from one’s labor; whereas Madison believed that they arose from the “faculties of

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282 THACHER, supra note 248, reprinted in 1 PAMPHLETS, supra note 16, at 484, 491.
283 DICEY, supra note 271, at 27.
284 1 WILLIAM BLACKSTONE, COMMENTARIES *135.
285 LOCKE, supra note 10, at 360.
These two conceptions, though different in expression, share the same core principle. The origin of property for both Locke and Madison is the idea that persons have property in their own persons and, therefore, in the uses to which they are put. Third, since labor accounts for more value than raw material, persons who own the labor (or faculties) of their own bodies also have rights to possess or dispose of the products of their efforts. Fourth, Madison’s own words illustrate his concept of justice:

The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to the predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

Madison believed that it was unjust to use the coercive power of government to take wealth from others, instead of obtaining it honestly through the application of one’s own faculties. Locke might similarly argue that the only just method of acquiring property is by labor and not by force. Fifth, if labor of the body belongs to the body itself, the infringement of property rights is an offense to the freedom of the person. It may be argued, upon this principle, that applying the collective force to appropriate one person’s labor for the benefit of another is a sophisticated form of slavery. Chief Justice John Marshall embraced that doctrine in the Antelope case:

That [slavery] is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.

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286 THE FEDERALIST, No. 10 (James Madison); see also Letter from James Madison to Thomas Jefferson, October 24, 1787, in BANNING, supra note 88, at 132, 138.

287 LOCKE, supra note 10, at 298.

288 Id. at 298-99.

289 THE FEDERALIST, No. 10 (James Madison).

290 The Antelope, 23 U.S. 66, 120 (1825). James Otis said, “if taxes are laid upon us in any shape without our having a legal representation where they are laid, are we not reduced from the
Sixth, property is a source of power. The protection of property against government interference maintains power in the people.\textsuperscript{291} As Madison said, “[i]t must be owned, indeed, that property will give influence to the holder, though it should give him no legal privileges[.]”\textsuperscript{292} Seventh, according to Madison, property “encourage[s] industry by securing the enjoyment of its fruits[.]”\textsuperscript{293} Montesquieu similarly held that:

\begin{quote}
Nature is just toward men. She rewards them for their pains; she makes them hard workers because she attaches greater rewards to greater work. But if an arbitrary power removes nature’s rewards, the distaste for work recurs and inaction appears to be the only good.\textsuperscript{294}
\end{quote}

While there are plenty of exceptions to Montesquieu’s principle, it should be beyond debate that property fosters greater personal initiative and economic efficiency.

\textit{g. Madison and the Fifth Amendment}

character of free subjects to the miserable state of tributary slaves.” OTIS, supra note 16, \textit{reprinted in} 1 PAMPHLETS, supra note 16, at 409, 473. Stephen Hopkins quoted Algernon Sidney for the proposition that “liberty solely consists in an independency upon the will of another; and by the name of slave, we understand a man who can neither dispose of his person or goods, but enjoys all at the will of his master.” HOPKINS, supra note 226, at 29.

\textsuperscript{291} Interestingly, Hopkins argued that:

\begin{quote}
It is not the judgment of free people only, that money for defending them is safest in their own keeping, but it hath also been the opinion of the best and wisest kings and governors of mankind, in every age of the world, that the wealth of a state was most securely as well as most profitably deposited in the hands of their subjects[.]
\end{quote}

HOPKINS, supra note 226, at 35.

\textsuperscript{292} Letter from James Madison to John Brown, August 23, 1785, \textit{reprinted in} 4 LETTERS, supra note 152, at 181.

\textsuperscript{293} Madison, \textit{Notes on Suffrage}, supra note 152, \textit{reprinted in} 4 LETTERS, supra note 152, at 24 (emphasis supplied).

\textsuperscript{294} MONTESQUIEU, \textit{THE SPIRIT OF THE LAWS} 214 (Cambridge ed. 1989) (1748)
Madison’s proposed draft of the Takings Clause was:

No person shall . . . 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.\(^{295}\)

Both sides of the modern debate assume that the phrase “relinquish his property” indicates that Madison intended to provide compensation for outright takings of property, and not regulatory takings.\(^{296}\) This reading of Madison’s proposal, however, makes two unjustified assumptions. First, it assumes that an unrestricted power to take property existed prior to and independent of a right to compensation. Second, it begs the question of how “property” was understood by Madison. We cannot very well determine what it means to “relinquish” property until we know what property is.

\(^{(1)}\) The government did not have unlimited power to take or control property under the common law, and the articulation of a right does not provide government power that did not already exist

The assumption that the Fifth Amendment was enacted to protect property that could otherwise be taken with impunity, or regulated out of existence, misunderstands history. In English law dating from Magna Carta, the King lacked the authority to interfere with property without the consent of the owner or, in the case of taxation, common consent through Parliament. These prohibitions also apply to the legislative branch in America. In the 1871 case of *Pumpelly v. Green Bay & Mississippi Canal*, the Supreme Court considered the question:

[I]f . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because in the

\(^{295}\) 1 CONG. REGISTER 427-28 (June 8, 1789), reprinted in COGAN, supra note 211, at 361.

\(^{296}\) E.g., Lucas, 505 U.S. at 1028 n.15; Id. at 1057-58 (Blackmun, J., dissenting).
narrowest sense of the word, it is not *taken* for the public use.\textsuperscript{297} Calling this possible interpretation “a very curious and unsatisfying result,” the court said that it would leave citizens with fewer rights than they had under the common law:

Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors.\textsuperscript{298}

Whatever the original intent of the Fifth Amendment, it is absurd to suggest that the Takings Clause added to the government’s powers or required less than traditional property law. That suggestion vindicates Alexander Hamilton’s fear that a bill of rights “would contain various exceptions to powers which are not granted [by the Constitution] and, on this very account, would afford a colourable pretext to claim more [powers] than were granted.”\textsuperscript{299}

Justice Stevens asserted in the *Lucas* case that the legislature may “revise the definition of property and the rights of property owners” and that “it certainly cannot be the case that every movement away from common law” effects a taking.\textsuperscript{300} I doubt that Justice Stevens would be so tolerant of legislative changes to the definition of freedom of the press. As the *Pumpelly* Court said, protecting the right of property in the Bill of Rights had the effect of “placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them[.]”\textsuperscript{301}

\textsuperscript{297} 80 U.S. 166, 177-78 (1871) (emphasis supplied).

\textsuperscript{298} *Id.*

\textsuperscript{299} *The Federalist*, No. 48 (Alexander Hamilton).

\textsuperscript{300} *Lucas*, 505 U.S. at 1069-70 (Stevens, J., dissenting).

\textsuperscript{301} *Pumpelly*, 80 U.S. at 177-78.
As argued earlier in this paper, the Fifth Amendment was enacted against a background of English law that required the owner’s consent for the government to acquire property. The Virginia Declaration of Rights codified this tradition as follows:

THAT elections 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, in the like manner, assented, for the public good.\(^{302}\)

Interestingly, the takings clause of the foregoing declaration is paired with the provision for rights of suffrage. These two provisions are not an obvious match until one considers the historical concern, explained earlier in this paper, that broad suffrage presented a danger to property rights. In that light, a broad suffrage provision (for its time) was placed in the same paragraph with limitations on the government’s right to take private property to emphasize that legislative action infringing on property rights was limited.

The protection of property against majority rule was a central preoccupation of Madison’s political career. In 1829, many years after the adoption of the Bill of Rights and his retirement from public life, Madison queried:

And whenever the majority shall be without landed or other equivalent property, and without the means or hope of acquiring it, what is to secure the rights of property against the danger of an equality and universal suffrage, vesting complete power over property in hands without a share in it\(^{303}\)

Madison answered that:

\(^{302}\) VIRGINIA DECLARATION OF RIGHTS art. 6 (1776).

\(^{303}\) Madison, Notes on Suffrage, supra note 152, at 22 (emphasis supplied).
It would seem unreasonable to extend the right [to participate in government] so far as to give [those without property], when they become a majority, a power of legislation over the landed property without the consent of the proprietors. Some shield against the invasion of their rights would not be out of place in a just and provident system of Government.\(^\text{304}\)

This essay was primarily a discussion of how best to structure the political system to protect property rights in a system of broader suffrage, without endangering the rights of citizens lacking property. However, it also reveals Madison’s conception of property. It demonstrates that Madison believed that “legislation over the landed property” could result in “the invasion of [property] rights.”\(^\text{305}\) It also demonstrates that Madison was concerned with protecting the property of political minorities against overreaching by the majority.

Madison believed that the oppression of minorities by the majority was a particular danger of republican forms of government:

> It is sufficiently obvious, that persons and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which the government was instituted. These rights cannot be well separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection as a social right. The essence of government is power; and power, lodged as it must be in human hands, will ever be liable to abuse. In Monarchies, the interests and happiness of all may be sacrificed to the caprice and passion of a despot. In Aristocracies, the rights and welfare of the many may be sacrificed to the pride and cupidity of the few. In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.\(^\text{306}\)

Madison’s statement demonstrates that he believed that legislative action regulating property could invade the personal rights of owners, and that minorities were in particular danger of abuse in a Republic. Madison reasoned that majorities would be partial to their own interests when

\(^{304}\) Id. at 25.

\(^{305}\) Id.

legislating, with “biass of interest or emnity agst” political minorities. Madison explained that “[w]herever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince.” The Fifth Amendment is an important check against such misuses of majoritarian power.

The essential question regarding Madison is whether he believed that controlling property without completely expropriating it could effect a taking. In his 1792 essay on political parties, Madison provided five suggestions for how “to combat the evil” of parties by solving the “difference of interests” which he thought was “the most natural and fruitful source of them.”

One suggestion was to combat the difference of interests, “[b]y the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.” While Madison believed it possible to craft legislation that would subtly lessen the gap between rich and poor without violating rights of property, his statement also rang a cautionary tone. Madison strongly implies that economic legislation presents a peculiar danger to property rights, and cautions that measures taken to narrow the gap between rich and poor should be undertaken without violating property rights.

Madison’s other suggestions provide clues as to what kind of regulations offend property rights. The most poignant example is “withholding unnecessary opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, especially an unmerited,

307 Id. at 132, 138.

308 Id. at 150, 151.

309 James Madison, Parties, NATIONAL GAZETTE, January 23, 1792, reprinted in JAMES MADISON: WRITINGS, supra note 20, at 504.

310 Id. (emphasis supplied).
accumulation of riches.”  Madison seems to be saying that he disfavors the use of political power to obtain wealth, rather than the application of one’s faculties. Madison’s other suggestions also suggest an evenhanded and neutral approach to economic legislation. One suggestion was “establishing a political equality among all”. Another suggestion was “abstaining from measures which operate differently on different interests, particularly such as favor one interest at the expense of another.”  While Madison’s suggestions are very broad, and certainly do not yield a bright line legal test, they do suggest a general philosophy favoring a neutral, balanced, and generally hands-off approach to economic legislation. Accordingly, economic legislation might violate rights of property if it permits an “unmerited, accumulation of riches” or “operate[s] differently on different interests[.]”

Further clues as to Madison’s attitudes about property are in his essay entitled Property. That essay provides both a more general and more specific definition of property. In the more general definition “property” includes a right to one’s religious opinions, freedom of speech, conscience and “[i]n a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.” Madison’s intention in providing compensation for takings was, possibly, the narrower definition of property, which is “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”  This is by no means certain. For example, Madison spoke against excluding

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311 Id. (emphasis altered).
312 Id.
313 Id.
314 Madison, Property, supra note 20, at 515.
315 Id.
316 Id.
religious ministers from political power, arguing that the exclusion would violate religious
freedom principles and declaring, rhetorically, “[d]oes it not in fine violate justice by at once
taking away and prohibiting a compensation for it.”

Certainly our tradition has not interpreted compensable property rights that broadly. However, it is important to understand Madison’s broad understanding of property rights before simply concluding that he did not intend for regulatory takings to be compensable.

The application of Madison’s more limited definition of property has regulatory takings implications that touch on the broader right of property as Madison understood it. Again, Madison believed that a highly interventionist economic policy with strong adverse effects on property values rendered property rights insecure:

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

Madison suggests that regulation of property can be just as serious as direct appropriation:

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

Again, Madison wrote this essay for general policy recommendations and not as a commentary on the legal consequences of the Takings Clause. His essay certainly begs the question as to what


318 Madison, Property, supra note 20, at 516.

319 Id. at 517.
might qualify as a direct taking of property for public use, and makes no bright line distinction between a direct and an indirect taking. Madison’s specific statement about the right of indemnification indicates that he believed that indemnification only for direct takings of property was an insufficient safeguard for property rights. Again, Madison’s essay reveals acute worry about legislation placing excessive burdens on certain interests to benefit others:

A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor[.]

Again, one will search this language in vain for any bright line legal test for providing compensation. It was a public essay advocating a republican legislative policy. However, it embraces a broad conception of property rights and criticizes the inadequacy of protection extending only against direct appropriation. Consider Madison’s rhetorical question:

What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbor who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the economical use of buttons of that material, in favor of the manufacturer of buttons of other materials?

Madison’s narrow view of property is exclusive and absolute dominion over the things of the world. Regulations requiring individual property owners to sacrifice disproportionately for public policy goals were of particular concern to him.

II. COMPARISON OF PROFESSOR SAX’S APPROACH TO THE LUCAS APPROACH

A. Professor Sax’s Approach Compared to Recent Cases

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320 Id. at 515-17.

321 Id.
Sax’s proposed rule is based on the mistaken premise that “the state’s becoming the
direct economic beneficiary of its own legislative acts” is the true concern of the Taking’s
Clause, “not the danger or extent of private loss.” Sax, supra note 9, at 59-60 (emphasis supplied).

Professor Sax suggests the following test:

The rule proposed here is that when economic loss is incurred as a result of
government enhancement of its resource position in its enterprise capacity, then
compensation is constitutionally required; it is that result which is to be
characterized as a taking. But losses, however severe, incurred as a consequence
of government acting merely in its arbitral capacity are to be viewed as a non-
compensable exercise of the police power. This suggestion is repugnant to the doctrine of United States v. General Motors, “that the
deprivation of the former owner rather than the accretion of a right or interest to the sovereign
constitutes the taking.” and in United States v. Causby that, “[i]t is the owner's loss, not the
taker's gain, which is the measure of the value of the property taken.”

The Lucas Court identified two regulatory scenarios which qualify as takings under
current Supreme Court jurisprudence. First, when the property owner suffers a physical invasion, it will constitute a taking, “no matter how minute the intrusion.” Second, where a regulation “goes too far,” meaning to deny “all economically beneficial or productive use of the land.”

\[322\] Sax, supra note 9, at 59-60 (emphasis supplied).
\[323\] Id. at 63 (emphasis supplied).
\[324\] 328 U.S. 373, 378 (1946).
\[325\] 328 U.S. 256, 261 (1946).
\[326\] Lucas, 505 U.S. at 1015-16.
\[327\] Id. at 1015.
\[328\] Id. (emphasis supplied).
regulation “fall[s] short of eliminating all economically beneficial use, a taking nonetheless may have occurred”\(^{329}\) based on a variety of considerations, including interference with “reasonable investment-backed expectations” and action “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^{330}\)

The *Lucas* Court also held that government action to abate a common law nuisance would not qualify as a taking, even if it deprived the owner of all productive use, since there is no property in a nuisance.\(^{331}\) The *Lucas* rule is a more limited application of the principles articulated in *Mugler v. Kansas*,\(^{332}\) where the prohibition of alcohol was found to be a legitimate exercise of police powers and, therefore, not a taking of breweries.

*Lucas* is directly at odds with Professor Sax’s approach. Where Sax rejects the “diminution of value approach,”\(^{333}\) *Lucas* held that a loss of all economic value is as a taking, unless the regulated activity was a nuisance. Under the Sax test, it is unlikely that the *Lucas* petitioner would have recovered anything. In *Lucas*, the Legislature had adopted legislation “barring petitioner from erecting any permanent habitable structures on his two parcels” thus rendering petitioner’s land economically “valueless” or at least having a “dramatic effect on the economic value” of petitioner’s land.\(^{334}\) A regulation requiring that land be left in its natural condition would be unlikely to enhance the government’s resource capacity and, under the Sax


\(^{330}\) Id. (quoting Armstrong, 364 U.S. at 49).

\(^{331}\) Lucas, 505 U.S. at 1029-31.

\(^{332}\) 123 U.S. 623 (1887).

\(^{333}\) Sax, *supra* note 9, at 60 (emphasis supplied).

\(^{334}\) Lucas, 505 U.S. at 1007.
test, would not trigger compensation. South Carolina’s legislation was primarily intended to promote “tourism and the creation of a ‘habitat for indigenous flora and fauna’.” While the fulfillment of these objectives would not directly enhance the government’s resource capacity, it would effectively deprive the owner of his property.

Similarly, most of the property in the Palazzolo case was protected coastal wetlands and, under Rhode Island law, could not be developed. However, a small portion of the tract was located on the uplands and, if developed by building a residence, would have an estimated value of $200,000. Palazzolo acquired the property with the intention of placing a seventy-four home subdivision on it, worth approximately $3,000,000. When limited to building only one home, worth approximately $200,000, the Supreme Court nonetheless found that Palazzolo’s land retained enough value to avoid a takings claim. While making this ruling, the Supreme Court said that “a State [sic] may not evade the duty to compensate on the premise that the landowner is left with a token interest” but found that the opportunity to improve a small fraction of the property to a value of $200,000 was more than a token interest.

Mr. Palazzolo argued that the wetlands portion of his property was distinct from the uplands portion, and that he should be able to claim a taking of the wetlands. The Palazzolo Court noted that earlier cases had held that any decrease in the value of land occasioned by a regulation should be measured against the value of the entire tract to determine if the loss is

335 Id. at 1010.
336 Palazzolo, 533 U.S. at 615.
337 Id.
338 Id.
339 Id. at 616.
340 Id.
sufficient to result in a taking of the parcel.\textsuperscript{341} The Court also said, however, that it had “at times expressed discomfort with the logic of this rule.”\textsuperscript{342} The Supreme Court refused to address the issue of whether Palozzolo had suffered a taking only of the wetlands portion of his property, because he had failed to raise that argument in the lower courts.\textsuperscript{343} However, the Court’s brief discussion of the issue leaves open the possibility that, in a future case, the Supreme Court may hold that a regulation depriving an owner of all economically productive use of a distinct segment of his/her property affects a taking of that segment. That ruling would put substantial protection back in the Takings Clause.

Since control is the essence of ownership, and economic autonomy is its political purpose, the forced subordination of substantial private control and economic freedom to public policy goals is oppressive if not justly compensated. The fact that a technical transfer of title may not have occurred should not obscure the fact that a loss of control over one’s property is an invasion of what Blackstone called the “absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, \textit{without any control or diminution}, save only by the laws of the land.”\textsuperscript{344} (As discussed earlier in this paper, “the laws of the land” refers to the requirement of due process of law, and not to regulatory legislation.\textsuperscript{345}) In his 1764 essay, Thomas Fitch argued that, “a regulation which necessarily obliges a man to part with any certain portion of his estate amounts to the same thing

\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{344} 1 WILLIAM BLACKSTONE, COMMENTARIES *134 (emphasis supplied).
\textsuperscript{345} Plucknett, \textit{supra} note 31, at 24 (footnotes omitted); 1 WILLIAM BLACKSTONE, COMMENTARIES *134-35 (emphasis supplied).
as an actual taking of such portion from him." 346 The common belief that regulatory takings are countenanced by British and early American legal history, and that compensation for them is a new innovation, misunderstands that history.

B. Modern Misanalysis of Legal History

Notwithstanding the importance of property rights in English law, Justice Blackmun’s dissent in Lucas claimed that Chief Justice Coke had ruled in The Case of the King’s Prerogative in Saltpetre that regulation could deny all productive use of property. 347 However, a careful reading of Coke’s actual opinion yields the opposite conclusion. The Court unanimously concluded that the King’s prerogative permitted the taking of saltpetre as a limited exception to the general property rights of the subject:

Although the King cannot take the trees of the subject growing upon his freehold and inheritance . . . . and although he cannot take gravel in the inheritance of the subject, for reparation of his houses . . . . Yet he may dig for saltpetre, for this that the ministers of the King who dig for saltpetre are bound to leave the inheritance of the subject in so good plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinherittance of the subject, which the King by prerogative cannot do; for the King (as it is said in our books) cannot do any wrong. 348

Two salient points emerge from this language. First, the King can dig for saltpetre on private

346 Fitch, supra note 227, reprinted in 1 Pamphlets, supra note 16, at 379, 396. Although Fitch’s argument is made in the context of taxation, he is not making fine constitutional distinctions between taxation and takings. Rather, he is suggesting equivalence between the regulation of property and the taking of property, where the regulation requires the owner to surrender “any certain portion of his estate.” Id.

347 Lucas, 505 U.S. at 1056 (Blackmun, J., dissenting) (quoting F. Boswell, ET AL., The Taking Issue 80-81 (1773) (quoting The Case of the King’s Prerogative in Saltpetre, 77 E.R. 1294 (1606))).

348 The Case of the King’s Prerogative in Saltpetre, 77 E.R. 1294 (1606).
land, but he must restore the land to as good a condition as he found it. While this requirement
may not quite rise to the level of full compensation for all inconveniences, it demonstrates
sensitivity to the rights of the owner, including requiring the King to make the extra effort of
restoring the land to make the subject whole. One of the reasons that the King had no right to
take timber is that it would damage the land beyond the possibility of complete restoration. This
cannot support the proposition of Justice Blackmun, that English law permitted the King to
deprive an owner of all use of his property so long as it furthered the public interest.

Second, Coke’s opinion clarifies that the prerogative to take saltpetre is a limited
exception to the general rule that the King may not take raw materials from private lands. The
exception is founded on national security interests “for the making of gunpowder for the
necessary defence and safety of the realm.”\textsuperscript{349} The taking of saltpetre is carefully limited as:

\textit{An incident inseparable to the Crown, and cannot be granted, demised, or
transferred to any other, but ought to be taken only by the ministers of the King
(as other purveyances ought), and cannot be converted to any other use than for
the defense of the realm, for which purpose only the law gave to the King this
prerogative.}\textsuperscript{350}

This analysis simply does not support Justice Blackmun’s assertion that English law permitted
unlimited regulation of property. Quite the contrary, it demonstrates that English law restrained
royal uses and regulations, even where it did \textit{not} amount to an outright taking.

\textsuperscript{349} \textit{Id.} The Justices considered the prerogative to take saltpetre from private land essential to
prevent the King from relying on foreign governments for the defense of England:

\textit{[The King] shall not be driven to buy [gunpowder] in foreign parts; and foreign
princes may restrain it at their pleasure, in their own dominions: and so the realm
shall not have sufficient for the defence of it, to the peril and hazard of it: and
therefore insomuch as saltpetre is within the realm, the King may take it
according to the limitations following for the necessary defence of the kingdom.}

\textit{Id.} at 1295.

\textsuperscript{350} \textit{Id.}
The *Salpetre* case suggests that the King of England was required by law to compensate owners for regulatory, partial, and temporary interference with private lands. Chief Justice Coke provided painfully detailed limitations on how and where saltpetre could be taken, in order to prevent damage to homes and other damage that the King’s ministers could not fully repair. The opinion further clarifies that the King’s prerogative is not “any prohibition to the subject to dig in his own land[.]”\(^{351}\)

An unbiased reading of the *Salpetre* case reveals that the King’s prerogative to take saltpetre from private land was a carefully limited exception to the general rule that the King could not regulate private land for public purposes. This understanding of the *Salpetre* case is completely contrary to Justice Blackmun’s baseless assertion that:

The colonists . . . inherited [from England] . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner[.]\(^{352}\)

Quite the opposite, the central teaching of the *Salpetre* Case is that the King of England must *preserve* the value of private property, even while making public use of it pursuant to a strictly limited prerogative. Despite Justice Blackmun’s contrary assertion, the *Salpetre* Case demonstrates that the American colonists inherited a tradition of rights requiring the King to prevent irreparable damage to property, and to repair any damage done by his officers, even when exercising a limited prerogative that was vital to national security. This conclusion is consistent with the account of English property law provided throughout this paper: that the right of property was, first and foremost, freedom from royal interference.

\(^{351}\) *Id.* at 1297.

\(^{352}\) *Lucas*, 505 U.S. at 1056 (Blackmun, J., dissenting) (quoting F. *BOSSELMAN*, ET AL., *THE TAKING ISSUE* 80-81 (1773) (discussing The Case of the King’s Prerogative in Salpetre, 77 E.R. 1294 (1606))).
Justice Blackmun also cited modern scholarship arguing that “the principle that the state should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution” and that “[e]ven into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners.”\(^{353}\) The United States Supreme Court held in 1833 that the just compensation “provision in the fifth amendment [is] intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to legislation of the states.”\(^{354}\) The federal Takings Clause was not applied to the states until the post-Civil War incorporation cases.\(^{355}\) The value of studying property rights in English and early American law is not that it demonstrates an ancient, ironclad, and universal right of compensation. Rather, history provides an opportunity to discover why the tradition of protecting property rights developed and how broad that protection was. History can aid in discovering the universe of rights that traditionally constitute property protected by the Fifth Amendment and, thus, inform judicial analysis of the appropriative impact of regulation. There is no need to defend the right of compensation for takings of property. It is constitutionally mandated. The difficulty in applying the Fifth Amendment in a regulatory context is finding an accurate and workable definition of property and determining when it has been taken.

III. CONCLUSIONS

The question of the scope of property rights is fundamentally “about the proper

\(^{353}\) Lucas, 505 U.S. at 1056 (Blackmun, J., dissenting).


\(^{355}\) Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897).
relationship between the individual and the state.”\textsuperscript{356} History demonstrates that the control of property is an effective method of controlling people. As Alexander Hamilton said (in a different context), “\textit{power over a man’s subsistence amounts to a power over his will}.”\textsuperscript{357}

Conversely, private control of wealth provides greater freedom and self-sufficiency to the owner. John Locke believed that property originated in the labor of individuals, and their property in their bodies as the instruments of labor, rather than in the common consent of society. According to Locke, the right to enjoy the fruits of one’s labor was intrinsic to bodily freedom. In a true sense, constitutional protection of property was the ultimate triumph of private ownership over the dependent tenures of medieval England.

Magna Carta, the Petition of Right, and other landmarks of English constitutional law mark the development of the principle that property may not be taken by the government from private individuals without their consent. If the taking pertained to specific property, consent was to be personal. If the taking of property was in the form of a generalized tax, the \textit{common consent} through Parliament was required. By the time of the American Revolution, the principle was firmly established that the King could not take property or impose taxes unilaterally, because the people’s consent was essential to the taking of their property for public purposes. Although Parliament occasionally took specific property without the owner’s consent, it traditionally provided compensation to the owner.

In the seventeenth century, some popular theories suggested methods of wealth equalization to prevent excessive concentrations of power. However, according to Locke, property that the government could arbitrarily appropriate would not be property at all. It would

\textsuperscript{356} Epstein, supra note 14, at 3.

\textsuperscript{357} Federalist No. 79 (Alexander Hamilton).
have the effect of placing excessive control over the wealth of society in the government and taking it away from individuals. Nonetheless, as Madison argued, the government inevitably must arbitrate the boundaries between the various private interests through trade regulations, tax policy, debtor-creditor law, and in other areas of economic interaction. According to Madison, an extensive republic with a multiplicity of factions and interests is less susceptible to domination by any one interest that would invade the property rights of others. The challenge of modern takings jurisprudence is to make a rational distinction between a regulation that unduly burdens specific owners, constituting a taking, and broader legislative decisions, which legitimately impose taxes or regulations of commerce by the *common consent* of society.

Control of property is a source of political power for the government. Property interests are protected in this context by the requirement of *common consent*, through the legislative branch, for taxes and general regulations of economic interests. A sufficiently representative political system is an adequate check against generally applicable taxation or regulation. However, the unique interests of specific persons and political minorities are protected by the compensation requirement of the Fifth Amendment. Because property fosters self-sufficiency, persons with sufficient assets to control their own means of support have greater freedom from coercion than people lacking such resources. Although property rights may not hold the glamour of such other protections as the freedom of speech, the real impact of an uncompensated loss of one’s home or livelihood has a deeper impact on a person’s life than a lost opportunity to criticize the government. Indeed, one of the most important traditional purposes of free speech is the ability to complain about violations of more basic rights, such as the freedom from illegal confinement or the right to property.

The key to determining whether or not the Takings Clause applies to a particular regulatory scenario is asking whether the situation simply calls for political checks to discourage
excessive concentrations of power; or whether it calls for the assertion of individual rights to prevent the political system from interfering with fundamental property principles. The Takings Clause is more seriously offended by government regulation that places unique hardships on particular owners than by general legislation. Legislation might offend the Takings Clause either by regulating specific parcels of land, such as unduly restrictive zoning or land use ordinances; or by permitting significant discretion in the executive branch to implement general statutory aims in individual cases.

The English tradition of property rights distrusts and disfavors taking or use of private property for public purposes by executive authority without the specific consent of the owner. Similarly, regulations directly limiting private control over private lands or chattels (such as land use, zoning, or some environmental regulations) have greater impact on the values protected by the Takings Clause than matters of international trade law, debtor-creditor law, or consumer protection law, which can affect property values, but do so more indirectly.

As the proposed test implies, the courts should abandon the rule that non-invasive regulatory activity cannot constitute a taking of private property unless it deprives the owner of all economically productive use. That standard is wholly inadequate to protect property rights against governments that, long ago, discovered that they need not formally own land if they can effectively control the vast majority of the activities that occur there through regulation. As Professor Sax admitted, “local governments have become highly ingenious at using the form of use regulation to accomplish almost any result desired.” Similarly, regulation depriving a distinct segment of a tract of all economically beneficial use should be considered a taking of that segment. If the government employed its power of eminent domain to condemn a distinct

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370 Sax, supra note 9, at 72; see also Epstein, supra note 14, at 104.
segment of a private tract of land for a nature preserve, there is no doubt that the courts would consider this a compensable taking. A regulation that effects the same result should not be treated differently simply because the formal legislative technique was different. Under English law, the central right pertaining to property was “seisin,” meaning the right to possession and control. Property means almost nothing if it does not secure the right of an owner to control his/her private land and chattels, and determine the uses to which they are put.

This test suggests a practical method for determining whether regulation has exerted sufficient control over private property to effect a taking. If a regulation is legislatively imposed, the effect on the property owner must be shown to be both *specific* to certain property and *substantial* before the law would permit a recovery. As Justice Holmes said, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[.]”371 However, a government official making a discretionary decision about a particular piece of property often has considerable opportunity to subordinate the rights of the owner to the service of policy goals. This subordination occurs without the benefit of a debate among a variety of legislators, some of whom would be property owners themselves and, therefore, more likely to be sensitive to property rights. For situations involving substantial executive discretion, a showing of “material” harm to the owner’s interests should be sufficient to trigger the right of compensation. Finally, government activity or regulation causing a physical invasion or a nuisance upon private property is such a clear imposition on traditional property rights that it should be compensated, even if the harm is negligible.

On a cautionary note, it is possible that a general economic regulation can affect a

constitutional taking if the regulation is broad on its face but narrow as applied. If the actual interests affected by the regulation are narrow, they may be inadequately protected in the political process. In such circumstances, generally applicable rules may be enacted as a pretext to encumber particular property without making compensation. Courts ought to have the flexibility and the will to recognize that a compensable taking of private property has occurred under such circumstances.

The Great French legal philosopher, Baron Montesquieu, recognized in his own time that England was the “one nation in the world whose constitution has political liberty for its direct purpose.” The right to a secure tenure in private property, free from royal interference, was central to the English concept of liberty. The road from the dependant tenures of medieval England—where the subjects’ tenure on their lands depended on obedience to higher authority—to free tenures that the King himself had to respect was a long and difficult one. It was painted red with the blood of martyrs who were offended that the fruits of their labor, upon which they depended for their lives and the security of their families, could be forcibly taken from them without their consent and without evidence of any crime. It was this same principle of English liberty that the justified the American Colonies’ separation from the British Crown.

The fundamental lessons of this history are that: (1) government control of the land, and the wealth proceeding therefrom, is an instrument of oppressive political power; and (2) private property is an important source of independence and personal freedom for its owners. The Takings Clause of the Fifth Amendment is, therefore, a vital means of ensuring that the real power of the nation remains dispersed among the people. Taken together, the evidence is

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372 Montesquieu, supra note 294, at 156. This language was enthusiastically quoted by Sir William Blackstone, who added the Latin phrase “esto perpetua!” or “stand upright forever!” 2 William Blackstone, Commentaries *140-41.
overwhelming that private property cannot serve the ends for which it was designed unless it limits government control over private lands and chattels. Because the essence of property is control, it is unprotected if the government exercises primary control by prohibiting most uses of land and chattels without compensating the owners.

The primary virtue of free land tenures under English law was that people were more free when they controlled their own means of support than if they depended on an employer or a political superior. Medieval England understood this principle well. It was the primary reason why the Magna Carta began the gradual process of strengthening land tenures against royal interference and reducing dependence on higher feudal lords. Control of property provides an effective source of power over those dependent on it for their livelihoods. The person who controls his or her own livelihood still enjoys greater freedom than an employee or renter.

Madison and his generation keenly appreciated this truth. He wrote:

> The class of citizens who provide at once for their own food and their own raiment, may be viewed as the most truly independent and happy. They are more: they are the best basis of public liberty, and the strongest bulwark of public safety. It follows, that the greater the proportion of this class to the whole society, the more free, the more independent, and the more happy must be the society itself.  

Throughout history, the control of property has provided power over the people dependant on it. Private property stands as a cornerstone in the temple of personal freedom. If the United States ignores this history lesson, it does so at peril of its hard-won liberty.

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