



Winter 2009

From Preferred Position to Poor Relation: History, Wilkie v. Robbins, and the Status of Property Rights under the Takings Clause

Michael B. Kent Jr.

Recommended Citation

Michael B. Kent Jr., *From Preferred Position to Poor Relation: History, Wilkie v. Robbins, and the Status of Property Rights under the Takings Clause*, 39 N.M. L. Rev. 89 (2009).

Available at: <https://digitalrepository.unm.edu/nmlr/vol39/iss1/8>

FROM “PREFERRED POSITION” TO “POOR RELATION”: HISTORY, *WILKIE V. ROBBINS*, AND THE STATUS OF PROPERTY RIGHTS UNDER THE TAKINGS CLAUSE

MICHAEL B. KENT, JR.*

I. INTRODUCTION

In 1994, Chief Justice Rehnquist declared for the Supreme Court: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation....”¹ The decision in which this declaration was made, *Dolan v. City of Tigard*, set a high bar for government actions that put property owners to the difficult choice between freely dedicating portions of their land to the public or foregoing needed regulatory approval for a proposed land use.² In doing so, the Court suggested that the government could not simply force a property owner to relinquish her constitutional right to receive just compensation in exchange for the conferral of discretionary governmental benefits.³ “A strong public desire to improve the public condition,” the Court announced, “[will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁴

A few months before the Court released its decision in *Dolan*, Wyoming rancher George Nelson conveyed an easement across his ranch to the Federal Bureau of Land Management (BLM).⁵ In exchange for the easement, Nelson received a right-of-way across a nearby portion of federally-owned property.⁶ The BLM, however, neglected to record its easement, a mistake that proved particularly troublesome when Nelson sold the ranch to Frank Robbins two months later.⁷ Robbins had no knowledge of the easement, and under Wyoming law, the failure to record meant that he took the ranch free and clear of the government’s interest.⁸ Upon discovering that the easement had been extinguished, a BLM employee telephoned Robbins and demanded that he re-convey the easement.⁹ Robbins rejected this demand, but he indicated his willingness to negotiate with the BLM over the granting of a new easement, provided some sort of compensation was in the offing.¹⁰ The BLM employee responded by telling Robbins that “the Federal Government does not

* Assistant Professor of Law, Atlanta’s John Marshall Law School. I would like to thank Lance P. McMillian, Scott W. Sigman, and Melanie D. Wilson for their helpful comments on an earlier draft of this article, as well as Greg Frayser and Daniel Stafford for their research assistance.

1. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

2. *See id.* at 391 (establishing “rough proportionality” test for regulatory exactions).

3. *See id.* at 385.

4. *See id.* at 396 (quoting *Pa. Coal v. Mahon*, 260 U.S. 393, 416 (1922)).

5. *Wilkie v. Robbins*, 127 S. Ct. 2588, 2593 (2007).

6. *Id.*

7. *See id.*; *see also id.* at 2608 (Ginsburg, J., dissenting).

8. *Id.* at 2593.

9. *Id.*

10. *See id.*

negotiate”¹¹ and “[t]his [i.e., granting the easement] is what you’re going to do.”¹² Robbins again refused, at which point the BLM (at least according to Robbins’s allegations) “mounted a seven-year campaign of relentless harassment and intimidation to force Robbins to give in.”¹³

This campaign consisted of BLM officials intentionally trespassing across Robbins’s land, taking adverse administrative actions against him, provoking a violent altercation between Robbins and a neighboring landowner, pressuring other agencies to impound his cattle, falsely charging him with criminal activity, and harassing his customers (including one occasion where several female guests were videotaped while attempting to relieve themselves).¹⁴ The cumulative effect of these actions was a reduction in business for the ranch of over 80 percent, as well as “hundreds of thousands of dollars in costs and attorney’s fees.”¹⁵ As a result, Robbins filed suit for damages under the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁶ alleging (among other things) that the BLM officials unconstitutionally retaliated against him for exercising his Fifth Amendment right to refuse an uncompensated taking of his property.¹⁷

Thus began a collision course, in 1994, between these two seemingly unrelated events—the Court’s pronouncements in *Dolan* and the BLM’s campaign to bully a landowner into giving it an uncompensated easement. Thirteen years later, the confrontation was concluded, and the property rights embodied in the Takings Clause were declared the loser. Although both the district court and the court of appeals agreed that Robbins’s retaliation claim could go forward,¹⁸ in *Wilkie v. Robbins*, a seven-member majority of the Supreme Court rejected that claim, holding that it was not cognizable under the judicially-created *Bivens* remedy.¹⁹

There are many interesting points about *Wilkie*, from its potential effect on constitutional tort litigation²⁰ to the alignment of the Justices with regard to Robbins’s claim.²¹ One of the most significant features of *Wilkie*, however, is what

11. *Id.*

12. *Id.* at 2609 (Ginsburg, J., dissenting).

13. *See id.* at 2608 (Ginsburg, J., dissenting).

14. *See id.* at 2594–96; *id.* at 2608–11 (Ginsburg, J., dissenting).

15. *See id.* at 2611 (Ginsburg, J., dissenting).

16. 403 U.S. 388 (1971).

17. *See Wilkie*, 127 S. Ct. at 2596.

18. *Id.* at 2596–97 (discussing procedural history).

19. *See id.* at 2604–05.

20. *See, e.g.*, John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 731 (2008) (discussing whether *Wilkie* endorses view that state remedies foreclose availability of *Bivens* remedy); Laurence H. Tribe, *Death By a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 26 (2007) (indicating that, after *Wilkie*, “the *Bivens* doctrine... is on life support with little prospect of recovery”).

21. The majority opinion rejecting the claims of the property owner was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, whom several commentators have suggested form the Court’s conservative bloc. *See, e.g.*, Erwin Chemerinsky, *The Rookie Year of the Roberts Court & a Look Ahead: Civil Rights*, 34 PEPP. L. REV. 535, 536 (2007) (identifying these Justices as “very conservative”); Charles Lane, *Narrow Victories Move Roberts Court to Right*, WASH. POST, June 29, 2007, at A4 (describing these Justices as “the four most conservative”). One would suspect that these Justices would be more sympathetic to property rights, given that the use of the Takings Clause to protect private property has been described as “a favorite conservative cause.” *See* David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1434 (2006). In dissent were Justices Ginsburg and Stevens, who have been described as “liberals generally considered unsympathetic to property

it says about the status of property rights in the current understanding of constitutional liberties. The claim advanced by Robbins—that he should not be forced to choose between his constitutional right to just compensation and freedom from government harassment—seems very close to the choice-based dilemma cautioned against in *Dolan*.²² Indeed, as described by Professor Tribe (who represented Robbins), that claim “fits comfortably within the Supreme Court’s longstanding and widely applied hostility toward government retaliation against the exercise of constitutional rights.”²³ The *Wilkie* majority overlooked these similarities, however, and described the BLM’s actions as little more than hard bargaining with an adjacent landowner.²⁴ Additionally, the majority openly worried that allowing the claim to go forward would release the floodgates to property rights litigation,²⁵ an argument the Court previously has rejected in the context of other constitutional rights.²⁶ From these statements, it is difficult to escape the conclusion that, despite its contrary pronouncements in *Dolan*, the Court views the rights at issue in *Wilkie*—that is, those property rights embodied in the Takings Clause—as less deserving of protection than other rights guaranteed by the Constitution. And this conclusion seems all the more inescapable given the increasing vigor with which the federal courts have enforced nonproperty-related rights throughout the last century.²⁷ As suggested by Ilya Somin, *Wilkie* indicates that constitutional property rights enjoy a “second-class status.”²⁸

Juxtaposed against *Wilkie* and its implications are the high regard for property rights generally, and the just compensation principle specifically, held by early American statesmen and jurists. A study of the ideas underlying the Takings Clause, and the implementation of those ideas by the courts, reveals a stark contrast to the attitude expressed by the *Wilkie* majority. Indeed, far from being any type of “poor relation,” the rights embodied in the Takings Clause “occupied the ‘preferred position’ in America’s pantheon of constitutional values.”²⁹

This article explores these differences by contrasting the status of property rights during the formative period of American constitutionalism with the status of those rights as reflected in *Wilkie*. To that end, this article seeks to develop the ideas underlying the Takings Clause and to evaluate what *Wilkie* suggests about the continued vitality of those ideas. Part II of this article discusses the ideas embodied in the Takings Clause by looking at how those ideas were developed and

owners.” See Ilya Somin, *Put Out to Pasture*, LEGAL TIMES, July 30, 2007.

22. See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (stating that doctrine of “unconstitutional conditions” prohibits government from requiring person to give up constitutional right to receive just compensation in exchange for discretionary governmental benefits).

23. See Tribe, *supra* note 20, at 35–36 (discussing anti-retaliation principle in context of free speech, right against self-incrimination, right to jury trial, right of access to federal courts, and right to interstate travel).

24. See *Wilkie*, 127 S. Ct. at 2602.

25. See *id.* at 2604.

26. See *Davis v. Passman*, 442 U.S. 228, 248 (1979).

27. See generally Daniel F. Piar, *A Welfare State of Civil Rights: The Triumph of the Therapeutic in American Constitutional Law*, 16 WM. & MARY BILL RTS. J. 649, 649–52 (2008) (discussing growth of judicially-enforceable civil rights and suggesting possible explanations for this growth).

28. Somin, *supra* note 21.

29. See Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 57 (1986).

implemented by the early American legal culture. Part III then contrasts these ideas with the Court's decision in *Wilkie* and what that decision suggests about the current (and future) status of constitutional property rights. Part IV offers concluding remarks.

II. "PREFERRED POSITION"—PROPERTY RIGHTS IN EARLY AMERICA

Any discussion of the ideas embodied in the Takings Clause must initially confront the limited historical record concerning that Clause. Indeed, the legislative history regarding the proposal and ratification of the Takings Clause "is notoriously sparse."³⁰ So far as we know, no delegate to the Constitutional Convention in 1787 made any mention of the need for protecting against the government's taking power.³¹ Similarly, although the state ratifying conventions proposed over eighty different amendments to be incorporated into the Bill of Rights, not a single request was made for the Takings Clause or any equivalent measure.³² In light of these facts, one scholar famously has wondered "how [the Clause] got into our constitutions at all."³³

What became the Takings Clause seems entirely to have been the product of James Madison, who included a just-compensation provision (in slightly different form) among the draft Bill of Rights he offered in a speech before the House of Representatives on June 8, 1789.³⁴ But Madison left no documentary evidence to explain his reasons for the provision, nor did the provision produce any meaningful discussion in Congress or the state legislatures.³⁵ For this reason, any discussion of the ideas underlying the Takings Clause cannot simply focus on the events surrounding the ratification of the Fifth Amendment. Rather, a broader evaluation is necessary.

This article attempts that evaluation by looking at how those ideas were developed and implemented by the legal culture—that is, by early American lawyers, legislators, and judges. In addressing the perspectives of this culture, the discussion will include aspects of the legal tradition inherited by early Americans from their English and colonial forebears, as well as from the practical experiences and political philosophies that led to the Constitution itself. A primary focus of the

30. See John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1132 (2000).

31. See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 282 (1988).

32. See *id.* at 282–83; see also DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 9–10 (2002); William Michael Treanor, *The Original Understandings of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 834 (1995).

33. See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 595 (1972).

34. 1 ANNALS OF CONG. 451–52 (Joseph Gales ed., 1834); see also Hart, *supra* note 30, at 1132 (suggesting that "Madison generated the Takings Clause on his own"). Historian Lance Banning has observed that the amendments offered by Madison "represented his distinctive wishes more completely than is frequently suggested by repeated, casual references to his extraction from the propositions of the state conventions only those that he considered safe." LANCE BANNING, SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 289 (1995). Given the complete inattention paid to the eminent-domain or just-compensation issues by the state ratifying conventions, this seems especially plausible with regard to the Takings Clause.

35. See McConnell, *supra* note 31, at 283.

evaluation, however, will be the manner in which these ideas were expounded by the courts.

There are several reasons to concentrate attention on judicial decisions. First, evidence exists that the Takings Clause was meant to be judicially enforceable,³⁶ and early judicial treatment of the Clause thus seems to be a natural topic of inquiry. Second, the legal controversies occurring during the first generation after ratification greatly influenced the nation's earliest constitutional understandings.³⁷ The "malleable nature of the young republic" during this period, as well as the recognition of its leaders "that this first generation of the nineteenth century...would be the one to shape that nature,"³⁸ gives these early judicial pronouncements a certain prominence in American constitutional thought. Finally, judicial opinions often reveal much about the larger intellectual and cultural attitudes prevailing at any point in time. As my colleague Daniel F. Piar has explained, there is "considerable interplay" between the legal culture and the society to which it is attached.³⁹ Thus, judicial decisions frequently reflect and find their authority in the accepted values of the day.⁴⁰ Accordingly, a study of the era's judicial opinions is relevant to understanding the perspectives held by society more generally.

Unfortunately, there is little direct application of the Takings Clause by the courts of this era for two reasons. First, in *Barron v. Baltimore*, the Supreme Court held that the Clause applied only to the federal government, and not to the states.⁴¹ Second, until the late nineteenth century, the federal government normally had the states condemn on its behalf or else paid compensation by private-bill legislation.⁴² As such, there was little opportunity to develop a body of thorough precedent regarding the Takings Clause. Nonetheless, it is possible to discern how the legal culture understood the ideas and purposes of the Takings Clause by reviewing state court decisions addressing issues of eminent domain, as well as similar decisions from the federal courts sitting in diversity. Likewise, given the intellectual linkage

36. See, e.g., Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181, 216–17 (1999); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1659–61, 1661 n.161 (1988); Treanor, *supra* note 32, at 794 n.69.

37. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (settling doctrine of judicial review of legislative acts for conformity to Constitution).

38. See WILLIAM F. SWINDLER, *THE CONSTITUTION AND CHIEF JUSTICE MARSHALL* 21 (1978).

39. See Daniel F. Piar, *Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties in Nineteenth-Century America*, 14 WM. & MARY BILL RTS. J. 987, 992 (2006). For examples of how this interplay works, see *id.* at 1008–22 (discussing how nineteenth-century cultural values influenced that era's understanding of the First Amendment).

40. For a similar suggestion more contemporary to the opinions included in the following discussion, see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 115 (Bruce Frohnen ed., Regnery Publishing 2002) (1889) (indicating that power of Supreme Court "is clothed in the authority of public opinion," without which it "would be impotent").

41. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833). The Takings Clause now applies to the states via the Fourteenth Amendment. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987). Exactly when "incorporation" of the Clause took place is a matter of some debate. See Treanor, *supra* note 31, at 860 n.369 (suggesting as possibilities *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226 (1897), *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896), and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894)).

42. See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1605–06 (2003); Stoebuck, *supra* note 33, at 559 n.18.

between the Takings Clause and the Contracts Clause,⁴³ decisions dealing with the latter can shed light on attitudes about the former. Finally, judicial statements about property rights more generally can offer worthwhile information inasmuch as they demonstrate the high value that the legal culture placed on such rights.

With this background in mind, a review of early American legal culture suggests at least three major characteristics concerning property rights: (1) private property enjoyed a central place in the legal culture and its perspectives on the proper relationship between individuals and the government; (2) the just compensation principle formed an integral part of the legal culture's conception that private property should be protected from undue governmental interference; and (3) the legal culture looked increasingly to the judiciary, rather than the political branches, as the ultimate guardian of property rights.

A. *The Centrality of Property*

Many scholars have observed that protecting private property was one of the driving forces underlying the constitutional system created in 1787.⁴⁴ By the time of the Constitutional Convention, Americans had seen firsthand the threats to property interests that could be occasioned by unchecked republican governments. During the Revolution and Confederation era, the state and national legislatures had engaged in several acts injurious to property, including the confiscation and redistribution of estates held by Loyalists and British subjects,⁴⁵ the expropriation of goods and services without payment,⁴⁶ and the upsetting of commercial relationships through paper money schemes and debtor-relief legislation.⁴⁷ In light of this experience, there was widespread agreement among the Convention delegates that the chief goal of any new government was the protection of liberty and property,⁴⁸ which they understood as inextricably linked.⁴⁹ At least three delegates placed the protection of property before liberty as the chief end of political society.⁵⁰ Gouverneur Morris pronounced property to be "the main object of Society" and indicated that individuals gave up the state of nature solely "for the

43. The Contracts Clause was patterned after a provision in the Northwest Ordinance of 1787, which also included just compensation language. See Northwest Ordinance of 1787, art. 2, reprinted in SOURCES OF OUR LIBERTIES 395 (Richard L. Perry ed., 1978). Early American courts tended to view the Contracts Clause and the Takings Clause as dealing with related concepts. See Siegel, *supra* note 29, at 86–87 (noting that "contract clause jurisprudence was shaped by the paradigm of takings clause adjudication").

44. See, e.g., James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1026 (2000); William W. Fisher, III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760–1860*, 39 EMORY L.J. 65, 100 (1990); Gold, *supra* note 36, at 194–96; McConnell, *supra* note 31, at 270.

45. See FORREST McDONALD, *NOVUS ORDO SECLORUM* 90–93 (1985); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 201 (1796) (referring to legislation vesting in the state real and personal property belonging to British subjects); *Chews v. Sparks*, 1 N.J.L. 56 (1791) (confiscation of landed estate previously held by supposed traitor).

46. See, e.g., *Republica v. Sparhawk*, 1 U.S. (1 Dall.) 357 (Pa. 1788) (removal and destruction of private goods for military purposes).

47. See McDONALD, *supra* note 45, at 154–55; 1 ALFRED H. KELLY, ET AL., *THE AMERICAN CONSTITUTION* 82–84 (7th ed. 1991); Fisher, *supra* note 44, at 102.

48. See McDONALD, *supra* note 45, at 3–4.

49. James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 917 (2006).

50. McDONALD, *supra* note 45, at 3–4 (identifying Gouverneur Morris of Pennsylvania, John Rutledge of South Carolina, and Rufus King of Massachusetts).

sake of property which could only be secured by the restraints of regular Government.”⁵¹ James Madison expressed a similar sentiment: “Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”⁵² In short, “[t]he protection of private property was a nearly unanimous intention among the founding generation.”⁵³

It would be a mistake, however, to view this emphasis on property as a new development in American thought. To the contrary, property (primarily in the form of landed interests) played a dominant role in the legal tradition inherited by the Founders from their English and colonial forebears.⁵⁴ Sir William Blackstone included “the right of private property” among the core rights of Englishmen, alongside “the right of personal security” and “the right of personal liberty.”⁵⁵ Blackstone described this right of private property as consisting of “the free use, enjoyment, and disposal of all [an individual’s] acquisitions, without any control or diminution, save only by the laws of the land.”⁵⁶ The protection of these property rights, along with those of security and liberty, formed “the principal aim of society,” such “that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.”⁵⁷

These sentiments were echoed in the leading political philosophies of the Revolution and Confederation periods, as well. Particularly influential were the theories articulated a century before by English philosopher John Locke,⁵⁸ which

51. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 1966).

52. James Madison, *Property* (1792), reprinted in 1 THE FOUNDERS’ CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987). Although Madison wrote these words after ratification, there is little question that protecting property was among his chief considerations at the time of the Convention. See, e.g., 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 147 (Max Farrand ed., 1966) (recording Madison as stating that “[t]he primary objects of civil society are the security of property and public safety”); see also THE FEDERALIST NO. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., 2001) (“The protection of these faculties, [from which the rights of property originate,] is the first object of government.”); Jack Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 483 (1988) (“[T]here can be no doubt that concern with the protection of property lay at the very center of Madison’s anxieties about republican government.”).

53. McConnell, *supra* note 31, at 270. This intention was shared by Federalists and Anti-Federalists alike. See Fisher, *supra* note 44, at 100.

54. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 52 (1973) (describing English land law as “the heart of the royal common law”); *id.* at 56 (“In the colonies, land was hardly of less importance than in England.”).

55. See 1 WILLIAM BLACKSTONE, COMMENTARIES *125. The importance of Blackstone’s *Commentaries* to early American lawyers has been noted by several scholars. E.g., FRIEDMAN, *supra* note 54, at 98 (“Blackstone was widely used by ordinary lawyers as a shortcut to the law. . . .”); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (noting that Blackstone’s *Commentaries* “grounded the legal education of Founding-era Americans”).

56. 1 BLACKSTONE, *supra* note 55, at *134.

57. *Id.* at *120.

58. Although Locke’s importance has at times been overstated, his influence on the founding generation, especially concerning the relationship between government and property, is unmistakable. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 12 (2d ed. 2005) (describing Locke’s theories as “[p]erhaps the most thorough discussion of natural rights available to the founding generation”); McDONALD, *supra* note 45, at 7 (noting that, at the Constitutional Convention, “[t]he contract and natural-rights theories of John Locke were repeatedly iterated without reference to their source”); Ely, *supra* note 49, at 930 (stating that “Locke had an enormous impact on constitutional thought”); Richard A. Epstein, *History Lear: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 593 (1995) (“No amount of historical roaming or romanticizing about the Founding can negate the Lockean influence on the Takings

received heightened attention in America because of their significance to the idea and goal of political independence.⁵⁹ According to Locke, all persons are initially in a state of nature—that is, they are lacking organized political society.⁶⁰ In this natural state, people enjoy the freedom to decide for themselves how to arrange their affairs, including the use and disposition of their possessions and persons.⁶¹ So long as individuals remain in the state of nature, however, this freedom lacks stability inasmuch as every individual enjoys the exact same freedom, with none having authority to settle disputes or regulate conduct for the mutual benefit of all.⁶² Accordingly, the rights enjoyed in the state of nature are to some degree indefinite because they are “constantly exposed to the Invasion of others.”⁶³ To obtain greater security for these rights, people unite together “for the mutual *Preservation* of their Lives, Liberties and Estates,” which Locke calls “by the general Name, *Property*.”⁶⁴ Thus, for Locke, as with Blackstone, the primary purpose for which individuals create and submit to formal government “*is the Preservation of their Property*.”⁶⁵ Locke viewed government largely as a mechanism for protecting individual interests; as such, government necessarily operates under certain natural limitations. Among these limitations is the inability to “*take from any Man any part of his Property without his own consent*.”⁶⁶ When a government violates these restrictions, thus acting contrary to the ends for which it was established, it ceases to be legitimate, and the people possess the right to dissolve their ties with such a government and create a new one.⁶⁷ This right of revolution was appealing to Americans for obvious reasons: Locke gave American patriots a clear rationale for severing their political ties with Britain, and property rights played a distinct role in that rationale.

This is not to say that all Americans shared a single, consensual political philosophy. To the contrary, scholars have identified a variety of viewpoints at work during the founding era,⁶⁸ with varying ideas about what constitutes property, what types of property should be protected, and to what extent that protection should be afforded.⁶⁹ Nonetheless, despite the differences in these political outlooks, there seems to have been fairly broad agreement with the notion that one of the primary goals of government was to secure individuals in their property.⁷⁰

Clause.”); Gold, *supra* note 36, at 217 (describing Locke as “one of the most influential liberal thinkers on property rights during the late eighteenth century in America”).

59. See McDONALD, *supra* note 45, at 60.

60. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

61. See *id.*

62. See *id.* at 269, 350.

63. See *id.* at 350.

64. See *id.*

65. See *id.* at 350–51.

66. See *id.* 360.

67. See *id.* 412–14.

68. See, e.g., McDONALD, *supra* note 45, at 57–96; Fisher, *supra* note 44, at 71–75. For reviews of the shifting patterns in historical scholarship relating to early American political thought, as well as the dominant scholars associated with each movement, see *id.* at 67–71 and Treanor, *supra* note 32, at 819–24.

69. See Fisher, *supra* note 44, at 95 n.121, 98–99.

70. See *id.* at 95–99 (explaining that all major viewpoints during the Founding era, to varying degrees, showed theoretical hostility to uncompensated takings of private property).

One of the more important of these alternative philosophical traditions—republicanism—proves illustrative.⁷¹ In contrast to Lockean liberalism and its emphasis on individual rights, republicanism promoted the idea that good government depended on public virtue, which in turn required the subordination of one's personal interests to the needs of the commonwealth.⁷² This meant that individual citizens might at times be called upon to submit their property rights to the common good, a concept seemingly at odds with the Lockean notion that government could not take individual property without the consent of its owner. But there was less disagreement than appears at first blush. Locke's understanding of consent included not only the individual agreement of the owner himself, but also the agreement of his elected representatives (who essentially could consent on his behalf).⁷³ Thus, Locke supported the idea that individual interests might yield to the public good when a popularly elected legislature determined such was necessary. More importantly, republicanism supported the Lockean understanding of the significance of private property, valuing property ownership (especially with regard to land) as essential to fostering the virtue needed for government to work properly in the first place.⁷⁴ Virtue required that no citizen should be dependent upon another, lest he be corrupted by that dependency and act in the interests of those on whom he relied, rather than in the common interest.⁷⁵ Property ownership advanced virtue by instilling values important to the preservation of autonomous and responsible citizens: "an attachment to community, self-sufficiency, stability, and wisdom."⁷⁶ "Only a person who was independent in this sense, who could transcend selfish considerations and resist manipulation by men ambitious for power, was truly free politically to act for the good of the commonwealth."⁷⁷ Thus, although

71. Modern historians generally use "republican" or "republicanism" in reference to a combination of ideas associated with the "country party" of the eighteenth-century English Opposition. See FARBER & SHERRY, *supra* note 58, at 6. A brief description of the varying strains of Oppositionist thinking may be found in Fisher, *supra* note 44, at 72–74. A more thorough discussion of American republicanism and its relation to Oppositionist thought is contained in MCDONALD, *supra* note 45, at 66–96. Republicanism was widespread during the Revolution and continued to have significant (though waning) influence through the time of the Founding. See, e.g., FARBER & SHERRY, *supra* note 58, at 6 (suggesting that American political philosophy ultimately was the product of synthesis between republicanism and Lockean liberalism, with the latter gaining in influence by the time of the Constitutional Convention); 1 KELLY ET AL., *supra* note 47, at 67–68 (noting tension between, and ultimate fusion of, republican and Lockean ideas in the Revolutionary period). The American political parties bearing the Republican name were subsequent to and distinct from the republicanism discussed in this article.

72. See FARBER & SHERRY, *supra* note 58, at 13–14; 1 KELLY ET AL., *supra* note 47, at 67; MCDONALD, *supra* note 45, at 70–71; Fisher, *supra* note 44, at 98. A famous contemporary explication of the republican notion of public virtue was given by John Adams: "Men must be ready, they must pride themselves, and be happy to sacrifice their private pleasures, passions, and interests, nay their private friendships and dearest connections, when they stand in competition with the rights of society." Letter from John Adams to Mercy Warren (Apr. 16, 1776), in 1 THE FOUNDERS' CONSTITUTION 670 (Philip B. Kurland & Ralph Lerner eds., 1987).

73. See LOCKE, *supra* note 60, at 362. Here, Locke was speaking most directly about taxation, but Professor Stoebuck has demonstrated that Americans applied this idea to eminent domain as well. See Stoebuck, *supra* note 33, at 567.

74. See MCDONALD, *supra* note 45, at 75 (indicating that American republicans, despite regional and philosophical differences, uniformly "embraced the dogma that landownership was a natural preservative of virtue").

75. See *id.* at 70–71; Treanor, *supra* note 32, at 821–22.

76. See FARBER & SHERRY, *supra* note 58, at 13.

77. See 1 KELLY ET AL., *supra* note 47, at 37.

their focus was different, republicans (like Locke) generally viewed private property as essential to preserving a legitimate political order.

Thus, by the time of the Constitutional Convention, property rights had long held a central place in American legal and political thought, and this centrality was preserved by the American legal culture after ratification. Courts during the late eighteenth and early nineteenth centuries repeatedly demonstrated a general belief in the sanctity of private property, viewing it as directly related to the freedom and well-being of the people.⁷⁸ Riding circuit in Pennsylvania, Justice Washington included “the right to acquire and possess property of every kind” among those “fundamental” liberties “which belong, of right, to the citizens of all free governments.”⁷⁹ A Virginia jurist went further, describing “the means of *possessing property*” as “the only means, so far as the Government is concerned, besides the security of his person, [that an individual has] of *obtaining happiness*.”⁸⁰ As such, the security of an individual’s private property was just as essential to the maintenance of liberty as was his personal safety.⁸¹ The chief justice of Kentucky likewise indicated that “[t]he rights of private property are essential to the happiness of man” and that “[r]espect for the laws under which vested private rights were acquired, is a moral sentiment, common to all civilized people of all nations.”⁸² For this reason, “retrospective laws aimed at the destruction of private rights and vested interests, are denounced as generally oppressive and unjust, and as only to be tolerated under urgent and imperious circumstances of public interest.”⁸³

This linkage between property and liberty clearly hearkened back to the English and colonial legal tradition, in which property and liberty intertwined to form the core rights of Englishmen.⁸⁴ It also affirmed the influential philosophies of the Revolution and Confederation era, in which individual property rights played such an important role. In his *Commentaries on American Law*, for example, Chancellor Kent echoed republican thinkers by speaking of property as a mechanism of public virtue and progress:

The sense of property is graciously bestowed on mankind for the purpose of rousing them from sloth, and stimulating them to action. . . . The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the

78. See 1 KELLY ET AL., *supra* note 47, at 186–87 (discussing protection of property rights as characteristic of Marshall Court decisions); Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decises, and Property Rights*, 5 AVE MARIA L. REV. 113, 149 (2007) (discussing connection between property rights and state courts’ development of stare decisis doctrine).

79. See *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (Washington, Circuit Justice).

80. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 276 (1828) (Green, J., concurring) (emphasis added).

81. See *id.*

82. *Beard v. Smith*, 22 Ky. (6 T.B. Mon.) 430, 476 (1828) (Bibb, C.J.).

83. *Id.* at 477.

84. See MCDONALD, *supra* note 45, at 13; see also Ely, *supra* note 49, at 917 (noting that English constitutionalism “had long treated property and liberty as interdependent concepts”).

spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.⁸⁵

Justice Chase likewise associated the protection of property with republican virtue, charging jurors:

[T]hat *our free Republican Governments* cannot be preserved without the *Republican virtues of probity, and industry; frugality, and temperance....* That without the restraint of Laws *Liberty* cannot exist in a State of Society.... That *good* Laws cannot be put in execution without *good morals*; and... That *Religion and piety; morality and virtue*, are the only pure foundations of *National happiness*.—Any government, whatever may be its form, that does not give protection and Security to the *property...of its Citizens* is unworthy of obedience, and defense.⁸⁶

In addition to these republican notions, many judges discussed property in terms directly reminiscent of Locke. One of the more famous of these discussions occurred in *Vanhorne's Lessee v. Dorrance*, where Justice Patterson explained:

[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact....⁸⁷

In similar fashion, a Virginia jurist explained that the “security of private property...is one of the primary objects of Civil Government, which our ancestors, in framing our Constitution, intended to secure to themselves and their posterity, effectually, and for ever.”⁸⁸

These notions clearly influenced how judges viewed the role of republican governments elected by and representing the interests of the people. Justice Story, for example, described “the right of the citizens to the free enjoyment of their property legally acquired” as “a great and fundamental principle of a republican government.”⁸⁹ Thus, according to a Louisiana jurist of the same period, the government was obliged “to protect the citizens in the enjoyment of their property,” such protection being one of “the first principles of the social compact.”⁹⁰ This attitude was shared by a New York judge, who opined that “[i]t is repugnant to the first principles of justice, and the equal and permanent security of rights, to take, by law, the property of one individual, without his consent, and give it to another.”⁹¹

85. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *319.

86. Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War Over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 465 (2008) (quoting Justice Chase's manuscript Jury Charge Book).

87. 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (Patterson, Circuit Justice).

88. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 276 (1828) (Green, J., concurring).

89. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50–51 (1815).

90. *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 556 (La. 1815) (Derbigny, J.).

91. *Dash v. Van Kleeck*, 7 Johns. 477, 493 (N.Y. Sup. Ct. 1811) (Thompson, J.).

In similar vein, Chief Justice Marshall declared that “[the] sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.”⁹² Justice Chase explained that, in republican governments like the United States, the legislature generally possesses no authority “to take away that security for personal liberty, or private property, for the protection whereof the government was established.”⁹³ And these limitations are not dependent on any textual warrants found in the federal or state constitutions themselves. To the contrary, “[t]o maintain that our federal, or state, Legislature possess such powers, if they had not been expressly restrained, would... be a political heresy altogether inadmissible in our free republican governments.”⁹⁴

These sentiments obviously flowed in part from the legal and philosophical traditions inherited by these jurists.⁹⁵ Additionally, private property ownership seems to have received an exalted status based on the unique prospects presented by the American situation. In the late eighteenth and early nineteenth centuries, land constituted the basic form of wealth, and land in America was “abundant and fertile.”⁹⁶ Thus, there was an unprecedented opportunity to seek both the republican ideal of widespread property ownership (with its resulting civic virtues) and more liberal notions of individual prosperity and affluence. To capitalize on this opportunity, Americans needed free and stable land markets,⁹⁷ which (experience during the Revolution and Confederation era had shown) was often threatened by governmental interference.⁹⁸ For this reason, among others, the legal culture understood individual, societal, and economic freedom to depend on individual rights in private property. Perhaps the definitive pronouncement came from Justice Story’s decision for the Supreme Court in *Wilkinson v. Leland*: “That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.”⁹⁹

B. The Compensation Principle

Many of the foregoing statements, at first blush, raise more questions than answers about the ideas embodied in the Takings Clause. If private property enjoyed such a central place in the early American legal culture, if the government generally possessed no right to expropriate the property interests of its citizens, then there seems to be no need to protect against governmental takings at all. Of course, the eighteenth-century conception of property entailed more than the rights of the individual owner. Rather, property was understood as a complex web of rights,

92. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833).

93. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

94. *Id.* at 388–89.

95. See generally *supra* notes 54–78 and accompanying text.

96. See FRIEDMAN, *supra* note 54, at 202.

97. See generally *id.* at 206–13.

98. See *supra* notes 45–49 and accompanying text.

99. See 27 U.S. (2 Pet.) 627, 657 (1829).

duties, powers, and limitations divided between the individual, society, and the state.¹⁰⁰ As such, aside from those rights belonging to the individual property owner, the notion of property included certain rights enjoyed by the government itself.

Included in these rights was the authority to regulate economic activity, as well as the right, either inherently or by reservation, to take private property for public use.¹⁰¹ The government's taking authority appears to have developed from two separate, yet related, powers. The first, vested in the executive, was the king's prerogative to make use of private land or goods in connection with defending the realm, dispensing justice, providing for the royal household, and certain other affairs within the province of the Crown.¹⁰² The second, vested in the legislature, was the power of eminent domain, under which Parliament could expropriate the real property of private citizens, including entire possessory estates, for public use.¹⁰³

Although the prerogative power and eminent domain remained distinct governmental functions, they shared (to varying degrees) at least one important feature—the provision of compensation to the affected property owner. While most of the prerogative acts were accomplished without compensation, Professor Stoebuck indicates that “the ancient and universal practice seems to have been to require payment of full value” in the case of purveyances made for the royal household.¹⁰⁴ In keeping with this practice, the Magna Carta explicitly prohibited the King's representatives from “tak[ing] anyone's grain or other chattels, without immediately paying for them in money, unless he is able to obtain a postponement at the good will of the seller.”¹⁰⁵ Thus, the compensation principle dates at least to 1215 with regard to certain executive appropriations. Exactly when compensation became associated with legislative appropriations remains uncertain, although Professor Stoebuck dates it to sometime in the early sixteenth century.¹⁰⁶

100. See MCDONALD, *supra* note 45, at 12–13.

101. See *id.* at 13, 22; see also Stoebuck, *supra* note 33, at 557–60 (discussing “reserved-power” and “inherent-power” theories of eminent domain). Whether the regulatory and taking functions were completely distinct, or whether a regulation could sometimes amount to a taking of property, remains the subject of intense academic disagreement. Compare Hart, *supra* note 30, at 1101 (arguing that compensation originally was provided only for direct appropriation and not for regulatory action), and Treanor, *supra* note 31, at 782 (arguing that “original understanding of the Takings Clause...required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used”), with Claeys, *supra* note 42, at 1553 (arguing that early state courts developed and applied doctrine akin to modern regulatory takings), and Gold, *supra* note 36, at 184 (arguing that there is “insufficient evidence to prove just compensation excludes regulatory takings” as a matter of original understanding). See also DANA & MERRILL, *supra* note 31, at 19 (suggesting that both sides of debate overstate their cases); Daniel J. Hulsebosch, *The Anti-Federalist Tradition in Nineteenth-Century Takings Jurisprudence*, 1 N.Y.U. J. L. & LIBERTY 967, 973–74 (2005) (positing that both sides are wrong and offering alternative theory that what amounted to a taking depended on availability of common law writ for challenging governmental action at issue). Attempts to resolve this debate are beyond the scope of this article.

102. See Stoebuck, *supra* note 33, at 563.

103. See *id.* at 564.

104. *Id.* at 563.

105. See Magna Carta, art. 28 (1215), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 43, at 16.

106. See Stoebuck, *supra* note 33, at 566 (citing Stat. 6 Hen. 8, c. 17 (1514–15) (requiring compensation for damage occasioned by river improvements performed by city officials in Canterbury); Stat. 31 Hen. 8, c. 4 (1539) (requiring compensation in connection with clearing projects performed on River Exe by city officials in Exeter)).

By the beginning of American colonialism, then, compensation seems to have been a prevalent feature of the taking power.¹⁰⁷ Importantly, however, the payment of compensation remained, as did the exercise of eminent domain itself, a creature of statutory pronouncement. In England, property could not be taken without a special act of Parliament until almost the eve of the American Revolution,¹⁰⁸ and no judicial decision on either side of the Atlantic required compensation without that result being compelled by express statutory language.¹⁰⁹ Nonetheless, there is general agreement that colonial statutes commonly provided payment to landowners whose property was taken.¹¹⁰ By the time of the Constitutional Convention, legislators had begun including references to the compensation principle in fundamental government documents. In 1777, for example, Vermont became the first state specifically to require the payment of just compensation as a constitutional matter,¹¹¹ and Massachusetts followed in kind three years later.¹¹² Congress likewise included a just-compensation provision in the Northwest Ordinance of 1787, enacted contemporaneously with the convening of the convention in Philadelphia.¹¹³ Thus, by 1787, the compensation principle was a longstanding part of the Anglo-American legal culture.

In light of this history, the absence of express just compensation language in the original Constitution remains something of a mystery. To be sure, the Constitution contained several provisions aimed at curbing many of the abuses against property rights to which the governments of the newly independent states had been most prone.¹¹⁴ The delegates' focus, however, remained on internal design and structural

107. *Id.* at 579.

108. See MCDONALD, *supra* note 45, at 22.

109. Cf. Stoebuck, *supra* note 33, at 575; Treanor, *supra* note 31, at 788.

110. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1283 (1996); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 381 (1991); McConnell, *supra* note 31, at 281; Stoebuck, *supra* note 33, at 579; Treanor, *supra* note 31, at 787. Whether compensation was an established legal right or merely a matter of political expediency, however, remains an open question. Scholars such as Professor Stoebuck have intimated that compensation was a well-established substantive right, describing it as "a principle of the common law—of immemorable usage in our land and in the land of our land." See Stoebuck, *supra* note 33, at 583. Others have been more reticent. Dean Treanor, for example, while recognizing that compensation was the usual *practice* in the colonies, argues that it was not considered to be an indestructible legal right. See Treanor, *supra* note 31, at 788 n.28; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 695 (1985).

111. See VT. CONST. of 1777, ch. I, art. II, reprinted in SOURCES OF OUR LIBERTIES, *supra* note 43, at 365 ("[P]rivate property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."). Although this version of Vermont's constitution was never ratified, the just compensation requirement remained in the version finally adopted in 1786. See VT. CONST. of 1786, ch. I, art. II, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3752 (Francis Newton Thorpe ed., William S. Hein & Co., Inc. 1993) (1909).

112. See MASS. CONST. of 1780, art. X, reprinted in SOURCES OF OUR LIBERTIES, *supra* note 43, at 375–76 ("[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").

113. See Northwest Ordinance of 1787, art. 2, reprinted in SOURCES OF OUR LIBERTIES, *supra* note 43, at 395 ("[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.").

114. See U.S. CONST. art. I, § 8 (giving federal government authority to lay and collect taxes, regulate interstate and foreign commerce, establish uniform bankruptcy laws, regulate the currency, and fix uniform weights and measures); U.S. CONST. art. I, § 10 (prohibiting states from coining their own money, issuing bills of credit,

protections, such as dividing governmental power both vertically (i.e., federalism) and horizontally (i.e., separation of powers). No provision expressly secured property from governmental confiscation or expropriation, nor did it mandate the payment of compensation upon the taking of property in the public interest. A possible reason for this omission could be that, as Madison famously suggested in *Federalist No. 10*, the Founders believed that an extended republic effectively would impede widespread encroachments on property rights.¹¹⁵ By the time he offered his proposed amendments to the Constitution on June 8, 1789, however, Madison apparently had become convinced that a just-compensation provision would be profitable. Among the amendments offered was language stating that “[n]o person shall . . . be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.”¹¹⁶ Of the proposals that ultimately became the Bill of Rights, the one concerning takings was among the least controversial, “occasioning no recorded substantive comment at all.”¹¹⁷

Professor Fisher has suggested that the delay (and seeming disinterest) in an express just-compensation provision may have “derived in part from uncertainty regarding the efficacy of judicially enforced bills of rights in preventing governmental invasions of private liberties.”¹¹⁸ To the extent the Framers feared such provisions would be little more than ineffective “paper barriers,”¹¹⁹ the judiciary proved those fears to be unfounded. Courts early and frequently demonstrated a willingness to strike down legislative acts that resulted in uncompensated takings, even in the absence of explicit constitutional protections. A 1792 decision from South Carolina, for example, declared void an act of the state legislature that purported to confirm the title of one claimant as against the rights of a prior owner.¹²⁰ In doing so, the court indicated that “it was against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another; and that, too, to the prejudice of third persons, without any compensation.”¹²¹ In 1805, the North Carolina court voided an act of the state legislature that divested certain lands, without compensation, from the Trustees of the University of North Carolina, stating that such “property is as completely beyond the control of the Legislature, as the property of individuals.”¹²² Although the court did not specifically rely on the lack of compensation in reaching its decision, later North Carolina judges understood the case as mandating compensation to the landowner.¹²³ The Massachusetts and New York courts issued

making anything other than gold and silver coin tender in payment of debt, enacting bills of attainder, and impairing the obligation of contracts).

115. See THE FEDERALIST NO. 10 (James Madison) (George W. Carey & James McClellan eds., 2001).

116. 1 ANNALS OF CONGRESS 451–52 (Joseph Gales ed., 1834).

117. McConnell, *supra* note 31, at 283.

118. See Fisher, *supra* note 44, at 103.

119. The phrase “paper barriers” comes from Madison’s speech introducing the Bill of Rights. See 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1834).

120. See *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (S.C. Ct. C.P. 1792).

121. *Id.* at 254.

122. See *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 88 (1805).

123. See *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391, 419 (1818) (citing *Foy* for proposition that legislature does not “possess the power of stripping one individual of his property without his consent, and without compensation, and transferring it to another”).

numerous decisions indicating that compensation was a requisite for the government's ability to take private property,¹²⁴ and judges in both states indicated that this requirement existed regardless of any controlling constitutional pronouncement.¹²⁵ Decisions from other states were in accord.¹²⁶

The compensation principle also featured prominently in several federal decisions of the era. Even though the Takings Clause did not apply to the states, the federal courts found little problem in reaching the same results under the Contracts Clause¹²⁷ or under "general principles."¹²⁸ As early as 1795, Justice Patterson declared that "[e]very person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value."¹²⁹ A year later, two Justices expressed their belief that the state of Virginia owed indemnity to debtors who, in reliance on an invalid relief measure, paid their debts to the state but now found themselves again subject to their British creditors.¹³⁰ The bases for this belief, at least for Justice Chase, included "the immutable principles of justice...recognized by the Constitution, which declares, 'that private property shall not be taken for public use without just

124. See, e.g., *Stevens v. Middlesex Canal*, 12 Mass. 466 (1815); *Perry v. Wilson*, 7 Mass. 393 (1811); *Commonwealth v. Coombs*, 2 Mass. 489 (1807); *Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. Sup. Ct. 1822); *People v. Platt*, 17 Johns. 195 (N.Y. Sup. Ct. 1819); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816).

125. See, e.g., *Bradshaw*, 20 Johns. at 105 (stating that just-compensation provisions of federal and state constitutions did not control the decision, but were "declaratory of a great and fundamental principle of government"); *accord* *Charles River Bridge v. Warren Bridge*, 24 Mass. 344, 507 (1829) (Parker, C.J., dissenting).

126. See, e.g., *Beard v. Smith*, 22 Ky. (6 T.B. Mon.) 430, 498 (1828) (Bibb, C.J.) (recognizing that private interests must yield at times to public good, but stating that "[j]ustice consists in making compensation in such cases"); *Piscataqua Bridge Co. v. New Hampshire Bridge*, 7 N.H. 35 (1834) (holding that infringement of exclusive franchise was lawful only upon payment of just compensation); *Reese v. Addams*, 16 Serg. & Rawle 40 (Pa. 1827) (indicating that constitutional provision for compensation protects vested lien rights as well as fee simple estates); *Barrow v. Page*, 6 Tenn. (5 Hayw.) 97 (1818) (upholding trespass action where no compensation was provided to landowner); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828) (voiding as uncompensated taking act requiring dam owners to build locks or have dams abated).

127. U.S. CONST. art. I, § 10. Property rights played a dominant role in several of the Supreme Court's earliest Contracts Clause cases. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 643-44, 653 (1819) (holding that college charter under which private donations were made was "a contract for the security and disposition of property" and state legislation altering charter was "subversive of that contract, on the faith of which [such] property was given"); *id.* at 664-65 (Washington, J., concurring) (equating alteration of college charter to appropriation for public road); *id.* at 702-03 (Story, J., concurring) (equating alteration of college charter to divestment of property); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 166-67 (1812) (holding that tax exemption forming part of consideration in land transaction ran with land and could not be repealed without violating Contracts Clause); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (holding that Contracts Clause, as well as "general principles which are common to our free institutions," restrained state from passing law declaring vested land titles null and void). This connection between vested property rights and vested contract rights was made explicit by Justice Baldwin: "Though the divesting of vested rights of property, is no violation, *per se*, of the constitution of the United States, yet when those rights are vested by a contract, its obligation cannot be impaired by a state law." See *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 828 (C.C.D. N.J. 1830) (Baldwin, Circuit Justice) (citations omitted).

128. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815) (voiding statute divesting private corporation of property previously acquired as inconsistent with "the principles of natural justice, . . . the fundamental laws of every free government, . . . the spirit and the letter of the constitution of the United States, and . . . the decisions of most respectable judicial tribunals").

129. See *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 309 (C.C.D. Pa. 1795) (Patterson, Circuit Justice).

130. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796) (Chase, J.); *id.* at 283 (Cushing, J.).

compensation.”¹³¹ Justice Chase alluded again to the compensation principle in *Calder v. Bull*, this time linking it to notions of legitimate legislative action: “It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction.”¹³² In similar vein, Chief Justice Marshall rhetorically asked whether any limits could be said to exist on legislative power “if the property of an individual, fairly and honestly acquired, may be seized without compensation.”¹³³ By 1830, Justice Baldwin stated in definitive terms that “the obligation to make just compensation is concomitant with the right” to take property for public use.¹³⁴ In keeping with these pronouncements, state actions that divested property owners without compensation were often declared void by the federal courts.¹³⁵

Indeed, as mentioned earlier, many courts of the era invoked the compensation principle despite the lack of an explicit governing constitutional text. Although some jurists grounded the compensation requirement in their English legal heritage,¹³⁶ many courts suggested that it was derived from natural law and the nature of free governments. In large part, these ideas flowed from Locke’s conception of the social compact.¹³⁷ Because individuals form government to protect their natural rights to property, government must indeed provide such protection to maintain its legitimacy. In those circumstances where the public good mandates the yielding of individual property interests, the protection for property implicit in the social compact is satisfied by requiring remuneration to the owner.¹³⁸

Several jurists of the period suggested as much. Chancellor Kent, for example, cited authorities from both the civil and common law traditions in explaining that compensation “is adopted by all temperate and civilized governments, from a deep and universal sense of justice.”¹³⁹ A subsequent New York jurist, after explaining that no express compensation provision governed the case under decision, nonetheless held that compensation was required by a “great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice.”¹⁴⁰ Chief Justice Parker of Massachusetts stated that the compensation provisions in the United States and Massachusetts Constitutions were simply declaratory, “for without these provisions, I hesitate not to say, that nowhere, except where a despotism of some kind or other

131. *Id.* at 245 (Chase, J.) (quoting U.S. CONST. amend. V).

132. *See* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798) (Chase, J.).

133. *See* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

134. *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 828 (C.C.D. N.J. 1830) (Baldwin, Circuit Justice).

135. *See supra* notes 127–29 and cases cited therein.

136. *See* *Lindsay v. Comm’rs*, 2 S.C.L. (2 Bay) 38, 59 (S.C. Ct. C.P. 1796) (Waties, J., dissenting) (explaining that “sacred principle of compensation” was part of “ancient common law of the land” acquired from England); *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252, 254 (S.C. Ct. C.P. 1792) (suggesting that compensation was derived from “common right, as well as...Magna Charta”).

137. *See supra* notes 60–67 and accompanying text.

138. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798) (Fredell, J., concurring) (stating that power of eminent domain is necessary to vitality of government, but “justice is done, by allowing [owners] a reasonable equivalent” for what is taken).

139. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 165 (N.Y. Ch. 1816).

140. *Bradshaw v. Rodgers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822).

existed, could the government lay its hands upon the property of any subject without making him a fair compensation."¹⁴¹ A Virginia judge found the compensation requirement rooted in "Natural Law, Civil Law, Common Law, and the Law of every civilized country."¹⁴² Writing for the Supreme Court, Justice Story suggested that compensation might be required "by the universal law of all free governments."¹⁴³ Justice Baldwin, riding circuit, indicated that the Takings Clause was a "declaration of what in its nature is the power of all governments, and the right of its citizens; the one to take property, the other to compensation."¹⁴⁴ Thus, "[t]he obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined."¹⁴⁵

The preceding discussion illustrates that compensation was a vital part of the legal culture's conviction that vested property rights should be protected from undue governmental interference. This is not to say, however, that the law required compensation in every instance. To the contrary, landowners seeking enforcement of the compensation principle met with resistance in at least three categories of cases: (1) military impressments;¹⁴⁶ (2) claims for consequential damages to property resulting from governmental action not directed toward that property;¹⁴⁷ and (3) takings for public roads.¹⁴⁸ But in none of these categories did the courts fundamentally reject the validity of the compensation principle. With regard to military impressments, for example, the courts seemed to distinguish between true emergency situations—those where appropriation was necessary to aid military endeavors or prevent useful supplies from falling into enemy hands—and circumstances of a less urgent nature. In the former, uncompensated takings might be justified; in the latter, uncompensated takings clearly were illegal.¹⁴⁹

Likewise, the cases declining to award consequential damages were not antithetical to the general requirement of compensating an owner whose property was taken by government action. Rather, the denial of consequential damages flowed from the conclusion that no taking had occurred in the first place. One of the leading consequential damages cases, *Callender v. Marsh*,¹⁵⁰ proves illustrative. There, the plaintiff landowner brought suit against a Boston city official for regrading the street next to the plaintiff's house so as to expose its foundation and

141. See *Charles River Bridge v. Warren Bridge*, 24 Mass. 344, 507 (1829) (Parker, C.J., dissenting).

142. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 265 (1828).

143. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 38 (1823).

144. *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 828 (C.C.D. N.J. 1830).

145. *Id.*

146. See, e.g., *Barrow v. Page*, 6 Tenn. (5 Hayw.) 97 (1818); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362–63 (Pa. 1788).

147. See, e.g., *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 430–31 (1823).

148. See, e.g., *Rentrop v. Bourg*, 4 Mart. (o.s.) 97 (La. 1816); *Paxson v. Sweet*, 13 N.J.L. 196 (N.J. Sup. Ct. 1832); *M'Clenachan v. Curwen*, 6 Binn. 509 (Pa. 1802); *Lindsay v. Comm'rs*, 2 S.C.L. (2 Bay) 38 (S.C. Ct. C.P. 1796).

149. See *Barrow*, 6 Tenn. (5 Hayw.) at 98–99 (indicating that uncompensated taking may be justified in cases of "extreme and invincible public necessity...to render an attack upon an enemy successful, or to defeat his attempts," but in "all other cases" the "positive and...fundamental law" of compensation controls); *Sparhawk*, 1 U.S. (1 Dall.) at 362–63 (allowing uncompensated taking of goods "necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands" because the seizure "happened flagrante bello...; for, otherwise, it would clearly have been a trespass").

150. 18 Mass. (1 Pick.) 418 (1823).

require costly repairs.¹⁵¹ In rejecting the claim, the court indicated that the compensation requirement applied “to the case of property actually taken and appropriated by the government,” but not to one “who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public.”¹⁵² Put differently, compensation was due as a matter of law when the owner suffered some loss or destruction of a recognized property interest (akin to what modern lawyers might think of as the core rights of exclusion, possession, use, and disposition). Compensation was not due when the owner merely suffered monetary damages as an incidental effect of government action not aimed at those rights. Thus, the compensation principle remained intact—it just did not apply to the plaintiff’s situation because the government had taken no property interest from him (that is, the government’s regrading of a *public* street, whatever its incidental economic effect, did not destroy or diminish the core rights of the adjacent parcel). Nonetheless, the moral force of the compensation principle, even though legally inapplicable, compelled the court to suggest that the legislature provide a remedy for comparable cases in the future.¹⁵³

Similar conclusions can be drawn from a review of the cases dealing with public roads. Although these decisions may be explained as a holdover from the colonial era, where compensation usually was not provided for the laying out of public thoroughfares across undeveloped land,¹⁵⁴ a close review reveals that perhaps they were not as inconsistent with the compensation requirement as might first appear. In *Paxson v. Sweet*,¹⁵⁵ for example, the New Jersey court rejected a challenge to a Trenton city ordinance requiring lot owners to install curb stones and foot ways in front of their lots. In doing so, the court assumed that the ordinance effected a taking that required compensation, but it reasoned that the benefits received from the city-wide project provided adequate recompense.¹⁵⁶ Thus, *Paxson* found that the plaintiff *had been compensated*, even though some of his property rights had been restrained, because the law “enlarge[d] the rights retained to make them as or more valuable than the rights lost.”¹⁵⁷ A similar conclusion was reached in *M’Clenachan*

151. *Id.* at 418.

152. *Id.* at 430.

153. *See id.* at 434–35 (asking “whether an application to the legislature ought not to be made” because “there seems to be no good reason why others, whose property is enhanced in value at their neighbour’s expense, should not be held to furnish part of the indemnity”).

154. *See, e.g., Vanderbilt v. Adams*, 7 Cow. 349, 352 (N.Y. Sup. Ct. 1827) (indicating that power to lay road across wild land without compensation “has been assumed and acted upon without a question, ever since we became an independent government”); *Lindsay v. Comm’rs*, 2 S.C.L. (2 Bay) 38, 56 (S.C. Ct. C.P. 1796) (stating that “the authority of the state... to appropriate a portion of the soil of every country for public roads and highways, was one of the original rights of sovereignty, retained by the supreme power of every community at its formation”) (Grimke & Bay, JJ.). Importantly, the *Lindsay* court was evenly divided over the landowner’s right to receive compensation, and the two judges voting against the owner previously had applied the compensation principle in another context. *Compare id., with Bowman v. Middleton*, 1 S.C.L. (2 Bay) 252, 254 (S.C. Ct. C.P. 1792) (Grimke & Bay, JJ.) (holding that legislative act transferring estate from one citizen to another without compensating the first was “ipso facto, void”).

155. 13 N.J.L. 196 (1832).

156. *See id.* at 199 (“The citizen receives it in part, by [the improvements] adding to his private property an increase of its intrinsic value either for sale or enjoyment; by the health and comfort of his own household; by his enjoyment of the like foot ways everywhere else, in which he freely participates without contributing to their expense....”).

157. *See Claeys, supra note 42, at 1587.*

v. *Curwen*, where the Pennsylvania court rejected a challenge to the appropriation of the plaintiff's land for a public turnpike.¹⁵⁸ As with *Paxson*, however, the court's decision was not based on a disagreement with the compensation principle. Rather, the decision was grounded in the peculiar nature of Pennsylvania land grants, which gave, free of charge, each grantee 6 percent more land than he actually purchased, the additional land being reserved for the building of public roads if and when necessary.¹⁵⁹ For this reason, the plaintiff was entitled to no payment now, "such compensation having been originally made in each purchaser's particular grant."¹⁶⁰ The Louisiana court hinted at a similar analysis in *Renthorp v. Bourg*, noting that the state's French and Spanish predecessors "granted their land gratuitously, but a reservation was generally made for roads."¹⁶¹

Thus, instead of being hostile to the compensation principle, many of the cases in the foregoing categories appear to have confirmed its validity. On the whole, the judicial decisions from this period paint a relatively consistent picture—the legal culture accepted the longstanding compensation principle as a key mechanism in protecting private property from undue governmental interference.

C. *The Role of the Courts*

A third major characteristic of the early American view of property rights was an increasing reliance on the judiciary, rather than the political branches, as the ultimate guardian of those rights. This characteristic has to some extent already been featured in the preceding sections, especially with regard to the willingness of the courts to strike down laws violating the compensation principle. As with the other characteristics highlighted in those sections, this third characteristic of early American legal culture was shaped by the traditions, philosophies, and experiences of the past.

Restrictions on the executive, in the form of compensation requirements for certain royal purveyances, were among the earliest limitations placed on the government's taking authority.¹⁶² In the eyes of early Americans, such restrictions made perfect sense. Taking their cues from Blackstone, these Americans would have understood the English historical experience as one in which the ancient constitutional balance between power and liberty was repeatedly encroached upon by the Crown and subsequently restored, finally culminating in the eighteenth-century parliamentary system of king, lords, and commons.¹⁶³ Commentators have noted that at the time of the Revolution executive power was considered "a far greater threat to liberty and property than the legislature,"¹⁶⁴ a fact illustrated by most of the early state governments "emasculat[ing] their executive branches."¹⁶⁵

158. 6 Binn. 509, 514 (Pa. 1802).

159. See *id.* at 511.

160. *Id.* at 513.

161. 4 Mart. (o.s.) 97, 135 (La. 1816).

162. See *supra* notes 104–05 and accompanying text.

163. See generally 4 BLACKSTONE, *supra* note 55, at *407–36; see also FORREST McDONALD, *THE AMERICAN PRESIDENCY 17–31* (1994) (discussing Blackstone's perspective).

164. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 101 (1999).

165. See McDONALD, *supra* note 163, at 126.

Moreover, the Lockean pronouncement that property cannot be taken from an individual without his consent almost certainly was designed to check the executive, since consent included decisions made on behalf of individuals by their elected representatives. Thus, Locke most distrusted executive abuses, not legislative ones.

Faith in legislative representatives was not unique to Lockean theory; it found expression in republican thought, as well. The concept of public virtue (and its concomitant belief that all members of the public shared identical interests)¹⁶⁶ initially led republicans to a “near-unbridled confidence in popularly elected legislatures.”¹⁶⁷ As with Locke, this confidence in representative legislatures corresponded to a general distrust of the Crown and its agents in the hereditary aristocracy,¹⁶⁸ as well as to a general faith in “the people.”¹⁶⁹ In modern parlance, the legislature was the “people’s branch” and, therefore, best equipped to look after the public interest and ward off corruption.

These ideas initially resulted in a general rejection of executive authority and the vesting of “virtually unlimited powers” in American legislatures.¹⁷⁰ Thus, the first constitutional provisions protecting against abuses of the taking power were aimed directly at the executive by prohibiting, in Lockean fashion, expropriations without the consent of the owner or his representatives.¹⁷¹ The behavior of the state legislatures after the Revolution, however, ultimately revealed that this confidence in popularly elected representatives was misplaced. In light of these experiences, many Americans became convinced that their legislative representatives, and the people from whom they derived authority, were just as prone to corruption as those exercising executive powers. More effective methods for protecting liberty and property were needed,¹⁷² and chief among these was the inclusion of explicit constitutional safeguards requiring just compensation upon the taking of private property.¹⁷³

The question remained, however, whether these just-compensation provisions constituted legally enforceable restrictions on the political branches or were merely precatory. As late as 1828, a South Carolina court indicated that the Takings Clause was not an enforceable limitation but rather “only the moral obligation by which the

166. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 57–58 (1969) (“What made...the republican emphasis on the collective welfare of the people comprehensible was the assumption that the people, especially when set against their rulers, were a homogeneous body whose interests candidly considered are one.” (internal quotation marks omitted)).

167. See Nathan Alexander Shales, Note, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339, 353 (1999).

168. See *id.* at 354.

169. See McDONALD, *supra* note 45, at 160–62.

170. See *id.* at 160; see also 1 KELLY ET AL., *supra* note 47, at 73 (stating that “in practice...there proved to be few effective limitations on the state legislatures”).

171. See MD. CONST. of 1776, art. XXI, reprinted in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES*, *supra* note 111, at 1688; N.C. CONST. of 1776, art. XII, reprinted in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES*, *supra* note 111, at 2788; N.Y. CONST. of 1777, art. XIII, reprinted in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES*, *supra* note 111, at 2632.

172. See 1 KELLY ET AL., *supra* note 47, at 73–74 (stating that “need to curtail state legislative power became a central issue of constitutional reform in the 1780s”).

173. See Brauneis, *supra* note 164, at 105 (noting that advent of constitutional just-compensation provisions revealed distrust of legislative branch as well as executive).

legislature is bound, to use [its taking] power discreetly and justly.”¹⁷⁴ Accordingly, the court held that the compensation principle “cannot be enforced by this or any other Court.”¹⁷⁵

But this view appears to have been outside the mainstream. As already mentioned, early American courts repeatedly enforced the compensation principle, and they did so despite the consequences to the political branches.¹⁷⁶ One of the earliest examples, in fact, comes from another South Carolina decision, *Ham v. McClaws*.¹⁷⁷ That case involved a statute prohibiting the importation of slaves into South Carolina, under penalty of forfeiture.¹⁷⁸ Although the court did not specifically mention the compensation principle, it made clear that it considered the application of the statute to the defendants an abrogation of their vested property rights. In this regard, the court noted that the defendants had inquired as to the legality of importation prior to setting sail, that importation had indeed been legal at that time, and that the forfeiture statute had been enacted while the defendants were at sea. For this reason, the court declared the forfeiture to be illegal, even though it clearly applied to the defendants on its face. Because no proper legislature could be presumed to encroach upon vested property rights, the court was “bound to give such a construction” to the statute “as [would] be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law.”¹⁷⁹

Three years later, the same court more explicitly enforced the compensation principle, invalidating an act of the legislature that affirmed the title of a subsequent claimant over that of a predecessor without providing compensation to the latter.¹⁸⁰ Justice Patterson voided a similar statute from Pennsylvania in 1795, calling it “an outrage on private property” and “a monster in legislation.”¹⁸¹ Although he conceded that legislators may be “the sole and exclusive judges” of the need for taking private property, Justice Patterson was adamant that legislative authority ran no further.¹⁸² Calling attention to the fact “that the Judiciary in this country is not a subordinate, but a co-ordinate, branch of the government,”¹⁸³ the Justice explained that judicial intervention (including the assessment of a jury) was “a constitutional guard upon property” and a necessary “barrier between the individual and the legislature, [which] ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility.”¹⁸⁴

This trend of safeguarding property from abuse by the political branches grew after the turn of the nineteenth century, with numerous decisions voiding or

174. *Patrick v. Comm'rs of Cross Roads on Charleston Neck*, 15 S.C.L. (4 McCord) 541, 543 (S.C. Ct. App. 1828).

175. *Id.*

176. *See supra* notes 120–28 and accompanying text.

177. 1 S.C.L. (1 Bay) 93 (S.C. Ct. C.P. 1789).

178. *Id.* at 93.

179. *Id.* at 98.

180. *See Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (S.C. Ct. C.P. 1792).

181. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).

182. *See id.* at 312.

183. *Id.* at 309.

184. *Id.* at 315.

enjoining acts that violated the compensation principle.¹⁸⁵ The results in these cases tended to reflect an attitude similar to that voiced by Justice Patterson—the judicial branch operated as a bulwark between the rights of the people and the power of the government. Judge Green of Virginia, for example, explained “that the Legislative and Judicial Departments, [are] distinct and separate; so that, neither shall exercise the powers properly belonging to the other.”¹⁸⁶ And the judge made clear that the issue of whether a legislative act worked an invalid encroachment upon private rights was a question “*emphatically Judicial in...nature.*”¹⁸⁷ This comported with the understanding of Chancellor Kent, who linked judicial authority directly to the protection of individual rights:

With us, the power of the lawgiver is limited and defined; the judicial is regarded as a distinct, independent power: private rights have been better understood and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law.¹⁸⁸

An early North Carolina decision declared that rights to property could not be deprived “unless by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution.”¹⁸⁹ A subsequent North Carolina judge was even more to the point:

The transfer of property from one individual, who is the owner, to another individual, is a *Judicial* and not a *Legislative* act. When the Legislature presumes to touch *private property*, for any other than public purposes, and then only in case of necessity, and rendering full compensation; it will behoove the Judiciary to check its eccentric course, by refusing to give any effect to such acts.¹⁹⁰

This attitude prevailed against the executive branch as well as the legislative. Even after ratification of the Constitution, many Americans remained suspicious of strong executive authority, and conflict between the executive and judicial branches enjoyed a long history.¹⁹¹ American lawyers were familiar with the skirmishes between James I and Sir Edward Coke in the seventeenth century, as well as the latter’s view (articulated in his *Institutes of the Lawes of England*) that the Crown must operate within the bounds of the law as interpreted by common law judges.¹⁹² By the eighteenth century, Anglo-American courts had begun putting this view into

185. See, e.g., *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Commonwealth v. Coombs*, 2 Mass. 489 (1807); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391 (1818); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805); *Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35 (1834); *Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. Sup. Ct. 1822); *People v. Platt*, 17 Johns. 195 (N.Y. Sup. Ct. 1819); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828).

186. *Crenshaw*, 27 Va. (6 Rand.) at 277 (Green, J.).

187. See *id.*

188. *Dash v. Van Kleeck*, 7 Johns. 477, 505 (N.Y. Sup. Ct. 1811) (Kent, Ch. J.).

189. *Foy*, 5 N.C. (1 Mur.) at 88.

190. *Robinson*, 6 N.C. (2 Mur.) at 420 (Daniel, J.).

191. Interestingly, the lack of an independent judiciary was included among the grievances levied against George III in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

192. See MCDONALD, *supra* note 163, at 21–23; *id.* at 13 (listing Coke among commentators “routinely studied” by American lawyers).

practice, as explained by Robert Brauneis: “If an executive official committed acts that were actionable at common law and that did not fall within the scope of a legislative grant of authority, a court could hold that official personally liable for damages.”¹⁹³ As Professor Brauneis further explains, this framework for disciplining executive officials provided the early model for just compensation litigation in America.¹⁹⁴ Thus, an aggrieved property owner would bring a common law action (usually trespass) against the officials carrying out the alleged taking, those officials would defend the claim based on some legislative authorization to perform the acts in question, and the plaintiff would challenge that legislation as void for not providing adequate compensation.¹⁹⁵ If the plaintiff succeeded on this final step, then the officials named as defendants would be liable at common law, as explained by a Massachusetts court in 1815:

[I]f the legislature should, for public advantage and convenience, authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording, at the same time, means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law, against those who should cause the injury, for his damages.¹⁹⁶

And unlike the legislature, executive officials enjoyed no discretion in determining even the necessity for a taking in the first instance, since the exercise of such discretion by the executive branch would result in “oppression and disproportioned exactions.”¹⁹⁷

III. “POOR RELATION”—PROPERTY RIGHTS IN *WILKIE*

In contrast to the high regard for property rights demonstrated by the early American legal culture, the majority opinion in *Wilkie* intimates that property rights currently enjoy a much lesser status. As demonstrated below, the Court’s decision in *Wilkie* is at odds with each of the prevailing characteristics of the early American legal culture included in the foregoing discussion.

A. The “Second-Class” Status of Property

Wilkie provides a subtle, yet definite, divergence from the perspectives of the early American legal culture concerning the status of property rights generally. Whereas that culture viewed private property as essential to the liberty and well-being of the citizenry, and understood the protection of property rights as one of the chief objects of the state, *Wilkie* reflects an attitude that property rights are not quite as worthy as other rights protected by the Constitution.

193. Brauneis, *supra* note 164, at 101.

194. *Id.* at 102–05.

195. *See id.* at 67–68. For a clear example of this framework, see *Perry v. Wilson*, 7 Mass. 393 (1811).

196. *See Stevens v. Middlesex Canal*, 12 Mass. 466, 468 (1815); *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 70–72 (1834) (explaining that a tort action will not lie where just compensation is made, but otherwise plaintiff may be entitled to damages and injunctive relief); *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 833–34 (C.C.D. N.J. 1830) (Baldwin, Circuit Justice) (distinguishing between damages remedy for past trespass and injunction against future trespass, until compensation is made to property owner).

197. *See Barrow v. Page*, 6 Tenn. (5 Hayw.) 97, 100 (1818).

An initial hint that constitutional property rights are no longer on equal footing with other constitutional liberties was the Court's failure to address the substance of Robbins's claim—i.e., that the BLM's conduct violated his rights under the Takings Clause to receive just compensation for the easement demanded of him. Given the procedural posture of the case, this failure is somewhat surprising. Robbins's lawsuit reached the Court on an interlocutory appeal from the denial of the defendants' motion for summary judgment, which was based on a claimed entitlement to qualified immunity.¹⁹⁸ It was the qualified immunity issue that allowed the appeal in the first place, providing an exception to the normal rule that litigants may only appeal final judgments.¹⁹⁹ In other contexts, the Court previously had made clear that, in considering issues of qualified immunity at the summary judgment stage, federal courts ordinarily should determine whether the alleged conduct violates a constitutional right in the first instance.²⁰⁰ The reason for this primary step, according to the Court itself, is to promote the development of constitutional issues and provide a mechanism by which rights may be clearly established.²⁰¹ By refusing to address the merits of Robbins's claim, then, the Court was operating outside its own established boundaries for resolving the issues that routinely arise in constitutional tort litigation.

The Court justified this departure by holding that, even if Robbins's constitutional rights had been violated, his claim nonetheless was not remediable under the *Bivens* doctrine. The Court indicated that the applicability of *Bivens* depended on a two-step inquiry: (1) whether there existed alternative remedies to protect the interests at issue; and (2) whether there were any "special factors counseling hesitation."²⁰² In applying this framework, the Court first admitted that, despite the existence of alternative avenues for relief, no single remedy was available adequately to protect Robbins from the campaign of harassment he alleged:

It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one's lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult. Agency appeals, lawsuits, and criminal defense take money and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.²⁰³

198. See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

199. See 28 U.S.C. § 1291 (2006) (establishing "final judgment" rule); *Mitchell v. Forsyth*, 472 U.S. 511, 525–27 (1985) (recognizing exception to "final judgment" rule for denials of qualified immunity).

200. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In January 2009, the Court relaxed this requirement, noting that it may often be appropriate but should not be considered compulsory. See *Pearson v. Callahan*, No. 07-751, 2009 WL 128768, at *9 (U.S. Jan. 21, 2009). Nonetheless, the Court acknowledged that, at the time it decided *Wilkie*, it was mandatory. See *id.* at *6 ("Saucier made that suggestion [i.e., first determining whether a constitutional violation had occurred] a mandate.").

201. See *Saucier*, 533 U.S. at 201; see also *Pearson*, 2009 WL 128768, at *9 ("[T]he *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent....").

202. See *Wilkie*, 127 S. Ct. at 2598.

203. See *id.* at 2600–01.

Accordingly, the case had to be decided under the second analytical step, with the Court evaluating any special factors that counseled against the application of *Bivens*.²⁰⁴

It was here that the Court further displayed its view that property rights enjoy a lesser status. The first “special factor” to which the Court turned its attention was the “difficulty in defining a workable cause of action” for Robbins’s claim.²⁰⁵ Although the Court conceded that it previously had recognized retaliation claims in the context of other constitutional rights,²⁰⁶ it found Robbins’s claim to be materially different. Whereas those previous cases “turn[ed] on an allegation of impermissible purpose and motivation” on the part of government officials, the Court viewed Robbins’s claim as involving “a perfectly legitimate purpose: as a landowner, the Government may have, and in this instance does have, a valid interest in getting access to neighboring lands.”²⁰⁷ The problem, according to the Court, was not the BLM’s purpose, but the methods used in achieving that purpose.²⁰⁸ And the Court suggested that those methods were not particularly troubling, stating that “[j]ust as a private landowner” can vigorously assert his own interests in dealing with adjacent neighbors, “the Government too may stand firm on its rights and use its power to protect public property interests.”²⁰⁹ In other words, the Court understood the BLM’s conduct to amount to little more than hard bargaining.²¹⁰

Several things stand out about the Court’s analysis in this regard. First, despite the majority’s assertions to the contrary, it is difficult to see why Robbins’s claim was substantively different from the Court’s prior anti-retaliation precedents, other than the nature of the rights involved. Although the majority viewed those prior decisions as involving questions of improper purpose and motive, such questions were no less central to Robbins’s claim. The Court itself noted that Robbins presented the following issue: “[C]an government officials avoid the Fifth Amendment’s prohibition against taking property without just compensation by using their regulatory powers to *harass, punish, and coerce* a private citizen into giving the Government his property without payment?”²¹¹ As Justice Ginsburg pointed out in dissent, the words “harass, punish, and coerce” indicate that the officials’ motives were vindictive, suggesting exactly the improper purpose and motive at issue in the Court’s prior cases;²¹² in other words, Robbins contended that

204. *See id.* at 2600.

205. *See id.* at 2601. As demonstrated by Professor Tribe, *Wilkie*’s evaluation of the “special factors” inquiry seems to present a departure from the traditional *Bivens* framework, which tended to view “special factors counseling hesitation” as including either implicit preclusion of *Bivens* based on the existence of an elaborate remedial scheme established by Congress (as in *Bush v. Lucas*, 462 U.S. 367, 388 (1983)) or claims involving substantive areas entrusted especially to congressional authority (as in *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)). *See* Tribe, *supra* note 20, at 63–68.

206. *Wilkie*, 127 S. Ct. at 2601 (citing anti-retaliation precedents concerning First Amendment speech rights, Fifth Amendment self-incrimination rights, and Sixth Amendment jury trial rights).

207. *Id.*

208. *See id.*

209. *Id.* at 2602.

210. *See id.* at 2604.

211. *Id.* at 2601 n.8 (alteration in original, emphasis added).

212. *See id.* at 2614 n.3 (Ginsburg, J., dissenting).

the BLM improperly retaliated against him because he exercised his constitutional right to be compensated for the taking of his property. The majority's inability (or refusal) to make this connection is indicative of how it viewed the rights at issue.

Perhaps more telling was the Court's characterization of the BLM as engaged merely in the "perfectly legitimate purpose" of obtaining a public easement.²¹³ Viewed in the light most favorable to Robbins, as was required at the summary judgment stage, the facts suggest more than a simple operation to obtain an easement across Robbins's ranch. In the words of the dissent, "[t]respassing, filing false criminal charges, and videotaping women seeking privacy to relieve themselves...are not the tools of 'hard bargaining.'"²¹⁴ Indeed, it is hard to imagine the Court describing similar conduct against a witness who refuses to waive his right against self-incrimination, or against a criminal defendant who demands a jury trial, as serving the "perfectly legitimate purpose" of ensuring that crimes are solved and the guilty are punished.²¹⁵ Thus, it seems that the context in which the conduct occurs—i.e., whether rights of property are involved or those of higher constitutional caliber—is determinative of whether the government's conduct is legitimate.

Moreover, even if the BLM's goal in obtaining the easement was itself legitimate, under the Court's prior precedents that would not necessarily preclude a retaliation claim if the BLM also sought to punish Robbins for asserting his constitutional rights. The Court's decision in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*,²¹⁶ cited by the *Wilkie* majority,²¹⁷ makes clear that a retaliation claim may involve mixed motives, some legitimate and others not.²¹⁸ Such claims proceed under a burden-shifting framework, with the plaintiff proving that the constitutionally protected conduct was a motivating factor in the response of the government, and the government defending that response by showing that it would have taken the same action even in the absence of the protected conduct.²¹⁹ This comports with the "elaborate jurisprudence of causation, burden shifting, criteria of seriousness, and the like" that the Court has developed when dealing with retaliation claims in a host of other circumstances, from the First Amendment to private employment discrimination.²²⁰ Again, the primary difference between these cases and *Wilkie* appears to be the nature of the rights involved.

At bottom, *Wilkie* leaves the impression that, for reasons not entirely or satisfactorily explained by the Court, the property rights embodied in the Takings Clause are not of the same caliber as those rights protected in the Court's prior cases addressing government retaliation. For this reason, *Wilkie* reflects a departure

213. *Id.* at 2601.

214. *Id.* at 2615 n.7 (Ginsburg, J., dissenting).

215. *Cf. Lefkowitz v. Turley*, 414 U.S. 70, 83–85 (1973) (holding unconstitutional retaliatory measures taken against government independent contractors that refused to waive Fifth Amendment right against self incrimination); *United States v. Jackson*, 390 U.S. 570, 571–72 (1968) (voiding as unconstitutional statute that authorized imposition of capital punishment only in cases where defendant demanded jury trial).

216. 518 U.S. 668 (1996).

217. *Wilkie*, 127 S. Ct. at 2601 (discussing *Umbehr*).

218. *See Umbehr*, 518 U.S. at 674.

219. *Id.* at 675.

220. *See Tribe*, *supra* note 20, at 44.

from the understanding of the early American legal culture, which viewed the protection of property as central to the maintenance of liberty, the fostering of virtue, and the very legitimacy of government itself.

B. Erosion of the Compensation Principle

In addition to exhibiting a different perspective toward property rights generally, the *Wilkie* decision also reflects a specific erosion of the Constitution's guarantee of just compensation. At the heart of the dispute between the BLM and Robbins was the latter's right to demand compensation for the easement sought by the government, either through a negotiated payment or as the result of formal condemnation proceedings. The BLM's refusal to take either course, but instead to pressure Robbins into submission, seems to present the very sort of conduct that the Takings Clause was designed to thwart.²²¹ As demonstrated, many early American courts held that the payment of just compensation was dictated, even in the absence of explicit textual requirements, by basic notions of justice flowing from the primary purposes of government itself—i.e., the fostering and protection of liberty and property.²²² In other words, “the obligation to make just compensation [was] concomitant with the right” to take property in the first place.²²³ Where the obligation was absent, so was the right.

These ideas suggest that the early courts would have seen the BLM's campaign against Robbins as violating the rights protected by the compensation principle—specifically, “[Robbins's] right to refuse to grant the Government something for nothing.”²²⁴ By rejecting Robbins's claim, and by failing even to address whether his constitutional rights were violated, the Court in *Wilkie* directly undermined the compensation principle in a way that seems foreign to the understanding of the early American legal culture. As Justice Ginsburg explained: “The constitutional guarantee of just compensation would be worthless if federal agents were permitted to harass and punish landowners who refuse to give up property without it.”²²⁵ After *Wilkie*, however, it is not at all clear what barriers exist to such conduct, or what value the compensation principle has if such conduct cannot be redressed.

The majority's answer provides little in the way of clarification. In keeping with its characterization of the BLM's conduct as “hard bargaining,” the Court suggested that, although “the Government was not offering to buy the easement,” it “did have valuable things to offer in exchange, like continued permission for Robbins to use Government land on favorable terms (at least to the degree that the terms of a

221. See *supra* notes 120–28 and accompanying text.

222. It is fairly easy to see the tension between the Court's holding in *Wilkie* and the Lockean notion that government exists primarily for the protection of individual property interests. But *Wilkie* seems to run afoul of republican ideas as well. Although (in republican terms) it might be argued that landowners such as Robbins should submit their personal interests to the needs of the public, the compensation principle provides the safeguard that empowers a citizen in Robbins's position (again, in republican terms) to resist ambition and corruption. If government officials can expropriate property without compensation, then the citizen may cower to those (such as politicians, other officials, or wealthy campaign contributors) who can promise better protection for his own interests, thereby losing his independence and ability to act freely in the best interests of the public at large.

223. See *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 828 (C.C.D. N.J. 1830) (Baldwin, Circuit Justice).

224. See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2617 (2007) (Ginsburg, J., dissenting).

225. *Id.* at 2618.

permit were subject to discretion).²²⁶ At first blush, this hints at an understanding of the compensation principle similar to that demonstrated by several of the early American cases concerning public roads—i.e., the requirement for compensation might be satisfied in ways other than direct monetary payment.²²⁷ Whatever its general validity, however, this understanding is belied by the specific facts in *Wilkie*, which viewed in the light most favorable to Robbins, raise a strong inference that the BLM was doing more than simply negotiating the price of the easement. Indeed, at one of the earliest meetings with Robbins, a BLM official allegedly told Robbins that “the Federal Government does not negotiate.”²²⁸ Moreover, the Court’s indication that the government can condition discretionary benefits in exchange for the surrender of a landowner’s right to just compensation is at odds with its earlier pronouncement about similar choice-based dilemmas in *Dolan*:

Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.²²⁹

Finally, the Court’s identification of the government with any other private landowner fails to recognize what was clearly understood by the early legal culture: that government was established in the first instance largely to help secure its citizens in their property, and that unrestrained government often ran afoul of this purpose.²³⁰ Early Americans recognized the compensation principle as critical to protecting private property from abuse by the protectors themselves, and the courts wielded the compensation principle both to void acts of the legislature and to impose liability on errant executive officials. *Wilkie*, by contrast, weakens the force of the compensation principle by suggesting that government officers who ignore it have little to lose.

C. *Whither Judicial Protection?*

As a final observation, *Wilkie* raises questions about the future role of the federal courts in protecting constitutional property rights from encroachment by the political branches. Unlike the early legal culture, which increasingly looked to the judiciary as a barrier between individual rights and the potential abuse of both executive and legislative power, the *Wilkie* Court expressly shrinks from this role despite the admitted unavailability of any other sufficient remedy for the property owner. And the Court’s explanation for its rejection of Robbins’s claim leaves open

226. *See id.* at 2602–03.

227. *See supra* notes 154–61 and accompanying text.

228. *See Wilkie*, 127 S. Ct. at 2593 (internal quotation marks omitted).

229. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *cf. Bd. of County Comm’rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (“[O]ur modern ‘unconstitutional conditions’ doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.” (internal quotation marks and ellipsis omitted)).

230. *See supra* notes 162–97 and accompanying text.

whether property owners should expect meaningful review of property rights cases in the future.

In addition to its inability to define a workable cause of action for Robbins's claim (its prior retaliation precedents notwithstanding), the *Wilkie* majority found a second factor counseling hesitation—"the reasonable fear that a general *Bivens* cure would be worse than the disease."²³¹ Here, in case there was any remaining doubt, the Court plainly invoked the property rights context in which the case arose:

[A] *Bivens* action to redress retaliation against those who resist Governmental impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations. Exercising any governmental authority affecting the value or enjoyment of property interests would fall within the *Bivens* regime....²³²

Thus, the concern that judicial resources might be expended on future property rights litigation was a deciding factor in the rejection of Robbins's claim. This fact alone should give pause to property owners about whether the federal courts will provide meaningful review of future governmental injuries to property.

Moreover, several things are worth noting about the Court's line of thinking. As an initial matter, the Court seemingly went out of its way to paint a parade of horrors, which again implies the Court's own disregard for protecting the property rights presented by Robbins's case. The other examples of potential property-based claims mentioned by the Court (enforcing the Internal Revenue Code or OSHA regulations) do not involve the same type of choice-based dilemma that is at issue under the Takings Clause—that is, the choice between surrendering the constitutional right to just compensation or enduring the harassment of government officials. Therefore, it is unlikely that these situations would give rise to the same sort of retaliation claim alleged by Robbins or previously recognized in the context of other constitutional rights. Moreover, even in the takings context, it is helpful to remember that "a plaintiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated."²³³ Thus, to prevail on a claim of retaliation under the Takings Clause, a plaintiff would need to show that the government's underlying action—the action prompting the plaintiff's insistence on just compensation and the resistance of which motivated the government's retaliatory conduct—actually would constitute a taking in the first place. That showing, in turn, would require a demonstration that the government was seeking a direct appropriation of some portion of the plaintiff's property (such as the easement in *Wilkie*) or that the government had taken regulatory action that was functionally equivalent to a direct appropriation.²³⁴ This suggests a much smaller number of viable claims than is evoked by the majority's global reference to all governmental action that might affect property.

231. See *Wilkie*, 127 S. Ct. at 2604.

232. See *id.*

233. See *Davis v. Passman*, 442 U.S. 228, 248 (1979).

234. See *Lingle v. Chevron*, 544 U.S. 528, 537–39 (2005); see also Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L. J. 63, 86–106 (2008) (discussing *Lingle*'s effect on regulatory takings analysis).

Second, the Court fails to explain why recognizing a *Bivens* remedy for property-based claims is more taxing on judicial resources than claims stemming from the violation of other rights. As the dissent noted, 42 U.S.C. § 1983 already provides a similar remedy against state officials, and the federal courts have yet to be inundated with retaliation claims against those officials arising out of the assertion of rights under the Takings Clause.²³⁵ In any event, whether taxing or not, one of the functions of the federal judiciary is to safeguard those rights expressed in the Constitution from encroachment by the political branches.²³⁶ As Madison famously stated when introducing the Bill of Rights, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights [expressed]; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive.”²³⁷ Early American courts held a similar view, and they were more than willing to hold both legislative and executive officials accountable for uncompensated actions against private property interests. The *Wilkie* majority calls into question the extent to which modern federal courts will do likewise.

Finally, the Court’s floodgates argument suggests far more than a mere concern for judicial resources. Rather, it reveals a mindset about the relative worth of the Takings Clause as compared to other constitutional provisions. As Justice Ginsburg noted, the Court rejected a similar floodgates argument years before in *Davis v. Passman*.²³⁸ There, the Court endorsed Justice Harlan’s concurring opinion in *Bivens* itself: “Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests.”²³⁹ Inasmuch as the Court previously has chosen to remedy certain constitutional violations through the *Bivens* framework, but refused to do so in *Wilkie*, it is difficult to escape the conclusion that the Court has expressed its own normative choice about which types of constitutional rights are deserving of judicial intervention and which are not.²⁴⁰ The exercise of such a choice to exclude property rights from protection finds little support either in the

235. See *Wilkie*, 127 S. Ct. at 2615–16 (Ginsburg, J., dissenting).

236. Cf. *Chapman v. California*, 386 U.S. 18, 21 (1967) (“We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.”).

237. 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1834).

238. See *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., dissenting) (citing *Davis v. Passman*, 442 U.S. 228, 248 (1979)). In *Davis*, the Court allowed a *Bivens* action on behalf of a congressional staffer alleging employment discrimination in violation of the Fifth Amendment’s Due Process Clause. See *Davis*, 442 U.S. at 248–49. Although the *Wilkie* majority cited *Davis*, it failed to address that opinion’s language about judicial resources. See *Wilkie*, 127 S. Ct. at 2597, 2600.

239. See *Davis*, 442 U.S. at 248 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411(1971) (Harlan, J., concurring)).

240. Although Justices Scalia and Thomas joined the majority opinion, they also concurred separately to express their view that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action” and, for that reason, “*Bivens* and its progeny should be limited to the precise circumstances that they involved.” See *Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring) (internal citations and quotation marks omitted). Unlike the rest of the majority, this approach would tend to treat property rights the same as all other constitutional rights (except possibly the Fourth Amendment rights at issue in *Bivens* itself)—that is, as potentially unprotected.

constitutional text or in the distinctive role that courts historically played in safeguarding property from governmental abuse.

IV. CONCLUSION

The contrast between the early American legal culture and the decision in *Wilkie* reveals two very different approaches to constitutional property rights. As we have seen, the early legal culture viewed private property as central to the proper interaction between the state and its citizens, understood the just compensation principle expressed in the Takings Clause to be an integral mechanism for protecting private property from governmental encroachment, and saw the judiciary as the barrier between the political branches and the property rights of the citizens they represented. The majority opinion in *Wilkie*, by contrast, is at odds with each of these characteristics, viewing the property rights embodied in the Takings Clause as less deserving of judicial protection than other civil liberties. The picture painted is one in which property rights have fallen from a "preferred position" to a "poor relation."

This change is an important one inasmuch as it demonstrates that any constitutional right is susceptible to relegation based on shifting judicial preferences. If a right as central to early constitutional understanding as that of private property, not to mention a principle as explicit in the constitutional text as that of just compensation, can be demoted to second-class status, then other rights would appear equally vulnerable.²⁴¹ Moreover, the relationship between property rights and other civil liberties should not be casually overlooked. The early legal culture understood that the concepts of property and liberty are to some degree interdependent. Although courts and commentators often speak of "property rights," the facts of *Wilkie* pointedly illustrate the Supreme Court's own admonition of just a few decades ago:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.²⁴²

After *Wilkie*, that recognition is less clear.

241. See Somin, *supra* note 21 (noting that "most of the arguments for denying damage remedies for property rights violations can also be used to justify their denial for violations of other individual rights").

242. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).