Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic

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I. Introduction

Takings in America have been studied and debated for decades, and the starting point for discussion is almost always the Fifth Amendment. Surprisingly little has been said about takings protections within the body of the Constitution. This Article seeks to rectify this oversight. More specifically, it discusses how the ban on bills of attainder in the Constitution is a significant takings protection separate from the Fifth Amendment.

Bills of attainder occur where the legislature labels a person or group as a wrongdoer and takes their property, liberty, or both without due process. Bills of attainder were extensively used by all the states during the American Revolution to fund the war effort. The constitutional ban on bills of attainder was a prohibition of arbitrary takings. James Madison's primary motive in proposing the Fifth Amendment (along with the rest of the Bill of Rights) was to avoid a second constitutional convention, not to protect rights which he believed were already largely protected.

This Article first addresses takings law generally during the American colonial period as a background to the general understanding of takings at the founding. Next will be a discussion of the thinking of the founders, particularly James Madison, regarding the best ways to protect individual and property rights. The ban on bills of attainder will then be discussed in detail, followed by a review of the purposes and intent of the Fifth Amendment in light of the attainder language. The Article will conclude with a discussion of how the Eleventh Amendment was primarily created as a way to protect the states from attainder lawsuits.

II. Takings in America Prior to 1787

A. Takings in the Colonies Prior to Independence

The necessity for takings protections was recognized from early colonial times in America. Section 1 of the 1641 Massachusetts Body of Liberties indicated that "no man's goods or estate shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unless it be by vertue or equitie of some expresse law of the Country warranting the same." The 1648 "Book of the General Laws and Libertyes Concerning the Inhabitants of the Massachusetts" stated that when towns laid out highways, "if any man

be thereby damaged in his improved ground the town shall make him reasonable satisfaction."² The 1669 Fundamental Constitutions of Carolina contained a similar provision.³

Colonial and local governments enacted numerous takings laws for the construction of a variety of public buildings and roads during the colonial period.⁴ Such legislation outlined the procedure to be followed in takings cases. In almost all cases, the purpose of the use was for the public good, and compensation was paid.⁵ These legislative acts show the germ of the three primary elements of any taking: (1) a procedure for the taking intended to satisfy basic fairness, or due process, (2) public use, and (3) compensation.⁶

Under British law, regulatory or partial takings also required compensation.⁷ A demonstration of this was the 1606 case of The King’s Prerogative in Saltpetre.⁸ In this case, the King desired to conduct mining operations on private property in England under the monarchial power of prerogative. The court allowed the King’s conduct, but required the King to pay consequential damages for any harm that might occur from the mining.⁹ It is noteworthy that this was not a total taking and that the damages at issue were contingent rather than certain.¹⁰

Takings were the subject of court cases in the colonies during this period as well. In 1669, the court of York County, Maine entered orders regarding the taking of lands for roads, directing that “those whose grounds are [t]respassed are to be satisfied according to

⁴. See Ely, supra note 2, at 4-13 (presenting an excellent summary of many of these acts).
⁵. Id.
⁶. See id. The Fifth Amendment, which today is considered the source of takings limitations, see infra text accompanying notes 215-19, contains all three of these elements. See U.S. CONST. amend. V.
⁹. SEIGAN, supra note 7, at 114 (explaining the damages at issue in the Saltpetre case).
¹⁰. See id.
law.”\textsuperscript{11} And in 1674, the Suffolk County Court in Massachusetts confirmed that compensation was to be given when property was taken for the purpose of building roads.\textsuperscript{12}

Some German settlers in Maryland provided an insightful commentary on takings around 1745. They encouraged other German immigrants to choose Maryland as their final destination, stating:

> We whose names are hereunto Subscribed all Natives of Germany, by this do acquaint our Country men with our Settlement (some Years since) in the Province of Maryland, into which Province we came from Pensilvania, for the sake of Better Land, & Easier terms, & we assure you, that the Land in this Province is very fertile, & produces every-thing in Great Abundance, we here Enjoy full Liberty of Conscience, the Law of the Land is so Constituted, that every man is secure in the Enjoyment of his Property, the meanest person is out of the reach of Oppression, from the most Powerfull nor Can anything be taken from him without his receiving Satisfaction for it.\textsuperscript{13}

Some of the more interesting examples of colonial takings are the “Mill Acts.” These legislative acts allowed private property adjacent to streams to be flooded in order for grist mills to be built. One of the earliest of these acts was one passed by the Massachusetts legislature in 1713, which provided compensation for flooded property owners.\textsuperscript{14} The Mill Acts were unusual because the party making use of the act was not the government but a private party wishing to establish a mill.\textsuperscript{15} The Mill Acts sanctioned this private taking for the good of the community. The justification was that the mill was a public convenience, providing a place where “all the inhabitants of the neighborhood should be entitled to have their grinding done in turn and at fixed rates.”\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{11} Ely, \textit{supra} note 2, at 8 (quoting \textit{Province and Court Records of Maine} 177 (Charles Thorton Libby ed., 1931)).
\item \textsuperscript{12} Id. (citing 29 \textit{Publications of the Colonial Society of Massachusetts: Records of Suffolk County Court}, 1671-1680, at 400-01 (1933)).
\item \textsuperscript{13} A Translation from Dutch Language Transmitted to Lord Baltimore by Mr. Dulany and Signed by 25 Names, \textit{in} 21 \textit{Maryland Proceedings and Acts of the General Assembly}, 1745-1747, at 697.
\item \textsuperscript{15} Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 \textit{Hastings L. J.} 1245, 1254 (2002).
\item \textsuperscript{16} Id. (quoting Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9, 15 (N.Y. 1837)). For an enlightening discussion of mill acts in the nineteenth century, see Richard Epstein, \textit{Takings: Private Property and the Power of Eminent Domain} 170-76 (1985).
\end{itemize}
In colonial times, individuals and even entire colonies often resisted allowing their property to be used for the benefit of the majority. Their complaint was that they had been forced to contribute more than their fair share for the public good, while others were free riders who did not pay their fair share. The natural tendency to resist relinquishing property rights for others’ use is the very reason for the existence of laws with respect to eminent domain, particularly compensation for takings. The concept was expressed quite well in the Plan of Union of the British American Colonies drafted by Benjamin Franklin in 1754, sometimes known as the “Albany Plan.” Under a section entitled “Raise Soldiers, and Equip Vessels, &c.,” Franklin wrote:

[Particular colonies are at present backward to build forts at their own expense, which they say will be equally useful to their neighboring Colonies; who refuse to join [the union], on a presumption that such forts will be built and kept up, though they contribute nothing. This unjust conduct weakens the whole; but the forts being for the good of the whole, it was thought best they should be built and maintained by the whole, out of the common treasury.]

In sum, many governmental takings occurred prior to the Revolutionary War. The fundamental protections of due process, public use, and compensation were almost always observed in such takings.

**B. The American Revolution and the Resulting State Constitutions**

With the American Revolution underway, the former colonies enacted state constitutions and declarations of rights. Although none of these constitutions included a grant of the power of eminent domain, almost all of the states, either in their respective constitutions or declarations of rights, contained clauses limiting this power. Hence, the power of the states to make use of eminent domain seems unquestioned. The limitation clauses took various forms, the most common being a repetition of the language of the Magna Carta; namely, that life, liberty, and property could not be taken except by

18. See id.
19. Id.
operation of the "law of the land," which was understood to mean due process of law.\(^\text{20}\)

Another method of limiting the states' takings power was a "remedy clause," under which persons suffering harm to property were guaranteed a just remedy, pursuant to the "law of the land."\(^\text{21}\) This remedy language also appears to have been derived from the Magna Carta language.

Consent clauses were also frequently used by the states. Pursuant to such clauses, the consent of the subject property owner was required in order to affect a taking of his property; however, legislative consent could be substituted if the owner was unwilling to consent voluntarily.\(^\text{22}\) Of course, voluntary consent by the property owner

\(^{20}\) The early constitutions can be found in The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, Colonies now or Heretofore Forming part of the United States (Francis Thorpe ed., 1909) (hereinafter Thorpe). Only Georgia, New Jersey and Rhode Island failed to have such a provision, probably because the Georgia and New Jersey constitutions were purely structural and contained no rights provisions, while Rhode Island stubbornly kept its 1663 colonial charter as its ruling constitution for decades after the revolution. See Ga. Const. of 1777, in 2 Thorpe, supra at 777; N.J. Const. of 1776, in 5 Thorpe, supra at 2594; R.I. Const. of 1842, in 6 Thorpe supra at 3222. In Pennsylvania, Vermont, and Virginia, the "law of the land" reference did not pertain to "life, liberty and property" as in the Magna Carta and the other eight states, but only to deprivations of liberty. See Pa. Const. of 1776, art. VIII, in 5 Thorpe, supra at 3083; Vt. Const. of 1777, ch. 1, art. IX, in 6 Thorpe, supra at 3740; Va. Const. of 1776, sec. 8, in 7 Thorpe, supra at 3813. The law of the land language is taken from Chapter 39 (later 29) of the Magna Carta of 1215, which says that "[n]o freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] the law of the land." Boyd Barrington, The Magna Charta and Other Great Charters of England 239 (2d ed. 1900). The reference to being "outlawed" is significant, as is more fully seen in the discussion of bills of attainder, below. "Law of the land" and "due process of law" have been considered similar if not identical concepts as early as the time of Sir Edward Coke. See Edward Coke, The Second Part of the Institutes of the Lawes of England 50 (Garland Publ'g 1979) (1797).

\(^{21}\) Delaware, Maryland, Massachusetts, New Hampshire, and North Carolina had such language, although in North Carolina it was restricted to deprivations of liberty only. See Delaware Declaration of Rights § 12 (1776); Maryland Declaration of Rights, art. XVII (1776), in 3 Thorpe, supra note 20, at 1688; Mass. Const. of 1780, part 1, art. XI, in 3 Thorpe, supra note 20, at 1891; N.H. Const. of 1784, art. XIV, in 4 Thorpe, supra note 20, at 2455; N.C. Const. of 1776, art. XIII, in 5 Thorpe, supra note 20, at 2788.

\(^{22}\) Eight states had such language: Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia. See Delaware Declaration of Rights § 10 (1776); Mass. Const. of 1780, part 1, art. X, in 3 Thorpe, supra note 20, at 1891; N.H. Const. of 1784, art. XII, in 4 Thorpe, supra note 20, at 2455; N.C. Const. of 1776, art. XVI, in 5 Thorpe, supra note 20, at 2788; Pa. Const. of
would constitute a sale or gift of his property, not a taking requiring due process protection. Indeed, it is only when a legislature forces consent that a taking occurs. The concept of legislative consent of this sort is closely tied to taxation, but was also intended in many of these constitutions to apply to the exercise of eminent domain.

The Pennsylvania Constitution of 1776 gives an example of consent language, providing that "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives." Compensation for takings, while not expressly stated, was understood as a principle derived from common law. Blackstone, on whom the framers of the U.S. Constitution relied heavily, said the following in this regard:

1776, art. VIII, in 5 Thorpe, supra note 20, at 3083; Vt. Const. of 1777, ch. 1, art. IX, in 6 Thorpe, supra note 20, at 3740; Va. Const. of 1776, § 6, in 7 Thorpe, supra note 20, at 3813. For an extensive discussion of this principle of consent, see Harrington, supra note 15, at 1257-69.

23. The concept of legislative consent in this fashion was highlighted by John Locke. He stated:

'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion the maintenance of it. But still it must be with his own consent, i.e., the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.


24. In two of the states—Maryland and North Carolina—the constitutional reference was to taxation. Md. Const. of 1776, art. XII, in 3 Thorpe, supra note 20, at 1687; N.C. Const. of 1776, art. XVI in 5 Thorpe, supra note 20, at 2788. Three of the remaining states—Massachusetts, New Hampshire, and Virginia—made a clear distinction between consent for taxation and consent for any other deprivation of property, such as eminent domain. See Mass. Const. of 1780, part 1, arts. X, XXIII, in 3 Thorpe, supra note 20, at 1902-03; N.H. Const. of 1784, arts. XII, XXVIII, in 4 Thorpe, supra note 20, at 2455-56; Va. Const. of 1776, § 6, in 7 Thorpe, supra note 20, at 3813. Three other states used the Pennsylvania language, quoted in the text, that could apply equally to taxation and eminent domain. See Delaware Declaration of Rights of 1776, § 10; Pa. Const. of 1776, art. VIII in 5 Thorpe, supra note 20, at 3083; Vt. Const. of 1777, ch. 1, art. IX, in 6 Thorpe, supra note 20, at 3740-41.

25. Pa. Const. of 1776, art. VIII in 5 Thorpe, supra note 20, at 3083. Section 10 of the Delaware Declaration of Rights of 1776 contained identical wording. Similar language is found in the 1776 Virginia Bill of Rights, which stated that men cannot be "deprived of their property for public uses without their own consent or that of their representatives." Va. Const. of 1776, § 6, in 7 Thorpe, supra note 20, at 3813.

26. For example, Jefferson advised law students that "Coke's Institutes and reports are their first, and Blackstone their last work, after an intermediate course of two or three years." Julian S. Waterman, Thomas Jefferson and Blackstone's Commentaries, 27 Ill. L. Rev. 629, 637 (1933) (quoting Letter from Thomas Jefferson to Judge John Tyler
So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. . . . In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. 27

It is noteworthy that consent clauses included a specific reference to one of the three essential elements of takings: public use. While compensation was not mentioned, as noted by Blackstone, common law required compensation when takings occurred. 28 Furthermore, at this time in England and in many of the newly formed states, only property owners were allowed to vote for the legislature. 29 This virtually guaranteed that members of the legislature would also be property owners. It would be unthinkable that a legislature composed of property owners would fail to provide compensation upon taking property. Indeed, James Ely argues that most legislative takings acts during the colonial period required the payment of compensation in connection with the taking. 30

With respect to due process, most of the state constitutions contained a specific “law of the land” or due process protection that applied when property was taken. 31 In the states that had consent clauses in their constitutions, such a clause was an additional due process protection requiring that the consent of the property owner or the legislature be obtained. This additional consent language is significant

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27. 1 WILLIAM BLACKSTONE, COMMENTARIES *135.
28. Id.
29. See Marchette Chute, The First Liberty: The History of the Right to Vote in America, 1619-1850, at 185-203 (1969). Virginia and South Carolina were staunch in allowing the vote only to property owners, while New Hampshire and Pennsylvania were more radical, allowing all taxpayers to vote, regardless of property ownership. Id. But as Chute notes, usually “a taxpayer was a man of property.” Id. at 203.
30. See Ely, supra note 2, at 4-6, 7-8, 11. Ely notes that only in the case of roads in some states was compensation not required, primarily because the road improved the value of the land. Id. at 11. However, for a contrary view regarding when compensation was given, see William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782 (1995).
31. See supra text accompanying note 20.
with respect to the three states whose "law of the land" or due process clauses pertained only to liberty and not to "life, liberty and property," since all three of these states had consent clauses.32

In addition to the law of the land and consent language cited above, two of the early state constitutions included express language regarding compensation for takings. The Vermont33 Constitution of 1777 stated that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."34 The Massachusetts Constitution of 1780 provided that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."35 Therefore, in these states, it was not left to common law or the property owning status of the legislature to guarantee compensation—it was a constitutional mandate.

In Vermont, the likely reason for this was the sensitivity its citizens had in respect to land claims, since a significant portion of the state's private property was the subject of competing grants from the

32. These three states were Pennsylvania, Vermont, and Virginia. See PA. CONST. of 1776, art. VIII, in 5 THORPE, supra note 20, at 3083; VT. CONST. of 1777, ch. 1, art. IX, in 6 THORPE, supra note 20, at 3740-41; VA. CONST. of 1776, § 8, in 7 THORPE, supra note 20, at 3813.

33. It should be noted that Vermont was not one of the thirteen original American colonies, but rose to independent statehood during the time of the revolution and thereafter, during the 1770s and 1780s. As the fourteenth state, it formed its first constitution at the same time the original thirteen colonies were doing so, and used the Pennsylvania Constitution as a model for its own. See Thomas Y. Davies, Correcting Search and Seizure History: Now Forgotten Common Law Warrantless Arrest Standards and the Original Understanding of Due Process of Law, 77 MISS. L. J. 1, 107 (2007).

34. VT. CONST. of 1777, ch. 1, art. II, in 6 THORPE, supra note 20, at 3740. Chapter I, article IX of Vermont's constitution contained consent language similar to that in other states, as follows: "[N]o part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives." Id. at 3740-41.

35. MASS. CONST. of 1780, part. 1, art. X, in 3 THORPE, supra note 20, at 1891. The law of the land reference, similar to those in other states, is found in part 1, article XIII, which says that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Id. The consent reference, which is contained in article X with the compensation language, says that "no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." Id.
State of New York.\textsuperscript{36} In Massachusetts, the reference probably was included because John Adams drafted that constitution, and did a far more thorough job than could be found in most contemporary constitutions, not only with respect to takings, but in all of its provisions.\textsuperscript{37}

Courts of the era likewise acknowledged the same takings and compensation principles found in state constitutions. One of the best examples is the 1788 case of \textit{Respublica v. Sparhawk}\textsuperscript{38} in which the Supreme Court of Pennsylvania acknowledged the right of an individual to “seek for redress and compensation, where his property has been divested for the use of the public.”\textsuperscript{39}

In sum, individual state constitutions and bills of rights formed after the Declaration of Independence usually included the “law of the land” takings protection language inspired by the Magna Carta. Some of these constitutions and bills of rights contained a requirement of legislative consent for all takings, while two states had specific takings compensation wording in their constitutions.

III. \textbf{The History Behind the Ban on Bills of Attainder and the Fifth Amendment Takings Clause}

A. \textbf{Events Leading to the Fifth Amendment}

It was with this background that the framers of the U.S. Constitution and Bill of Rights formed the new national government. In light of this history, it is not surprising that there is no statement in the Con-
stitution specifying a power of eminent domain. 40 Just as with the states, it appears to have been an assumed power of sovereignty—a point subsequently confirmed by federal courts. 41

Limits on the takings power are generally recognized by scholars today only in the Fifth Amendment. This amendment combines in one place many different safeguards and rights, which mostly protect the accused in criminal cases. 42 Only the last two phrases deal with property, specifically: “nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” 43

Most scholars who research and discuss takings law start their analysis with these sentences from Fifth Amendment. In so doing, however, they overlook other limits on takings within the constitution itself. The constitution was framed in 1787, while the Bill of Rights (including the Fifth Amendment) was not adopted until 1791. The history of the framing of the Constitution and its amendments reveals that takings were known and dealt with in the body of the Constitution from the very beginning—before the Fifth Amendment was drafted. The Fifth Amendment was merely a later link in the chain of takings law as it developed. In order to better understand how takings were dealt with in the Constitution, it is necessary to review briefly the history of the constitutional convention in 1787, the drafting of the Bill of Rights in 1789, and the key characters involved.

40. See 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 448 (Gaillard Hunt & James Brown Scott eds., 1987) (1787). However, during the constitutional convention wording was suggested (but not adopted) apparently intended to give a federal takings power. This occurred in the Committee of Detail’s report of August 22, 1787, wherein it was proposed to add to the list of Congress’ powers the power to “provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States, in such manner as shall not interfere with the governments of the individual states.” Id.; see also 2 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 761 (2005).


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

43. Id.
The Articles of Confederation, formed by the rebelling colonies after independence in 1776, proved inadequate to govern the new American nation. While the Articles purported to give the Continental Congress a number of federal powers, in reality "the decisions of Congress were little more than recommendations." 44 Indeed, "[t]wo powers that the central authority much needed were withheld: the power to raise money and the power to regulate commerce." 45 Therefore, when the Continental Congress called on the states to fulfill their quotas to pay for the war effort, or to cooperate in other ways, the states frequently ignored such requests. 46

James Madison of Virginia was a member of the Continental Congress during much of this time. With others, he supported an amendment to the Articles of Confederation that would have given the national government the power to compel state compliance with a request of Congress. 47 The effort failed, since some of the states were unwilling at that time to yield their sovereignty to a national body they did not trust. 48

By 1787, the situation had reached a stage of crisis, and the states were grudgingly beginning to see the necessity of a stronger national government. 49 The crisis led to a constitutional convention in Philadelphia that summer, resulting ultimately in the creation of a new and much stronger federal government. Madison was a key member of this convention. 50 Indeed, he was the principal author of the "Virginia Plan," which was presented on the opening day of the convention. 51

This newly proposed constitution did not contain an expression of the power of eminent domain, nor did it contain what would normally be considered a bill of rights. However, it did contain some limitations on state powers, which constituted a significant protection of property rights. 52 In order to better understand why these limitations are in the Constitution, it is first helpful to review Madison's thinking

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46. See Farrand, supra note 44, at 4.
47. Letter from James Madison to Thomas Jefferson (Apr. 16, 1781), reprinted in 1 The Writings of James Madison 129-32 (Gaillard Hunt ed., 1900) [hereinafter Hunt].
48. See McLaughlin, supra note 45, at 171-72.
49. C. Ellis Stevens, Sources of the Constitution of the United States 41 n.1 (1894).
50. See McLaughlin, supra note 45, at 185-87.
51. See Farrand, supra note 44, at 68.
52. See U.S. Const. art. I, § 10.
and the historical context that later led to the drafting of the Bill of Rights, and then to return to the drafting convention of 1787. Madison's later comments on the Bill of Rights help to clarify his ideas as to the best methods for protecting individual and property rights.

Opponents of the Constitution seized on the lack of a bill of rights and other perceived problems as reasons to oppose its adoption. In the ensuing ratification debates, supporters of the Constitution (particularly Madison) were compelled to promise that a bill of rights would be added if the people would agree to adopt the constitution.

As a member of the first session of Congress, Madison drafted and submitted the promised amendments that would form the Bill of Rights. Among them was language that would later become part of the Fifth Amendment. 53

### B. Madison's Negative Opinion of a Bill of Rights

However, Madison's motive for submitting these amendments extended far beyond mere fulfillment of a promise during the ratification process. He and other "federalists" or "constitutionalists" knew that the new government was still in its infancy and still had many enemies who were calling for a second constitutional convention to insert the amendments and corrections they thought were necessary. 54 Madison believed a second convention would be a disaster, since opponents of the constitution would make significant structural changes, altering the whole form of government. As he stated in his speech proposing the Bill of Rights,

I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself. 55

In drafting his proposed amendments, Madison carefully chose only those that would not cause contention and would almost certainly be adopted. 56 His main goal was to avoid rehashing the funda-

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54. Id.
55. 1 Annals of Cong. 433 (1st Session Joseph Gales ed., 1834). Madison's speech presenting the proposed Bill of Rights was given in the House of Representatives on June 8, 1789. Id. at 431-42.
56. See Letter from James Madison to Samuel Johnston (June 21, 1789), reprinted in 5 Hunt supra note 47, at 409-10. Madison stated that "nothing of a controvertible nature ought to be hazarded" in the amendments so as to increase the chances of
mental principles on which the new government was based while it was in its infancy. He referred to his Bill of Rights as “a conciliatory declaration of certain fundamental principles in favor of liberty, in a form not affecting the validity and plenitude of the ratification” of the constitution itself.57 Because he took care to propose only innocuous amendments, almost all of them were in fact adopted.58 Among these were the due process and compensation clauses appearing in the Fifth Amendment today, although (as discussed below) he did not propose the compensation clause with quite the same language as now exists.

Madison was not the only one who knew that the Bill of Rights was more illusory than real. Samuel Livermore, a representative from New Hampshire who expressed his opinion during the House debates on the amendments, stated that his constituents would see the Bill of Rights as no “more than a pinch of snuff; they went to secure rights never in danger.”59

It is significant that Madison did not believe the amendments comprising the Bill of Rights were really necessary and that he stated this on many occasions throughout his life. He repeatedly made it clear that the amendments were, in his view, not essential or significant.60 While he never went so far as to say they were worthless, and indeed agreed that they might serve some useful purpose, they were of little importance to him. His sentiments on this point did not change with time. As late as 1821, he referred to the Bill of Rights as “those safe, if not necessary, and those politic, if not obligatory, amendments introduced in conformity to the known desires of the Body of the people.”61

Madison’s statements on this subject are instructive:

[M]y own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent passing a Bill of Rights. Letter from James Madison to Edmund Pendleton (June 21, 1789), reprinted in 5 HUNT, supra note 47, at 406.

57. Letter from James Madison to Ambrose Madison (June 24, 1788), reprinted in 5 HUNT, supra note 47, at 226–27.
58. Id. at 24.
59. 1 ANNALS OF CONG. 775 (Joseph Gales ed., 1834).
60. Madison’s remarks of this sort are discussed infra.
61. Letter from James Madison to John G. Jackson (Dec. 27, 1821), reprinted in 9 HUNT, supra note 47, at 75.
amendment. . . . I have favored it because I supposed that it might be of use, and if properly executed could not be of disservice. 62

Having said this, Madison went on to explain why he did not think a bill of rights to be worth the fuss:

I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience [religious freedom] in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power . . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. 63

For Madison, a bill of rights was a mere paper barrier that could easily be circumvented by the legislature. On many occasions he spoke of the dangerous tendency of legislatures to abridge rights. The reason was very simple for Madison, even if not as apparent to others. It had to do with factions; a subject he addressed eloquently in the Federalist Papers. A faction is a group of citizens with a common interest, who have little regard for the rights of those who oppose them. 64 When the faction consists only of a minority of a community, the majority holds it in check; but when the faction is in the majority, then the minority has cause to fear for its rights.

Hence, Madison stated that "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its

63. Id. at 271-72 (emphasis added). One of the chief examples of this was Virginia's attempt to enact a statute in 1785 providing that the salaries of the clergy would be paid from tax funds. Madison vigorously opposed the measure, and it did not pass. MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1784), in 2 HUNT, supra note 47, at 183-91.
64. THE FEDERALIST No. 10, at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961).
ruling passion or interest both the public good and the rights of other citizens."65 On another occasion, he said that

wherever the real power in a government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.66

Ever the pragmatist, Madison did not see a bill of rights as being a particularly effective way of guaranteeing rights or protecting property. A state bill of rights was not always effective and could be easily ignored if the legislators were not vigilant, as he had personally seen happen in Virginia.67 Likewise, a federal bill of rights was of little importance because it would mostly apply only to the federal government and would not protect individual citizens from abuses of power by states. Furthermore, because the federal government had only limited powers (in contrast with the states which retained all powers), Madison and others believed the federal government lacked the ability to invade religion or the press or the other fundamentals stated in the Bill of Rights.68

C. Madison's Views on the Best Way to Protect Property Rights

Whatever his misgivings about the bill of rights, Madison firmly believed there was a direct and effective way to protect property and individual rights from state abuses. This method was so vital to his

65. Id. at 132.
67. See supra note 63.
68. For example, Alexander Hamilton wrote, "[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" THE FEDERALIST, No. 84, at 535 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Hamilton expressed the sentiments of many in this number of the Federalist, when he stated that bills of rights "are not only unnecessary in the proposed Constitution, but would even be dangerous." Id. Interestingly, 100 years later, the Australian constitutional founders did not even debate whether to include a bill of rights in their new constitution, and rejected adoption of the due process and equal protection clauses found in the amendments to the American Constitution. One of the leading Australian founders, Alfred Deakin, stated that the due process clause "has given them [the Americans] a great deal of trouble." See OFFICIAL REPORT OF THE NATIONAL AUSTRALASIAN CONVENTION DEBATES, MELBOURNE 3D Sess., at 667 (1898), available at http://www.aph.gov.au/senate/pubs/records.htm (last visited Nov. 27, 2009).
thinking that he proposed it at the commencement of the Constitutional Convention in 1787. This was no afterthought, or language written merely to satisfy the whims of those clamoring for a bill of rights. Rather, it was fundamental to Madison’s whole plan of government. It was similar to what the Continental Congress had tried to do in order to strengthen the Articles of Confederation: an absolute legislative veto of all state actions by the federal legislature. 69

At the start of the Constitutional Convention in 1787, years before the Bill of Rights was adopted, Madison proposed in the sixth resolution of his Virginia Plan that the National Legislature should have the power “to negative all laws passed by the several States contravening, in the opinion of the National Legislature the articles of Union.” 70

Obviously, such a power could be very broad, since almost anything could come within the national legislature’s opinion. Later, during the debates, Madison confirmed this broad view when he stated that “an indefinite power to negative legislative acts of the states [was] absolutely necessary to a perfect system. Experience had evinced a constant tendency in the states to . . . [among other things] oppress the weaker party within their jurisdictions.” 71 This statement demonstrates clearly that for Madison a legislative veto was the chief instrument to protect individual and property rights and would be far more effective than a written bill of rights.

Alexander Hamilton was in agreement with a federal veto, although his proposed enforcing body was slightly different. In his own plan of government, he proposed that “all laws of the particular states contrary to the constitution or laws of the United States [are] to be utterly void.” Enforcement of the provision was to be entrusted to the governors of the states. 72

Again, for Madison, the only way the legislative veto power could be effective was for it to be unlimited. He said,

in order to give the negative this efficacy, it must extend to all cases. A discrimination [i.e., partial or limited legislative veto power] would

69. For an informative discussion of Madison’s thoughts regarding the legislative veto, and why a bill of rights was not an effective instrument, see Robert A. Goldwin, From Parchment to Power 59, 65 (1997); see also Jack N. Rakove, James Madison and the Bill of Rights, in This Constitution: A Bicentennial Chronicle (1987), http://www.apsanet.org/imgest/JamesMadison.pdf (last visited Dec. 2, 2009).

70. 2 Madison, supra note 40, at 24. The Virginia Resolutions, although originating from the mind of Madison, were proposed to the convention by Virginia Governor Edmund Randolph on May 29, 1787. See id.

71. 3 Hunt, supra note 47, at 121.

only be a fresh source of contention between the two authorities[;] [the federal and state governments] . . . . [T]his prerogative of the general government is the great pervading principal that must control the centrifugal tendency of the states; which, without it, will continually fly out of their proper orbits and destroy the order and harmony of the political system.\textsuperscript{73}

To those able to benefit today from over 200 years of hindsight in the workings of the Constitution, Madison's goal of a legislative veto may seem extreme. Under such a system, the states would seem to be mere puppets of the federal government because Congress could veto all the laws they made. Moreover, a federal review of state laws would be overwhelming and outside the physical capacity of Congress—a point raised by its opponents, and ultimately acknowledged by Madison himself.\textsuperscript{74}

Many members of the 1787 convention did not agree with Madison's proposed legislative veto. The small states objected that the larger number of representatives from the larger states would use the federal veto power as a tool to bully the small states.\textsuperscript{75} Many also wondered how the national legislature could review all state laws. One comment to this effect by James Mason has taking overtones. He asked, "Are all laws whatever to be brought up? Is no road nor bridge to be established without the sanction of the General Legislature?"\textsuperscript{76} The establishment of a road or bridge could include the taking of any property needed for it. Hence, if a legislative veto were established, federal approval would be needed for every state taking.

Ultimately, the convention changed the negative proposal significantly, but did not utterly abolish it. Instead, the delegates specified certain limits to state power within the body of the Constitution. If the states defied these limits, the federal judiciary could then declare their acts unconstitutional, or, failing that, the congress would take

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\textsuperscript{73} Id. at 122.

\textsuperscript{74} Letter from James Madison to John Tyler (1833), reprinted in 9 \textsc{Hunt}, supra note 47, at 506. Madison still favored the legislative veto, but acknowledged that it suffered from "insuperable objections," including the "multiplicity of the laws" of the states. On the other hand, a legislative veto of state actions may not be that far different from Congress's vast preemption powers today, under the commerce and related clauses. \textit{Id.} Moreover, one wonders whether the civil war would have occurred, or at least whether the constitutional crisis regarding the power of secession would have been debated, if a legislative veto of state actions had been a known and respected principle in 1860. \textit{See id.}

\textsuperscript{75} 3 \textsc{Hunt}, supra note 47, at 125-26. This point was raised by Gunning Bedford of Delaware. \textit{Id.}

\textsuperscript{76} 2 \textsc{Madison}, supra note 40, at 456.
action by passing a federal law. As stated by Governor Morris, “a law that ought to be negatived will be set aside in the Judiciary department and if that security should fail; may be repealed by a National law.”77 In essence, Madison’s legislative veto was replaced with a judicial veto.

After the convention, Madison revealed to Thomas Jefferson his thoughts regarding the failure of the delegates to agree to his legislative veto, and their replacement of it with a judicial veto. Madison stated:

[A] constitutional negative on the laws of the states seems equally necessary to secure individuals against encroachments on their rights. . . . A reform therefore which does not make provision for private rights, must be materially defective. The restraints against paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark.78

Madison believed the convention had missed the best way to protect individual and property rights, even though the Constitution contained protections he approved, such as the ban on paper money and bills of attainder. For Madison, the legislative veto would have given the national legislature power to take swift action against any state attempting to defy individual and property rights. While the legislative veto is virtually forgotten today, for Madison it was one of the most essential parts of the plan for a new federal government.

He recognized that all was not lost, since the judicial veto was still in place. In the convention debates after the legislative veto was rejected, Madison said,

The jurisdiction of the supreme court must be the source of redress.
So far only had provision been made by the plan against injurious acts of the states. His own opinion was that this was sufficient. A negative on the state laws alone could meet all the shapes which these could assume. But this had been overruled.79

Hence, Madison acknowledged to his contemporaries in the convention that the judicial veto was “sufficient,” even though the legislative veto he wanted (which he thought would have been better) had been overruled. However, he continued to lament the loss of a legislative veto in his private correspondence with Jefferson. A judicial veto power, although better than nothing, was problematic. He stated:

It may be said that the Judicial authority, under our new system will keep the states within their proper limits, and supply the place of a

77. 3 HUNT, supra note 47, at 449.
78. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 5 HUNT, supra note 47, at 27 (emphasis added).
79. 4 HUNT, supra note 47, at 442.
negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal against a State to the supreme Judiciary.  

In sum, for Madison, the judicial veto coupled with specified limits on state powers didn't go far enough to protect individual and property rights. It is significant that the convention felt it necessary to specify limits on state powers and create a judicial veto. Madison was not alone in thinking that some federal restraint on state powers was necessary to protect individual rights. As stated by Alexander C. Hanson in 1788 with respect to the limits on state power in the Constitution, “the restraints laid on the state legislatures will tend to secure domestic tranquility, more than all the bills, or declarations, of rights, which human policy could devise.”

And what were the specified limits on state power? In today’s world, where the Bill of Rights garners all the attention, these limits are seldom acknowledged. However, at the time of their creation, these limits constituted a significant curtailment of state power by the Federal Constitution, not unlike a bill of rights. Many of them related to property rights. Indeed, protection of property rights was too important an issue to be left out of the Constitution.

IV. Specified Property Protections in the Body of the Constitution

A. Limits Specified in Article 1, Section 10

The limits on state power are found in Article I, Section 10 of the Constitution.  

80. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 5 HUNT, supra note 47, at 26. James Wilson from Pennsylvania expressed a similar sentiment during the 1787 convention, stating that “[t]he firmness of judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law, than to declare it void when passed.” 4 HUNT, supra note 47, at 287.


82. The provisions in this section were not the only rights guaranteed in the constitution. As noted by Hamilton, other rights in the body of the constitution included Article I, Section 3, Clause 7 (limiting the punishment in impeachment cases); Article I, Section 9, Clause 2 (the protection of the habeas corpus privilege from suspension); and Article III, Section 3, Clause 1 (requiring two witnesses for a conviction of treason). THE FEDERALIST No. 84, at 532–33 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).
state usurpation of necessary federal powers, such as foreign trade, making war or entering treaties, other prohibitions strike more directly at state powers that pertain to individual rights, including property rights. The first paragraph is particularly pertinent in this regard:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. 8

One reason these limitations may have been ignored over the years is because some of the wording is archaic or deals with issues that have long since ceased to be of any concern. One such example was paper money. Many states had passed laws forcing creditors to accept paper money from debtors in satisfaction of their debts. This money was often depreciated in value, thereby giving a great benefit to the debtor, and a consequent loss to the creditor. In short, there was a taking, since the creditor lost much of the loan he had extended to the debtor. As Matthew Harrington stated, “In the view of many, paper money emissions and tender laws were attacks on the sanctity of property, and the inevitable result would be economic chaos.” 8

James Madison stated that paper money “affects rights of property as much as taking away equal value in land.” 8

Article I, Section 10 was intended to stop this practice. It did so most directly by the prohibition against a state making “anything but gold and silver coin a tender in payment of debts.” In addition, states were prohibited from “impairing the obligation of contracts,” such as a loan contract between a creditor and a debtor. 8

83. U.S. CONST. art. I, § 10. A letter of marque was a commission issued by a government to a privateer or mercenary to act on its behalf against other nations. See Black’s Law Dictionary 925 (8th ed. 2004). A reprisal was a retaliation against the acts of other nations, such as seizing a ship in retaliation for a seized ship. See id.

84. Harrington, supra note 15, at 1278.


86. U.S. CONST. art. I, § 10, cl. 1. At first blush, it would seem that the ban on ex post facto laws would also accomplish the same goal of stopping the payment of antecedent debts with paper money, since many of the states had passed laws saying that preexisting debts had to be satisfied with such funds. However, it was pointed out in the convention that this provision applied only to criminal matters. 2 Madison, supra note 40, at 483. Mr. Dickenson “mentioned to the House that on examining Blackstone’s Commentaries, he found that the terms, ‘ex post facto’ related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite.” Id. No further provision was provided, however. On the other hand, later in the conven-
For Madison, paper money and impairment of contractual obligations were big issues that related directly to creditor and property rights. Indeed, he once identified "two cardinal objects of Government: the rights of persons and the rights of property." In Federalist No. 10, he spoke out against popular zeal "for paper money, for an abolition of debts, [and] for an equal division of property." Naturally, Madison supported the language of Article I, Section 10 regarding paper money. While a paper money taking is not a contemporary issue today in the same sense it was in 1787, the general concerns pertaining to takings remain relevant.

In sum, the body of the Constitution contains several property protections. These include the ban on paper money, on ex post facto laws, and on impairment of contracts. Most important of all, however, was the ban on bills of attainder.

B. The Ban on Bills of Attainder

Among the most important limits on state power listed in Article I, section 10 of the United States Constitution, and the most significant with respect to property rights, is the prohibition of states passing any bill of attainder. The ban on bills of attainder is not just an archaic reference to criminal matters, but is in large measure a takings protection that has mostly been ignored by historians.

A bill of attainder is a legislative act imposing punishment (including a potential taking) on a person or group without a trial or the benefit of any other proceeding. Interestingly, Article I, Section 9 also prohibits Congress from passing a bill of attainder. Although it
was stated during the Constitutional Convention debates that a bill of attainder had “saved the British constitution,” the general bans on bills of attainder were adopted by the Convention with no dissent. In reality, bills of attainder had been used excessively and abused by all of the states during and after the Revolutionary War, in large part as a way to take property in order to obtain needed revenue. The abuse had been so extreme that none of the convention delegates hesitated or even commented on specifying a total ban on all bills of attainder. The founders perceived the anti-attainder clauses in the Constitution as a necessary protection against arbitrary due process and takings violations by the legislature.

The term “attainder” is not generally known, even within the legal profession. It is generally considered an ancient and outdated concept with little modern applicability. “The word attainder is derived from the Latin term attinctus, signifying stained or polluted.” The notion of pollution emanates from the consequences of a treason or felony conviction—the blood of a traitor or felon was polluted; or in other

__Proposal was altered to be a ban on bills of attainder and ex post facto laws by the states. Later, the committee of style reinserted the impairment of contracts language, which the convention accepted. See Robert Ernst, Rufus King: American Federalist 111-12 (1968).__

91. 4 Hunt, supra note 47, at 276.

92. id. The statement regarding the British constitution was made by George Mason, in reference to Parliament’s attainder of Thomas Wentworth, The Earl of Strafford, in 1641. Wentworth had become a symbol of monarchical power, which Parliament felt it had to destroy. Parliament first tried to impeach him, then passed a bill of attainder against him when the impeachment effort failed. This attainder has generally been considered vital to Parliament’s assertion of independence from the crown. For a detailed discussion of the Strafford attainder, see Craig S. Lerner, Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial, 69 U. Chi. L. Rev. 2057, 2075-95 (2002).


94. 4 Hunt, supra note 47, at 276.

95. 1 Joseph Chitty, A Practical Treatise on the Criminal Law 725 (1819).
words, all inheritance rights that might otherwise pass through him were erased. 96

In old England, bills of attainder were most often used by Parliament to get rid of undesired high officials. 97 By way of the bill of attainder, Parliament would condemn the attainted individual to death and cut off all his inheritance. 98 A legislative bill calling for a loss of liberty or property, but not the life of the named person, was known as a bill of pains and penalties. If the person's life was called for, then it was a true bill of attainder. 99 However, bills of pains and penalties and of attainder were commonly lumped together, and the reference in the Constitution to a bill of attainder was generally understood to include the bill of pains and penalties as well. 100

One of the most important elements of a bill of attainder is that the legislature sits in a judicial capacity, passing judgment on persons or groups without giving them the benefit of due process or a trial. 101 Thus, bills of attainder implicate not only due process concerns, but separation of powers concerns as well.

Recent historical and legal scholarship has rarely included attainders as part of its review of individual rights or takings law. 102 Arguably, this is because it is more convenient simply to toss attainders in with forfeitures and taxes—two areas not usually included in a traditional discussion of takings. However, there is no real justification for this separation, since bills of attainder are a central expression of the government's takings power.

97. ZECHARIAH CHAFEES, THREE HUMAN RIGHTS IN THE CONSTITUTION 103 (1956).
98. See Miner, supra note 96, at 826-27.
99. See Chafee, supra note 97, at 97.
100. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (stating that "[a] bill of attainder may affect the life of an individual, or may confiscate his property or both"). Thus, a bill of attainder necessarily included bills of pains and penalties. Madison and Hamilton also appear to have had this understanding. See supra text accompanying footnotes 79-81; infra text accompanying notes 109-16.
102. For example, Richard Epstein's book on takings, supra note 16, has no discussion of attainders. However, Epstein would not necessarily disagree that attainders should be considered in any discussion of takings law, since he repeatedly states that all instances in which property is redistributed at the hands of government—including taxation, regulation and interference with contracts—qualifies as a taking. Id. at 74-104, 263-305
1. Bills of Attainder Distinguished

The primary distinction between traditional forfeitures and bills of attainder is that the former require a judicial conviction in criminal cases, or a decree of forfeitability in civil in rem forfeiture cases. A forfeiture may occur only after due process has been observed. Hence, the uncompensated taking is justified by the conviction of wrongdoing or decree of forfeitability after trial. Conversely, a bill of attainder is a direct takings act by the legislature, in which the conviction is assumed or created by the legislature without the benefit of trial or due process. Roger J. Miner identifies the distinction thus: "Bills of attainder, being legislative enactments designed to inflict punishment without trial, are different from common law attainder that followed a sentence of death following trial." Thus, there is a key distinction between bills of attainder and regular attainers that sometimes creates confusion. A person judicially convicted after a trial was considered "attainted" at common law, and his property forfeited. A bill of attainder on the other hand was a legislative act in which the conviction and forfeiture occurred without trial. Thus, a bill of attainder is very close to eminent domain, as an act of taking by the legislature.

In the founding era, bills of attainder were considered by many to be little different than takings that would normally be protected by a bill of rights. For example, Chief Justice John Marshall said in the 1810 case of *Fletcher v. Peck* that the constitution of the United States contains what may be deemed a bill of rights for the people of each state. No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may

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103. Stefan D. Cassella, *Asset Forfeiture Law in the United States* 12-17 (2007). During and after the civil war, the "in rem" forfeiture proceeding was created, under which the government would pursue a civil action directly against property used for criminal purposes, thereby escaping the need to first convict the property owner. The "personification fiction," whereby property was treated as if it were a person was the theory behind such forfeitures. However, a due process procedure was still required. See id. at 29-32; Stuart D. Kaplan, Note, *The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Courts to Realize RICO's Potential*, 33 Am. U.L. Rev. 747, 755-57 (1984).
104. Id.
105. See Miner, *supra* note 96, at 827.
106. Id.
108. Id.
confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained.\textsuperscript{109}

For Marshall, then, the ban on bills of attainder could be construed so broadly that it and the ban on ex post facto laws and laws impairing contracts constituted an entire bill of rights. A bill of attainder specifically was a power to take, and the ban on bills of attainder was a prohibition of legislative takings without due process—a protection normally found in a bill of rights. Marshall was not the only one to view Article I, Section 10 as a bill of rights. Prior to ratification of the Constitution, Richard Henry Lee, writing in opposition to the Constitution as “The Federal Farmer,” stated that “the 9th and 10th Sections in Art. 1, in the proposed constitution, are no more nor less, than a partial bill of rights.”\textsuperscript{110} And Hamilton defended against the claim that the Constitution lacked a bill of rights by pointing out that it contained many rights protections, including the ban on bills of attainder.\textsuperscript{111}

The similarity between bills of attainder and eminent domain is striking. With both, the legislature acts to obtain identified property. While bills of attainder were usually associated with punishment for treason or felony, there was no judicial conviction based on evidence in a trial to justify the forfeiture. This is markedly different than a justified forfeiture following conviction. Because of this lack of due process, what could in fact be occurring in a bill of attainder case was a traditional taking. When the elements of eminent domain and bills of attainder are compared, there is surprisingly little difference.

2. The Scope of Bills of Attainder

Both Hamilton and Madison felt that bills of attainder could be interpreted more broadly to include any targeting for disparate treatment of a person or persons labeled by the legislature as wrongdoers.\textsuperscript{112} In this sense, the bill of attainder clause had overtones of an

\textsuperscript{109} Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).
\textsuperscript{111} The Federalist No. 84 at 532 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).
\textsuperscript{112} See infra text accompanying notes 167–79. One of the best examples of this is the Mormons. In the late nineteenth century, Congress passed a series of laws intended to take away property of the faith and its individual members due to their
equal protection clause. Arguably, bills of attainder are not true takings because they are limited to treason or felonies.\textsuperscript{113} However, the legislature could potentially circumvent any such perceived requirement by simply labeling a person or group of people as felons or wrongdoers in order to obtain their property.

Madison identified this possibility in \textit{Federalist No. 43} as the reason the Constitution contained a definition of treason. He stated:

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime.\textsuperscript{114}

While the possibility of "artificial treasons" was foreclosed by this language in the Constitution, the possibility of an "artificial felony" was not. In short, a bill of attainder is the ultimate act of an arbitrary taking. Such labeling occurred frequently in England, and indeed the American colonies engaged in wholesale attainder acts against alleged loyalists to gain their property to pay for the war effort.\textsuperscript{115}

3. The Dividing Line Between Traditional Takings and Bills of Attainder

It can be said that bills of attainder are illegitimate or arbitrary takings, while eminent domain is an acceptable taking. The challenge is defining the line between the two. The most effective dividing line is found in the three things specified in the Fifth Amendment: due process, public use, and compensation.

The greatest difference between arbitrary and acceptable takings is the presence or absence of fundamental principles of fairness. As stated by Blackstone, "it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon

practice of polygamy. 1 VILE, \textit{supra} note 40, at 39. One writer has identified this as one of four primary examples of the improper use of bills of attainder since the Constitution was drafted. Francis D. Wormuth, \textit{On Bills of Attainder: A Non-Communist Manifesto}, 3 W. Pol. Q. 52, 52–65 (1950).

\textsuperscript{113} See \textit{supra} text accompanying 96.

\textsuperscript{114} The \textit{Federalist No. 43}, at 310 (James Madison) (Benjamin Fletcher Wright ed., 1961). The definition of treason is found in Article III, Section 3 of the Constitution, which also states that even bona fide treason convictions resulting in an 'attainder of treason' cannot result in disinheriance as in the British system. See U.S. \textit{Const. art. III, § 3, cl. 2.}

\textsuperscript{115} See \textit{infra} text accompanying notes 155–65.
or seise any man's possessions upon bare surmises without the inter-
vention of a jury." 116 Unless basic principles of due process are com-
plied with, the king "can neither take, nor part from, any thing." 117
The exception, however, is high treason, for Blackstone goes on to say,
"in case of attainder for high treason, the king shall have the forfeiture
instantly," 118 and therefore may immediately take the property with-
out the need for due process. While bills of attainder were usually
associated with high treason in England, they were not so limited in
America, and had a much broader application. 119 Indeed, this is why
bills of attainder were strictly banned in the Constitution: in order to
provide the protection of due process in all takings.

Not everyone felt that attainders denied due process. In a fasci-
nating 1717 essay, Richard West claimed that the state had a right of
self defense by way of attainders just as any individual could defend
himself. 120 The attainted person or group was supposedly not denied
due process, since they could always go before the legislature and
plead their case while the lawmakers debated the bill of attainder. 121

But it is hard to imagine anyone on a list in a bill of attainder
actually going before the legislature to plead his case. Indeed, West
ignored the most famous of the old English attainder cases, that of
Thomas Wentworth, the Earl of Strafford, who in fact did appear
before Parliament during his impeachment and pled his case. 122
Because Parliament found his defense too troublesome to deal with, he
was silenced by being banished to the tower. When Parliament finally
realized it could not impeach him, it simply passed a bill of attainder
instead, after which he was executed. While West did note that in
1696 Sir John Fenwick was given the opportunity to defend himself
before Parliament while it debated whether to approve a bill of attain-
der against him, 123 Chafee contends that these proceedings were
largely political and were hardly fair. 124

116. 4 WILLIAM BLACKSTONE, COMMENTARIES *259.
117. Id.
118. Id.
119. See infra text accompanying notes 155-65.
121. Id. at 106.
122. The Strafford attainder is discussed in more detail in Lerner, supra note 92, at 2075-95.
123. West, supra note 120, at 106.
124. See Chafee, supra note 97, at 135.
Simply put, there is no procedural safeguard for an accused who wishes to appear safely before the legislature while it contemplates his attainder. What occurred more commonly in America in the 1770s and 1780s was for the bill of attainder to be justified by its drafters on the basis that the bill gave the offender a time limit in which to appear and subject himself to normal legal process. Indeed, this was essentially Jefferson’s argument in defending his drafting of the attainder of Josiah Philips. 125

Clearly, while such a time limit in a bill of attainder gives a semblance of fair treatment, there is no question the bill of attainder still mandates conviction without trial if the deadline is not complied with—an idea foreign to the concept of due process of law. Such a concept harkens back to the medieval days of trial by ordeal, in which conviction could be justified by the subsequent acts or failures of the accused. Or, as stated eloquently by Hamilton, this concept was

a subversion of one great principle of social security, to wit, that every man shall be presumed innocent until he is proved guilty: This was to invert the order of things; and instead of obliging the state to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence, to avoid the penalty. 126

Another common strategy of those who had been subjected to a bill of attainder and lost property was to submit later (after passions had cooled) a proposal to the legislature to enact a bill to reverse the attainder. One such example is the 1788 case of Respublica v. Gordon, in which an attainder victim sued to recover his property on the basis that he was a minor when he was attainted. 127

In order to become un-attainted, Gordon first applied to the Pennsylvania Executive Counsel (essentially the governor’s office), where he was told “that they had it not in their power to restore his estate, which was a matter of legislative jurisdiction.” 128 He then approached members of the General Assembly (the legislature), who told him the proper body to deal with his matter was either the executive counsel or the courts. 129 He returned to the executive counsel with the plea that

125. THOMAS JEFFERSON, DRAFT OF BILL OF ATTAINDER AGAINST JOSIAH PHILLIPS (1778), in 2 THE WRITINGS OF THOMAS JEFFERSON 149, 149-54 (Paul Leicester Ford ed., 1893) [hereinafter FORD].
126. ALEXANDER HAMILTON, A SECOND LETTER FROM PHOCION (1784), reprinted in 3 THE FOUNDERS’ CONSTITUTION 346 (Phillip B. Kurland & Ralph Lerner eds., 1987) [hereinafter KURLAND & LERNER].
128. Id. at 233.
129. See id.
the Attorney General raise the question on his behalf in the courts, which occurred.\textsuperscript{130}

Ultimately, the Supreme Court of Pennsylvania ruled that his case would violate the peace treaty between the United States and Great Britain, and dismissed his case.\textsuperscript{131} However, the court stated in a footnote that

the object that the Defendant meant to accomplish by this proceeding was to reverse the attainder; in consequence of which his title to the estate would revive, and, as it had not been appropriated or disposed of by the Commonwealth, there would be no obstacle to his taking immediate possession. The Legislature soon afterwards passed an act in favor of Mr. Gordon's pretensions.\textsuperscript{132}

Hence, the legislature finally did its duty, and reversed the attainder.

After due process, the next element that separates bills of attainder from valid exercises of eminent domain is the purpose or intent for the taking. Taking property by way of a bill of attainder is generally associated with a punishment against a group or person for behavior which is outside the approval of society, or at least of the legislature.\textsuperscript{133} A valid exercise of eminent domain, on the other hand, would have a public use as its purpose rather than an intent to punish the owner of the land.\textsuperscript{134} The purpose of the taking becomes the heart of the issue—is it for punishment, or for public use? The specification of the public use wording in the Fifth Amendment may have been motivated by a desire to distinguish legitimate takings from bills of attainder.

The final element distinguishing attainders from legitimate exercises of eminent domain is compensation. In bill of attainder cases, the property at issue is forfeited to the state without compensation. In legitimate takings, compensation is required by common law.\textsuperscript{135} Therefore, the compensation reference in the Fifth Amendment may have been inserted simply to distinguish legitimate takings from bills of attainder.

\textsuperscript{130} See id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 233 n.1.
\textsuperscript{133} See Chafee, supra note 97, at 93, 145.
\textsuperscript{134} Nathan A. Sales, Note, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L.J. 339, 344 (1999).
\textsuperscript{135} See supra note 27 and accompanying text.
4. Fifth Amendment Takings Language as a Possible Outgrowth of the Ban on Bills of Attainder

Indeed, it could even be argued that the due process and takings language was put into the Fifth Amendment specifically as a backlash against bills of attainder. The complete ban on bills of attainder was a relatively new concept when it was put in the U.S. Constitution (the last bill of attainder in Britain occurred years later, in 1820). It can be argued that the founders realized, after the ban on bills of attainder went into effect, that they had gone too far. The ban on bills of attainder might be interpreted so broadly as to prevent legitimate exercises of eminent domain. Thus, the language in the Fifth Amendment may have been inserted not as a limit on the power of eminent domain, but rather as a sly recognition of that power instead. Creation of a negative or limit in a law necessarily creates a positive implied power as well, for otherwise the limit would have no meaning. In the words of Hamilton, this was "what lawyers call a NEGATIVE PREGNANT—that is, a negation of one thing, and an affirmation of another." 138

However, this is probably not the case, as can be seen by reviewing some of Madison's statements. Madison was asked in 1785 what rights a constitution for the proposed State of Kentucky should contain. This was two years before the Constitutional Convention with its total ban on bills of attainder, and four years before he drafted the Fifth Amendment. Madison listed the following as essential rights to include:

The Constitution may expressly restrain them from meddling with religion; from abolishing Juries; from taking away the Habeas Corpus; from forcing a citizen to give evidence against himself; from controlling the press; from enacting retrospective laws, at least in criminal cases; from abridging the right of suffrage; from taking private property for public use without paying its full value; from licensing the importation of slaves; from infringing the confederation, &c., &c. 139

136. See Chafee, supra note 97, at 136.
137. Bernard Seigan makes this very argument with respect to the due process clause: that the public use and compensation language was inserted immediately after the Fifth Amendment's discussion of due process because the due process clause potentially could be interpreted so broadly as to eliminate all legitimate exercise of eminent domain. See SEIGAN, supra note 7, at 108-09.
138. THE FEDERALIST No. 32, at 243 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Hamilton was discussing the concurrent power of taxation as between the states and federal government. Id.
139. Letter from James Madison to John Brown (Aug. 23, 1785), reprinted in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 177, at 178 (New York, R. Worthington 1884) (emphasis added).
Notably, Madison's reference to takings compensation was not linked to bills of attainder or due process.

As another example of Madison's thinking on the subject, in 1782, the Continental Congress was asked to decide whether compensation should be paid to horse owners whose horses were initially taken by the British, but then recaptured by the Americans. This was five years before the Constitutional Convention, and seven years before Madison drafted the Fifth Amendment. Madison stated that "The demand of restitution in favor of the original proprietors is warranted by the principles of equity." 140 It appears that Madison viewed compensation for legitimate takings as a straightforward equitable principle to protect basic property rights. It is therefore not likely that he included the Fifth Amendment language to acknowledge the power of eminent domain.

For Madison, the very structure of government—with members of the Senate being property owners who were elected by property owners—formed a significant protection of property rights as well.141 A largely property-owner Senate would not likely fail to pay compensation for legitimate takings. The ban on bills of attainder was necessary to protect against illegitimate, excessive, and arbitrary takings that denied due process, public use, and compensation.142 A positive statement allowing legitimate takings or specifying the limits thereto was hardly necessary since such principles were recognized by common law and principles of equity.

Bernard Siegan has acknowledged the possibility that the ban on bills of attainder could be seen as a takings protection. However, he discounts the idea in part because there would have been a redun-

140. Letter from James Madison to Edmund Randolph (Dec. 17 1782), reprinted in 1 HUNT, supra note 47, at 292-93 n.1.
141. James Madison, Observations on the “Draught of a Constitution for Virginia” (1788), in 5 HUNT, supra note 47, at 286-87. Madison stated:
"The first question arising here is how far property ought to be made a qualification [of eligibility for legislative office]. There is a middle way to be taken which corresponds at once with the Theory of free Government and the lessons of experience. A freehold or equivalent of a certain value [i.e., property ownership] may be annexed to ye right of voting for Senators, and ye right left more at large in ye election of the other house. . . . This middle mode reconciles and secures the two cardinal objects of Government; the rights of persons, and the rights of property. The former will be sufficiently guarded by one branch, the latter more particularly by the other.
Id. Thus, Madison felt that property ownership as a qualification for the Senate was appropriate, but that the other legislative house should not necessarily be tied to a property ownership requirement.
142. See supra text accompanying notes 119-22.
dancy: the federal ban on bills of attainder and due process and takings wording later inserted in the Fifth Amendment would have covered the same ground. In other words, if the attainder clause was a takings protection, why go to the trouble of restating the takings protections again in the Fifth Amendment?

However, there are two reasons this argument falls short of the mark. In the first place, the Fifth Amendment and attainder clauses were not the only examples of duplicity. Another redundancy would be criminal jury trials, since the Sixth Amendment provided for jury trials in criminal cases, just as did the last paragraph of Article III, Section 2 of the body of the Constitution. The public use and compensation language in the Fifth Amendment was itself redundant, since due process included both concepts already. Indeed, to some the very concept of a bill of rights was redundant, since many thought it unnecessary. Samuel Livermore said the Bill of Rights "went to secure rights never in danger," that is, it dealt with rights which were already protected. Once again, the amendments were for Madison of lesser importance, and were mere "paper barriers." As Madison said in his speech presenting the Bill of Rights,

143. See Seigan, supra note 7, at 119. Seigan notes that Article 1, Section 10, which limits the states, is not redundant, but that Article 1, Section 9, is redundant because it bans bills of attainders by the federal congress. Id. Seigan maintains that another "problem with imposing these clauses against the state governments at the time of the founding was that they might have been employed to support slavery." Id. Seigan seems to be asserting that the founders did not want to protect property constitutionally because the institution of slavery would end up being protected as well. However, there is no evidence of this. Rather, as this article makes clear, protection of property was too vital an issue to be left out of the constitution, regardless of the personal feelings the founders may have had about slavery. Indeed, Seigan agrees with Madison's statement that slavery was constitutionally protected in its own right, which means that it could not legitimately be the cause of an attainder claim in any event. Id.

144. U.S. Const. amend. VI.

145. U.S. Const. art. 3, § 2, cl. 3. The Constitution states that the trial by jury "shall be held in the State where the said Crimes shall have been committed." Id. The Sixth Amendment states that the accused has a right to "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

146. See infra text accompanying note 225.

147. See supra note 68. Christopher Eisgruber in particular is quite uncomplimentary regarding the Bill of Rights, stating, "We dishonor neither the Constitution nor the Framers if we regard some of its provisions as clumsy, regrettable, or redundant. And much of the Constitution deserves exactly that kind of treatment.... Despite frequent and cloying praise for the Bill [of Rights], it is a disappointing work." Christopher L. Eisgruber, Fidelity in Constitutional Theory: Fidelity Through History: The Living Hand of the Past: History and Constitutional Justice, 65 Fordham L. Rev. 1611, 1618 (1997)

148. 1 Annals of Cong. 775 (Joseph Gales ed., 1834).
The people of many states, have thought it necessary to raise barriers against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the Federal constitution, we shall find that although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency.149

Secondly, and more importantly, there was not a redundancy in any event. The ban on bills of attainder was to protect against the most egregious and arbitrary of takings, in which individuals or groups were necessarily labeled (rightly or wrongly) as wrongdoers, and were being punished. The Fifth Amendment public use and compensation language was clearly targeted at legitimate exercises of the power of eminent domain, in which alleged punishment of wrongdoers was not at issue and common law applied. While there could clearly be some overlap of the two concepts if the legislature were acting in an arbitrary manner, the focus of the two clauses still differs in degree.

V. HISTORICAL USE OF BILLS OF ATTAINDER IN THE REVOLUTION AND THEREAFTER

A. The New States Make Use of Bills of Attainder

Just how widespread were bills of attainder in the American states as compared to England? In England, bills of attainder had fallen into disuse for decades prior to the revolution.150 Likewise, bills of attainder in the colonies prior to the revolution were unheard of.151 With the Declaration of Independence in 1776, however, the new state governments suddenly found themselves with all the powers of sovereignty, unhampered by the higher authority of Parliament in England, and largely unhampered by the weak federal government under the Articles of Confederation. They also found themselves burdened with war debt, and populated to varying degrees by loyalists to the crown. It is not surprising, therefore, that the states made wholesale use of their newfound power of bills of attainder as a weapon to achieve a variety of goals. Confiscating the property of so-called loyalists was a pre-

149. 5 Hunt, supra note 47, at 381.
150. See Chaee, supra note 97, at 135–37. However, British bills of attainder were not completely gone from the scene. Thomas Jefferson recounts that he and several other patriots such as John and Samuel Adams, Patrick Henry, Peyton Randolph and John Hancock were named in "a bill of attainder commenced in one of the houses of parliament, but suppressed in embryo by the hasty step of events which warned them to be a little cautious." Thomas Jefferson, Autobiography (1821), reprinted in 1 Ford, supra note 125, at 14.
ferred method of raising revenue, since it was easy to justify without the necessity of paying any compensation.

The wholesale takings appear to have occurred at the direction of the Continental Congress. In November 1777, it adopted the following resolution:

Resolved, that it be earnestly recommended to the several states, as soon as may be, to confiscate and make sale of all the real and personal estate therein, of such of their inhabitants and other persons who have forfeited the same, and the right to the protection of their respective states, and to invest the money arising from the sales in continental loan office certificates, to be appropriated in such manner as the states shall hereafter direct.\(^{152}\)

Madison, who was not in the Continental Congress when this resolution was passed, later offered the following criticism of this act and the ensuing bills of attainder passed by the states: "Was it a proper form of government, that warranted, authorized, or overlooked the most wanton deprivation of property? Had the government been vested with complete power to procure a regular and adequate supply of revenue, those oppressive measures would have been unnecessary."\(^{153}\)

The states made extensive use of bills of attainder. Each of the thirteen colonies enacted attainder legislation, not only to punish British loyalists, but specifically to confiscate and sell their property.\(^{154}\) The New York Act of Attainder of October 22, 1779 named fifty-nine persons, and stated that

each of them are hereby severally declared to be, Ipso Facto, convicted and attainted of the offence aforesaid; and that all and singular the estate, both real and personal, held or claimed by them the said persons severally and respectively, whether in possession, reversion or remainder, within this State, on the day of the passing of this Act, shall

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\(^{152}\) 9 Journals of the Continental Congress 971 (1777).

\(^{153}\) 5 Hunt, supra note 47, at 144-45.

\(^{154}\) Claude Halsted Van Tyne, The Loyalists in the American Revolution app. C at 335-41 (1902). Van Tyne lists these acts, including those specifically directed at taking property. The most active state in the taking of property by this method—perhaps not surprisingly because of the large number of loyalists it contained—was New York. Id. at 337-38. It enacted eleven attainder acts directed at property between 1777 and 1784. Id. For the other states, the number of such acts directed at property were as follows: New Hampshire, four; Massachusetts, three; Rhode Island, two; Connecticut, two; New Jersey, three; Delaware, one; Pennsylvania, two; Maryland, two; Virginia, four; North Carolina, eight; South Carolina, eight; and Georgia, ten. Id. at 327-41.
be and hereby is declared to be forfeited to and vested in the people of this state.\textsuperscript{155}

In its bills of attainder, New York confiscated property worth $3,600,000.\textsuperscript{156} While the revenue raised in other states was not as great, all of them passed bills of attainder for revenue purposes. In a supreme twist of irony given his authorship of the Declaration of Independence, Thomas Jefferson also authored one of the attainder acts in Virginia, that of Josiah Philips in 1778.\textsuperscript{157}

Bills of attainder were included in the 1783 Treaty of Peace ending the Revolutionary War. This treaty required that all confiscations cease and that the federal government recommend to the states that they should make restitution to the loyalists who had lost their property due to bills of attainder.\textsuperscript{158} John Adams favored compensating "the wretches how little soever they deserve it, nay, how much soever they deserve the contrary."\textsuperscript{159} However, the states were loathe to compensate, or even to stop the confiscations. North Carolina took loyalist property as late as 1790,\textsuperscript{160} and Hamilton opposed a New York attempt at a bill of attainder in 1787.\textsuperscript{161}

In a March 5, 1792 letter to Thomas Jefferson, the British Minister James Hammond demonstrated that the many bills of attainder by the states during the war had not been forgotten in England. He stated:

During the war the respective legislatures of the U.S. passed laws to confiscate & sell, to sequester, take possession of & lease the estates of the loyalists, & to apply the proceeds thereof towards the redemption of certificates and bills of credit, or towards defraying the expenses of the war . . . . In some of the states confiscated property was applied to the purposes of public buildings & improvements: in others was

\begin{footnotes}
\item[156] Van Tyn\textsuperscript{e}, supra note 154, at 280.
\item[157] 2 Ford, supra note 125, at 149–54. This act provided for "all forfeitures, penalties & disabilities prescribed by the law against those convicted & attainted of High-treason." Id. at 152.
\item[159] Letter from John Adams to Jonathan Jackson (Nov. 17, 1782), reprinted in 9 The Works of John Adams, Second President of the United States 516 (1854).
\item[160] Id.
\item[161] See infra text accompanying notes 228–32.
\end{footnotes}
appropriated as rewards to individuals for military services rendered during the war.\textsuperscript{162}

Thus, many of the attainders were used for the specific purpose of obtaining public buildings and improvements, which would normally only occur in cases of eminent domain.

\section*{B. Contemporary Warnings Against Bills of Attainder}

It is significant that many of the founders saw the potential mischief of bills of attainder to target the innocent. For example, Hamilton and Madison both indicated their understanding that bills of attainder could include any act of the legislature which took away the liberty or property of individuals or denied them due process.\textsuperscript{163} Hamilton's statement to this effect came in 1784. Writing as "Phocion," he opposed the sentiment of many New Yorkers that the loyalists should be punished by restricting their right to vote or even to reside in the state.\textsuperscript{164}

Hamilton pointed out that the "law of the land" or due process clause in New York's constitution did not allow such discrimination against loyalists.\textsuperscript{165} He also criticized bills of attainder, stating: "It is true, that in England, on extraordinary occasions, attainders for high treason, by act of parliament have been practiced, but many of the ablest advocates for civil liberty have condemned this practice . . . ."\textsuperscript{166} Hamilton further stated that bills of attainder historically applied only to named individuals and not to "general descriptions of men" in a broad legislative enactment.\textsuperscript{167} Such an attempt was contrary to natural justice and fundamental principles of law and liberty.\textsuperscript{168} Indeed, the New York Constitution forbade bills of attainder except for crimes committed during the revolutionary war.\textsuperscript{169}

Then followed Hamilton's most telling statement regarding how harmful bills of attainder could be. Although he was addressing the right to vote or reside in the state under the proposed legislation, his

\begin{thebibliography}{9}
\bibitem{162} 6 Ford, \textit{supra} note 125, at 11-12.
\bibitem{163}  See \textit{infra} text accompanying notes 168-76.
\bibitem{164} Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (January 1784), \textit{reprinted in} 3 The Papers of Alexander Hamilton 483 n.1, 485 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter SYRETT & COOKE].
\bibitem{165}  Id. at 485.
\bibitem{166} Id.
\bibitem{167} Id.
\bibitem{168} Id.
\bibitem{169} Id. The constitutional provision can be found in 5 Thorpe, \textit{supra} note 20, at 2637.
\end{thebibliography}
reasoning applies equally to bills of attainder taking property. Hamilton stated:

Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government, principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement and banishment by acts of legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partizans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense. 170

Madison’s comment on attainders came in 1794. 171 In a State of the Union Address, President George Washington made reference to certain “self-created societies” as probably being behind the recent Whiskey rebellion. 172 It was generally known that such societies were included among the local chapters of the democratic-republicans, the party of Jefferson and Madison. 173 The House of Representatives, of which Madison was still a member, debated whether to issue its own legislative statement against these societies.

Not surprisingly, Madison rose in opposition. The record indicates Madison’s view of the proposed legislation that

if it falls on classes or individuals, it will be a severe punishment. He wished it to be considered how extremely guarded the constitution was in respect to cases not within its limits. Murder, or treason, cannot be noticed by the legislature. Is not this proposition, if voted, a vote of attainder? 174

For Madison, when an individual or a group was labeled by the legislature as treasonous or wrongdoers, without due process of law, an attainder occurred.

170. SYRETT & COOKE, supra note 164, at 485-86 (emphasis added).
171. 6 HUNT, supra note 47, at 222 n.1.
172. 12 THE WRITINGS OF GEORGE WASHINGTON 44-45 (Jared Sparks, ed. 1837). The “whiskey rebellion” was an uprising of radicals against the federal excise tax on whiskey in 1794. President Washington sent federal troops to the area in Pennsylvania where the uprising occurred. Many of the radicals in the uprising were members of the societies at issue. McDONALD, supra note 53, at 36-38.
173. See id. at 37.
174. 6 HUNT, supra note 47, at 222 n.1.
Madison was well aware of the existing bill of attainder clauses in the Constitution. In his notes of his speech to the House of Representatives in June 1789, in which he presented the Bill of Rights for consideration and vote, he identified certain rights that the American Constitution should guarantee which British law did not. These rights were “freedom of press—Conscience General Warrants—Habeas Corpus jury in civil cases—criminal attainders—arms to protest.”

Significantly, habeas corpus and attainders were already in the Constitution, and neither of them was included in his list of proposed amendments that he presented that day. That these essential rights, already protected by the Constitution, were mentioned by Madison when he presented the Bill of Rights shows that he was well aware of the importance of the bill of attainder clause as a protection of property rights.

Madison proposed inserting the Bill of Rights directly into the body of the Constitution. He stated,

I wish, also, in revising the constitution, we may throw into that section, which interdicts the abuse of certain powers in the State Legislatures, some other provisions of equal, if not greater importance than those already made. The words, ‘No state shall pass any bill of attainder, ex post facto law, &c.’ were wise and proper restrictions in the Constitution. I think there is more danger of those powers being abused by the State Governments than by the Government of the United States.

Madison once again reiterated his fear that the greatest threat to individual rights was from state governments, and that is why the constitution needed to contain express limits on the states—including the express limit against arbitrary takings found in the ban on bills of attainder.

Madison then proposed inserting limits on state power over the rights of conscience (religion), the press, and civil jury trials. Congress subsequently changed his proposal, deciding not to insert these limits or indeed any of the new amendments into the body of the Constitution.

175. Letter from James Madison to Edmund Randolph (May 31, 1789), reprinted in 5 Hunt, supra note 47, at 389. The reference to “criminal” attainders was an acknowledgment that in enacting a bill of attainder, the legislature usually creates the label, without due process protections, that the attainted person or group are criminals—regardless of whether they really are.

176. Id. at 386–87.

177. Id. at 387. It is significant that Madison did not attempt to insert the due process and public use/compensation guarantees of the Fifth Amendment into the body of the constitution as well. The reason is obvious: they were already there, in the ban on bills of attainder, at least in respect to the most egregious takings that were not safeguarded by the common law.
stitution, but to include them as an appendix instead. However, the attainder clause remained untouched in Article I, Section 10, and continued to act as a limit on the state power to enact arbitrary takings legislation.

One of the clearest expressions by Madison against bills of attainder was found in his 1785 work, *Memorial and Remonstrance*. This was an opposition to a proposed state law in Virginia that would have paid the clergy with state tax revenues. Madison said:

Either . . . we must say, that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may control the freedom of the press, may abolish the trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into the law the Bill under consideration.

In making this statement, Madison joined Hamilton in condemning unfettered legislative power, including any attempt by the legislature to act in a judicial manner. When legislatures passed laws that affected liberty and property rights without any benefit of due process, they essentially were enacting bills of attainder.

Indeed, Madison directly discussed the danger of bills of attainders in *Federalist No. 44*, in which he stated,

Bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.

In light of this, he noted with respect to the constitutional ban on bills of attainder that it was "[v]ery properly" that "the convention added

178. Davies, supra note 33, at 140.
179. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), in 2 Hunt, supra note 47, at 190-91.
this constitutional bulwark in favor of personal security and private rights.” 181

In sum, the Constitution contained a number of limits on state power, including several that relate to takings, even before the adoption of the Bill of Rights. Chief among these was the ban on bills of attainder, which was essentially a due process and takings guarantee with respect to the most egregious of takings.

VI. THE FIFTH AMENDMENT

A. Madison’s Drafting of Takings Protections in the Proposed Bill of Rights

We have seen that the bill of attainder clause was intended to act as a protection of individual and property rights. It was the rough equivalent of a due process and takings clause, at least in the most arbitrary cases in which individuals were labeled as wrongdoers. However, in 1791 Madison drafted a new bill of rights to apply to the federal government. 182 Madison’s motive for doing so was mainly to prevent a second constitutional convention. 183 While he did not think this bill of rights was particularly important, it did have some relevance. Although Madison chose provisions for this bill of rights that would not be contested, he also chose provisions that had at least some level of significance. While the federal Bill of Rights may not have been too important to Madison, his talents were so great and his insight so keen that he could not help but include some meritorious provisions. Today, with the judicial veto and the ban on bills of attainder fading into oblivion, the Fifth Amendment is more meaningful. What follows is a review of the history and meaning of the takings and due process clauses in the Fifth Amendment.

Madison’s proposed wording for the Fifth Amendment was as follows:

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

181. Id.

182. One scholar asserts that the Fifth Amendment was understood, at least by some, as applying not only to the federal government, but to the states as well, even before the civil war and the adoption of the Fourteenth Amendment. See Jason Mazzone, The Bill of Rights in the Early State Courts, 92 MINN. L. REV. 1, 38–39 (2007).

183. See supra text accompanying notes 53–56.
As can be seen by comparing this with the Fifth Amendment as enacted, the wording of the due process clause was not changed at all by Congress during its debates on the amendments, but the wording of the compensation clause was. Further criminal guarantees were also added to the Fifth Amendment.

B. Possible Reasons for Separate References to Due Process and Takings

Why was the Fifth Amendment written in this way, with reference to due process, followed by a separate reference to public use and compensation? There were only two state constitutions that had such dual wording. While four states recommended a due process clause to be part of the Bill of Rights, no state suggested inclusion of a takings compensation clause. Indeed, this was the only clause in the bill of rights that was not taken from a state suggestion—Madison inserted it on his own. Why did he do it? A number of scholars have proposed different theories on this point. William M. Treanor postulates that the compensation clause was included after the due process clause due to "process failure." According to Treanor, compensation was not always given for takings even though it should have been, and therefore this wording was necessary.

Conversely, George Tucker asserted in 1803 that the compensation clause was inserted separately because of the recent Revolutionary

185. The relevant portions of the Fifth Amendment read as follows: "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
186. The two states were Vermont and Massachusetts. As discussed in the state constitution section above, their constitutions contained both the consent language of the other states and a specific reference to compensation. The Northwest Ordinance of 1787 also contained this dual reference, stating in Article II that [n]o man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.
188. Treanor, supra note 30, at 791.
189. Id. at 836.
190. Id.
War, and the many uncompensated military requisitions that took place. William Rawle discounted the due process reference as a mere redundant restatement of criminal protections, and claimed that the compensation clause was a restatement of common law. Harrington suggests that the different language was to distinguish compensable takings from non-compensable taxes and forfeitures, while Davies maintains that the due process language related solely to pretrial criminal procedures and was therefore distinct from the takings language. Robert Natelson asserts that ex post facto laws (which he says include takings) were the founders’ real concern, and the due process and compensation clauses were inserted as a civil ex post facto guarantee.

Unfortunately, Madison left no clear statement indicating why he chose this wording. However, his writings do indicate that compensation for legitimate exercises of eminent domain was something he firmly believed in, and was reason alone for him to insert the references to public use and compensation after the due process clause. Familiar as he was with the improper takings that occurred during the Revolutionary War, his writings indicated that he had a natural distaste for uncompensated takings. The extra wording he inserted in the Fifth Amendment regarding compensation simply emphasized the principle of protecting property rights that went to the very heart of Madison’s fundamental beliefs.

We have already seen examples of this belief in his 1785 list of rights to include in the Kentucky constitution, and in his statement that compensation should be paid for horses originally taken by the


194. Davies, supra note 33 at 144, 150-51. However, Davies does acknowledge that “it is plausible that the shorter phrasing of the ‘law of the land’ clause [i.e., use of the words, due process of law in the Fifth Amendment] may have been intended to allow more emphasis on property protection.” Id. at 150. Davies also raises bill of attainder issues, although he does not directly discuss bills of attainder. He states, “There is no doubt that Madison’s language conveyed the basic principle that Hamilton had asserted in 1787—that an individual could be punished only through a criminal prosecution and conviction, but not by a legislative enactment.” Id. at 155


196. See supra text accompanying notes 142-43.
British but recovered. Another example of Madison's thoughts regarding takings and compensation occurred right after the Constitutional Convention of 1787. The Virginia legislature passed a law that prohibited importing alcohol into the state, making all imported alcohol forfeitable contraband, even if brought into the state before the law went into effect. Madison saw the law as an ex post facto and takings effort, and criticized it as a despotic measure enforced by despotic means. This taking effort by a state legislature right before Madison wrote the bill of rights may have provided much of his motivation to insert the public use and compensation language, even though no state had called for it.

There is the possibility that the public use and compensation language was inserted by Madison on his own initiative in order to preserve the federal eminent domain power from the Tenth Amendment. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Since the power of eminent domain was not specifically listed in the Constitution, and since the Tenth Amendment specifically limited all federal powers to those that are listed, the idea was that the power of eminent domain would be lost if it were not mentioned in some fashion. Indeed, this very issue was raised 100 years later by the makers of the Australian constitution when fashioning their own new federal government. The question they raised is a compelling one. If a new government is formed which consists of smaller units, and under which the federal government is one of limited powers, can it exercise the power of eminent domain if that power is not an express power?

Compelling as this argument may be, it probably did not influence Madison. When Madison made his speech to the House of Representatives in which he proposed his bills of rights, he demonstrated

197. Id.
198. See 5 Hunt, supra note 47, at 75-76.
199. Id.
200. This point was already noted above, in the discussion of how the ban on bills of attainder (or even the due process clause itself) could be interpreted so broadly as to dispense with the eminent domain power entirely. See supra text accompanying note 140. However, due to other statements by Madison it appears unlikely that this was the motivation for his inclusion of the takings compensation wording in the Fifth Amendment. See id.
201. U.S. Const. amend. X.
near embarrassment at the inclusion of what was to become the Tenth Amendment. Regarding it, he said,

I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated, should be reserved to the several states. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration.\footnote{203. Letter from James Madison to Edmund Randolph (May 31, 1789), reprinted in \textit{5 Hunt, supra} note 47, at 387–88.}

Furthermore, when the Tenth Amendment was debated, it was urged that the word “expressly” should be inserted so that it would read, “[t]he powers not expressly delegated to the United States by the Constitution.” Had this occurred, the need to preserve the power of eminent domain in the Fifth Amendment would be obvious, since eminent domain is not expressly mentioned anywhere in the Constitution. However, Madison opposed inserting the term “because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutia.”\footnote{204. \textit{1 Annals of Cong.} 761 (Joseph Gales ed., 1789).}

Madison apparently felt the power of eminent domain was an implied power, probably based on the general grants of power to congress in Article I, Section 8 of the Constitution. The most likely provisions would be the first clause giving Congress the power “to provide for the common defense and general welfare of the United States,”\footnote{205. U.S. Const. art. I, \textsection 8, cl. 1.} and perhaps the seventh clause giving Congress power “to establish post offices and post roads.”\footnote{206. U.S. Const. art. I, \textsection 8, cl. 7.}

In proposing the Bill of Rights, Madison did not fear the Tenth Amendment or that the federal government’s power was too limited or that its powers (including eminent domain) were not sufficiently expressed—rather, his statements show that he feared the opposite. His greatest concern was that in specifying protected rights, those not on the list would be assumed and invaded by the government. Hence, Madison told the House of Representatives,

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were
intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.\textsuperscript{207}

Madison went on to say that the Ninth Amendment was proposed to cure this problem.\textsuperscript{208}

Madison’s concern here rekindles issues addressed by the ban on bills of attainder in the Constitution. Just how far does legislative authority go? Do the powers of the legislature extend to whatever they touch, and to whatever they are not denied by the constitution? If a list of prohibitions is made, does the legislature have the power to invade whatever is not on the list? Or, stated in terms of the issue raised by the State of New York and opposed by Hamilton in 1787, is whatever the legislature does the “law of the land,” even if it invades matters rightfully belonging to the judicial or executive branches?\textsuperscript{209}

For Madison, the answer was clear: the legislature was limited in its powers to those that were enumerated or legitimately implied in the body of the Constitution.\textsuperscript{210} The ban on bills of attainder in the body of the Constitution was one of the key instruments by which this principle was preserved.\textsuperscript{211}

As for the due process language in the Fifth Amendment, suggestions for inclusion of such general wording had been made by several states.\textsuperscript{212} Therefore, it may be less of a mystery as to why it was included. It is possible that it too may have been slyly inserted in order to provide a power not expressly granted in the Constitution.

\textsuperscript{207} Letter from James Madison to Edmund Randolph (May 31, 1789), reprinted in 5 \textsc{Hunt}, supra note 47, at 384.

\textsuperscript{208} The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

\textsuperscript{209} \textit{See infra} text accompanying notes 227-29.

\textsuperscript{210} Madison expounds on his fears regarding the legislature, and how it is curtailed in the new constitution, in \textit{Federalist} Nos. 48-51.

\textsuperscript{211} Interestingly, Madison sought to expand on this concept in his proposed wording for the Tenth Amendment. Prior to giving his version of the wording that sits in the Tenth Amendment today, he proposed that the amendment state as follows:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial; nor the Judicial exercise the powers vested in the Legislative or Executive Departments.

Letter from James Madison to Edmund Randolph (May 31, 1789), reprinted in 5 \textsc{Hunt}, supra note 47, at 379.

\textsuperscript{212} \textit{See Paul}, supra note 187, at 74.
The framers were unwilling to adopt the British common law wholesale to be applicable against the federal government. However, they recognized that many aspects of common law were good and desirable, but had not been included in the Constitution. Hence, the reference to “due process of law” may have been inserted specifically to preserve common law protections, particularly in respect to criminal prosecutions, but arguably also in respect to takings as well.

Given the vague, open-ended nature of due process, this idea is rather compelling. However, while deriving hidden motives behind the inclusion of the due process and takings clause may be intellectually attractive, the simple reality is that Madison’s proposals appear to be merely innocuous statements regarding fundamental rights that he and his contemporaries believed in, but the inclusion of which he did not consider of great importance.

C. What Do the Words Mean?

The last two sentences of the Fifth Amendment deal with property protections: “nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” Usually the two clauses are separated from each other by scholars and analyzed and discussed as distinct and unconnected. There is usually little discussion or justification for separating the two clauses. They are simply separated and dis-

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213. Madison indicated his reluctance to adopt the common law wholesale in a letter to George Washington:

The common law is nothing more than the unwritten law, and is left by all constitutions equally liable to legislative alterations .... Since the Revolution every state has made great inroads & with great propriety in many instances on this monarchical code ..... What could the convention have done? If they had in general terms declared the Common law to be in force, they would have broken in upon the legal Code of every State in the most material points; they would have brought over from [Great Britain] a thousand heterogeneous and antirepublican doctrines, and even the ecclesiastical Heirarchy itself, for that is part of the Common law.


214. U.S. Const. amend. V.

215. As an example, in his 376-page volume on takings, Richard Epstein discusses due process only in one small segment, consisting of less than five pages. See Epstein, supra note 16, at 140-43

The tendency in modern times to treat the due process and takings clauses separately may be because the due process clause at first blush appears to deal more with what comes before it—protections of life and liberty of the criminally accused. However, the plain wording of the Fifth Amendment applies the due process clause to governmental deprivations of property as well. Such a clear statement includes takings within its ambit. Indeed, the wording and sequence of the two clauses suggests the simple concept that before government can take, it must satisfy due process principles of fairness. If due process is satisfied and there is a public use involved, then compensation must be paid.

Additionally, simple logic suggests that compensation should be a subpart of basic fairness, and is therefore merely part of due process in any event. By this argument, government cannot take or deprive a person of property fairly without paying for what it has taken. Similarly, logic suggests that a fair government taking that satisfies due process will only be for a public purpose, not a private one. The due process clause by itself should therefore cover the public use and compensation aspects of the takings clause. At least one scholar has agreed that this is the case.\footnote{218} The history of due process and takings prior to the adoption of the Fifth Amendment tends to confirm the mixing of these concepts.

Many modern scholars view compensation and public use issues as being substantive matters outside the purview of due process, which they maintain is purely a procedural concept. However, the fallacy of a purely procedural view of due process has been confirmed by

\footnote{217. Two such articles in which takings are discussed extensively, but due process is rarely mentioned, are Sales, supra note 134, and Michael H. Schill, Intergovernmental Takings and Just Compensation: A Question of Federalism, 137 U. PA. L. REV. 829 (1989). However, at least one scholar acknowledges that the concepts go together, noting that eminent domain “could be exercised only for bona-fide public purposes . . . only in accordance with the law of the land, and it must be accompanied with just compensation.” Forest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 22 (1985). Additionally, Akhil Amar urges what he calls an “intratextual” approach as the better alternative to the traditional method. Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 748 (1999). This approach considers wording in context, viewing documents as a whole and comparing like terms. See id.}

\footnote{218. Bernard Siegan, Economic Liberties and the Constitution 31 (2d ed. 2005).}
a number of recent scholars.\textsuperscript{219} Alexander Hamilton likewise disagreed with such a view in his comments before the New York Assembly in 1787, in which he contemplated a substantive side of due process.

His statement to this effect occurred a short while before the Constitutional Convention in Philadelphia. At that time, the New York legislature was debating whether to limit eligibility to sit in the state legislature to keep out loyalists. One proposal was to ban those involved in navigation during the war, since it was known that such persons were mostly British loyalists.\textsuperscript{220} Hence, at issue in this case was a distant form of taking—of a person's right to sit in the legislature, rather than of tangible property. Hamilton objected, relying on New York's law of the land provision\textsuperscript{221} and its newly enacted due process provisions that had only just been accepted that term by the legislature.\textsuperscript{222} Some legislators contended that anything the legislature did was "the law of the land" and therefore satisfied the constitutional requirement. Obviously, if this were true, the legislature would have unfettered power and could defy individual rights and take private property at will.

In essence, the New York legislature was proclaiming itself supreme, with unlimited powers, just like the British Parliament. Hamilton countered this notion with the following statement:

\begin{quote}

220. 4 \textit{Syrett \& Cooke}, supra note 164, at 34-36.

221. The New York Constitution of 1777 stated in Article XIII that "no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers." N.Y. CONST. of 1777, art. XIII, in 5 \textit{Thorpe}, supra note 20, at 2632. As noted above, Sir Edward Coke had equated the phrase "law of the land" with "due process of law." See supra note 20. In 1784, Hamilton cited Coke and stated, "If we enquire what is meant by the law of the land, the best commentators will tell us, that it means \textit{due process of law}." \textit{Alexander Hamilton, A Letter From Phocion to the Considerate Citizens of New York}, reprinted in 3 \textit{Syrett \& Cooke}, supra note 164, at 485.

222. In the very same 1787 New York legislative session being discussed here, the legislature had just adopted a bill of rights that said "that no citizen of this state shall be taken or imprisoned or be disseised of his or her freehold or liberties . . . but by lawful judgment of his or her peers or by due process of law," and "that no person of what estate or condition soever shall be taken or imprisoned, or disinheritd or put to death without being brought to answer by due process of law." See Act of Jan. 26, 1787, ch. 1, arts. 2, 5, N.Y. Laws, 10th Sess. Hence, at that time in New York, both the law of the land clause and due process clauses were at work, covering the same basic rights. In the quote by Hamilton given in the text, he refers to both.
\end{quote}
In one article of [the New York state constitution], it is said no man shall be disfranchised or deprived of any right he enjoys under the constitution, but by the law of the land, or the judgment of his peers. Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by due process of law, or the judgment of his peers. The words "due process" have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature. Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?223

A surprising number of scholars have misinterpreted this statement (usually by way of omitting the last two sentences) to mean that due process is purely a procedural concept. Indeed, this quote is one of the favorites used against substantive due process.224 However, seen in its true light, and with the inclusion of the last two sentences, it suggests Hamilton was saying the opposite. He simply observed that the legislature lacks the power to sit as a court and declare anything it does as satisfying due process. If it attempts to do so, it violates the very due process and fairness principles it claims it is fulfilling. Hence, whatever law it passes on this basis is substantively void.

While the discussion is in the terminology of due process, what is being generally addressed is really nothing more or less than bills of attainder; for when bills of attainder are passed, the legislature acts in a judicial capacity in defiance of due process. In the statement above, Hamilton appears to have combined due process, takings, and general concepts of attainders in one.225 It should be noted that this exchange

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223. 4 SYRETT & COOKE, supra note 164, at 35-36
225. However, see supra text accompanying note 174. New York at this time had a clause in its constitution that allowed bills of attainder for crimes committed during the revolutionary war, but prohibited such bills in all other cases. Because the legislation at issue was directed at wartime ship officers and owners, Hamilton could not cite this partial ban on bills of attainder to support his argument. Indeed, his opponents
occurred in early 1787, only a few months before the Constitutional Convention and the resulting ban on bills of attainder.\textsuperscript{226}

Simple logic once again dictates against a purely procedural view of due process as an elevation of form over substance. The legislature could easily create a procedure that, if followed, would allow it to take whatever it pleased, even if doing so were unfair. As stated by Bernard Siegan, “Life, liberty and property would then truly be at the discretion of the lawmaker and the judiciary would simply be a conduit to implementing it. Such an interpretation would enhance authority at the expense of liberty.”\textsuperscript{227} Put simply, if due process were only a procedural concept, the legislature could circumvent it very easily by creating any arbitrary procedure it pleased, without any accountability. In such a case, the legislature would sit as a super-judicial body, and decide all matters, including those of due process. As we have already seen, this would be a violation not only of due process but of the bill of attainder clause, which was primarily an instrument to prevent the legislature from sitting in a judicial capacity.

The substantive nature of due process, without which the legislature would have unlimited powers, was closely tied to bills of attainder and was understood from the early days of the American Republic.\textsuperscript{228}
Indeed, when the judiciary reviews whether the legislature has enacted a bill of attainder, it must engage in substantive due process review, since legislative defiance of due process is an essential element of a bill of attainder. In short, the concepts of procedural and substantive due process are clarified and easier to understand in light of the ban on bills of attainder.

VII. THE ELEVENTH AMENDMENT: A PROTECTION FROM ATTAINDER SUITS

A. The Problem Presented by Chisholm v. Georgia

A short time after passage of the Bill of Rights, a new amendment was proposed. This Eleventh Amendment to the Constitution dealt with the jurisdictional reach of the judiciary, and whether individuals could sue the states. Much of the impetus for this amendment was supplied by the revolutionary era bills of attainder.

The Eleventh Amendment is commonly understood to be a reaction to the 1793 case of Chisholm v. Georgia. Issues surrounding bills of attainder were raised in this case, even though it was not, strictly speaking, a bill of attainder case. The most important protection of property rights from arbitrary takings by the states was the ban on bills of attainder in Article I, Section 10 of the Constitution. As explained above, this limitation was considered to be a more important restraint against arbitrary takings by the states than any “paper barrier” in the state or federal bills of rights. This concept was expressed by Edmund Randolph in Chisholm. As a delegate to the Constitutional Convention of 1787 and a close contemporary of Madison in Virginia, Randolph was very familiar with the ban on bills of attainder. While holding the office of Attorney General of the United States, he also undertook private representation of the Plaintiff in Chisholm. In that case, two citizens of South Carolina—executors of the estate of a deceased Georgia loyalist whose property had been confiscated by the state—sued for recovery of a bond given by Georgia

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229. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
230. See supra text accompanying notes 64, 149.
231. Chisholm, 2 U.S. at 421–22.
232. Id. at 419.
to the decedent before the revolution.\textsuperscript{233} It is significant that this was not a suit for recovery of attainted property, but was solely an action in assumpsit\textsuperscript{234} for recovery of the bond proceeds pursuant to contractual agreement. Georgia resisted payment of the bond and refused to appear in the suit, on the basis that federal courts could have no jurisdiction over Georgia since it was a sovereign entity and was immune from suit. Certainly before the Constitution had gone into effect, that had been the case.\textsuperscript{235} But Article III, Section 2 allowed suits by citizens against other states,\textsuperscript{236} and accordingly, the plaintiffs seized on this language to bring their assumpsit claim against Georgia.\textsuperscript{237}

Randolph presented a number of arguments asserting that a citizen of one state had the right to sue another state. Among these was a reference to "the spirit of the constitution," as found in the prohibitions on state powers found in Article I, Section 10 of the Constitution.\textsuperscript{238} Randolph stated that this section "shews that there may be various actions of States which are to be annulled."\textsuperscript{239} After quoting Article I, Section 10, he stated:

\begin{quote}
These are expressly prohibited by the Constitution; and thus is announced to the world the probability, but certainly the apprehension, that States may injure individuals in their property, their liberty, and their lives; may oppress sister States; and may act in derogation of the general sovereignty. Are States then to enjoy the high privilege of acting thus ominently wrong, without controul; or does a remedy exist?\textsuperscript{240}
\end{quote}

\textsuperscript{233.} See McDonald, supra note 53, at 35.

\textsuperscript{234.} Assumpsit is "a common-law action for breach of such a promise or for breach of a contract." BLACK'S LAW DICTIONARY 133 (8th ed. 2004).

\textsuperscript{235.} See McDonald, supra note 54, at 34–35.

\textsuperscript{236.} The Constitution defines the jurisdiction of the federal courts as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2.

\textsuperscript{237.} Chisholm, 2 U.S. at 419, 430-31.

\textsuperscript{238.} Id. at 421-22.

\textsuperscript{239.} Id. at 421.

\textsuperscript{240.} Id. at 422.
Randolph's most telling statement, which followed, had clear takings overtones: "What is to be done, if in consequence of a bill of attainder, or an ex post facto law, the estate of a citizen shall be confiscated, and deposited in the treasury of a State?"\footnote{241}

In this statement, Randolph indicated that the judiciary could exercise its "judicial veto" against state acts which were contrary to constitutional prohibitions. Specifically, if a state took property by way of a bill of attainder, it would be subject to a suit for violation of the Constitution.\footnote{242}

Randolph also mentioned ex post facto laws. As we have seen above, it was acknowledged at the Constitutional Convention that ex post facto laws pertained solely to criminal matters, not civil matters such as a taking. However, there was apparently still some doubt on the subject, and some still considered the ex post facto clause capable of applying to civil takings.\footnote{243} Notwithstanding this, because there was doubt on the applicability of the ex post facto clause, but no doubt in respect to the bill of attainder clause, the stronger clause was the bill of attainder clause. Randolph probably included the reference to ex post facto laws in \textit{Chisholm} simply because the doubt had not yet been resolved.\footnote{244}

Among other things, the Court in \textit{Chisholm} ruled that Georgia was subject to suit and could not escape behind the curtain of sovereign immunity. Naturally, \textit{Chisholm} created a stir among the states.\footnote{245} There was serious concern that the states would face a multitude of suits by foreign (mainly British) creditors for debts incurred before the Revolutionary War. More significantly, however, there was concern the states would be sued by attainted individuals who had lost their estates. These persons had lost the right to sue their home state because the bill of attainder eliminated their status as citizens,\footnote{246} and

\begin{align*}
\text{241.} & \quad \text{Id.} \\
\text{242.} & \quad \text{Id.} \\
\text{243.} & \quad \text{2 Madison, supra note 40, at 483. Colonel Mason in particular still had this concern. See id.} \\
\text{244.} & \quad \text{The issue was decided in \textit{Calder v. Bull}, in which the Supreme Court ruled that the ex post facto clause applied only to criminal matters. 3 U.S. (3 Dall.) 386, 400 (1798).} \\
\text{245.} & \quad \text{See McDonald, supra note 53, at 35-36. Georgia was so displeased with the decision that its House of Representatives passed a bill stating that any federal marshal or other person attempting to execute the decision would be guilty of a felony and worthy of death. Id. This was obviously another bill of attainder. Fortunately, the bill was not passed by the upper house. Id.} \\
\text{246.} & \quad \text{An example of this is found in \textit{Respublica v. Gordon}, 1 U.S. (1 Dall.) 233 (1788). See supra text accompanying notes 133-35. Because Gordon could not sue}
\end{align*}
therefore eliminated their capacity to sue. They now saw hope to bring
suit to regain their attainted property under the Constitution, as citi-
zens of other states.

B. *The Eleventh Amendment as a Creative Solution*

The difficulty posed by the *Chisholm* decision was resolved by the
Eleventh Amendment. This amendment states that "[t]he Judicial
power of the United States shall not be construed to extend to any suit
in law or equity, commenced or prosecuted against one of the United
States by Citizens of another State, or by Citizens or Subjects of any
Foreign State." 247 This wording was intended to modify only parts of
Article III, Section 2 regarding federal court jurisdiction, the parts
which stated that the federal courts had jurisdiction of suits "between
a state and citizens of another state" and "between a state, or the citi-
zens thereof, and foreign states, citizens or subjects." 248

At first blush, it would appear that the Eleventh Amendment at
least partially terminated the judicial veto that meant so much to
Madison, and which stood as a bulwark to protect citizens from arbi-
trary acts (such as arbitrary takings) by the states. After all, a citizen
of one state could own property in another state, and the Eleventh
Amendment would seem to take away his right to sue under the bill of
attainder clause if an arbitrary taking occurred. This being the case,
Madison and likeminded members of Congress should have spoken
out strongly against it, and voted against it. But they did not.

When the Eleventh Amendment was presented to the House of
Representatives where Madison was sitting, he joined the vast majority
of his colleagues and voted for it without comment. 249 Why did he
take such an unexpected course of action? The reason is fairly simple,
and highlights the ingenious nature of the Eleventh Amendment. To
better understand Madison's view of this issue, it is helpful to look at
two statements he made which seem to contradict each other.

During the 1787 Virginia ratification debates, when the ability of
a foreign citizen to sue Virginia under the federal constitution was dis-
puted and debated, Madison defended the wording by stating,

> [J]urisdiction in controversies between a state and citizens of another
state, is much objected to, and perhaps without reason. It is not in the
power of individuals to call any state into court. The only operation it

directly, he approached the governor's office with the plea for the state attorney gen-
eral to bring the cause before the courts. *Id.* at 233.

247. U.S. CONST. amend. XI.
249. 4 ANNALS OF CONG. 476–77 (1795).
can have, is that if a state should wish to bring a suit against a citizen, it must be brought before the federal court . . . . It appears to me, that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.\(^{250}\)

This statement is in stark contrast to what Madison told Jefferson at approximately the same time. When speaking of his disappointment that his legislative veto had not been adopted, Madison said:

It may be said that the judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal against a State to the supreme Judiciary.\(^{251}\)

Hence, Madison seems to have been saying that a citizen cannot sue a state, while at the same time saying that the judicial veto is enforced primarily by just such a suit. Madison's two competing statements are reconciled by the concept of consent. The Eleventh Amendment limited only two of nine bases for jurisdiction found in Article III, Section 2, namely suits by a citizen of another state against a state, and suits by a foreign citizen. It did not erase suits "arising under this constitution," under what is now called "subject matter jurisdiction," regarding matters expressly found under the Constitution. Madison believed a private citizen could still bring suit for an offense prohibited by the Constitution, which naturally would not include a claim predating that Constitution. Accordingly, there was no inconsistency in Madison's statements.

Hamilton had a similar understanding regarding this principle of consent. In respect to sovereign immunity, he said: "It is inherent in the nature of sovereignty not to be amendable to the suit of an individual \emph{without its consent} . . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States."\(^{252}\) By ratifying the Constitution, the states had each surrendered their immunity and consented to subject matter jurisdiction by any party in respect to the points listed in Article I, Section 10 (including the ban on bills of attainder). However, individuals with claims not covered by the Constitution or federal statute could not bring suit

\(^{250}\) Hunt, \textit{supra} note 47, at 218-19 (emphasis added).

\(^{251}\) Id. at 26-27 (emphasis added).

\(^{252}\) \textit{The Federalist} No. 81, at 511 (Alexander Hamilton) (Benjamin Fletcher Wright, ed. 1961) (emphasis added).
against the state. Indeed, such was the case in *Chisholm v. Georgia*, which was a suit in assumpsit. Randolph's comments in respect to the limits in Article I, Section 10 in that case, were illustrative dicta, and not directly on point.

Thus, the Eleventh Amendment was ingenious, since it evaded suits by British creditors and attained individuals based on claims predating the 1787 Constitution, but still allowed prospective suits under the ban on bills of attainder. As such, the Eleventh Amendment was never intended or understood as a ban on all suits by citizens of a state against another state, and never was considered a threat to the judicial veto and ban on bills of attainder which protected private citizens from arbitrary takings. It was not until nearly a century later that the U.S. Supreme Court in *Hans v. Louisiana* took the extreme position that the Eleventh Amendment did prohibit suits by a citizen of another state against a state under Article I, Section 10. Indeed, the *Hans* Court went even further and declared that all suits by private citizens against a state—even their own state—were barred by the Eleventh Amendment. Surely such a ruling would have shocked the founders, being directly contrary to their stated intentions. However, by this time, the ban on bills of attainder had faded as a takings protection and had been replaced by the Fourteenth Amendment and its incorporation of the Fifth Amendment (including its due process and takings clauses) as a direct limit on the power of states to take arbitrarily.

253. For a lengthy discussion of the modern misunderstanding of the Eleventh Amendment, see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983). While Gibbons correctly asserts that the Eleventh Amendment should not be understood as a complete ban on all suits by individuals against states, he errs in asserting that the concept of state sovereign immunity in the late 1700s was false and was derived solely from three isolated statements of Madison, Marshall and Hamilton, and that there is no “significant countervailing documentation.” *Id.* at 1899. The 1781 Pennsylvania case of *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. 1781), is one such countervailing source. This case says that the states were immune from suit. *Id.* at 80. As new sovereign entities dating from the 1776 Declaration of Independence, the states naturally assumed all the rights of sovereignty. However, as noted in the text, by consenting to the federal constitution, the states waived their sovereign immunity in suits under Article I, Section 10 of the Constitution.


255. The plaintiff in *Hans* sued under the ban on states impairing the obligation of contracts, not the ban on bills of attainder. *Id.* at 3. Incredibly, the Supreme Court in *Hans* fully quoted the above cited statements by Hamilton and Madison, yet ignored the references to consent and subject matter jurisdiction in its ruling. *Id.* at 13-14.

256. See generally *McDonald, supra* note 53, at 228.
VIII. CONCLUSION

This Article has traced the origin and creation of takings protections in the founding days of the American Republic. Eminent domain was a frequent practice in colonial governments, which were bound by common law to grant compensation when they took property. When the individual state constitutions were formed, they generally provided due process protections in takings cases, and also frequently made reference to public use and the need for consent by the individual or legislature before property could be taken.

The ban on bills of attainder in the body of the Constitution was intended to protect individuals from arbitrary takings, such as the bills of attainder frequently passed by state legislatures during and after the Revolutionary War. The Fifth Amendment merely restated the same common law concepts of due process, public use, and compensation in respect to takings that had existed for decades prior to its adoption. Madison did not see the Fifth Amendment as a particularly significant protection against arbitrary takings when it was adopted. For Madison, the best protection from arbitrary state violations of rights, including property rights, would have been a legislative veto. However, the delegates to the Constitutional Convention had not accepted this proposition, replacing it instead with a judicial veto based on certain specified limits on state powers, including the ban on bills of attainder.

Of course, history is not static, and things change. The understanding of Madison and the other founders regarding the ban on bills of attainder as a protection against arbitrary takings faded rather rapidly. Indeed, this concept is now all but forgotten. With the Civil War and the advent of the Fourteenth Amendment came the doctrine of incorporation of the Bill of Rights (including the Fifth Amendment) against the states. Because of this radical new doctrine, the judicial veto in respect to takings was reborn, since the Fifth Amendment—including its due process and takings clauses—was now directly applicable to the states. The Fifth Amendment that Madison drafted in haste, thinking it less significant than the bill of attainder protection in the body of the Constitution, ultimately assumed preeminence as a takings protection. Hence, the intention and hope of the founders in protecting against arbitrary takings was preserved, although not in the way they had originally planned.