

# Take-ings

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The word *property* had many meanings in 1789, as it does today, and a critical aspect of the ongoing debate about the meaning of the Fifth Amendment's Takings Clause has centered on how the word should be read in the context of the Clause. *Property* has been read by Professor Thomas Merrill to refer to "ownership" interests,<sup>1</sup> by Richard Epstein in terms of a broad Blackstonian conception of the individual control of the possession, use, and disposition of resources,<sup>2</sup> by Benjamin Barros as reflective of constructions through individual expectations and state law,<sup>3</sup> and by me as physical control of material possessions.<sup>4</sup>

As a textual matter, however, the Takings Clause is not simply concerned with governmental actions that affect property. The Clause provides that "private property [shall not] be taken for public use without just compensation."<sup>5</sup> It is thus concerned with "property taken for public use" and the word *taken* is the key, at least for a textualist, to

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1. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (2000).

2. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 22–23 (1985).

3. D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1854 (1995).

4. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995).

5. U.S. CONST. amend. V.

understanding both which types of governmental actions fall within the ambit of the Clause and what types of property the Clause protects. The centrality of the concept of takings to the Clause's meaning is reflected by the name by which the Clause is known. It is the "Takings Clause," not the "Property Clause."<sup>6</sup> Although it has, ironically, not figured prominently in "takings" scholarship, the word *taken* is of fundamental importance to the Clause's meaning. In this essay, I will explore that importance from a textualist perspective and argue that a textualist will reject the doctrine of regulatory takings.

In modern usage, *to take* is, most commonly, a physical act. The Webster's Dictionary that I keep on my desk, for example, begins its entry on *take* and its derivatives, *took*, *taken*, *taking*, *takes* as follows: "1. To get into one's possession by force, skill, or artifice, . . . 2. To grasp with the hands . . ." <sup>7</sup> If I tell my daughter Katherine that she cannot play ball in the apartment, she will not be happy with me, but she will not accuse me of having "taken" her ball—or, for that matter, of having "taken" anything at all, such as a usage right she previously possessed in her ball. I have not gotten possession of it; I am not grasping it with my hands.

There are, of course, usages of *take* that do not involve physical seizure. One can take issue with something, or take turns, or take something for granted, or take heart. But none of the various meanings of *take* that do not involve physical possession or something similar intelligibly links with the word *property*. As a result, for a textualist who interprets constitutional text in accordance with modern usage—what I will call a modern usage textualist—the Takings Clause simply does not implicate regulations that affect the value of property.<sup>8</sup> The Clause is only about government acts of seizure—classic acts of eminent domain. There is, obviously, a dramatic gap between the case law and the reading that a textualist of this stripe should embrace: the Supreme Court has embraced the doctrine of regulatory takings for well over one hundred years.<sup>9</sup>

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6. It is sometimes called the *Just Compensation Clause*, but *Takings Clause* is far more common. A search conducted on November 10, 2007 in the LEXIS database of articles published in 2007 indicates that 196 use the phrase *Takings Clause*, while only 24 use the phrase *Just Compensation Clause*.

7. WEBSTER'S II NEW COLLEGE DICTIONARY 1150 (3d ed. 2005).

8. In his book *Constitutional Fate*, Philip Bobbitt argues that Justice Hugo Black's textualism reflected this approach. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 31 (1982).

9. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 413 (1894). While *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922), is often thought to be the first regulatory takings case, the doctrine of regulatory takings emerged in the Supreme Court case law in *Reagan* and in the ensuing years became well established as the Court reviewed government regulations of "businesses 'affected with a public interest.'" For discussion,

Nonetheless, a modern usage textualist should reject *regulatory takings* as an oxymoron because *regulation* is not a particular kind of *taking of property*.

This point is illustrated by looking at the definition of a *taking of property* offered by Professor Richard Epstein, a textualist and the leading champion of a broad conception of regulatory takings—although one who looks to original meaning rather than modern meaning to define text. Epstein has defined a *taking of property* as “[a]ny diminution of rights in the bundle of any holder, no matter what becomes of those rights.”<sup>10</sup> While the conception of property as rights in the bundle of any holder reflects a standard usage, *diminution* does not reflect a meaning of *take*.<sup>11</sup>

There are not many modern usage textualists today, but textualists who seek to recover the original meaning of the text are one of today’s dominant schools of constitutional interpretation, a school of thought championed by both Justices Scalia and Thomas, as well as leading academics.<sup>12</sup> I will call this school of thought “original meaning textualism.” Justice Scalia has simply and precisely captured this school’s approach to constitutional interpretation: “What I look for in the Constitution is

see William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 836–39 (1998).

10. Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635, 640 (1978) (book review).

11. For further development of my critique of Epstein’s reading of the Takings Clause on textualist grounds, see William Michael Treanor, *Translation Without Fidelity: A Response to Richard Epstein’s Fidelity Without Translation*, 1 GREEN BAG 2D 21 (1997). Professor Epstein’s response to my critique turns on his speculation about what the “social sensibilities of 1791” would deem a taking, rather than examination of the original meaning of *taken*. See Richard A. Epstein, *More Fidelity, Less Translation: A Loyalist’s Response to Professor Treanor*, 1 GREEN BAG 2D 185 (1998). In his classic work, *Takings*, Professor Epstein develops his concept of takings at great length. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 34–104 (1985). But the basis of Epstein’s analysis is, again, not textualist. His focus is on a conception of property: “For things reduced to ownership, the rules of property uniquely specify the rights of persons for all times. The rights so specified are internally consistent, so when all external things are claimed under a rule of first possession, each has one and only one owner.” *Id.* at 85. Government action that denies the property owner the ability to use any of these rights is a taking. See, e.g., *id.* at 102 (discussing why regulations are takings). Epstein’s argument is based on a series of logical steps about when compensation should be due, rather than a discussion of what the word *taken* means. See generally *id.* at 34–104 (developing the concept of “takings prima facie”).

12. See William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 487 (2007) (discussing rise of textualism).

precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”<sup>13</sup> Original meaning textualists read the Constitution in accordance with the public meaning of the constitutional text—not the meaning that ratifiers or drafters gave the words, but the meaning of the words to the general public—at the time of the text’s adoption.

In explaining the gap between textualism and other approaches to constitutional interpretation, Justice Scalia writes:

My favorite example of a departure from text . . . pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments of the United States Constitution . . . . By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.<sup>14</sup>

There is, however, another phrase in the Bill of Rights with respect to which the modern Court has departed from the obvious original meaning of the text, although neither Justice Scalia nor Justice Thomas would acknowledge this. That phrase is “the Takings Clause.”

Justice Scalia, along with Justice Thomas, has read the text of the Takings Clause to encompass regulations. In *Lucas v. South Carolina Coastal Council*, Justice Scalia—joined by Justice Thomas and two other members of the Court—observed:

[T]he text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) (“No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation”)).<sup>15</sup>

Thus, Justice Scalia reads *relinquish* as limited to physical deprivations, but *taken* as applying to regulations, as well as physical deprivations. Similarly, in arguing in the dissent in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* that a temporary moratorium on land development ran afoul of the Takings Clause, Justice Thomas—joined by Justice Scalia—stated: “A taking is exactly what occurred in this case.”<sup>16</sup>

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13. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997).

14. *Id.* at 24–25.

15. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

16. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 355 (2002) (Thomas, J., dissenting, joined by Scalia, J.).

Although leading original meaning textualists embrace the doctrine of *regulatory takings* with enthusiasm, regulatory takings is at least as much an oxymoron as *substantive due process*.

Examination of the meaning of the word *take* at the time of the adoption of the Fifth Amendment and examination of the earlier history of the word shows that the word most commonly referred to physical acts. The Oxford English Dictionary (OED) reports:

The earliest known use of this verb in the Germanic languages was app. to express the physical action 'to put the hand on', 'to touch'—the only known sense of Gothic *tēkan*. By a natural advance, such as is seen in English in the use of 'lay hands upon,' the sense passed to 'lay hold upon, lay hold of, grip, grasp, seize'—the essential meaning of Old Norse *taka*, of MDu. *taken*, and of the material senses of *take* in English.<sup>17</sup>

The OED lists the first definition of the word *take* as *to touch*, and traces this usage back to 1150.<sup>18</sup> The second definition is:

To lay hold upon, get into one's hands by force or artifice; to seize, capture, esp. in war; to make prisoner; hence, to get into one's power, to win by conquest (a fort, town, country). Also, to apprehend (a person charged with an offence), to arrest; to seize (property) by legal process, as by distraint, etc.<sup>19</sup>

This definition, which encompasses physically seizing property by force of law, is traced back to 1100.<sup>20</sup>

A second legal usage is reflected in the fifteenth definition. This definition involves a physical act of possession—and the exercise of eminent domain reflects this meaning of *take*: "[t]o transfer by one's own direct act (a thing) into one's possession or keeping; to appropriate; to enter into possession or use of. . . . To take possession; *spec.* in *Law*, to enter into actual possession."<sup>21</sup> This legal usage is traced back to 1642; for example: "There is one named in the Lease who may take immediately."<sup>22</sup>

In dictionaries of the same era as the Fifth Amendment, the dominant meaning of *take* involves a physical act of control, most commonly a seizure or a reception of control of an object; none of the definitions provided in these dictionaries is consistent with the idea that regulation

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17. 17 OXFORD ENGLISH DICTIONARY 557 (2d ed. 1989).

18. *Id.*

19. *Id.* at 558.

20. *Id.*

21. *Id.* at 559.

22. *Id.* (quoting JOHN PERKINS, PROFITABLE BOOK 11 § 52 (15th ed. 1827) (1642)).

of property is a taking. For example, in the fifth edition of Sheridan's dictionary, which was published in 1789, the same year Congress proposed the Fifth Amendment, *to take* is defined in the following way as an active verb:

To receive what is offered; to seize what is not given; to receive; to receive with good or ill-will; to lay hold on, to catch by surprize [sic] or artifice; to make prisoner; to captivate with pleasure, to delight; to understand in any particular sense or manner; to use; to employ; to admit any thing had from without; to turn to, to practice; to close in with, to comply with; to catch in the hand, to seize; to receive into the mind; to swallow as a medicine; to choose one of more; to copy; to convey, to carry; to fasten on, to seize, not to refuse, to accept; to endure, to bear; to assume, to allow, to admit; to hire, to rent; to use as an oath or expression; to seize as a disease.<sup>23</sup>

The dictionary defines *to take* in the following way as a neutral verb: "to direct the course; to have a tendency to; to gain reception; to have the intended or natural effect; to catch, to fix."<sup>24</sup> In the sixth edition, *to take* is defined as "to catch in the hand; to seize; to receive into the mind; . . . to admit" and "to gain reception; . . . to catch; to fix."<sup>25</sup> The American edition of the Perry's Royal Standard English Dictionary published in 1788 states that *take* meant "to hire; receive; fix; seize; to suppose; please; to gain reception."<sup>26</sup> The Columbian Dictionary in 1800 defines *take* as "to receive, to seize, . . . to please, to gain reception."<sup>27</sup> Kersey's dictionary, in both its 1713 and 1772 editions, defined *to take* as "to hold with one's hand, to lay hold of."<sup>28</sup>

Like today, in the late eighteenth century there were usages of *take* that did not involve physical seizure. For example, the Oxford English Dictionary reports a 1780 usage of the phrase *to take a joke*, which the dictionary defines as "to be able to bear teasing or amusement at one's expense; usu. in negative."<sup>29</sup> The OED also finds from this era usages of

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23. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1789).

24. *Id.*

25. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796).

26. WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 499 (1st Am. ed. 1788).

27. CALEB ALEXANDER, THE COLUMBIAN DICTIONARY OF THE ENGLISH LANGUAGE 472 (1800).

28. JOHN KERSEY, A NEW ENGLISH DICTIONARY (2d ed. 1713); JOHN KERSEY, A NEW ENGLISH DICTIONARY (8th ed. 1772). John Elliot and Samuel Johnson's dictionary did not have a definition of the word *take*. See JOHN ELLIOTT & SAMUEL JOHNSON, JR., A SELECTED, PRONOUNCING AND ACCENTED DICTIONARY 204 (1800).

29. 17 OXFORD ENGLISH DICTIONARY 563 (2d ed. 1989). The quoted example from 1780 was "Poor Sam cant [sic] take a Joke." *Id.* (quoting J. WOODFORDE, DIARY (28 Mar. 1780)).

*take* meaning “[t]o receive and hold with the intellect.”<sup>30</sup> But in reviewing late eighteenth century dictionaries and the Oxford English Dictionary, I have not found a usage of *take* consistent with *diminution of a right*. Therefore, if one is committed to interpreting constitutional text in accordance with usage at the time of adoption, one should reject the doctrine of regulatory takings. As a textual matter, for the founding generation, a government regulation that diminished the value of property did not *take* that property. Original meaning textualists should thus view the doctrine of regulatory takings as they view the doctrine of substantive due process, which is to say that they should regard it as an obvious example of courts gone astray.

Originalists—if they look at background evidence beyond the meaning of the adopted text itself—wind up in the same place.<sup>31</sup> Although the debate about the competing methodologies of textualism and originalism is a heated one,<sup>32</sup> the fact that the originalist evidence supports my reading of the text is helpful: it reinforces the notion that my reading of the text tracks the way in which the text would have been understood at the time of the Fifth Amendment’s adoption. Indeed, I use originalist evidence here as Justice Scalia would use it: to “display how the text of the Constitution was originally understood.”<sup>33</sup>

The two pre-revolutionary precursors of the Takings Clause both use variants on the word *take* in contexts where the word clearly refers to physical seizure of things. The Magna Carta bars crown officials from “tak[ing] corn or other chattels of any man without immediate payment . . . .”<sup>34</sup> The 1641 Massachusetts Body of Liberties provides that “[n]o man[’]s Cattel or goods of what kinde soever [sic] shall be pressed or taken for any publique use or service” without payment.<sup>35</sup> Consistent with the

30. *Id.* The example from 1737 was “The Reader will easily take the Meaning.” *Id.* (quoting BRACKEN, II FARRIERY IMPR. 278 (1737)).

31. My argument here is a brief summary of my argument in *The Original Understanding of the Takings Clause and the Political Process*. Treanor, *supra* note 4, at 782–84. My argument has not convinced everyone. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1573–74 (2003).

32. See Treanor, *supra* note 12.

33. SCALIA, *supra* note 13, at 38 (discussing *The Federalist’s* relevance to textual interpretation).

34. Magna Carta, ch. 28 (1215), reprinted in A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (rev. ed. 1998).

35. Massachusetts Body of Liberties of 1641, § 8, reprinted in WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, at 34–35 (Lawbook Exch., Ltd. 2006) (1641).

dictionaries quoted above, the word *take* refers to a physical act of control.

The three revolutionary era constitutional documents that had takings clauses seem to have been a product of concern about physical takings. The first takings clause in the revolutionary era was in the Vermont Constitution of 1777, and like the Fifth Amendment, employs *taken*: “That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”<sup>36</sup> The clause was the product of Vermont’s breaking away from New York after the New York government had rejected the New Hampshire land claims where most of the property in the area that ultimately became Vermont rested; thus, the Vermont framers’ concern was with the physical loss of their land.<sup>37</sup> The Massachusetts Constitution of 1780 used the language of appropriation— “[W]henever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor”<sup>38</sup>—which also reflects the idea of government physically controlling property, rather than regulating it. To the extent that one can deduce why Massachusetts adopted this clause, the evidence suggests that it reflected a concern with impressment of goods by the military.<sup>39</sup> Similarly, the language of the Northwest Ordinance of 1787— “[S]hould the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same”<sup>40</sup>—suggests a concern with impressment, and was so interpreted by an early court.<sup>41</sup> In sum, historical context indicates that the three revolutionary era constitutional documents that had takings clauses were the product of concerns about acts of physical takings. The use of the word *take* in two of the documents, like the use of the word *appropriated* in the third, accords with the concern that gave rise to the need for constitutional protection. *Take* denotes a physical act.

The Takings Clause has virtually no drafting or ratification history relevant to understanding the Clause’s meaning. It is the only Clause in the Bill of Rights not sought by any state during the constitutional ratification process. Madison did not explain its meaning when he proposed

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36. VT. CONST. ch. I, art. 2 (1777).

37. See Treanor, *supra* note 4, at 827–30.

38. MASS. CONST. OF 1780, pt. 1, art. X, reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 342 (1971).

39. See Treanor, *supra* note 4, at 830–32.

40. Northwest Ordinance of 1787, ch. 8, art. II, 1 Stat. 50, 52 n.(a) (1789).

41. *Renthorp v. Bourg*, 4 Mart. (o.s.) 97, 132 (La. 1816).



the Bill of Rights in the House of Representatives, and there is no discussion of the Clause's meaning in the record of the debates over the Bill of Rights. As Justice Scalia noted in *Lucas*, the language of the Clause was modified in Congress.<sup>42</sup> But there is no record of why the shift from Madison's phrase, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation," to "nor shall private property be taken for public use without just compensation" occurred. As argued above, the word *taken* when linked with *property* reflected physical control, so—contrary to Justice Scalia's claim—the shift did not lead to a text that encompassed government regulations. I suspect that the wording change simply reflected an effort to bring the Clause more in line with its precursors, all of which—with the exception of the Massachusetts Constitution—employed the word *take* or a variant.

The other relevant contemporaneous evidence on the meaning of *taken* in the Takings Clause is Madison's 1792 essay *On Property*, in which he used the Takings Clause as a basis for critiquing Hamilton's economic policies of preferential taxation to support manufacturing and grants of monopolies. Madison wrote:

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.<sup>43</sup>

Although this paragraph does not precisely spell out Madison's understanding of the Takings Clause, what is noteworthy is that the word *taken* is the key to his analysis of what the Takings Clause covers, as opposed to the broader principles for which it stands. He outlines three types of interferences with property: when real property is directly taken, when there are other direct violations of property rights, and when there are indirect violations of property rights. Thus, as Madison read the

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42. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

43. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266, 267–68 (Robert A. Rutland et al. eds., 1983).

Clause as it was adopted, it covered only a limited subset of property rights, a view consistent with the textual analysis above.<sup>44</sup>

The dominant approach in antebellum case law was consistent with the textual reading that I have offered here.<sup>45</sup> As one treatise writer observed in 1857: “It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word . . . .”<sup>46</sup> When in the late nineteenth century, John Lewis, in his influential treatise on eminent domain law, argued that the takings doctrine should afford protection “beyond the mere corporeal object” and protect property conceived of as a “bundle of rights,” he noted that his view was at odds with the early case law.<sup>47</sup> He acknowledged that the early case law had not adopted this capacious view of the takings doctrine, and, significantly, he argued that the cause of the flawed approach in the early case law was that “[t]hese early cases attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*.”<sup>48</sup> As this quote from Lewis perfectly illustrates, modern regulatory takings doctrine emerged when courts began to overlook the significance of the word *taken* in the Takings Clause.

To conclude, at the time of the founding, the relevant dictionary definitions of *taken* concerned physical seizing or gaining physical control; the predecessor clauses to the Federal Takings Clause were also

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44. For further discussion, see Treanor, *supra* note 4, at 838–39. Madison’s other primary discussion of the Takings Clause was in an 1819 letter indicating that the Clause mandated compensation to slave owners if slavery were abolished. *See id.* at 839. This letter indicates that for Madison, slaves were property within the meaning of the Takings Clause, and compensation was owed even when the slaves were freed. This is consistent with what appears to have been the consensus view concerning abolition and compensation in the early republic, *see id.* at 839 n.292, and bears on what the term *public use* meant for the founding generation.

45. *See id.* at 792–94. *See also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 71–74 (1977) (discussing early case law and consequential damages doctrine).

46. THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 519 (New York, John S. Voorhies 1857). One exception to the principle stated by Sedgwick is that a number of judges, beginning in the 1830s, found revocation of franchises to be compensable takings. *See* Treanor, *supra* note 4, at 792 n.56. This does not, however, challenge my textualist argument. Rather, it shows that, even in the nineteenth century, not all judges were textualists. For further discussion of nontextual approaches to constitutional interpretation in the early republic, *see* William Michael Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 455 (2005) (discussing prevalence of nontextual approach to constitutional review in certain circumstances at the time of the founding).

47. *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 147 (1992) (quoting JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 41, 43 (1888)).

48. *Id.*

concerned with physical takings, which further supports the equation of *taken* with physical control; Madison's primary writing on the Clause evidences a narrow reading of the clause, as does the early case law. Justices Scalia and Thomas have championed expansive readings of the Takings Clause, but for a committed textualist, *regulatory takings*, like *substantive due process*, is an oxymoron.

