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Eminent Domain, Public Use, and the Conundrum of Original Intent

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The Fifth Amendment to the United States Constitution reads, in part, that private property shall not "be taken for public use, without just compensation." Several state constitutions, both early and modern, place similar public use limitations on the eminent domain power. As the United States underwent the Industrial Revolution in the 1800s, new mechanisms of property distribution appeared that enabled quasi-public corporations, especially railroad corporations, to take others' property for their own use. Some state courts reacted to the rise of the corporation by reading the public use limitation strictly, requiring actual public access to the property taken in order to justify the taking. Other courts adhered to a broader interpretation, which required only that the public benefit in some fashion from the taking. This debate produced a persistent confusion in legal doctrine that lasted for decades and obscured earlier, pre-nineteenth century Anglo-American definitions of the term "public use." The history of takings in English law, and in the American colonial and early state and national experience, suggests that the "public benefit" theory is more in line with the early meaning of the term than is the "actual use" theory. Late twentieth century application of the "public benefit" theory, now almost universal in the United States, is thus congruent with the early meaning of "public use."

Farewel happy Fields

Where Joy for ever dwells: Hail horrors, hail
Infernal world, and thou profoundest Hell
Receive thy new Possessor: One who brings
A mind not to be chang'd by Place or Time.
The mind is its own place, and in it self
Can make a Heav'n of Hell, a Hell of Heav'n.
What matter where, if I be still the same,
And what I should be, all but less than he
Whom Thunder hath made greater?¹

I. INTRODUCTION

In the dawn of the age of the railroad, Henry David Thoreau withdrew to the environs of Walden Pond. There, contemplating both nature and industry, he wrote:

"When I hear the iron horse make the hills echo with his snort like thunder, shaking the earth with his feet, and breathing fire and smoke from his nostrils, (what kind of winged horse or fiery dragon they will put into the new Mythology I don't know,) it seems as if the earth had got a race now worthy to inhabit it. If all were as it seems, and men made the elements their servants for noble ends! If the cloud that hangs over the engine were... as beneficent to men as that which floats over the farmer's fields, then the elements and Nature herself would cheerfully accompany men on their errands and be their escort."

This new race of Thoreau's fed not only upon wood and capital; it also required land over which its rails could run. State legislatures, sensing the great benefits that would flow from such stretches of track, often allowed the early, quasi-public railroad corporations to exercise the power of eminent domain so that they might achieve their goals of expansion. Eventually, however, Americans began to realize that such corporations could use this power to acquire an individual's land without the latter's actual consent. Thus individuals turned to the courts to protect themselves from what they soon came to see as a dangerous new power, seeking some means of salvation.

Many others, however, saw their future not in transportation, industry, and related businesses but rather in the land itself. One of these was John Bowman, owner of a plantation on the banks of the Ocmulgee River in Bibb County, Georgia. The life of the South, and of its residents, in those days was bound up closely in the soil. One would be mistaken, however, were she to presume that Bowman's was an insular existence.

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4. See infra notes 161-72 and accompanying text.
7. See Eaton, supra note 5, at 98 (observing that "the vast majority of Southern families lived on small farms," although "the plantation type of life set the tone of Southern society").
8. Plantations generally grew cash crops, which, of course, necessitated commerce and transportation of the goods. Eaton, supra note 5, at 99-100. Many planters, moreover, "did not regard it beneath their dignity to engage in money-making enterprises other than
planters needed access to the outside world in order to profit from their agrarian ventures. So it was that in the spring of 1848, Bowman asked the county court to allow him to run a private way from his lands to the Forsyth Road. The court agreed, and Bowman established his way—directly through the property of one Thomas Brewer.

Brewer, understandably, was not happy about this intrusion. When he blocked the road, and Bowman secured an injunction against him, Brewer attacked the constitutionality of the 1834 state act that purported to allow condemnation for the benefit of a private citizen. The act would have been invalid, Brewer maintained, even had the government compensated him, which it had not.

This lack of a compensation requirement proved fatal to the statute; the court agreed with Brewer and found the fundamental law of the land to require remuneration. Having thus disposed of the issue, however, the court then undertook to consider, in dictum, whether the statute would have been invalid even if it had required a public (as opposed to a private) purpose. Instead of discussing whether a taking for private use was permissible, however, Justice Warner pondered the meaning of "public use." He observed that the roads constructed pursuant to the 1834 act allowed citizens not only to see to their private interests, but to discharge their public duties as well. Without private connecting roads, Justice Warner noted, a land-locked party (of whom the state had many) would be

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10. Id. at 38.
11. Id.
   "The Inferior Courts of the several counties in this State are hereby authorized and empowered, on application (whenever in their opinion it shall seem reasonable and just), to grant settlement-roads or private ways to individuals to go from and return to his, her, or their farm or place of residence."
14. Brewer, 9 Ga. at 39. The restrictions of the Fifth Amendment's Takings Clause did not, as of 1850, apply to state governments. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) ("[T]he provision in the fifth amendment . . . declaring that private property shall not be taken for public use without just compensation . . . is not applicable to the legislation of the states"). The Brewer court found, however, that natural, or "fundamental," law accomplished the same end regarding state law as the federal Takings Clause did respecting federal law. See Brewer, 9 Ga. at 39. See also U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").
15. Id. 39-41 (dictum).
16. Id. at 39 (dictum).
17. Id. at 40 (dictum).
unable to perform such duties.\textsuperscript{18} "[H]e cannot," wrote the jurist, "get out to vote at elections, to perform jury or road duty, to perform either militia or patrol duty, to give evidence in the courts of Justice, or to carry the productions of his farm to market\textsuperscript{19}—this last being a pointed reference to the public interest in commercial and economic development.\textsuperscript{20} Thus, Warner concluded, the act of 1834 clearly allowed takings for public use,\textsuperscript{21} even though nothing in the opinion indicates that Bowman himself was a registered voter, a militiaman, or a past or present participant in a court proceeding other than his own—even though, in short, the record revealed no actual public use in this instance. A potential public use, of the sort the court contemplated, would suffice to render such a statute valid, assuming that it provided for compensation.\textsuperscript{22}

In adopting this broad view of "public use" rather than a narrow interpretation that would have required actual public occupation, access, or possession of the road and not just a public benefit,\textsuperscript{23} the Georgia Supreme Court came into conflict with decisions in other states,\textsuperscript{24} a fact that Justice Warner recognized.\textsuperscript{25} The narrow definition that other states had accepted was apparently a reaction to the rise of railroad, and other corporations, which apparently put the security of private lands in jeopardy of private condemnation.\textsuperscript{26} These conflicting state approaches exemplify an emerging doctrinal battle that would continue for the rest of the century.\textsuperscript{27} One relatively recent account describes the debate thus:

The precise meaning of the "public use" requirement has varied over time and according to the type of taking involved. The conventional statement of the historical case development holds

\begin{itemize}
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} See supra note 8.
\item \textsuperscript{21} Brewer, 9 Ga. at 40 (dictum). The court obviously made these statements to assure the legislature that a replacement for the 1834 act would be acceptable as long as it provided compensation. See id. at 41 (dictum).
\item \textsuperscript{22} One could argue that Bowman needed access across Brewer's land in order to travel to court and enjoin Brewer from blocking Bowman's access across Brewer's land. Despite its circularity, Justice Warner may have found even this argument sufficient, given his broad view of the meaning of "public use." See id. at 40-41 (dictum).
\item \textsuperscript{23} See Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 OR. L. REV. 203, 205 (1978); see also infra note 28 and accompanying text (defining these terms).
\item \textsuperscript{24} See, e.g., Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 31 Am. Dec. 313 (N.Y. 1837); see also infra notes 161-172 and accompanying text (discussing Bloodgood).
\item \textsuperscript{25} Brewer, 9 Ga. at 41 (dictum) (citing Taylor v. Porter, 4 Hill 140 (N.Y. 1843)).
\item \textsuperscript{26} See FRIEDMAN, supra note 3, at 182.
\item \textsuperscript{27} Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 YALE L.J. 599, 605-06 (1949) ("By the beginning of the [twentieth] century, there had developed a massive body of [public use] case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification").
\end{itemize}
that there are two basic opposing views of the meaning of "public use": (1) that the term means advantage or benefit to the public, (the so-called broad view); and (2) that it means actual use or right to use of the condemned property by the public (the so-called narrow view). 28

The doctrinal confusion was remarkably persistent. 29 Not until Berman v. Parker, 30 decided over a century after Brewer, did the United States Supreme Court help end the debate by embracing fully the broad "public benefit" doctrine. In doing so, the Berman Court allowed the sale or lease, to private parties, of property condemned as part of an urban renewal scheme. 31

Today, in Berman's wake, the broad view holds the field completely. The Court confirmed as much in Hawaii Housing Authority v. Midkiff, 32 in which it approved an even more far-reaching governmental redistribution of privately owned lands to other private parties. 33 Such an
interpretation has rendered the "public use" requirement almost a mere matter of form. In light of the doctrinal struggles of the 1800s this definitive result, though a blessing to the practitioner, is troubling both to the scholar and often to attorneys on the losing side of condemnation proceedings.

The conflicting interpretations of the early industrial years has partially obscured an older meaning of public use—a meaning that predates not only the Fifth Amendment, but the American Revolution as well. This early meaning undoubtedly influenced the framers' generation as its members drafted, debated, and ratified the Fifth Amendment and state public use provisions. In order to perceive it, one must part the curtain of the 1800s and move into the realm of the preceding

stressed the applicability of a "rational relationship" test in public use cases.

To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. Id. at 241 (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)).

34. See Midkiff, 467 U.S. at 240-43; see also Alois V. Gross, Annotation, When is Taking of Property for "Public Use" So as to be Permissible Under Federal Constitution if Just Compensation is Provided—Supreme Court Cases, 81 L. Ed. 2d 931 (1986) (discussing the Supreme Court's treatment of the public use issue). For an earlier compilation of federal and state cases discussing the public use/public benefit distinction, see Annotation, Public Benefit or Convenience as Distinguished from Use by the Public as Ground for the Exercise of the Power of Eminent Domain, 54 A.L.R. 7 (1928).

A celebrated, and extreme, case in which the judiciary effectively rendered the public use requirement nugatory is Poletown Neighborhood Council v. City of Detroit, 405 N.W.2d 455 (Mich. 1981). In Poletown the Michigan Supreme Court refused to uphold residential landowners' "public use" objections to Detroit's plan to transfer title from the owners to General Motors Corporation, so that the latter could construct a new factory. Id. at 457. Here the court focused not on the identity of the recipient of the property, but instead the economic benefit to the community. Interpreting the Michigan Constitution's Public Use Clause, the court observed that eminent domain would "accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental." Id. at 459. Cf. Midkiff, 467 U.S. at 241-42 (in which the Supreme Court also emphasized the economic benefits that would flow from the property redistribution).

In recent years, however, courts have still occasionally found purely private purposes in some takings and invalidated the condemnations on that ground. See, e.g., Steen v. Columbo, 722 S.W.2d 648, 649 (Mo. Ct. App. 1987). Recent scholarship, however, has raised the argument that the framers intended takings for private use to be not only permissible, but permissible without compensation. See Jed Rubinfield, Usings, 102 YALE L.J. 1077, 1079, 1120 (1993).

35. See Berger, supra note 23, at 205.

36. See infra notes 56-151 and accompanying text.
century, and even earlier. While the inquiry in itself is fascinating, one would do well not to ignore its utilitarian object, conducting the investigation with reference to the Berman/Midkiff doctrines that predominate today. This existing state of public use law dictates the appropriate question: Is this recent interpretation of public use consistent with the original meaning of that concept?

II. ORIGINALIST INTERPRETATION OF "PUBLIC USE"

A. The Problem Presented

One who attempts to discover original intent confronts many problems, not the least of which is the question of whose intent matters. Several potential candidates may exist. Among them may be the author of a statute, regulation, or constitutional phrase; the members of the majority who voted for it; the representative body or constitutional convention as a whole, including the measure's opponents; or even the entire community, which, after all, may be the audience the author intends to address.

A related problem is that of the dominant political philosophy (assuming that a dominant one existed at all) of the relevant individuals, groups, and/or eras. The generation of Americans that produced the early state constitutions, the Federal Constitution, and the Bill of Rights, had among them a variety of Weltanschauungen. One relatively recent debate, for instance, has stressed the presence of discrete "liberal" and "republican" ideologies. Another view highlights the existence of, and interplay between, separate Protestant and Enlightenment strains of thought in late eighteenth century America, and how that interaction influenced the development of American thought of the time. Of course, the researcher may also face practical problems of limited or incomplete sources, which, if severe enough, may only distort or confuse matters rather than clarify them.

Such problems surround original intent as it relates to the public use question. Nevertheless, historical analysis of original intent may serve an important function. While much maligned, and often

37. See infra notes 56-151 and accompanying text.
41. See, e.g., Continental Can v. Chicago Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) (decrying an intentionalist approach within the context of federal statutory interpretation); FISH, supra note 38, at 1-21 (questioning the existence of an
indeterminate, the fact remains that courts and judges can, and do, utilize intent-based arguments. The well-versed property lawyer, therefore, would do well to have in his arsenal the weapon of original intent.

The first problem the researcher faces in thus arming herself is the practical one of source availability. While many source collections exist on the subject of the drafting and ratifying of the Constitution, those dealing with the Bill of Rights are less satisfactory. In the absence of clear statements about the Takings Clause itself, then, one must find other sources to consult.

Because the framers themselves often drew upon legal and political history—both their own and Europe's (and especially that of England)—that history is an excellent starting point. One may then proceed to examine other statements and acts of the framers' own generation in order to gain insight into what they understood the public use limitation to mean. The present study thus focuses upon the English originalist meaning). For a discussion of scholars' limited use of original intent within the context of the Takings Clause, see Treanor, supra note 39, at 782, 811-12. See also Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 29 (1985) ("Historical arguments have played virtually no role in the actual interpretation of the [Takings Clause].

42. See Epstein at 29.

43. See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 458-65 (1892) (applying an intent-based approach in a statutory context). "It is a familiar rule," wrote Justice Brewer for the Court, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Id. at 459.


45. The volumes of the Documentary History that will cover the drafting and ratification of the Bill of Rights have yet to be published. Such problems of source availability have led to the observation that "[s]cholars have generally focused more on philosophy and economics than they have on history, partly because of the paucity of historical evidence of the framers' intent." Treanor, supra note 39, at 811 (footnote omitted).


47. See McDonald, supra note 46, at 187-88 (discussing British and other intellectual influences upon certain framers); Wood, supra note 46, at 10-14 (describing Americans' appreciation for the English Constitution and political tradition during the Revolution); id. at 575-76 (illustrating this continued influence upon individuals such as John Adams during the constitutional period).

48. Some would find this approach preferable to a study that focused upon the framers themselves. See Fish, supra note 38, at 14; David B. Anders, Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated
tradition, together with some civil law commentary; the American colonial experience; American Revolutionary and early national history (approximately 1763-1789); and the Federalist era (1789-1801). The treatment would not be complete without a brief examination of nineteenth century developments, which may indicate how courts and legislatures adopted new, nonoriginal understandings of the phrase.

In this context, the researcher need not confine himself to "Fifth Amendment law." Indeed, he would miss a great deal of relevant information were he to do so, for the federal government did not actually exercise its own eminent domain powers until late in the 1800s. Not until _Kohl v. United States_, decided nearly a century after the drafting of the Fifth Amendment, did a Supreme Court case on a federal taking arise. The Court, moreover, did not recognize the incorporation of the Takings Clause

_Fundamental Rights, 61 FORDHAM L. REV. 895, 904-05 (1993)._  
49. Such a self-imposed imprisonment could well lead to what one scholar has recently denounced as "law office history," in which researchers "notoriously pick and choose facts and incidents ripped out of context that serve their purposes." Martin S. Flaherty, _History "Lite" in Modern American Constitutionalism_, 95 COLUM. L. REV. 523, 554 (1995). Flaherty objects to researchers' failure to immerse themselves completely in both the mindset of an historical era and in all of the materials that it has to offer, relying instead only upon salient, well-known documents. _Id._ at 553-54.

While such a critique is often well warranted, one can nevertheless perceive in Flaherty's approach to constitutional history a tendency towards Historical Idealism that, taken to its logical conclusion, could preclude anyone from truly comprehending an historical epoch or event to which he himself was not party. See MARK T. GILDERHUS, HISTORY AND HISTORIANS 73 (2d ed. 1992) (discussing Benedetto Croce's argument that, in Gilderhus's words, "[i]f the past to take on vitality and meaning, historians [must] make it come alive with relevance by rethinking it in their own minds.") See also R.G. COLLINGWOOD, THE IDEA OF HISTORY (1946) (constituting the most famous statement of Historical Idealism). Such a view would go far to deny the ability of historical episodes to enlighten us, in any scientific sense, about present legal (or other) developments. If each event is unique, or consists of myriad variables too diverse and complex to observe or quantify, or results from factors of which no empirical evidence even survives, then any attempt to use history to "explain" the present in positivist terms is probably doomed.

This present article, however, does not purport to discuss at length this perennial philosophical debate. The author here merely expresses his hope that, in examining what he believes to be some representative bits of evidence of the history of public use, he has not done serious damage to the fabric of that history, and has thus avoided becoming a target of Flaherty's criticism. For other perspectives on this debate within the context of constitutional history, including the history of property rights, see Richard A. Epstein, _History Lean: The Reconciliation of Private Property and Representative Government_, 95 COLUM. L. REV. 591 (1995); Cass R. Sunstein, _The Idea of a Useable Past_, 95 COLUM. L. REV. 601 (1995).

50. See Comment, _supra_ note 27, at 599.

51. 91 U.S. 367 (1876). _Kohl_ involved the federal government's condemnation of a parcel of land in Cincinnati in order to build a post office. _Id._ at 368. The Court's unequivocal opinion quickly killed any doubts about the viability of a federal power of eminent domain. See _id._ at 371-75.
into the Due Process Clause of the Fourteenth Amendment until 1896,²
and so the Fifth Amendment provision played little direct role in eminent
domain law in the early years of the republic.

On the other hand, the colonies, and later the states, had similar
provisions in their early laws and constitutions.³ These provisions not
only provided a source for James Madison as he drafted what became the
Fifth Amendment,⁴ but help to reveal his generation's understanding of
the phrase. A great deal of eminent domain law, moreover, eventually
proceeded not from constitutions and statutes, but from common law
principles as well.⁵

The paucity of federal materials on the early history of public use,
therefore, presents no obstacle to an originalist analysis. At any rate, an
emphasis on mere federal law would discount a history of the doctrine that
reaches back beyond the federal Constitution, before the founding of British
North America and even of the Empire itself, to the early days of Norman
England, and before.

B. The English and Continental Background

At least one scholar contends that eminent domain got its start in
Biblical times,⁶ and these origins were not lost on early United States
judges.⁷ The traditional, and preferable, starting point for American
purposes, however, is English law, particularly that scholar whose work so
shaped American legal thought. From his late eighteenth century vantage
point, looking backward over hundreds of years of English legal
development, Sir William Blackstone made some rather strong statements
about takings in general and public purpose in particular. "So great
moreover is the regard of the law for private property," he wrote, "that it

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52. See Comment, supra note 27, at 599-600 n.4.
53. See infra notes 112-113 and accompanying text.
54. 12 THE PAPERS OF JAMES MADISON 58 (Robert A. Rutland & Charles F. Hobson eds.,
1979) [hereinafter MADISON PAPERS].
55. William B. Stoebuck, A General Theory of Eminent Domain, 47 WASH. L. REV. 553,555
(1972).
56. Id. at 553; see 1 Kings 21:2 (King James) ("And [King] Ahab spake unto Na'both,
saying, Give me thy vineyard, that I may have it for a garden of herbs, because it is near
to my house: and I will give thee for it a better vineyard than it; or, if it seem good to thee,
I will give thee the worth of it in money.") While including an offer of just (apparently, at
least) compensation, Ahab's attempted condemnation may arguably have been for a private
purpose, since the vineyard apparently was to have been devoted to Ahab's own use. Id.
The answer to this issue would most likely turn upon whether the kings of ancient Israel
could rightly say, in the words of Napoleon, "L'état c'est moi." See JOHN BARTLETT, FAMILIAR
QUOTATIONS 399 & n.2 (13th ed. 1955). This question the author would not presume to
answer.
57. Stoebuck, supra note 55, at 573.
will not authorize the least violation of it; no, not even for the general good of the whole community. . . . Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.  

These observations are most useful, revealing as they do the twin concerns of any inquiry into the meaning of public use: 1) the question of whether private use is permissible at all (as Jed Rubinfeld would have us believe), and 2) the issue of what constitutes public use. In adopting such unequivocal language, however, Blackstone was overstating his case, since both Crown and Parliament had long been appropriating private property, as Blackstone himself recognized. A chapter in Magna Carta, in fact, restricted the king's right to take timber without consent. The very existence of this provision implies that 1) the Crown had been doing so before 1215 and 2) that the Crown could, and probably did, continue to take timber, albeit with consent, afterward. The Crown's power to take property in order to exercise royal prerogative in areas such as defense, navigation, foreign affairs, and dispensation of justice, moreover, is well documented. Parliament, moreover, clearly exercised an eminent domain power (although the invention of that term came later) at least three centuries before Blackstone wrote.

58. 1 WILLIAM BLACKSTONE, COMMENTARIES *139. Blackstone also penned a sentiment that would have been (and, given the pervasiveness and influence of his volumes, perhaps was) of great interest to the Brewer court and litigants: "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." Id.

Blackstone did, however, qualify these pronouncements to a degree. While admitting that the legislature could "compel the individual" to part with his property, Blackstone characterized this event not so much as an invasion of property rights as a forced exchange, in which the former owner received "a full indemnification and equivalent for the injury thereby sustained . . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price." Id. The owner, in other words, retained the full value of his property, though not the thing itself. Nevertheless, that Blackstone would proclaim the utter sanctity of property even in the face of Parliament's undeniable exercise of eminent domain reveals a certain depth of feeling upon the subject.

59.  See Rubinfeld, supra note 34, at 1079 (theorizing that the phrase "public use" actually specifies "which takings of property require compensation" rather than "which takings of property are unconstitutional with or without compensation").

60.  See Stoebuck, supra note 55, at 562-66.

61.  See supra note 58.


63.  Stoebuck, supra note 55, at 562-64.

64.  See infra note 70 and accompanying text.

65.  Stoebuck, supra note 55, at 565.
The areas in which Crown and Parliament acted have obvious overtones of public benefit, however, even though the public itself might not have had access to a particular fortification or sewer. An apparent requirement of at least a public benefit, moreover, if not an actual public use, appears in the writings of the civil law jurisprudent Hugo Grotius. Grotius, who generally receives credit for originating the term "eminent domain," discussed the concept within the context of the sovereign's powers to conclude a peace. His treatment of the subject addresses both the public/private use question and the issue of the breadth of public use.

The property of subjects is so far under the eminent control of the state, that the state or the sovereign who represents it, can use that property, or destroy it, or alienate it, not only in cases of extreme necessity, which sometimes allow individuals the liberty of infringing upon the property of others, but on all occasions, where the public good is concerned, to which the original framers of society intended that private interests should give way.

Because the original word that Grotius employed in his discussion of public use (utilitas) may mean either use or benefit, the literal meaning of the passage is open to question. Even if we do regard Grotius's as the definitive language, it thus provides no help in choosing the broad or narrow view of public use. At first glance, moreover, this passage also seems to offer no assistance to one seeking to undercut Rubinfeld's argument regarding private use. Grotius apparently suggests, in these

66. Id. at 564-65.
67. See infra notes 68-78 and accompanying text.
68. Stoebuck, supra note 55, at 559.
70. Id. (emphasis in Campbell translation). Cf. 1 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN 1-15 (rev. 3d. ed. 1994) (quoting a different translation, which reads in part "in which even private persons have a right over the property of others, but for ends of public utility").
71. The entire section reads in the original as follows:

VII. I. Disputari et hoc solet quid in res singulorum possint pacis causa statuere qui reges sunt, nec in res subditorum sub eminenti dominio esse civitas, ita ut civitas, aut qui civitas vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quae privatis quoque ius aliquod in aliena concedit, sed ob publicam utilitatem, cui privatæ cedere illi ipsi voluisse censendi sunt qui in civilem coetum coerumpère.

HUGO GROTIUS, DE IURE BELLi AC PACIS, lib. III, at 653 (A.W. Sijthoff 1919) (emphasis added, footnote omitted).
72. OXFORD LATIN DICTIONARY 2118 (1968).
73. See Rubinfeld, supra note 34, at 1079.
words, that even private individuals may appropriate another’s property in cases of necessity.

Within another context, however, this right of private use has a considerable implied restriction. Earlier in his work, Grotius writes further of the "extreme necessity" that may allow such an appropriation. The illustrations he provides of such necessity, although involving nominally private redistribution, reveal an unmistakable community—or "public" interest in this redistribution.

[If in a voyage provisions begin to fail, the stock of every individual ought to be produced for common consumption; for the same reason a neighboring house may be pulled down to stop the progress of a fire: or the cables or nets, in which a ship is entangled, may be cut, if it cannot otherwise be disengaged.]

Even Grotius’s example of the ship, which was, and remains, a principal channel for the flow of commerce and transportation, is not far removed from the Brewer court’s concept of public benefit. From this the conclusion seems to follow that Grotius believed eminent domain to be acceptable where a public benefit resulted, even if the use itself were private. This conclusion seems even more accurate in light of Grotius’s advocacy of price control and government regulation of, or interference with, the economy and private property.

Grotius’s was not, however, the final word on the subject. The framers' generation also had, by the 1770s, well over a century and a half of colonial tradition upon which to draw, and this tradition reveals even more interesting developments in the law of takings.

C. The American Colonial Experience; The Mill Acts

In 1641, the authors of the Massachusetts Body of Liberties penned the following provision:

No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattel or goods shall perish or

74. Grotius, supra note 69, bk. 2, at 92.
75. Id.
77. See supra notes 16-22 and accompanying text.
suffer damage in such service, the owner shall be sufficiently recompensed.\textsuperscript{79}

This provision, appearing 16 years after the original publication of De Iure Belli ac Pacis,\textsuperscript{80} suggests that the authors of the Massachusetts Charter may have drawn upon Grotius's work for the phrase "publique use," choosing "use" rather than "benefit" as the "correct" translation. On the other hand, the modern reader should not reflexively read the word "use" in this passage in its usual, lay meaning; English jurisprudents of the day could also see in that term a history of beneficial ownership.\textsuperscript{81} The Puritan founders of Massachusetts, moreover, also believed in the Christian concept of "just price"\textsuperscript{82} that one scholar has linked to Grotius's regulatory sentiments.\textsuperscript{83} The employment of "use" in the charter, therefore, while reflecting Grotius's influence on this point, does nothing to rule out the possibility—perhaps the likelihood—that the authors accepted a broad definition of the term.

State governments' adoption of the term "public use" in the months and years immediately following the Declaration of Independence likewise says nothing about its meaning. Just as some state constitutions and declarations of rights reflexively quoted provisions of Magna Carta verbatim,\textsuperscript{84} so the Massachusetts Body of Liberties might be a "home-grown" source of express rights, to which constitution-makers might naturally turn without much analysis. Clearly, they attached some significance to the "public use" provision (else they would not have included it within the Revolutionary constitutions); but one may get a more accurate view of how they understood it by examining contemporary acts. Of these, one type of legislation in particular stands out: these are the colonial and state mill acts.\textsuperscript{85}

\textsuperscript{79.} MASSACHUSETTS BODY OF LIBERTIES § 8 (1641), reprinted in 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48 (William F. Swindler ed., 1975) [hereinafter SOURCES].

\textsuperscript{80.} See Stoebuck, supra note 55, at 560 n.24.

\textsuperscript{81.} See, e.g., THOMAS BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 82 (2d ed. 1984).

\textsuperscript{82.} 4 DICTIONARY OF THE HISTORY OF IDEAS PSYCHOLOGICAL THEORIES IN AMERICAN THOUGHT 18 (1973).

\textsuperscript{83.} See Sax, supra note 78, at 54-56; supra note 78 and accompanying text.

\textsuperscript{84.} Compare, e.g., N.C. CONST. of 1776, Decl. of Rights § XII, reprinted in 7 SOURCES, supra note 79, at 402-03 ("no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, . . . or deprived of his life, liberty, or property, but by the law of the land") with MAGNA CARTA of 1225, ch. 29, reprinted in SOURCES OF ENGLISH LEGAL HISTORY, supra note 62, at 54 (using essentially the same language).

In a country where land was readily available, but sources of mechanical power lay largely in the flowing of water, governments understandably showed little reluctance to interfere, sometimes to a large physical extent, with property ownership rights along rivers and streams. This riparian property was quite useful, indeed indispensable, to one who sought to build a water mill; but often, in order to power the mill, one required a mill pond or some other source of fast-moving water. Such a source might require a dam, which in turn meant that the dam had to connect to each bank of a river or stream. The trouble came when one party owned one bank in an area suitable for a dam or pond, and refused to sell the property to the would-be miller, who, perhaps, owned the opposite bank. The mill acts provided a governmental solution to this problem.

While the first mill act appeared in 1667, and states continued to pass them well into the late 1800s, most of the statutes that came into being before the turn of the nineteenth century are fairly similar. Generally, they permitted a party seeking to establish a mill to institute a condemnation proceeding in order to obtain the necessary parcel of land on

86. FRIEDMAN, supra note 3, at 59.
87. "Before Independence," writes one group of scholars, "only one manufacturing establishment in America was using a steam engine . . . . American manufacturers appear to have preferred the waterwheel to the steam engine as the prime [power source] until some time in the middle of the last century." Jeremy Atack et al., The Regional Diffusion and Adoption of the Steam Engine in American Manufacturing, 40 J. ECON. HIST. 281, 281 (1980). Evidence indicates that even as late as 1860, total horsepower production of American waterwheels exceeded that of steam engines. Id. at 282 n.10. One should not neglect, however, the fact that animal sources of power (horses, mules, and oxen) also constituted a prime power source. JONATHAN HUGHES, AMERICAN ECONOMIC HISTORY 144-45 (3d ed. 1989).
88. See infra notes 91-107 and accompanying text.
89. See HUGHES, supra note 87, at 145.
90. For a relatively complete list of mill acts through the late 1800s, see Head v. Amoskeag Mfg. Co., 113 U.S. 9, 17 n.* (1884).
92. See Head, 113 U.S. at 17 n.*.
the opposite bank or elsewhere. Although the proceeding usually obligated the future miller to compensate the former owner for the parcel, it barred any action for damages that the latter might have otherwise have brought, except an action of debt in the event the mill owner failed to pay the required compensation. While all the statutes effectively barred the former owner's use and enjoyment of property, some went further and expressly shifted fee simple title to the prospective miller, who was, of course, a private party.

At first glance, the mill acts would seem to render the public use limitation nugatory, or at least to suggest that Rubinfeld's thesis about private use is correct. This is so because even though many of these acts predate the ratification and incorporation of the Fifth Amendment, many states had public use provisions at the time the mill acts were in force.

As was the case with Grotius, however, first impressions here are misleading. A closer examination of the mill acts reveals that they either expressly or implicitly (usually the former) contemplated that a public benefit would flow from the establishment of a mill, much as the Brewer court saw public benefit emanating from private roads. The North Carolina statute, for example, stated clearly in its title that its purpose was to provide for the construction of public mills, and it set prices at which the millers were to grind others' grain. The 1714 Massachusetts statute established its scheme in order to benefit millers who had gone to considerable expense to construct mills "serviceable for the publick good." The 1667 Virginia statute likewise observed the importance of the community benefit. Mill construction, stated the statute, would "conduce much to the convenience of this country." Many persons would no doubt undertake to build mills, the law observed, "if not obstructed by the perversenesse of some persons not permitting others,


96. See supra note 93.


98. See Rubinfeld, supra note 34, at 1079; see also supra note 34 (describing Rubinfeld's thesis).


100. See supra notes 18-22 and accompanying text.


though not willing themselves to promote soe publique a good."\textsuperscript{104}

While these statutes sometimes provided for the condemnation of small parcels—typically an acre, and an unimproved one at that\textsuperscript{105}—the appropriation could be much larger. The Maryland act, for example, permitted the shifting of title to as much as one hundred acres,\textsuperscript{106} which was no small plot of ground even in a land-rich country. While here, as in other acts, the land in question must have been unimproved,\textsuperscript{107} this requirement may have been as much for the protection of a resource-poor society's economy as for the benefit of the deprived landowner. If the purpose of promoting mills was to improve the economy, then a mill that reduced or destroyed valuable improvements would obviously frustrate this purpose to at least some extent. Had mills been an even greater economic boon that they already were, the acts' drafters may have been less forbearing of landowners' rights.

While the mill acts' drafters had a broad concept of public use, therefore, they nevertheless shied away from the notion that they could shift title or use of land for purely private purposes. This attitude seemed a constant from early colonial days through the end of the 1700s,\textsuperscript{108} and perhaps beyond.\textsuperscript{109} The question remains, however, of whether the framers' generation entertained these same sentiments.

D. The Early State and National Experience, 1776-1789

While the mill acts are best suited to illustrating the early American outlook on the breadth of public use, the experiences of the revolutionary generation, together with commentators on the proposed Constitution, provide more insight on the issue of whether strictly private use was an acceptable object of condemnation. One obvious experience that members of this generation may have remembered with caution was that which they had had with the confiscation of loyalist lands.\textsuperscript{110} While one could easily describe such acts as being at least for public benefit, the fact remains that they were blatant examples of private property appropriation, for whatever ends. Regardless of the use to which such lands were put, the confiscation acts undoubtedly showed the power of state governments over property.

\textsuperscript{104} Id.

\textsuperscript{105} See, e.g., id.

\textsuperscript{106} Md. Mill Act of 1719, supra note 93.

\textsuperscript{107} Id.

\textsuperscript{108} See supra note 93.

\textsuperscript{109} See, e.g., Act of Dec. 15, 1865, 1865 Or. Laws 11; see also Head, 113 U.S. at 17 n.* (listing other nineteenth century mill acts).

\textsuperscript{110} For a digest of the acts that confiscated loyalist property, see Claude H. Van Tyne, The Loyalists of the American Revolution 335-41 (1959).
These acts, notes Gordon Wood, "were not the decrees of a tyrannical and irresponsible magistracy, but laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislature in history." Such a record of takings could do nothing but make the people wary of their new governments' power, even though many of them had not themselves been the objects of its exercise.

The fact that many early state constitutions had qualified eminent domain clauses suggests that Americans at once viewed the power as necessary, perhaps inherent, but nevertheless dangerous and in need of restraint by consent and just compensation provisions. The essential question is whether they viewed these clauses as prohibiting private use altogether, or whether private use, without the compensation required of public use, was permissible. In light of the extreme jealousy with which Americans spoke of their interests in the 1780s, the question almost answers itself in the asking.

Of particular interest to Rubinfeld is the 1780 Massachusetts provision, which states 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. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Rubinfeld makes much of the dichotomy here between taking, which seems permissible for any use without compensation, and application to public use, which does require compensation. This dichotomy, he argues, supports the notion that takings for private use were acceptable in the eyes of the framers, or at least of their generation. While the plain meaning of the two sentences in conjunction seems to be as Rubinfeld suggests, an originalist interpretation yields a potentially different answer.

As William B. Stoebuck has pointed out, however, the Massachusetts provision's second sentence was added during floor

111. WOOD, supra note 46, at 404.
112. See, e.g., DEL. CONST. of 1792, art. I, § 8, reprinted in 2 SOURCES, supra note 79, at 205, 206 ("nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made."); MASS. CONST. of 1780, pt. 1, art. 10, reprinted in 5 SOURCES, supra note 79, at 94.
113. MASS. CONST. of 1780, pt. 1, art. 10, reprinted in 5 SOURCES, supra note 79, at 94.
114. See Rubinfeld, supra note 34, at 1120.
115. Id.
116. Rubinfeld implicitly uses a plain meaning methodology in his textual analysis. Id.
debates. While the vote to add the second sentence could certainly indicate that the Massachusetts drafters intended just the result that Rubinfeld perceives, general evidence of the mindset of the period indicates that this whole provision was simply the result of poor drafting. The Massachusetts mill acts, for example (one of which originated while the above constitutional provision was in force), showed just the sort of aversion to private use that Rubinfeld's interpretation of the constitutional provision apparently allows. When one moves beyond Massachusetts' borders, moreover, and approaches the latter years of the decade, one encounters increasingly strident concerns about the safety of private property. This suggests that Rubinfeld's reading of the Massachusetts constitutional language is incorrect—or, even if Rubinfeld is correct, that the Massachusetts approach represented the minority view.

"Those who wish to enjoy the blessings of liberty," wrote Landholder, an influential New England essayist, in 1788, "must be willing to . . . devote some part of their property to the public use that the remainder may be secured and protected." While possibly concerned more with taxation than eminent domain, Landholder clearly saw the problem in black and white: the government must apply private property to public use, or else it could not involve itself with the property. Landholder, of course, was addressing the questions that the proposed Federal Constitution had raised in the minds of the people, rather than interpreting a "public use" provision, but his language here is general, and readily applicable to public use provisions. At the time Landholder wrote, the chief sources of both taxation and condemnation were, and had always been, the states and the colonial governments before them. Deprivation of property was deprivation of property; the fears that Americans might harbor about the prospective federal government were probably ones that they had learned to control with regard to their states by imposing restraints upon state powers. In this light, then, Landholder and his fellow commentators reveal at least a bit about how citizens viewed not just federal, but any, government.

Landholder, who was probably a Federalist, was certainly not alone in harboring such sentiments. Antifederalists such as William

117. Stoebuck, supra note 55, at 592-93.
118. See supra note 93.
121. See infra notes 122-134 and accompanying text.
123. See Stoebuck, supra note 55, at 585-88.
124. 13 DOCUMENTARY HISTORY, supra note 44, at 561-62.
Symmes, Jr., were freer in both their criticisms and their defense of property. The new Constitution, wrote Symmes, would undoubtedly effectuate a general surrender of all property in the country to the federal government.\footnote{125} While probably an overstatement even without the illumination of twenty-twenty hindsight, Symmes displays an almost hysterical jealousy of his interests that many contemporaries shared.

One fear in particular reflects the property-oriented mindset of the framers' generation. While many Americans viewed the security of private property as an end of government,\footnote{126} this security also served as a means to government as well.\footnote{127} Property gave owners an interest in stable government\footnote{128} and often provided them enough subsistence to permit them to acquire management skills and bring these skills to political office.\footnote{129} For individuals who recognized these facts, the redistribution of private property among private quarters would seem both catastrophic in itself and conducive to further disaster. The common thread seemed to be that legislators could act in a public capacity to benefit their own private property interests. Such a scenario is not at all hard to imagine, since this is exactly what happened in Georgia less than a decade after the Constitution's ratification (the celebrated Yazoo land fraud).\footnote{130} The essential fear was apparently that, since property was power, legislators could use their public authority to transfer property—real or otherwise—to themselves, and so become economic (and thus, as a vicious cycle began, political) tyrants.\footnote{131}

One commentator feared that Congress's small size would lead to this sort of corruption, which in turn would unhinge the security of

\begin{footnotes}
\footnote{125} Letter from William Symmes, Jr., to Peter Osgood, Jr., \textit{reprinted in 14 DOCUMENTARY HISTORY, supra note 44, at 107, 111.}
\footnote{126} See Stoebuck, \textit{supra} note 55, at 585-86 (discussing the Lockean tradition in late 1780s American political thought).
\footnote{127} “What one must stress is that the right to property was an unquestioned assumption of the American Revolutionaries. To assert this is merely to assert that they were eighteenth-century men. But one must go on to say that they did not defend property as an end in itself but rather as one of the bases of republican government.” Stanley N. Katz, \textit{Thomas Jefferson and the Right to Property in Revolutionary America}, 19 J.L. & ECON. 467, 469-70 (1976).
\footnote{129} See Sydnor, \textit{American Revolutionaries, supra} note 128, at 15-17; Sydnor, \textit{Gentlemen Freeholders, supra} note 128, at 4-6; infra notes 130-34 and accompanying text.
\footnote{131} See infra notes 132-34 and accompanying text.
\end{footnotes}
property and thus endanger fundamental rights. Responding to claims that the relatively equal property distribution in America would lead to congressional equilibrium, a second writer responded that a small legislature would be able to upset that distribution. Perhaps the most pointed of these attacks, however, came from the pen of Centinel, who called his readers' attention to framers Robert Morris and his dealings with the Bank of North America. Morris had, Centinel asserted, converted the bank's assets "to his own and creatures' emolument, and by the aid thereof, controlled the credit of [Pennsylvania], and dictated the measures of government." Despite such fears, curiously, the Constitution's lack of an eminent domain provision seemed to cause little, if any, concern during the ratification debates. Even when the question of a bill of rights arose, the subject drew little attention. In early 1789, James Madison wrote to a correspondent that the First Congress should prepare "the most satisfactory provisions for all essential rights." Conspicuously absent from the suggested list that Madison included in his letter was anything remotely resembling an eminent domain provision. Nevertheless, within a few months, Madison introduced in the House of Representatives his proposed amendments, including a draft of the Takings Clause. The House, however, shared his apparent lack of concern for the provision, for the records do not indicate any floor debate in which discussion of the clause figures. On the one occasion when the

135. Letter from James Madison to George Eve (Jan. 2, 1789), in 11 MADISON PAPERS, supra note 54, at 404-05.
136. Id. Several weeks earlier, Madison had written Thomas Jefferson that he saw no need for a Bill of Rights, since he considered that the Constitution reserved all power that it had not expressly granted. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 MADISON PAPERS, supra note, at 295-97. If Madison continued to believe this, and saw the proposal of amendments as a purely political gesture, then the appropriate reading of the Fifth Amendment's public use clause, at least in Madison's view, is probably as a threshold requirement (that is, requiring a public use in order to justify a taking). This interpretation flies in the face of Rubinfeld's thesis that takings for private use are permissible without compensation. See Rubinfeld, supra note 34, at 1079.
137. 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789) ("[N]o person shall . . . be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."). Like some of the state clauses, see supra notes 112-13 and accompanying text, this wording supports the notion that the government's act of taking may by definition constitute a public use—the broadest possible interpretation of the phrase.
entire article came up for debate, the representatives focused their attentions upon the criminal provisions that later found their way into the Fifth and Sixth Amendments. The whole tenor of the debate surrounding ratification, Madison's early reticence in admitting the existence of implied powers, and the apparent congressional silence on the provision he finally did propose, suggests one conclusion. Americans, while fearful for their property, thought that the Takings Clause as finally engrossed provided them sufficient protection. They would, and did, apparently, admit the necessity of a broad concept of public use. The idea that they accepted a government power, either state or federal, to take land for purely private purposes (perhaps with the legislators themselves as the benefited private parties) runs counter to the general evidence. That a public purpose was relatively easy to establish, moreover, probably rendered the comparatively few conceivable cases in which it could not be established even more objectionable as subjects of takings. Their generation, then, insisted on some public benefit, although not an actual public possession or use.

III. THE POST-FOUNDING ORIGINS OF THE RESTRICTIVE INTERPRETATION OF "PUBLIC USE"

From whence, then, did the more restrictive view of public use emanate? One of the early signs of a highly restrictive reading of the whole concept of eminent domain appears in Van Horne's Lessee v. Dorrance. In this circuit court case, Supreme Court Justice William Paterson discussed the takings provision of the Pennsylvania Constitution of 1776. A transfer of property from one private party to another, he wrote, was justifiable without compensation only in cases of great necessity; he confessed to encountering difficulty, furthermore, in picturing a scenario in which the necessity would be so great to require this particular action. On the other hand, Paterson did see a compensated shifting of private property from one private individual to another as more acceptable.

While Justice Paterson's opinion seems to condone, at least in theory, takings for a private use, he may in fact have been troubled only by the issues of the actual shifting of the title and compensation. Twice, when

138. 1 ANNALS OF CONG. 753-54. See also Stoebuck, supra note 55, at 595.
139. See supra notes 100-09 and accompanying text.
140. 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).
141. PA. CONST. of 1776, Decl. of Rights, § VIII, reprinted in 8 SOURCES, supra note 79, at 278.
142. Dorrance, 2 U.S. (2 Dall.) at 310-12.
143. Id. at 312.
writing pointedly of legislative shifting of title from private party to private party, Paterson injects the compensation issue as a limitation upon the legislature's power to effect this conveyance. "No one," he declares, "can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value." And again: "The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation." The inference is that such an action would be acceptable, at least in some cases, as long as the original owner did receive compensation.

Paterson's opinion then goes on to deny that public necessity could ever be so great as to justify such an action even with compensation, but then the opinion undercuts itself by entertaining the possibility of the existence of such a power and describing at length the compensation necessary in such an instance. "The legislature declare and enact, that such are the public exigencies, or necessities of the State, as to authorize them to take the land of A. and give it to B.;" however, "the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the Constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land." Next comes a passage in which Paterson discusses at length the means of fixing the proper amount of compensation. Here again, the necessity of compensation, and not the identity of the new owner, seems to be Paterson's foremost worry. As had Blackstone, therefore, Paterson tempers an unequivocal statement by including a means of making an "end run" around it. For both Blackstone and Paterson, the substance of this "end run" was compensation.

Running throughout Paterson's discussion, moreover, is the concept of, as he calls it, "state necessity." This concept has strong overtones of public benefit. In Paterson's eyes, furthermore, state necessity is a sine qua non for a legitimate government transfer of title from one private party to another. Paterson's statements, therefore, do little to dispute that the framers saw broad elements of public benefit within the phrase "public use," or that purely private uses in their view did not suffice

144. Id. at 310.
145. Id.
146. Id. at 311-12.
147. Id. at 312.
148. Id. at 312-15.
149. See supra note 38.
150. Cf. 1 BLACKSTONE, supra note 38, at *140 (stressing the importance of "indemnification").
151. Dorrance, 2 U.S. (2 Dall.) at 311.
152. Id. at 312.
to justify condemnation. One seeking the legal (if not the philosophical) advent of the narrow interpretation, therefore, must look still later in American history than Dorrance.

The famous 1798 Supreme Court case of Calder v. Bull\textsuperscript{153} comes to mind as a possibility. It was in Calder that Justices Samuel Chase and James Iredell engaged in their dialogue, or rather, debate, upon the nature of sovereignty:\textsuperscript{154} it was in Calder that Chase made perhaps his most famous observation. \"An ACT of the Legislature (for I cannot call it a law),\" he declared, \"contrary to the great first principles of the social compact, cannot be considered a rightful exercise of the legislative authority.\"\textsuperscript{155} By way of illustration, Chase cited several examples of wrongful exercises of legislative power, including \"a law that takes property from A. and gives it to B.\"\textsuperscript{156}

Chase made this declaration even in the face of statutes that had done just that.\textsuperscript{157} One may perhaps argue that Chase was unaware of such acts or, more charitably, that he disagreed with them or viewed the new Constitution and the Fifth Amendment as establishing a new rule for new occasions. The latter possibility, however, seems unlikely. Chase's recourse in his Calder opinion is not to the Constitution but rather to \"reason,\" \"justice,\" and \"great first principles.\"\textsuperscript{158} One would hope that neither the meaning of these things, nor Chase's understanding of them, would change both quickly and drastically simply because of an enactment of positive law—even if that enactment was a constitution rather than a statute.

At any rate, whether Chase was ignorant of the mill acts' existence, or was opposed to the philosophy behind them and sought to change the minds of the people, unfortunately (for Chase) few were listening.\textsuperscript{159} The

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\item \textsuperscript{153} 3 U.S. (3 Dall.) 386 (1798).
\item \textsuperscript{154} Id. at 386-400.
\item \textsuperscript{155} Id. at 383.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} The reference here, of course, is to the mill acts. See supra notes 91-97 and accompanying text.
\item \textsuperscript{158} Calder, 3 U.S. (3 Dall.) at 383.
\item \textsuperscript{159} Among those who failed, or refused, to hear was Iredell. He observed in Calder, Some of the most necessary and important acts of Legislation, are . . . founded upon the principle that private rights must yield to public exigencies. Highways are run through private grounds. Fortifications, Light-houses, and other public edifices, are necessarily sometimes built upon the soil owned by individuals. In such, and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessities require; and justice is done, by allowing them a reasonable equivalent.
\item Id. at 400. This certainly seems a \"public benefit\" rather than a \"public use\" interpretation. See supra note 23. For this reason, Iredell would possibly—indeed, probably—have found the mill acts acceptable exercises of legislative power in light of the benefits that those acts
\end{itemize}
passage of the mill acts, for example, continued for years after Calder. Not until decades had passed did the tide show signs of turning.

According to some scholars, the doctrine that requirement of an actual use by the public did not arise until the 1800s, specifically 1837, in the New York case of Bloodgood v. Mohawk & Hudson Railroad. Fittingly, the case involved one of those many instances in which a state had invested a railroad corporation with the power to take land for its line, compensating the landowner in exchange. Upon this occasion, a landowner had brought an action against such a corporation for trespass quare clausum fregit. This gave the court the opportunity to examine both the meaning of the term public use and the propriety of a delegation to a railroad corporation of the power of eminent domain. In a long, considered opinion, New York Senator John Tracy gave his answers. These answers reflected a fear of the steam-powered, infernal world of industrial capital.

When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation that of public utility, . . . or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property?"

"[S]uch a construction of legislative power," Senator Tracy continued, "is inconsistent with the secure possession and enjoyment of private property, and repugnant to the language and object of the constitutional provision." The Senator then proceeded to declare that judicial oversight of the legislation in such circumstances was entirely appropriate, so that the court might preserve the sanctity of natural law. Here, then, and not in the pre-industrial world of the framers' generation, did the narrow view at last emerge.

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160. See supra notes 91-92 and accompanying text.
162. 18 Wend. 9 (N.Y. 1837). For discussions of Bloodgood and its impact, see Sackman, supra note 70, at 617 n.14.
163. Bloodgood, 18 Wend. at 10-11.
164. Id. at 10.
165. Id. at 60.
166. Id.
167. Id. at 62.
168. Id. at 62-63.
IV. CONCLUSION

Tracy's opinion, in a way, typifies American constitutional history. One may tell a great deal of that history, especially its nineteenth century chapters, in terms of the contest between government power and vested rights.169 In raising a new barrier to government invasions of vested property interests (as well as to the progress of the railroads), Senator Tracy joined this battle, aligning himself with such luminaries as John Marshall170 and Joseph Story171 on the one hand and Stephen J. Field on the other.172 All were kindred spirits in the vested rights struggle;173 in Senator Tracy's instance, however, the forces of natural law and vested rights favored a status quo that stood in the way of an on-rushing train.

Ultimately the train prevailed,174 despite Tracy's holding that the delegation of the eminent domain power to a private railroad corporation was improper.175 Within little more than a half a century, the industry had changed the face of America and transmuted it into a Great Power.176 If the mill acts of earlier generations had promoted the "publick good"177 in some broad commercial sense, then giant industry—whatever evils accompanied it—did far more in this direction as the United States swiftly became an industrial leviathan.178 In strictly economic terms, then, the greater public return would, consistent with early views of public use, justify greater invasions of private property rights. Just as a pastoral, agrarian and water-driven society gave way to the hell of steam and industry, so, too, did the narrow doctrine of public use which that society raised to defend itself fall before the predominant, unchanging public benefit theory.179 To those favoring the sanctity of private property, this no doubt came as a blow, especially since legislatures have discovered

173. See notes 169-72 and accompanying text.
175. Bloodgood, 18 Wend. at 71-72.
179. See, e.g., Hawaii Housing Authority, 467 U.S. 229; Berman, 348 U.S. 26.
many more occasions for eminent domain in the twentieth century. In general terms, however, the doctrine that has developed in conjunction with this trend is consistent with the original American concept, which appeared in colonial, revolutionary, and early national days, that while "public use" was necessary, "public use" actually meant public benefit—of almost any conceivable kind.

180. See, e.g., Berman, 348 U.S. at 33-35.