CONCLUSION

Eminent Domain

What was this apparently radical theory of eminent domain that Virginia’s emancipationist evoked? Eminent domain is the legal theory of government taking power; the power of the sovereign to take or destroy private property for public purpose without the consent of the owner.¹ In 1832, in Virginia, eminent domain was an assumed and largely undefined power. It was not specified in either the Federal or the Virginia Constitutions. In the Bill of Rights, however, the Fifth Amendment included a provision that protected citizens from uncompensated taking and thus implicitly acknowledged this governmental power.² Yet, as has been previously discussed, participants in the Virginia slavery debate argued over the interpretation of the taking clause. The proslavery position, articulated by William Brodnax and Thomas Roderick Dew, believed that the Fifth Amendment assured property owners of full and fair compensation from any governmental taking. Conversely, William Ballard Preston argued that the just compensation clause was merely a restriction of the Federal Government’s taking powers and did not guarantee the right of compensation to individuals in situations involving state and local governments.

The Dutch jurist Hugo Grotius is normally credited with first enunciating the term and concept of eminent domain. In 1625, Grotius wrote that “the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even ... destroy such property, not only in the case of extreme necessity ... but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.” Grotius allowed, however, that “the state is bound to make good the loss to those who lose their property.”³ Yet, antecedents of eminent domain can be traced back to “higher law” theories, which emphasized inherent rights of man, originating in the classic societies of Greece and Rome. A provision of the Magna Carta, which protected freeholders from being randomly disseized, also reflected another instance where potential conflict between sovereign power and privat property rights was recognized.

Grotius and other natural rights philosophers of the seventeenth century believed that property was an individual right. Lockean philosophy identified property as existing outside of the social contract. Individuals brought their property into the contract with themselves. Under natural rights philosophies, the right of property flowed from the individual to the state. The state,


² The taking clause of the Fifth Amendment reads: “nor shall private property be taken for public use, without just compensation.”

therefore, derived its right of eminent domain from the popular consent represented by the social contract. Accordingly, natural right theories stipulated that those who forfeited their property were logically entitled to just compensation from the state.4

These natural right theories of property strongly influenced the Revolutionary generation in their creation of the American Republic. Yet, the Articles of Confederation and many of the states’ Revolutionary constitutions, neglected to address the taking issue. Gordon Wood has argued that the creation of a republic, resting upon popular sovereignty, seemed to abrogate any need to protect private property from government taking. It was inconceivable that people could tyrannize themselves. Arguably, this interpretation can explain the absence of a taking clause from the 1776 Virginia Constitution. A decade later, however, republicans better understood the threats posed by a “tyranny of the majority” and included a taking restriction on the powers of the government in the Fifth Amendment.5

The protection of private property from governmental taking powers prevailed as a dominant ideological concern in the Early Republic. Judicial decisions in Van Horne’s Lessee v. Dorrance (1795) and Calder v. Bull (1798) reflected the Supreme Court’s desire to uphold the inviolability of property. In Van Horne’s Lessee, Justice William Patterson echoed Locke in his ruling, declaring that “the preservation of property . . . is a primary object of the social compact.”6 Patterson’s ruling expressed the “higher law” interpretation of private property in which that right was considered a vested right, a claim enforceable by law. In Calder, Justice Samuel Chase endorsed Patterson’s opinion on the sanctity of vested rights. Chase affirmed that “the legislative power, even if not expressly restrained by a written constitution, could not . . . violate . . . the right of private property. To assert otherwise . . . would be a political heresy.”7

Within this Lockean construct of property rights, the government could not exercise its eminent domain authority without appropriate compensation to the dispossessed. The right of


5 Gordon S. Wood in Paul and Dickman, ed., Foundations, xii-xiii. Wood argues persuasively that proponents of the republican ideal in 1776 could not envision people tyrannizing themselves. By the 1780's many now recognized the threat of factional majorities. He quotes James Madison that this threat “brought into question the fundamental principle of republican government, that the majority who rule in such governments are the safest guardians both of public and private rights.” Vermont and Massachusetts were exceptional. They enacted just compensation provisions in their Revolutionary Constitutions.

6 Paul, Property Rights, 72.

7 Levy, et al., 416.
property was inviolable. People formed contracts to institute governments, which protected their property. Any action, by the government, against the right of property contradicted the very premises of government. Any government’s claim to eminent domain was thus perceived as a potential vehicle of tyrannical police powers. Only by specified limitations, such as the stipulation for just compensation in the Fifth Amendment, could property owners be protected from the unlimited power of the sovereign. It was this opinion that both William Brodnax and Thomas Roderick Dew evoked when they argued that even in a case of necessity the state must compensate the owner for surrendered property.

In Virginia, this Lockean interpretation of property rights prevailed through the first decades of the nineteenth century. Yet, it was not an absolute. A series of judicial decisions and legislative acts revealed occasions where the Lockean doctrine was abandoned for more pragmatic schemes. In many instances, these compromises reflected the societal changes wrought by nascent industries. A series of “mill acts” enacted in colonial Virginia, as well as several other colonies, justified private business taking because it served a public good. Other instances defined the limitations of an individual’s right to property. In Ware v. Hylton (1796), John Marshall and Patrick Henry argued that, by state law, Virginia’s debtors were not obligated to compensate British creditors. Similarly, in Martin v. Hunter’s Lessee (1815), the Virginia Supreme Court of Appeals refused to allow the reclamation of large land-holdings, which had been seized during the Revolution, by heirs to the Fairfax estate. On the Federal level, McCullough v. Maryland (1819), upheld an interpretation of expanded police powers for the federal government. The landmark decision in favor of the National Bank affirmed the constitutionality of federal internal improvement projects, and implicitly the ability to legislate on slavery, as well. Even more significantly, only a year after the publication of Dew’s essay, Chief Justice Marshall ruled in Barron v. Baltimore that the Fifth Amendment did not guarantee compensation for property taken by state or local authorities. The implications of the Barron decision supported William Ballard Preston’s assertion that the Fifth Amendment did not protect private property (and thus slavery) from the eminent domain powers of state governments.

This subtle and complex intellectual trend away from Lockean construction can be examined in the ideas of James Madison. Madison’s comments on property reflected the influence of the Lockean interpretation, but they intellectually deviated in some significant ways. In Federalist Number 10, Madison wrote that property rights originated from “the diversity in the

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9 Michael Kammen, “The Rights of Property, and the Property in Rights: The Problematique Nature of ‘Property’ in the Political Thought of the Founders and the Early Republic” in Paul and Dickman, Foundations, 9. Following the ruling of the Virginia Court, the case was heard on appeal by the U.S. Supreme Court in a contest of jurisdictional interpretation.

faculties of men. . . . The protection of these faculties is the first object of Government.” At first glance, Madison’s statement may be considered a reiteration of Locke’s declaration that the “chief end . . . [of] government, is the preservation of property.” But a closer look reveals a substantial distinction between Locke and Madison. Whereas Locke spoke of preserving property, Madison asserted that the object of government was to protect the faculties in men that create property. Not surprisingly then, Madison claimed that, beyond any landed or manufacturing interest, “conscience [was] the most sacred of all property.” By Madison’s definition, not only did a man have a right to his property, but “he may be equally said to have a property in his rights.”

Madison expanded the traditional definition of property. In doing so, he also extended conceptions of property rights and made the relationship between property and government more ambiguous. Within the more simplistic definition of property as land and assets, the role of government could best be understood as affording protection for these tangible resources. Since the prevalent political philosophy of the Early Republic identified government, itself, as the most significant threat to private property, legislation and judicial decisions were often designed to prevent government interference. Subscribers to this political philosophy of Commonwealth Republicanism, and there were many, endorsed the concept of “negative liberty”; freedom from restraint or interference. Accordingly, the government’s exercise of eminent domain violated the liberty of property owners and had to be restricted. Conversely, the Madisonian conception of property more closely paralleled the ideas expressed by Faulkner, Preston and McDowell during the legislative debate. These emancipationist delegates argued for the protection of their individual faculties that created property. They believed that slavery threatened these faculties, and they appealed to the government as a protector of property.

During the Virginia slavery debate, defenders of slavery recognized that significantly more than the institution of slavery was threatened from this radical intellectual challenge. The emancipationist declarations of eminent domain represented a doctrine of a new political philosophy. This philosophy may have been engendered by a political theorist of Virginia but, it

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12 Laslett, ed., *Two Treatises*, 395.

13 Kammen, “Rights of Property,” 11. Locke had maintained that an individual’s original property was “in his own Person,” but he did not elaborate on this point. Madison found property in “everything to which a man may attach a value and have a right; and which leaves to every one else the like advantage.” From this definition, Madison argued that an individual’s opinions and religious beliefs were property.

14 *Ibid.* This passage was printed as an essay in *The National Gazette*, March 29, 1792.

was alien to the political custom of the Old Dominion. It redefined property by proposing that property was not a special right of individuals in society. Rather, Madison’s definition portrayed property as a general right of all members of a society. Such a claim contradicted the political philosophy of the American Revolution and thus inspired James Gholson to ask of the emancipationists, “can these be the sons of their fathers?”

Defenders of slavery sought to protect their fundamental principles of government as well as slavery. In order to do so, defenders of slavery abandoned their traditional necessary evil justification and proclaimed slavery a positive good. The publication of Thomas Roderick Dew’s Review of the Debate represented the pronouncement of the symbiosis between slavery and Lockean philosophy, which before had been only tacitly acknowledged in the necessary evil argument. In subsequent decades, as abolitionists increasingly challenged slavery, other defenders of slavery refined Dew’s justification into a comprehensive proslavery ideology. This ideology embraced the Lockean concepts of property and government that characterized the political principles of the American Revolution. Accordingly, defenders of slavery endorsed the Spirit of 1776 while they simultaneously defended slavery.

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16 Richmond Enquirer, January 21, 1832.