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THE LOCKE REPUBLICAN DEBATE AND THE PARADOX OF PROPERTY RIGHTS IN EARLY AMERICAN JURISPRUDENCE*

DAVID SCHULTZ**

INTRODUCTION

Recent debates surrounding the intellectual and ideological origin of the American Founding1 have primarily focused upon whether the basis of early American political thought is either Lockean or Republican in character.2 These debates question which of several differing philosophies most influenced colonial leaders and the subsequent development of American legal history. According to one view, the more influential philosophy was a Liberal tradition originating with John Locke's *Two Treatises of Government*3 that stressed the impor-

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1. "Founding" refers to the political character or political values that were important in the formulation of early American and subsequent political thought.


tance of political liberty, limited government, a natural rights philosophy, and a right to property, among other values. Proponents of the other approach argue that the more influential philosophy was a Republican tradition, inspired most directly by James Harrington’s *The Commonwealth of Oceana*, that emphasized political liberty, equality, popular government, a fear of political corruption, and a linkage between property ownership, distribution, and political power in society. Still another and perhaps more practical view stressed the influence of Sir William Blackstone’s *Commentaries on the Laws of England*.

Until recently, such debates concerning the nature of the philosophies which influenced the development of early American law were only of academic interest to historians and political scientists. Today, this issue has taken on new meaning and become a subject of interest among lawyers and constitutional scholars. Debate in the legal community is now focused on the importance of the republican tradition in America as it relates to issues of constitutional interpretation, adjudication, and the determination of the federal judiciary’s role in American politics. Siding with either the Lockean or Republican position may commit a person to a set of politics that either advocates a powerful regulatory state or is inherently sympathetic to individual liberty or


5. J. HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656), reprinted in J. POCOCK, *THE POLITICAL WORKS OF JAMES HARRINGTON* 155-361 (1977) (hereinafter *POCOCK III*). The Republican tradition was also remotely influenced by Roman and other classical writers such as Aristotle.


9. See *infra* notes 27-84 and accompanying text for an explanation of Republican and Lockean values.
perhaps occasionally indifferent to it.\textsuperscript{10}

These studies have been insightful, but they have also been remiss in at least two ways. First, they have been preoccupied with the exclusivity of either the Lockean or Republican character of the Founding while ignoring the existence of other political traditions,\textsuperscript{11} including the importance and emergence of an American legal tradition indebted to Blackstone,\textsuperscript{12} as rival and significant influences upon political debate in early American history. This is especially odd in the case of scholarly legal commentary.

Second, dominant interpretations of the American Founding have been confined to political rhetoric or have been concerned only with what colonial and early Americans have said about politics and political issues, regardless of the context or the existence of other and perhaps contradictory assertions about the same or similar subject.\textsuperscript{13} These interpretations do not adequately address how the Lockean or Republican rhetoric permeated political consciousness and influenced the way Americans in the eighteenth and nineteenth centuries acted upon their political beliefs. These approaches also fail to link political utterances to other kinds of pronouncements on the same or similar subjects. As Michael Lienesch noted in his study of the sources of early American political thought,\textsuperscript{14} many scholars ignore the many

\begin{thebibliography}{99}
\bibitem{11} Other commentators have claimed that American political thought is indebted to Puritan and Calvinist religious thought. W. McWilliams, The Idea of Fraternity in America 112-32 (1973); P. Miller, Errand into the Wilderness 1-15 (1956). Others credit Scottish Enlightenment thought. See, e.g., G. Wills, Explaining America: The Federalist ix (1981). For a criticism of the latter, see Draper, Hume & Madison: The Secrets of Federalist Paper No. 10, 58 Encounter 34 (1983). Several authors have also noted the appearance of other "tongues" or influences in early American political thought. Kramnick, The "Great National Discussion": The Discourse of Politics in 1787, 45 WM. & MARY Q. 3, 3-7 (1988).
\bibitem{12} For discussion relating to the influence of Blackstone on early America, see F. McDonald, supra note 7, at 10-24; D. Lockmiller, Sir William Blackstone (1938); L. Warden, The Life of Blackstone (1938); Lutz, supra note 7, at 193; Whelan, Property as Artifice: Hume and Blackstone, in NOMOS XXII: Property 102-03 (J. Pennock & J. Chapman eds. 1980).
\bibitem{13} R. Hanson, The Democratic Imagination in America: Conversations With Our Past 22-53 (1985). Hanson described liberal democracy as a "rhetorical tradition" that engages in the essential contest over the meaning of key liberal terms. Id. at 28. Hanson, however, confined his study or understanding of political terms to the level of rhetoric and failed to engage the political/legal and institutional forces that may have shaped or questioned the influence of the language and theory that he wished to examine. See id.
\end{thebibliography}
different languages or "persuasions" that influenced the Founders. Lienesch observed that "because of the porous and penetrable nature of these persuasions, a thinker of the time could even be attracted simultaneously to contradictory or even mutually exclusive concepts." In his defense of a Lockean-Liberal interpretation of the American Founding that challenged the Republican interpretation, J.P. Diggins noted that historical scholarship on the American Founding reveals that specific political language was used, but not why it was used or how the language influenced action.

The need to explain how specific political vocabulary influenced actions in early American history leads to an interesting problem for any interpretation of the American Founding. If any theory about the Founding is to be considered viable, it must not only accurately describe the political rhetoric used, but must also explain how such rhetoric was translated into political action and into the creation of political/legal institutions indebted to a particular political philosophy. In short, any viable interpretation must demonstrate some enduring institutional legacy associated with that language beyond the level of political rhetoric in order to claim that the language has in fact significantly influenced American politics beyond some semantic level. Present arguments concerning the Founding have thus far failed to do this because these arguments have not attempted to go beyond the rhetoric of a particular language to see how it manifested itself in concrete political institutions.

This article presents a discussion of early American political theories and outlines some of the commentary in this area. The article then discusses state law on property rights and eminent domain as one means to examine the above claims and to clarify current debates concerning the character of the foundations of American politics. This article proposes that present debates over a specific American political character have been too abstract, unhistorical, and confined to the level of political rhetoric. The debates have ignored the more important and specific institutional influence these values may or may not have had at different times in early American history. Examination of early state law offers a test of the strength or depth of how a particular tradition moved from the realm of political debate, permeated political

15. Id. at 13.
16. J. Diggins, supra note 2, at 361.
17. This suggests that not all acts of speech are necessarily speech-arts, or that not all types of utterances are necessarily speech-acts. For a discussion of speech-acts, see J. Austin, How to Do Things with Words (1962).
consciousness, and influenced the actual development of American law.

This article then proposes that neither the Lockean nor the Republican tradition is a satisfactory or complete explanation of nineteenth century law regarding property rights and eminent domain. This article argues that the failure of either theses to concretely influence the area of property rights at specific times raises questions about how satisfactory these general claims about American political values are when forced to demonstrate influence on a non-rhetorical level. Specific legal treatment of property in early America demonstrates how the Founders may have said one thing in their political pronouncements but did another in actual political practice. This paradox makes it difficult to claim that our Founding or subsequent history was exclusively Liberal or Republican, or that either of the main theories of the American Founding can exclusively account for how early Americans actually acted in regard to what they said, at least in regard to an important political concept such as property.

I. PROPERTY, POLITICAL THEORY, AND THE CONSTITUTION

The concept of property rights had an important yet ambiguous role in early American politics, political theory, and law. One purpose of the right to property was to define and limit legislative power and to preserve individual liberty by providing a defense against the arbitrary and intrusive power of the state. For example, James Madison described property broadly to include an individual’s opinions and beliefs.18 He argued that “[p]roperty as well as personal rights . . . is an essential object of the laws” necessary to the promotion of free government. 19 Alexander Hamilton stated that the preservation of private property was essential to liberty and a republican government. 20 Thomas Jefferson depicted property as a “natural right” of mankind. 21 John Adams described a proper balance of property in society as important to maintaining republican government. 22 Thomas Paine felt

19. P. LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY 156 (1930); J. MADISON, supra note 18, at 101.
that the state was instituted to protect the natural right of property,\textsuperscript{23} and Noah Webster would later link property to virtue, freedom, and power.\textsuperscript{24} Finally, numerous Anti-Federalists described a society as free when it protected property rights or equalized property distributions.\textsuperscript{25} While these two notions might lead to contradictory state actions, this contradiction was apparently not evident to most Republicans.

While current debates stress the importance of either Lockean-Liberalism or the Atlantic Republican tradition as key to understanding the character of early American politics,\textsuperscript{26} these are only two of at least three political theories and views on property that were important in colonial America and at the time of the writing of the Constitution. The third relates to the writings of Sir William Blackstone. This article briefly reviews these three political views.

A. John Locke and the Naturalness of Property Rights

The writings of John Locke arguably had the most influence on early America. This influence has been noted by many scholars.\textsuperscript{27} For example, Steven Dworetz, in his examination of the appeal of Locke's political philosophy prior to and during the American Revolution, claimed that Locke was the most frequently cited source among the colonists during the Revolutionary Era.\textsuperscript{28} Carl Becker argued that Locke's influence can be traced to the writings of Jefferson, especially in certain passages in the Declaration of Independence.\textsuperscript{29} Specifically, Becker noted how Jefferson's adoption of Locke's views on the right to revolution and a natural rights philosophy and even the

\begin{thebibliography}{99}
\bibitem{23} Id. at 353.
\bibitem{24} M. Lienesch, supra note 14, at 93.
\bibitem{26} See supra notes 27-84 and accompanying text for a description of the two sides to this debate.
\bibitem{27} J. Diggins, supra note 2, at 60-61; L. Hartz, supra note 2, at 6; T. Pangle, The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke 2 (1988).
\bibitem{28} S. Dworetz, supra note 10, at 43-44. In his examination of Revolutionary War era citations to Locke, Dworetz noted over 760 references to the philosopher. Id. at 44. This number reflects a greater number of references to Locke than to any other individual. Id. at 45.
\end{thebibliography}
occurrence of the phrase "life, liberty, and the pursuit of happiness" in the Declaration of Independence indicated that the Founding Fathers read and were influenced by Locke. Thomas Pangle, in his analysis of Republican and Lockean thought in colonial America, claimed that the Founders interpreted classical Republican thought through the writings of Locke. The result of such a "filtered" interpretation was to make Locke's philosophy superior to that of its chief ideological rival, Republicanism. Louis Hartz made the first and perhaps the most influential argument that American political thought is indebted to Locke. Hartz argued that Locke is "America's philosopher" and that American political thought is essentially Lockean.

Even J.G.A. Pocock, one of the staunchest defenders of the Republican thesis, acknowledged the influence of Locke's views, although he disagreed on the matter of their importance. Despite disagreements, these writers and others acknowledge that Locke's views on property influenced colonial as well as post-colonial political debate.

Locke's theory of property has been interpreted as justifying both modern capitalist accumulation and traditional Christian natural laws. While both of these interpretations have some merit, the bourgeois interpretation of Locke was not the Locke the colonists and Founders read. Instead, the bourgeois Locke did not emerge perhaps

30. See J. Locke, supra note 3, ¶ 87 (Locke discussed "life, liberty, and estate").
31. C. Becker, supra note 29, at 27.
32. T. Pangle, supra note 27, at 2, 35.
33. L. Hartz, supra note 2, at 59-61. Hartz's evidence for this claim rests in his analysis of several historical periods in American history, for example, the American Revolution, the Civil War, and the Progressive Era, and in his subsequent demonstration that the political issues debated during these periods were conducted in essentially Lockean terms. Id.
34. See Pocock I, supra note 2, at 423-24.
35. See J. Diggins, supra note 2, at 192-229; L. Hartz, supra note 2, at 17-18; P. Larkin, supra note 19, at 154-56; II V. Parrington, Main Currents in American Thought 287 (1930); Hamilton, Property—According to Locke, 41 Yale L.J. 864, 872-80 (1932).
36. C. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 245 (1962). Macpherson argued that Locke's discussions of money, property, and accumulation throughout his writings point to a political philosophy that supports capitalist acquisition and logic. Macpherson labeled this political philosophy "possessive individualism." Id. at 263-71. A different view of Locke discounted the capitalist ethos in Locke's writings and concluded that there was a strong Christian influence to his writings. See L. Strauss, Natural Right and History 246 (1965); J. Tully, A Discourse on Property: John Locke and His Adversaries 130, 175 (1980). In criticizing Macpherson's reading of Locke, Strauss stated, "Locke's doctrine of property is directly intelligible today if it is taken as the classic doctrine of 'the spirit of capitalism' . . . ." L. Strauss, supra, at 246.
37. The interpretation of Locke as a philosopher that sustains capitalism often describes him as the "bourgeois" Locke.
until the nineteenth century. What these interpretations ignore is the important political character of Locke's theory of property rights in the *Two Treatises*, and the historical context of the *Two Treatises* as a radical Whig political argument against the Tories and the power of the British Crown during the 1680s and 1690s.

For the Founders, in opposition to the abuses of the Crown, Locke's ideas defended the principles of limited government, the natural rights of men, and the right to revolution. Thus, it was in this context that the early American conception of property was situated. Accordingly, the history of Locke's theory of property is primarily political, with the language of property used to defend the political liberty of Englishmen (including the colonies) against the Crown. As noted by Becker and others, it was this political linkage of property to personal power that was most influential on America.

Locke argued in both the First and Second Treatises that the protection of property is the goal of civil society. Locke proposed that property is a natural and pre-political institution given to man by God. A property interest gives the owner a singular and absolute control over something which no one, including the state, could violate. Property ownership of a thing was based upon ownership of one's body and labor such that anything mixed with the labor of a person

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40. Some commentators have claimed that Locke's concept of property, as well as the Liberal tradition as a whole, embodies a radical-conservative tension that can be traced to seventeenth century political conflicts that occurred while Liberal ideology was being formed. See R. Ashcraft, *supra* note 39, at 183-85. The implications of Ashcraft's argument suggest that many of Locke's concepts might embody several different meanings, and this might also apply to property. Different Founders appropriated and interpreted the word property in several different ways, suggesting that property could be described as an "essentially contested concept." Gallie, *Essentially Contested Concepts*, 56 Proc. of Aristotelian Soc'y 167 (1956).

Additionally, Dworetz's exegesis of Locke suggested that Locke's view of property was tied to liberty, consent, and limited government, the notion of property that the American Revolutionaries noted. S. Dworetz, *supra* note 10, at 70-74.


42. II J. Locke, *supra* note 3, ¶ 88; see also J. Madison, *supra* note 18, at 102 (stating that "[g]overnment is instituted to protect property of every sort.").


44. Locke's theory of property was an "in rem" or thing theory of ownership as opposed to a "relational" theory of ownership.
became personal property.\textsuperscript{45}

In Locke's view, property included more than the possessions of individuals. Property referred to one's "Life, Liberty, and Estate."\textsuperscript{46} "Property" was a general political term referring to all the personal and political rights of individuals with ownership of one's body and talents premised upon the natural freedom of individuals.\textsuperscript{47} These comments of Locke, along with the placing of property in a state of nature, indicate that property was meant to affirm the natural political rights and liberties of individuals against the state,\textsuperscript{48} and not necessarily to only be a tool of economic development.\textsuperscript{49} These natural rights are not lost to the state, but instead "[t]he supreme power cannot take from any man part of his property without his own consent; for the preservation of property being the end of government and that for which men enter into society, it necessarily supposes and requires that the people should have property."\textsuperscript{50}

Thus, when Locke argued that the protection of property is the end or goal of government, or that each individual should have property, he argued that government should protect the political liberties of individuals. It is a misreading of Locke to suppose that his theory of property is essentially a defense of capitalist accumulation, although it may be incidentally so.\textsuperscript{51} It is also wrong to assume that the protection of property means an absolute ban upon government interference with the material possessions of its citizens. Property is to be protected because it is associated with the political liberties of individuals, and is important to individual self-expression, identity, and personality.\textsuperscript{52} Many colonial American readings of Locke's theory of property

\begin{itemize}
\item \textsuperscript{45} II J. Locke, supra note 3, ¶ 27.
\item \textsuperscript{46} Id. ¶ 123.
\item \textsuperscript{47} Id. ¶ 123; II id. ¶ 5.
\item \textsuperscript{48} R. Smith, Liberalism and American Constitutional Law 198 (1985). Smith argued that the core meaning of Lockean-Liberalism, and presumably property, is to "promote reflective self-direction, or rational liberty." Id. at 198-201.
\item \textsuperscript{49} W. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 126 (1975). Nelson argued that legal recognition of property rights expanded after the American Revolution. While indicating that the reasons for this expansion are unclear, Nelson speculated that "[p]erhaps the extension of property doctrine may best be explained by a tendency of the postrevolutionary generation to equate the protection of property with the preservation of liberty." Id.
\item \textsuperscript{50} II J. Locke, supra note 3, ¶ 138.
\item \textsuperscript{51} Macpherson contended that Locke's views were a defense of capitalism. C. Macpherson, supra note 36, at 220-21. For a response to Macpherson's bourgeois interpretation of Locke, see R. Ashcraft, supra note 39, at 185.
\item \textsuperscript{52} II J. Locke, supra note 3, ¶¶ 28-31; J. Tully, supra note 36, at 110-11, 121, 131, 143; Fellman, supra note 39, at 505; Hamilton, supra note 35, at 864, 868.
\end{itemize}
noted this connection between personal political liberty and property ownership. These interpretations agreed with Locke that property rights deserved a somewhat absolute protection against government regulation. 53

B. James Harrington and Republicanism

J.G.A. Pocock argued in *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* that a second description of property is found in the neoclassical Republican tradition that influenced American political thought. 54 This Republican tradition can be traced back to the classical writings of Aristotle, the Romans, Machiavelli, and sixteenth century humanists in Florence, Italy. 55 This school's primary influence on colonial America was James Harrington's utopian treatise, *The Commonwealth of Oceana*.

According to Pocock, the Atlantic Republic tradition (Republicanism) is characterized by a political philosophy emphasizing the "vita activa" (active life) of political engagement as opposed to the contemplative and withdrawn life of the Christian world. 56 Thus, the Republican tradition stressed the importance of a politically engaged citizenry active in a small homogeneous community. It was a political philosophy committed to popular government, political liberty, and a relatively equal distribution of wealth or property ownership within a political community. 57 The reason for the preoccupation with this latter point was that Republican writers were fearful of private avarice and interest corrupting the political community. 58 Pocock proposed that avarice upset the public virtues necessary for the maintenance of a republican form of government, and once this type of government was infected by corruption, its degeneration into tyranny was inevitable. 59

Perhaps the most obvious sign of corruption in a republic was the unequal distribution of wealth or property. If property were maldistributed, according to Pocock, Republicans feared that some individuals or groups (factions as they would later be called by James

55. Id. at vii, 6-15.
56. Id. at 49-56.
57. Id. at 203-07.
58. Id. at 133-35.
59. Id. at 208-09.
Madison) would gain too much political power and upset popular government and individual liberty.\textsuperscript{60} One “solution” to preventing corruption and encouraging political “regeneration” would be to maintain a relatively equal distribution of property ownership in the political community.\textsuperscript{61}

James Harrington’s \textit{The Commonwealth of Oceana} is indebted to and part of the Florentine tradition that linked the maintenance of Republican government, liberty, and popular government to the distribution of property within a community.\textsuperscript{62} Harrington described the political institutions necessary to maintain a republican form of government. In \textit{Oceana}, he argued for the need to achieve a balance of power in a commonwealth between the king, the nobility, and the people if tyranny was to be avoided and a limited republican form of government was to be sustained.\textsuperscript{63} Crucial to that balance of power, or the “doctrine of balance” in Harrington’s words, was the equal distribution of property among the above three groups.\textsuperscript{64} Granting any one group, such as the king, a disproportionate amount of control over property would give that group excessive power in the republic.\textsuperscript{65}

Harrington saw the doctrine of balance as necessary to limit the Crown’s power.\textsuperscript{66} The doctrine of balance was rooted in the traditional neoclassical fear of excessive or maldistributions of wealth as a sign of an unhealthy commonwealth.\textsuperscript{67} A free republic could only be maintained if excessive concentrations of wealth in the possession of few could be avoided.\textsuperscript{68} Dispersed and relatively equal ownership of property was crucial to limiting political power and promoting freedom.\textsuperscript{69}

Harrington, perhaps over-simplistically, adopted this Republican view of property and saw a correlation between personal property and political power. While Harrington and Locke agreed that property was important to independence and status in society, Harrington did not share Locke’s view that the goal of society was to protect property, or that the state could not regulate it.\textsuperscript{70} Harrington also did not be-

\begin{footnotes}
\footnote[60]{Id. at 209.}
\footnote[61]{Id. at 104-20.}
\footnote[62]{POCOCK III, supra note 5, at 6-16.}
\footnote[63]{Id. at 167, 405.}
\footnote[64]{Id.}
\footnote[65]{Id. at 164.}
\footnote[66]{Fellman, supra note 39, at 507-09.}
\footnote[67]{POCOCK III, supra note 5, at 164; POCOCK I, supra note 2, at 209.}
\footnote[68]{Fellman, supra note 39, at 509-10.}
\footnote[69]{Id.}
\footnote[70]{POCOCK III, supra note 5, at 137-38, 145.}
\end{footnotes}
lieve that existing property distributions were natural.\textsuperscript{71} Property rules were conventional and distributions could be altered or regulated to promote Republican forms of government. Harrington would protect individual liberty not by protecting the natural property rights of individuals, but by redistributing property to ensure a Republican and limited form of government.\textsuperscript{72}

According to Pocock, Harrington's doctrine of balance was interpreted by his followers as an argument against executive patronage and power.\textsuperscript{73} Therefore, it became an important ideological tool of opposition for the American colonials against King George III,\textsuperscript{74} and a clear influence upon the early formulation of American politics such that the American Founding can be linked to the Atlantic Republican Tradition.\textsuperscript{75} The influence of James Harrington, the principal European source of colonial Republican thought, can best be seen in the writings of the Anti-Federalists who articulated the importance of property divisions in preserving state Republican governments.\textsuperscript{76}

For example, Samuel Bryan, in his Letters of Centinel, closely followed Harrington's sentiments when he argued that a "republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided."\textsuperscript{77} Additionally, John Adams, a Federalist, was also influenced by Harrington in his advocacy of the position that the distribution of political power in society flows from the distribution of property.\textsuperscript{78} Even Thomas Jefferson's "wards system," or the political reorganization of Virginia counties into hundreds of equally-sized school districts,\textsuperscript{79} along with the broad distribution of property ownership, was a recognition of the re-

\textsuperscript{71} Id. at 405.
\textsuperscript{72} Id.; POCOCK I, supra note 2, at 386-90.
\textsuperscript{73} POCOCK III, supra note 5, at 143-45; POCOCK I, supra note 2, at 416-20.
\textsuperscript{74} POCOCK III, supra note 5, at 144.
\textsuperscript{75} POCOCK I, supra note 2, at 506-07. In opposition to this notion, Thomas Pangle's \textit{The Spirit of Modern Republicanism} questioned how direct and coherent the Republican tradition was in America. Pangle argued that the influence of the Republican tradition was felt indirectly because it was read and interpreted by the Founders through the work of Locke. T. PANGLE, supra note 27, at 28-39.
\textsuperscript{76} G. WOOD, supra note 2, at 70-75.
\textsuperscript{77} Bryan, Letter of Centinel, I, in ANTI-FEDERALISTS VERSUS FEDERALISTS: SELECTED DOCUMENTS, supra note 25, at 141. These letters were published to urge against the abandonment of the Articles of Confederation and to oppose the adoption of the then proposed United States Constitution. \textit{Introduction} to ANTI-FEDERALISTS VERSUS FEDERALISTS: SELECTED DOCUMENTS, supra note 25, at 1-5.
\textsuperscript{78} McKeon, supra note 22, at 354-57.
\textsuperscript{79} T. JEFFERSON, \textit{A Bill for the More General Diffusion of Knowledge}, in WRITINGS 367-68 (1984); Letter from Thomas Jefferson to Dr. Joseph Priestly (Jan. 27, 1800), reprinted in WRITINGS, supra, at 1073.
publican link between property, independence, and limited government. 80

Harrington's views also surfaced in James Madison's Federalist No. 10, where property distributions were described as the chief cause of factionalism in society. 81 Nevertheless, the Republican solution of equalizing property so as to remove sources of factionalism was rejected. James Madison, while noting how important property distributions were to popular government, created political mechanisms, such as checks and balances and separation of powers, to render these distributions politically less significant. 82 In Madison's view, inequalities in property, as rooted in the differences in human talents and faculties, would be rendered politically unimportant if appropriate checks were instituted to neutralize some property interests by others. 83 Somewhat conversely, Gordon Wood argued in The Creation of the American Republic: 1776-1787 that this transformation of the traditional Republican concept of property in the Federalist Papers and the United States Constitution represented the "end of classical politics," because it minimized the need to eliminate avarice and vice from the political system and instead sought mechanisms to make private interest and property divisions serve the public good. 84

C. Blackstone and the Conventional Nature of Property

While the influence of Locke and Harrington upon early American political thought are often noted, other commentators have suggested that Sir William Blackstone's views on property have been overlooked as an important influence on eighteenth century perspectives on property and early American property law. 85 In an article relating to both the influence of David Hume and Blackstone on common law notions of property, Frederick Whelan suggested that Blackstone's view of property represented "the 'official' view of property in

80. POCOCK III, supra note 5, at 150-51 (noting Harrington's influence upon Jefferson and Noah Webster); H. SMITH, HARRINGTON AND HIS OCEANA: A STUDY OF A 17TH CENTURY UTOPIA AND ITS INFLUENCE IN AMERICA 152 (1914) (discussing Harrington's influence in America).
81. THE FEDERALIST No. 10, at 56 (J. Madison) (J. Cooke ed. 1961); Fellman, supra note 39, at 509-16.
83. THE FEDERALIST No. 10, supra note 81, at 56-57.
84. G. WOOD, supra note 2, at 606-19.
85. F. McDONALD, supra note 7, at 11, 20, 188; Whelan, supra note 12, at 101-04, 114-27.
the classical liberal era."

Blackstone's views were generally more legalistic and conventional than either Locke's or Harrington's. Despite this general view, there were instances in the *Commentaries on the Laws of England* where Blackstone mirrored the views of Locke. For example, in volume two of the Commentaries, Blackstone stated:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

In this passage, Blackstone described property as an "absolute right." Blackstone proposed that the protection of this right, as well as the protection of other absolute rights such as security and liberty, is the "principle aim of society."

Despite passages suggesting that Blackstone was simply echoing Locke, there are numerous other instances where Blackstone differed with Locke and as suggested by Whelan, agreed with David Hume, who denied that property existed in a state of nature and instead claimed that property rights are "not natural but moral." For instance, Blackstone argued that property was not a natural right but a conventional institution created by law, habit, or the passage of time.

In volume one of his Commentaries, Blackstone agreed with Locke that the protection of property is important and necessary for freedom. However, Blackstone also indicated that property is not natural but acquired by usurpation and other means. Blackstone argued that it is the law and not natural right that determines what can be owned and the prerogatives associated with the ownership of property.

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87. 2 W. BLACKSTONE, *supra* note 7, at 2. Whelan suggested that this quotation, read in the overall context of the Commentaries, does not reflect Blackstone's agreement with Locke that property is a "mere positive right." Whelan, *supra* note 12, at 119. Rather, Whelan suggested that the "'right of property' is a form of shorthand for a complex set of different rights." *Id.* at 119.
88. Whelan, *supra* note 12, at 118; see also 1 W. BLACKSTONE, *supra* note 7, at 134 ("The third absolute right, inherent in every Englishman, is that of property . . . .").
89. 1 W. BLACKSTONE, *supra* note 7, at 120.
92. *Id.*
93. Whelan, *supra* note 12, at 102-03.
94. See 1 W. BLACKSTONE, *supra* note 7, at 134.
95. *Id.*
In the first volume of the Commentaries, Blackstone described property as an absolute right of an Englishman, yet this right was tempered by "the laws of the land" and subject to numerous legal restrictions as described in the second volume. In the second volume, Blackstone described property ownership as an absolute dominion, noting that the legal ownership of property had no foundation in nature or natural law and that rules prescribing its use and transfer were determined by society. Although Blackstone stated that the protection of property was the principle aim of society, he did not agree with Locke that the purpose or origin of society resided in the protection of property rights. In the Introduction to volume one of the Commentaries, Blackstone claimed that "[t]he only true and natural foundations of [s]ociety are the wants and the fears of individuals."

These two passages could be said to represent contradictory views on property, and biographers and analyses of Blackstone’s writings have sought to reconcile this contradiction. For example, commentators have suggested that Blackstone was not a consistent political theorist but was more concerned with pulling together the existing contradictory or inconsistent laws of England. This suggests that Blackstone either had little concern or did not see his different writings on property as inconsistent, but instead as reflective of legal practice at that time in England. Another suggestion, offered by Whelan, was that Blackstone was not inconsistent when it came to his discussion of property. Property rights were absolute for Blackstone, but only absolute within the lines prescribed by society and law. Moreover, while first occupation may be the original reason why one has acquired use of property, continued or legal occupation rests upon rules of a civil society. In short, an individual's absolute right to property is tempered by the rights of others or by the public good.

Despite some inconsistencies in describing property rights, Blackstone greatly influenced American legal history. Blackstone's biographers claim that his influence was greater in America than in England and that numerous editions of the Commentaries were

96. Id.
97. 2 id. at 373-83.
98. Id. at 373-74.
99. 1 id. at 47.
100. See, e.g., Whelan, supra note 12, at 118-20.
101. For a review of criticisms of the Commentaries, see D. Lockmiller, supra note 12, at 146-48, 162-68; L. Warden, supra note 12, at 273-80.
103. See 2 W. Blackstone, supra note 7, at 374.
104. F. McDonald, supra note 7, at 7.
shipped to or printed in the colonies. For example, Blackstone's views on the rights of Englishmen influenced the writing of the Declaration of Independence as sixteen of its signers were known to have purchased and read the Commentaries. At the Constitutional Convention, the Founders discussed terms such as "ex post facto laws" and "due process" in the way that Blackstone had described these legal concepts. But most importantly, some argue that it was Blackstone's influence that was especially important in early American legal history because judges and lawyers (in addition to many of the Founders such as Jefferson, Hamilton, and Adams) turned to him for reference as they sought to apply English property law to new American social and economic conditions. Jurists such as Marshall, Kent, and Story turned to Blackstone as the only source and commentary on the common law and incorporated many of his views into their "Americanization" of English rules.

In sum, at least three traditions can be considered important in early American legal and political thought on property. Locke's view linked property to the natural political liberties and personality of individuals. Harrington linked property to limited and Republican forms of government, while Blackstone's views emphasized the changing legal nature of property and how the law could alter property relations. Those who claim that American Founding values were exclusively Lockean or Republican ignore the fact that there is no single or uniquely and easily identifiable influence at the level of political rhetoric because all of these languages were used by early Americans. No one view predominated colonial American politics.

There is, then, a hybrid of several languages in the "great national discussion" forming a distinctly American view of property. Yet, if

106. L. Warden, supranote 12, at 323.
109. See supranotes 29-55 and accompanying text.
110. See supranotes 56-84 and accompanying text.
111. See supranotes 85-103 and accompanying text.
112. Horwitz, supranote 8, at 64.
113. Kramnick discussed how the language of our Constitution embodies several different languages, often at odds, and usually difficult to separate or discern from one another, thus inviting a diversity of interpretations. Kramnick, supranote 11, at 4; see also M. Lienesch, supranote 14, at 13 (making a parallel claim).
there was any consensus among the Framers, it resided in the agreement that property was important to individual political liberty.\textsuperscript{114} Despite these claims about property rights, the important question is how this rhetoric of property rights was translated into political-institutional mechanisms. In particular, which, if any, political tradition actually influenced the reality and practice of property rights in American politics and law? The second part of this article addresses this question.

II. THE TRANSFORMATION AND CONTRADICTIONS OF PROPERTY RIGHTS

While influencing colonial and constitutional debate, the Liberal, Republican, and legal (Blackstone's) theories on property may have influenced other aspects of American legal history.\textsuperscript{115} Examples include later court decisions and political debates on property rights and eminent domain. Yet despite the importance attached to property rights in Liberal and Republican debates in 1787, these rights were not treated as inviolable, and it appears that other political languages, such as the Blackstone legal tradition mentioned above, more clearly explained how property rights were treated in early American politics and law.

In his examination of the different political traditions that influenced colonial America, Issac Kramnick noted that the language of "state-centered theories of power and sovereignty" was important in early constitutional debate and that the reality of creating a government and nation tempered the excesses of political rhetoric articulated during the Founding era.\textsuperscript{116} For example, according to Alexander Hamilton, the Constitution was only written to protect property.\textsuperscript{117} Institutional necessity did give property some special protections, but this necessity did not create a constitutional right to property or preclude all state regulation of property rights as might have been sug-

\textsuperscript{114} See R. Hofstadter, The American Political Tradition and the Men Who Made It 10-12 (1948).

\textsuperscript{115} See, e.g., V. Parrington, supra note 35, at 305. Madison's notes on the Constitutional Convention indicated numerous discussions of property in the drafting of the new Constitution. Property qualifications for voting and election to office were discussed. Madison linked the protection of property and private rights together as the "essential object of the laws." P. Larkin, supra note 19, at 156-58; see also Horwitz, supra note 8, at 68 (noting Lockean-Liberal influences in the fifth amendment).

\textsuperscript{116} Kramnick, supra note 11, at 4, 23-27.

\textsuperscript{117} The Federalist No. 1, at 3-7 (A. Hamilton) (J. Cooke ed. 1961).
gested by Liberal ideology. Instead, the Founders, as political realists, lawyers, and followers of Blackstone and the British legal tradition, realized that there may be instances when property rights may have to be limited for public necessity.

Even if the Constitution did follow Locke's view and treat property as a natural and absolute barrier against legislative power, there is evidence that within fifty years after 1787, the political rhetoric of property as an absolute political right was abandoned in favor of an economic-utilitarian theory of property rights which was clearly not Lockean or Republican; at least not Lockean or Republican as the Founders understood these traditions. In The Transformation of American Law, Morton Horwitz argued that in early America there existed a natural or antidevelopmental view of property rights. This agrarian and "natural" view of property resembled the teachings of Locke, and stressed the absolute right of individuals over their property to the exclusion of others. Such a view implied that other parties were precluded from interfering with another's property and would be expected to pay damages for trespass or denial of use.

A second view of property also surfaced in early American law. The focus of this view was a more commercial or developmental theory of property which made it subject to regulation for the economic welfare of the community.

The emergence of a developmental theory of property had several important consequences. At one level, the theory questioned any myth about the absolute rights individuals had over property, and made the ownership of property subject to greater legislative regulation than before. At another level, the commercial focus denied that property rights were natural or that they were as closely tied to individual political liberty as Locke's politics had assumed.

The developmental theory of property also pitted the economic interests of landed property owners against the rising commercial class who sought to limit the rights of the property owners in order to further economic development. Horwitz argued that these rival inter-

119. Dworetz claimed that by this time in history, colonial practice had rejected the belief that political property rights were immune from regulation. S. Dworetz, supra note 10, at 70-71.
120. M. Horwitz, supra note 108, at 32.
121. Id. at 32-33.
122. Id. at 33-34; M. Lienesch, supra note 14, at 83.
123. This notion further suggests that different groups or interests in society had
ests were adjudicated by the state courts throughout this country and that by 1860, the conflict was resolved in favor of the developmental theory of rights. 124 The resolution, which Horwitz described as the transformation of American law, 125 resulted in the emergence of an instrumental and economic utilitarian depiction of property. This characterization viewed property rights not as natural or "political" (as suggested by Liberal rhetoric), 126 but as conventional and subject to regulation and limitation (as suggested by Republican thought) to promote the economic development of society and the class interests of a rising entrepreneurial class. 127 This transformation of property law was aided in part by changes in eminent domain which eroded traditional property rights and made them subject to regulation for the common good. 128

Changes in American property law occurred within the first 50 years after 1787 as judges adapted British property law, as understood through Blackstone, to American social-economic conditions. 129 In the absence of a colonial American law on property, judges changed English property law to conform to the new United States Constitution. As Morton Horwitz, 130 James Hurst, 131 and G. Edward White 132 have noted in their respective histories of early American law, state and federal court judges were important in adapting the English property law, which was suited to a nation with limited land tied to feudal privileges, to a large and expanding nation with ample land. The task of the early American judge was to rewrite property law to fit the new American needs of commercial development. Thus, although the same language of property was used in the United States as in England, the empirical context and referents had changed such that the meaning and use of the term "property" in America had to be

125. Id. at 1-30.
126. "Political" is used here in the sense that property ownership was justified as an important political tool to limit governmental power.
127. See supra text accompanying notes 5-6.
128. See infra notes 176-226 and accompanying text.
different than it was in England. 133 The empirical context or referent of property in early nineteenth century America was different even from 1776-1787 America.

There are many criticisms of Horwitz's transformation thesis. Some critics questioned the class conflict theory implicit in his arguments, while others questioned the evidence tying state judges to the interests of a rising commercial class. 134 However, legal scholars do not disagree regarding the claim that property law changed tremendously in the early nineteenth century. Property law did lose much of its political and natural rights character and became viewed almost exclusively as an economic commodity that could be regulated for the public welfare. 135 The great transformation of property law came as a shift from a political right important to liberty, to an economic good that could be regulated for economic reasons. 136 Legal commentators on property law agree that this change occurred, and eminent domain and state judges were important in articulating that change. 137

Much of the political fiction or myth that property rights were absolute appears to have been abandoned in the law soon after 1787, suggesting that on the institutional level Liberal rhetoric had minimal influence, or that the Locke that had emerged was the “bourgeois” Locke that C.B. Macpherson 138 and others had described. 139 Yet throughout the nineteenth century, American law continued to be

133. For a discussion of the role of context and usage as influencing the meaning of concepts, see L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1958).
136. Id.
137. White and Hurst agreed with Horwitz on the emerging utilitarian and economic character of American property law in the early nineteenth century. G. WHITE, supra note 132, at 35-37; J. HURST, supra note 131, at 3-8. Friedman argued that the transformation of American property law was occurring even before the Revolution. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 202 (1973). Friedman noted his agreement with Horwitz on the economic transformation of American law as a movement from a static to dynamic theory of property. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 235-36 (2d ed. 1985). The cause of that transformation was not discussed by Friedman.
138. See supra notes 38-40 and accompanying text.
139. Lockean premises dominated much of the political rhetoric of property from 1776-1790 while regulation of property was more consistent with Republican or Blackstone's legalistic values. However, later in the nineteenth century, Lockean ideology did become more important in American law, especially with the adoption of the fourteenth amendment and the articulation of liberty of contract and substantive due process concepts. Grant, The “Higher Law” Background of the Law of Eminent Domain, 6 WIS. L. REV. 67, 81-83 (1931).
plagued by the "contradiction" that the right to property was absolute in some respects and not in others.\textsuperscript{140} This contradiction suggests that while Liberal or Republican rhetoric may have been given rhetorical lip service, a legal tradition stemming from Blackstone may have been more important in how the judiciary and commentators of the time thought about and acted in regard to property. Even though there is evidence that property had been transformed during the early nineteenth century, there is also evidence that even during the Founding era, there was a gap between the rhetoric and the reality of property rights which led to the above transformation.

III. EMINENT DOMAIN IN EARLY AMERICAN LAW

A. Early Constitutional History and the Fifth Amendment

While property rights in the late eighteenth and early nineteenth centuries may have been described in Lockean or Republican terms, early recognition of eminent domain among other forms of American property regulation meant that property rights were not absolute and were subject to numerous legislative controls.\textsuperscript{141} For example, while Jefferson felt that property was an absolute right, he advocated that the state should regulate it to abolish primogeniture and promote agricultural production.\textsuperscript{142} In his role as Secretary of Treasury, Hamilton accepted some regulation of property as essential to the promotion of commerce.\textsuperscript{143} In addition, numerous jurists and advocates of Republicanism recognized the need to regulate property to promote individual freedom.\textsuperscript{144} Extensive demand and actual colonial regulation of property suggests that legal reality conflicted with the political rhetoric of absolute property rights.

Eminent domain is the sovereign right or power to take private property for public use.\textsuperscript{145} William Stoebuck, in his analysis of the history of eminent domain, argued that eminent domain can be traced

\begin{itemize}
\item \textsuperscript{140} Scheiber, \textit{supra} note 108, at 332.
\item \textsuperscript{141} F. McDonald, \textit{supra} note 7, at 10-55 (discussing the legislative limitations on property rights including regulation of the acquisition and use of property and contracts, regulation of monopolies, and the construction of debt law). There were numerous restrictions on property because property was seen to serve community ethical or economic needs first, and individual convenience second. W. Nelson, \textit{supra} note 49, at 51-53.
\item \textsuperscript{142} F. Brodie, \textit{Thomas Jefferson: An Intimate History} 130 (1974); M. Lienesch, \textit{supra} note 14, at 87-89, 93.
\item \textsuperscript{143} J. Cooke, \textit{supra} note 20, at 73-84.
\item \textsuperscript{144} J. McClellan, \textit{Joseph Story and the American Constitution} 61-83, 194-97 (1971).
\item \textsuperscript{145} I J. Sackman & R. Van Brunt, \textit{Nichols on Eminent Domain} § 1.11 (3d ed. 1990).
\end{itemize}
to the Romans, but the origin of what is considered modern eminent domain can be found in English feudal law and the natural law tradition.\[^{146}\] Stoebuck claimed that eminent domain originated in medieval feudal law granting the king supreme power or eminent domain over all land in the kingdom.\[^{147}\] Similarly, in his historical analysis of eminent domain, J.A.C. Grant traced the origin of the concept to natural law arguments giving the state a natural right to control land to secure "higher" purposes.\[^{148}\]

Whatever the origin, Stoebuck and Lenhoff agree that eminent domain came to be seen as an essential attribute of sovereignty which could not be alienated. By the time the United States Constitution and the fifth amendment were written, the law recognized that eminent domain was an inherent power of government (as evidenced by colonial use) and not in need of specification.\[^{149}\]

The concept of eminent domain was mentioned by Locke and Blackstone, among other seventeenth and eighteenth century political writers.\[^{150}\] Locke, while defending an absolute right to property as a political protection against the king, recognized the right of the government to take property to the extent that either the owner or his representative consented.\[^{151}\] However, Locke did not indicate compensation was due when property was taken. William Stoebuck contended that a compensation requirement was implicit in Locke's discussion of taxation.\[^{152}\] Perhaps this is true, yet Stoebuck's own discussion suggested that Parliament and general practice did distinguish eminent domain, or expropriation, from taxation,\[^{153}\] and thus it is not clear that the restrictions on one applied to the other. Consent was required for both, but compensation for taxation was certainly not required and it is uncertain if Locke had thought about applying a compensation requirement to expropriation.

In his analysis of the just compensation doctrine in early American law, Errol Meidinger argued that the first recorded uses of emi-


\[^{147}\] Stoebuck, *supra* note 146, at 562-64.

\[^{148}\] Grant, *supra* note 139, at 67-85.

\[^{149}\] Kohl v. United States, 91 U.S. 367 (1876) (eminent domain affirmed as an inherent and implied power of states and federal government).

\[^{150}\] See Lenhoff, *supra* note 146, at 601-03 (arguing that the origin of the "enforced sale concept" is in Montesquieu, Pufendorf, and Blackstone).

\[^{151}\] Stoebuck, *supra* note 146, at 567.

\[^{152}\] Id.

\[^{153}\] Id. at 566-67.
Eminent domain in America can be traced to a 1639 Massachusetts statute authorizing the taking of land to build roads. This statute did not allow houses, gardens, or orchards to be destroyed. The only compensation that would be given to the owner would be for damage to these items. Land acquisition itself did not merit compensation. In New York, Pennsylvania and South Carolina, private property could also be taken without compensation. Eminent domain was widely used to acquire land in colonial America. However, as Meidinger, Horwitz, Nelson, Stoebuck, and other commentators have agreed, neither the principle of just compensation nor a "public use" limit on acquisition was stipulated in colonial charters or constitutions. Horwitz noted that compensation did not become the rule in the states until the mid-nineteenth century, and it was not until 1897 that the Supreme Court required states to compensate for property acquisition. Similarly, public use stipulations only slowly emerged after the Revolution and in the nineteenth century.

By 1787, eminent domain was a recognized element of sovereignty and used by the states to acquire property for projects such as roads, dams, and schools. However, just compensation was not a widely accepted practice despite the fact that Blackstone and parliamentary practice endorsed this concept. A review of the history of the fifth amendment and colonial political thought illustrates the reason for this apparent contradiction between British and American practice.

In an article addressing the just compensation clause of the fifth amendment, one commentator claimed that this contradiction disappeared when the fifth amendment is viewed as a part of the ideological shift from Republicanism to Liberalism. The commentator claimed that colonial America was significantly influenced by a Republican ideology that had faith in the public legislature to secure the public

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156. Meidinger, supra note 154, at 13-14.
158. W. NELSON, supra note 49, at 130.
159. Stoebuck, supra note 146, at 591-92.
160. Comment, supra note 155, at 695 n.6.
163. See infra notes 176-226 and accompanying text.
164. Comment, supra note 155, at 694.
Republicans also believed that excessive property ownership was a sign of a corrupt polity and counterproductive to republican government. A legislature thus had the right to redistribute property to secure both the public good and a republican government. A compensation requirement would make this property redistribution costly and difficult.

According to one commentator, colonial constitutions reflected this view in that they lacked just compensation statutes, and instead gave legislatures broad discretion to determine how land may be best used. Just compensation clauses finally emerged in the 1777 Vermont and 1780 Massachusetts constitutions, and in the 1787 Northwest Ordinance. This commentator claimed that these documents represented early shifts from Republican to liberal ideology, which stressed the growing importance of individual property rights. This transition from Republicanism to Liberalism is reflected in the drafting of the new United States Constitution and emerged more clearly in the first Congress and with the passage of the fifth amendment.

Madison introduced the fifth amendment in Congress on June 8, 1789. The amendment as proposed by Madison stated:

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

No debate on the takings clause was ever recorded, although there were debates on other sections of the amendment. Thus, no recorded debate on this issue ever took place, although prior to the passage of the Bill of Rights the question of just compensation was

165. Id. at 694-95.
166. Id. at 699-700.
167. Id. at 698.
168. Id. at 701.
169. Id. at 694-95.
170. 1 ANNALS OF CONGRESS 434 (J. Gales ed. 1834) (Technically, Madison was not introducing the fifth amendment, but was suggesting that this clause be added in Article I, section 9 between clauses three and four.).
171. Id.
172. Id. at 753.
173. Actually, Madison’s National Gazette, March 29, 1792, piece does refer to the taking of property for a public use, but the discussion gives little clarification of the meaning of the fifth amendment except to show that Madison, while recognizing that property is important in society, also allowed it to be taken for social purposes. J. MADISON, supra note 18, at 101-03.
certainly not settled.\textsuperscript{174}

The fifth amendment had several important characteristics not readily apparent on the face of the provision. First, the amendment applied only to the national government and not to the states. Both Anti-Federalists wishing to limit the national government, and liberals, such as Madison, interested in protecting property, supported the just compensation clause as a limitation on national power. The passage of the amendment settled the question that eminent domain was an inherent power of sovereignty and that there was no question that the national government had this power. Colonial Americans appear to have been more worried about just compensation and the national government than uncompensated takings by the states. After the passage of the fifth amendment, the states were still free to take property as they had done in pre-amendment colonial times.\textsuperscript{175}

B. \textit{Judicial Applications and the Mills Acts}

There was very little litigation at the federal level concerning eminent domain and the takings clause of the fifth amendment until after the Civil War.\textsuperscript{176} Early American litigation on eminent domain occurred in state courts where legal compensation requirements were minimal and the definition of a taking was narrowly construed to be an actual physical taking of property.\textsuperscript{177} The Mills Acts are a good example of this nineteenth century eminent domain property litigation.\textsuperscript{178}

In many states, for example, Massachusetts, the construction of grain mills required the building of dams that resulted in the flooding of adjacent lands and the disturbing of riparian rights.\textsuperscript{179} The Mills Acts permitted this dam construction and flooding but the Acts and many state court judges did not stipulate compensation.\textsuperscript{180} Property was damaged, but no legal injury resulted. Even though an individual

\textsuperscript{174} See \textit{supra} notes 141-64 and accompanying text.

\textsuperscript{175} This may suggest that Lockean influences were more significant on the national than on the state level where republican concerns were stronger.

\textsuperscript{176} The federal courts did not recognize the federal power of eminent domain until Kohl v. United States, 91 U.S. 367 (1876). The fifth amendment just compensation requirement was not applied to the states until 1897 in Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897). In Barron v. The Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), Chief Justice Marshall delivered the opinion of the Court and explicitly rejected the application of the fifth amendment and the Bill of Rights to the individual states.

\textsuperscript{177} Comment, \textit{supra} note 155, at 708.

\textsuperscript{178} M. Horwitz, \textit{supra} note 108, at 47-53.

\textsuperscript{179} Id.

\textsuperscript{180} Id. at 49-53; G. White, \textit{supra} note 132, at 55-61.
property owner lost land to flooding, no legal taking occurred because
the owner did not lose complete use of the property. The lost property
was considered a legitimate sacrifice for the public good.

The Mills Acts were important in the early history of eminent
domain for several reasons. The Acts set a precedent for the transfer
of eminent domain to private individuals so long as the actions of the
private individuals served a public purpose. For example, creating a
grain mill was deemed a valid public use.181 The notable opinions of
Massachusetts Justice Shaw on the Mills Acts upheld the transfer of
eminent domain to private parties so long as a public use ensued.182
The Massachusetts cases paved the way for the subsequent transfer of
eminent domain to other private concerns, such as the railroads, so
long as a similar public use could be shown.183

Few colonial or early post-Revolution state constitutions had a
public use stipulation for eminent domain. In their comprehensive
analysis of eminent domain law in America, Julius Sackman and Rus­
sell Van Brunt claimed in Nichols on Eminent Domain that the taking
of property for private use was common practice in colonial America,
and that public use limitations were not even discussed when the first
post-Revolution state constitutions were created.184 Although public
use limits became popular around 1800, the meaning of public use was
still a matter of some debate.185 As Stoebuck and Philip Nichols indi­
cated in their respective studies of eminent domain, the Mills Acts
made public use an important state justification for eminent domain,
defining public use as “for the public benefit.”186 The Mills Acts were
thus important in influencing future understandings and limitations on
eminent domain power.

The judiciary broadly interpreted the term “public use” in con­
struing the Mills Acts.187 This reading of public use granted legisla­
tures significant power to acquire property, often to the private benefit
of individuals, so long as some public benefit could be claimed. A
broad interpretation of public use competed with narrow construc­

181. Meidinger, supra note 154, at 16, notes that prior to the Mills Acts, only the
Pennsylvania and Virginia constitutions had a public use stipulation.
182. G. WHITE, supra note 132, at 58-60.
183. See, e.g., Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 (N.Y. 1837) (transfer of
eminent domain to railroad upheld).
184. 2A J. SACKMAN & R. VAN BRUNT, supra note 145, § 7.01.
REV. 615, 617-21 (1940).
186. Id. at 619-21; Stoebuck, supra note 146, at 588-90.
tions of the phrase that would later emerge. 188 The narrow definition of public use was determined to mean "used by the public" and did not give legislatures the power to take property as did a broad construction of the term. 189 Specifically, the public acquisition and transfer of property to private individuals for primarily private benefit would not be permitted even if there were an incidental public benefit.

As stated earlier, early state eminent domain legislation in the Acts did not require compensation for land flooded when a dam was built. In general, the states did not require such compensation until the mid-1840s. As late as 1820, the majority of the states had not enacted compensation requirements for any taking of unimproved land. 190 However, during the first half of the nineteenth century a trend towards requiring compensation developed in the law. At the same time, a countertrend also emerged that limited the scope or application of compensation. 191 For example, Justice Shaw's opinions distinguished police power and regulation from takings. Shaw permitted some uncompensated takings as necessary for the public good. 192 Horwitz contended that a rule of limited compensation represented one means for the rising entrepreneurial class to redistribute property and power away from the traditional landed gentry. 193 Eminent domain without compensation became an important subsidy for economic development in that the property taken was put into more productive use by an emerging mercantile class. New economic interests, aligned with the judiciary in the state courts, supported an expanding eminent domain power so long as compensation was narrowly defined. 194

The litigation over the Mills Acts exemplifies how state law and

188. Id. at 618-20.
189. See id. for a discussion of the competing "broad" and "narrow" meanings of public use.
191. Id. at 66.
192. G. WHITE, supra note 132, at 35-63. White discussed the opinions of Justices Story, Kent, and Shaw and their differing approaches to property rights and eminent domain. Id. White argued that both Story and Kent were hostile to the emerging eminent domain power as a threat to private and traditional property rights. Id. In contrast, Shaw was instrumental in the transformation of property rights and views of property from a natural right to an instrumental or promotion of the public good theory of property. Id. Other commentators have also made this observation. M. HORWITZ, supra note 108, at 52-53, 261. As noted earlier, the activity of early American state court judges represents a significant amount of judicial activism in the face of legislatures not able or unwilling to change the existing laws on property. See infra notes 202-15 and accompanying text.
194. Id. at 261-63.
the judiciary formulated much of the early American law on eminent domain and changed "ancient property rules to the promotion of economic development." Until the 1850s, takings were construed narrowly to mean actual title transfer or complete loss of land use. Public use was construed to mean utilized by the public, and it justified the transfer of eminent domain to private concerns. Just compensation was limited both in scope and the amount awarded.

Eminent domain permitted the taking of property to further normal governmental functions, such as the construction of railroads and public buildings. It was also used to help mills and other economic projects. Additionally, eminent domain was used to further some social welfare functions, such as building hospitals and poor houses. It was even used to further aesthetic purposes such as the construction of parks, the preservation of landscapes, and the maintenance of scenic views.

While the use of eminent domain was well established in the early part of the nineteenth century, around the middle of the century the meaning of public use and just compensation changed in ways that again affected the status of property rights in many states. One early example of this change is reflected in a New York State court decision, Bloodgood v. Mohawk & Hudson Railroad Co. At issue in Bloodgood was a New York state law granting railroads the right to trespass, take private land, and compensate the owner to build rail lines. The statute did not contain a public use justification for this action. Chancellor Walworth and Senator Tracy opined that the public use doctrine applied to this type of taking and discussed the issue of what actually constituted a taking for the public use. While addressing

197. Id. at 618-19.
198. M. Horwitz, supra note 108, at 72; Lenhoff, supra note 146, at 618; Meidinger, supra note 154, at 27. Even sovereign immunity was passed on to private companies. See commentary cited supra. Private companies were exempt from suit for any damages caused to private property. At least one court ruled that even unanticipated damages were nonrecoverable. Van Schoick v. Delaware & Raritan Canal Co., 20 N.J.L. 249 (1843). The general principle of the day, damnum absque injuria, stressed that private damages were part of the price one paid for the betterment of social conditions. M. Horwitz, supra note 108, at 73. The individual property owner's compensation for sacrifice was the ability to share in the better conditions of society.
199. Scheiber, supra note 108, at 399-400.
200. Id.
201. Meidinger, supra note 154, at 19. The latter uses did not emerge until the late nineteenth century.
202. 18 Wend. 9 (N.Y. 1837).
203. Id. at 29, 77.
the notions of public utility, public interest, and expediency, the court settled on a narrow definition of public use as "used by the public," rejecting earlier and broader notions of public use that equated the term with the public good.\(^{204}\) Thus, since the railroads were used by the public, it was deemed appropriate for the state to allow the railroads to take land.

*Bloodgood* is significant because the court stated that the judiciary and not the legislature was declared to be the arbiter of the meaning of public use.\(^{205}\) *Bloodgood* represented one of the first state cases in which the judiciary failed to defer to a legislature to make public use decisions. Moreover, *Bloodgood* was one of the first cases that declined to follow the broader notions of public use that previously had eroded the legal protections of property against legislative regulation and acquisition.

In 1843, a New York court reaffirmed this new judicial role and trend towards limiting eminent domain. In *Taylor v. Porter*,\(^{206}\) the New York Supreme Court held that determinations of legitimate public use should be judicial and not legislative. In *Taylor*, the court found unconstitutional a colonial law which allowed private roads to be built across the property of another person.\(^{207}\)

Around the same time, Justice Shaw in Massachusetts made public use determinations which narrowed the scope of earlier decisions. Prior decisions had given the state legislature broad authority to acquire land for public uses such as railroads, turnpikes, bridges, and mills.\(^{208}\) In *Fiske v. Framingham Manufacturing Co.*,\(^{209}\) *Murdock v. Stickney*,\(^{210}\) and *Chase v. Sutton Manufacturing Co.*,\(^{211}\) Justice Shaw's opinions narrowed the eminent domain rulings of the Mills Acts, construing the Acts as a species of riparian land law.\(^{212}\) Other states also overruled earlier eminent domain decisions on Mills Acts and imposed compensation and public use stipulations.\(^{213}\) The significance of these cases was to increase judicial protection for property rights by denying legislatures wide discretion to define public uses. State courts, led by

\(^{204}\) *Id.* at 58-68.
\(^{205}\) *Id.* at 70-72.
\(^{206}\) 4 Hill 140 (N.Y. Sup. Ct. 1843).
\(^{207}\) *Id.* at 147-48, 153.
\(^{209}\) 29 Mass. (12 Pick.) 68 (1832).
\(^{210}\) 62 Mass. (8 Cush.) (1851).
\(^{211}\) 58 Mass. (4 Cush.) 152 (1849).
\(^{212}\) M. Horwitz, *supra* note 108, at 261.
\(^{213}\) Scheiber, *supra* note 108, at 386.
Chancellor Walworth in *Bloodgood*, narrowed the definition of public use to mean "used by the public."\(^{214}\) The ruling of many of the courts at this time indicated that all takings would require compensation, and that they would make determinations as to valid public use.\(^ {215}\)

A trend towards compensation for takings, and a narrowing of the definition of public use, grew out of what J.A.C. Grant called the "higher law" background of eminent domain, and such protections seemed to represent a triumph of Lockean ideology.\(^ {216}\) According to Grant, there existed in the nineteenth century a higher or natural theory of law that stood in contrast to the positive law.\(^ {217}\) This natural law stood behind state laws and constitutions and recognized certain rights of individuals, including the right to property.\(^ {218}\) The concept of a natural right to property, influenced by Locke's political philosophy, conflicted with state eminent domain law which, until then, had generally required compensation for takings. This natural law tradition was important in nineteenth century law and it represented a revival of the belief that property rights were absolute, at least in common discourse.\(^ {219}\)

These property rights were not political, as described by earlier Lockean-Liberal language, but economic, and the conservative wing of the judiciary argued that natural law required just compensation and that a public use limit be attached to eminent domain. In cases such as *Gardner v. The Village of Newburgh*,\(^ {220}\) Chancellor Kent used natural law reasoning to require compensation for land flooded when the village installed a public water system fed by a spring. In other cases involving dams, canals, and roads, the courts also required compensation based on similar natural law reasoning.\(^ {221}\)

Grant cited numerous cases in the nineteenth century to show how just compensation was dictated by natural law in order to protect

\(^{214}\) *Bloodgood v. Mohawk & H.R.R.*, 18 Wend. 9 (N.Y. 1837) (upholding transferring of eminent domain to the railroad because railroads were "used by the public."). Implicit in the *Bloodgood* decision was a rejection of broader "for the public benefit" definitions of public use. Nichols noted that throughout the nineteenth century, "narrow" (used by the public) and "broad" (of public benefit) constructions of "public use" competed as rival interpretations of eminent domain, with the broad meaning eventually winning out. Nichols, *supra* note 185, at 617-23.


\(^{216}\) Grant, *supra* note 139.

\(^{217}\) *Id.* at 68.

\(^{218}\) *Id.*


\(^{220}\) 2 Johns. Ch. 162 (N.Y. Ch. 1816).

\(^{221}\) Grant, *supra* note 139, at 72-73.
property. Grant noted how Chancellor Kent, as early as 1832, wished to apply the federal Bill of Rights to the states and make the fifth amendment just compensation requirement apply to New York. From the middle 1800s to the end of the century, New York and other state courts narrowed the meaning of public use by limiting legislative discretion to determine its meaning. After 1800 and clearly by the Civil War, more and more states had constitutional public use and just compensation provisions to protect private property. By 1897, natural law arguments led the United States Supreme Court to apply the fifth amendment just compensation clause to the states.

CONCLUSION

During the eighteenth and early nineteenth centuries eminent domain was recognized as a valid power of the states to acquire property for public projects, often without judicial scrutiny, and without compensation or public use limitations. Early American history on property rights does not indicate that either the courts or the legislatures were initially great defenders of property against eminent domain or other forms of regulation. Property rights did not significantly limit state legislative activity, and state court decisions increased eminent domain power at the expense of these rights.

Lockean-Liberal rhetoric indicated that property rights were absolute political limits upon legislative activity. Property rights were also described as crucial elements to maintaining republican government and individual liberty. This concept was abandoned at the state level soon after 1787. Despite the pronouncements of the Founders, property increasingly came to be described in economic terms and subject to regulation for the common good. State courts and state eminent domain law were crucial in this early transformation of property rights. The taking of unimproved land for mills or railroads, without compensation, was permitted as a valid public use, even if the taking primarily benefitted another private party.

In the 1820s, 1830s, and later, numerous jurists changed the meaning of and strengthened property rights and put limits on eminent domain. While acknowledging that property was an economic

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222. _Id._ at 71-77.
223. _Id._ at 76-77.
224. _Id._ at 79-81.
225. _Id._ at 80-85.
227. _See supra_ notes 175-98 and accompanying text.
228. _See supra_ notes 37-55 and accompanying text.
good subject to legal regulation, state judges argued that natural laws protecting property mandated that all takings of private property would require compensation and would have to be for public use (with judges determining what a valid public use was, and often ruling on non-Lockean grounds). Additionally, during this time period, state constitutions were rewritten with compensation and public use clauses codifying and extending changes made in the courts.

Examination of colonial political theories and state litigation reveals the deficiencies of current and popular interpretations of American political thought stressing either the Lockean or Republican origins and character of the American Founding. The existence of Blackstone's legal and conventional views on property suggests that a political language other than the Lockean or Republican theories influenced early American political descriptions of property, the creation of political institutions, and the definition of a legal apparatus to govern the United States.

Neither Republican nor Lockean rhetoric, both of which treated property as a political claim, can account for the transformation of property into an economic commodity subject to regulation for the common good, and perhaps a legalistic tradition indebted to Blackstone can not do so either. The definition of property in the nineteenth century United States departed so significantly from earlier Republican or Liberal ideological concepts that it is difficult to describe the legacy of American political institutions as essentially Liberal or Republican. While the Founders might in some contexts have said that property was an absolute political right, in other contexts some lesser view of property held sway. However, the subsequent treatment of property in American law indicates that this lesser view of property was either replaced by another conception of property, or that the Founders' political rhetoric did not adequately describe how they acted upon their statements when it came time to create political institutions. In effect, they often followed one view about property in political discourse, but acted differently when it came to treating property institutionally. Perhaps some hybrid language is the reality of early America, with the Founders adopting and blending often contradictory views on certain ideas or concepts, including property.229 At the core of the American legal view of property is a tradition that embodies contradictory or multiple meanings that compete for recognition in the constitution and in our legal tradition.230

229. M. LIENESCH, supra note 14, at 7-9, made a similar claim.
230. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72
Whatever the reality of the meaning of property in America, neither Republican nor Lockean language can adequately describe how these theories moved from the level of political rhetoric, permeated political consciousness, and were translated into social reality. Neither of the major philosophical schools which adopts a Lockean or Republican view of the American Founding has thus far shown how individuals acted upon specific rhetoric, unless the articulation of rhetoric is considered a political act.\textsuperscript{231} Property rights, in either Republican or Liberal thought, may have been thought of as politically important to individual liberty and as limits upon legislative power; yet the practice of eminent domain and other regulations questions the viability of using either the Lockean or Republican theories as exclusive and satisfactory interpretations of American politics with regard to legal practice.

The legal rhetoric of Blackstone demonstrates better than Locke or Republicanism an influence of greater depth as American institutions were formed by judges and legislators. In effect, state court jurisprudence and judicial activism highlight the transformation and articulation of property rights rhetoric into American political institutions, and serve as examples of how to chart the diffusion of specific political ideologies into political practice.

\textsuperscript{231} Of course, the articulation of rhetoric is sometimes considered a political act in revolutionary situations.