Creating a Self-Stabilizing Constitution: 
The Role of the Takings Clause 

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Abstract

The U.S. Constitution has survived for over two centuries, despite a Civil War and numerous other crises. In contrast, most national constitutions last less than two decades. Why has the U.S. Constitution sustained a largely stable democratic system while so many others have failed? A self-stabilizing constitution creates incentives for all relevant actors to abide by the rules: political leaders follow institutionalized rules, including those that place limits on their authority; in particular, the rule that mandates officials must step down in the face of electoral failure. Similarly, those out of power must have incentives to follow the rules about capturing power: in particular, to eschew violence as a means of gaining control of the government.

Drawing on earlier work, we argue that, to be self-stabilizing, a constitution must (1) lower stakes in politics for both ordinary citizens and powerful elite groups; (2) create focal points that facilitate citizen coordination against transgressions by government officials; and (3) enable adaptation over time. But what is the role of constitutional text in creating such stability? In addition to their explicit roles in defining rights and the powers of government, constitutional clauses often serve a deeper structural purpose: providing the foundations for long-term constitutional stability.

In this paper we examine the role of the federal Takings Clause in helping to create a self-stabilizing constitution in the United States. We argue that the text of the Takings Clause was designed to work together with other provisions of the proposed Constitution to lower the stakes in politics for political stakeholders by protecting individual property rights (including, notably, property rights in slaves). The inclusion of the Takings Clause into a Federal Constitution that represented supreme law was designed to create a focal point to facilitate coordination against government invasions of property rights, especially at a time when few state constitutions provided similar protections. A variety of federal and state interpretations of the Takings Clause emerged after the adoption of the Constitution, and different mechanisms—including federal and state judicial review, legislative pacts, constitutional amendment, and administrative action—helped render the Takings Clause self-stabilizing over time.

1. Introduction

Most constitutions fail in less than two decades. The median country faces
violent political change about once every eight years, and these changes are often
accompanied by changes in constitutional arrangements. Constitutional failure is the
norm, making the U.S. Constitution’s endurance an exception that requires explanation.

Today it is easy to forget that honoring the basic social contract was far from a given at
the framing of the Constitution. The threat of violence—from foreign countries, from
sectional strife, and from rebellions—was a primary concern driving Americans to come
together in 1787. Because the Constitution has endured, we now have the luxury of
overlooking that once-central anxiety.

Despite facing numerous crises, most notably the Civil War, the U.S. Constitution
has survived over two centuries and is the longest living national constitution in effect
today. The reason, we argue, is that the Constitution is “self-stabilizing”: embedded
within its text are the mechanisms for its own survival. We argue that stabilization is a
major aspect of the Constitution. Many constitutional clauses, in addition to their explicit

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3 Gary W. Cox, Douglass C. North, & Barry R. Weingast, The Violence Trap: A Political-Economic
Approach To the Problems of Development (Hoover Institution, Stanford University, Working Paper
2013), pp 4-6.
4 See, e.g., DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN
5 The extent to which the U.S. Constitution can be said to have endured presents an important and
difficult question for research in this area. Constitutional scholars have argued that historical episodes
such as the Civil War have produced substantial textual and non-textual change in the U.S. Constitution,
See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 58-80 (1991); AKHIL REED AMAR, AMERICA’S
UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 79–94 (2012); WILLIAM N.
Nonetheless, it is difficult to argue that these episodes have resulted in constitutional failure. As William
Baude has said in the context of the Civil War, “[t]he Constitution was not abolished and replaced; it was
amended.” William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738, 1812
(“It would be extravagant to claim that events of the 1860s erased all of that previous system. Nobody
thinks that the Civil War and Reconstruction cast doubt on whether Presidents should serve four-year
terms.”). The leading empirical study of national constitutions, ELKINS ET AL., supra note 2, provides a
detailed discussion of indicators of longevity and presents the U.S. Constitution’s unusual endurance as a
problem to be explained.
roles, such as guaranteeing free speech or trial by jury, serve a deeper structural purpose: providing the foundations for long-term constitutional stability.

Classic studies of the U.S. Constitution typically fail to appreciate the problem of how constitutions provide for their own stability and, in particular, how the U.S. Constitution does so. Understanding how the U.S. Constitution is crafted to promote self-stabilization does not downplay or contradict studies examining the jurisprudence of specific constitutional doctrines and the extensive normative literature on how the Constitution should be structured; but the existing literature has failed to appreciate that many constitutional clauses also contribute to the Constitution’s stability. Understanding the self-stabilizing role of specific constitutional provisions enables a more holistic analysis of the Constitution, providing a fuller picture of why American democracy has been stable for so long, and which features of the American experience are replicable in other nations.

In previous work, Sonia Mittal and Barry Weingast argue that constitutional systems face three fundamental problems that perennially lead to constitutional failure; further, they explain three conditions for self-stabilizing constitutions, each of which solves one of the three fundamental problems. First, citizens are rationally fearful when the

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government poses a threat to their assets, livelihood, or well-being.\(^8\) When an incumbent regime sufficiently threatens citizens, they are often willing to support extra-constitutional action, such as coups, to protect themselves. To address this problem, self-stabilizing constitutions lower the stakes of politics for political stakeholders by placing limits on legitimate governmental actions. Credible constitutional limits on the powers of government reduce the extent to which ordinary citizens are likely to feel vulnerable to government interference with their rights and liberties, their property and other interests. We describe this with the shorthand of “lowering the stakes of politics” which captures the perceived decreased threat of governmental intrusion on the lives of ordinary citizens when they governmental capacity for such intrusion is curtailed.\(^9\) We call this the limit condition. Committing government officials to honor limits on their own power is perhaps the most important goal in achieving constitutional stability. We believe that the limiting effect of the text of the Federal Constitution is both more widespread and more complex than generally appreciated.

Familiar examples of mechanisms that illustrate the limit condition include Article 1, section 8’s enumeration of the powers of Congress, which implicitly limits the power of the federal legislature,\(^10\) and perhaps, most noticeably, the Bill of Rights’ definition of areas of immunity from government action—from intrusions on free-speech\(^11\) to takings of property without just compensation.\(^12\) Moreover, a wide range of Fifth Amendment

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\(^9\) As discussed *infra*, this does not necessarily translate to limited government.


\(^11\) U.S. CONST. amend. I.

\(^12\) U.S. CONST. amend. V.
criminal protections, including the protection against double jeopardy and constitutional restrictions on federal and state ex post facto laws, similarly lower the stakes in politics for ordinary citizens.\(^\text{13}\)

Second, when citizens have the ability to coordinate against political officials who attempt constitutional transgressions, they can ensure constitutional compliance by threatening to remove officials who fail to honor the rules.\(^\text{14}\) However, citizens often face a number of difficulties in coordinating against an overreaching government. For instance, citizens of diverse backgrounds typically disagree about the content of rights, when those rights have been transgressed, or whether honoring rights is more important than some other value, such as providing security or promoting the general welfare. Constitutions are more likely to survive when they create focal solutions to solve these coordination dilemmas. Focal points create the *consensus condition*—consensus about citizen rights and constitutional procedures, enabling citizens to coordinate their responses to government transgressions.

At a general level, the separation of powers requires coordination among and within the branches, each of which represent different constituencies, with the presumption of inaction if such coordination cannot be achieved. At a more specific level, individual constitutional provisions can create bright-line focal solutions, which enhance the ability of a large, decentralized populace to coordinate in both identifying and reacting to governmental transgressions.\(^\text{15}\) Examples include the Taxation Clause’s

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provision that “all Duties, Imposts and Excises shall be uniform throughout the United States”\textsuperscript{16} and the minimal eligibility requirements for legislative and executive office, which provide relatively open entry into office, thus assuring that opponents are able to challenge incumbents.\textsuperscript{17}

Third, every country faces shocks to its environment, including demographic change, natural disasters, economic downturns, wars, and technological innovations.\textsuperscript{18} These shocks often present new problems and crises. Sufficiently large shocks reduce the benefits of cooperation achieved under current rules and policies, rendering institutions unstable. To address this problem of change, constitutions must create conditions for successful adaptation: that is, they must create institutions that allow the three conditions to continue to hold on an ongoing basis. Mechanisms designed to lower stakes or facilitate coordination for certain groups at one time often differ from those that must lower stakes and facilitate coordination over time as power shifts among different groups. Successful constitutions must therefore have mechanisms that allow them to adapt over time to changing conditions. We call this the adaptation condition.\textsuperscript{19}

Over the course of American history, mechanisms that have facilitated adaptation include the amendment process, a precise but sluggish form of adaptation; legislative pacts, which are enabled by the ordinary legislative process set forth in the Constitution, and which constituted a central form of adaptation in the 19th century; the necessary and proper clause; and later judicial review.

\textsuperscript{16} U.S. CONST. art. I, § 8, cl. 1.

\textsuperscript{17} See U.S. CONST. art. I, § 2,3; id. art. II, § 1.

\textsuperscript{18} See DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 103-115 (2005).

\textsuperscript{19} On adaptive efficiency see Schofield 2006; North, \textit{id.}; FRIEDERICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960). North’s concept of adaptive efficiency was applied to the development of the United States Constitution in Mittal, Dynamic Constitutional Stability, \textit{supra} note XX.
The three conditions for self-stabilizing constitutions interact in complex ways, and often tradeoffs exist in satisfying the conditions. For instance, a critical element of adaptation is ensuring that government has adequate power to address societal needs as those needs change. But this raises the potential for conflict with the need to lower the stakes and promote constitutional consensus in order to deter transgressions. Creating broad powers to respond to crises down the road can render the ratification of a constitution difficult because large grants of power to government can be perceived to threaten particular interests. Similarly, structural protections designed at the constitution’s creation to ensure the limit condition for particular groups can come at the expense of long-term stability if the protections are difficult to preserve over time, or if groups coalesce around interests that require strong government action.

In this paper, we begin our examination of the self-stabilizing features of constitutional text by considering how the United States’ Takings Clause contributes to a self-stabilizing Federal Constitution. Although there was little demand for the Takings Clause in 1787 in the states, James Madison—the Clause’s author—developed it with constitutional stability in mind. This clause now famously protects private property rights from interference or expropriation by the federal and state governments, and in doing so it has helped to lower the stakes of politics for key political stakeholders and ordinary citizens over the course of American history.20 The Takings Clause now forces the national and state governments to bear some of the cost of seizing or hobbling land or chattels, making such actions less likely and less arbitrary. In doing so, the Clause helps to ensure that propertied citizens have less reason to resist or take up arms

against the state. But the Clause does not limit the stakes of politics on its own—it interacts with numerous other provisions that play similarly stabilizing roles, roles that are often less apparent than their explicit purposes. For instance, throughout the antebellum period, the Takings Clause acted with other features of the Constitution—most notably bicameralism—to prevent the passage of potentially destabilizing antislavery legislation.21

This is not, however, to equate constitutional stability with minimization of government. Optimal levels of stabilization will depend on the historical circumstances in which a constitution is crafted—in particular, the extent to which there is a threat of violence. How likely is the union to dissolve, or for individuals to take up arms against the government, if their interests are not protected? If the danger is not high, stability need not be as highly prioritized, since it does impose costs in terms of governmental effectiveness: a more limited government may lower the stakes of politics, but it will also make governmental action more difficult. We contrast the conditions that framers in the United States faced to the conditions of those faced by the framers of the Australian Constitution. The Australian Constitution was developed in a context of much lower threat of violence; Australia's route towards independence was gradual, not radical, reflecting the already centralized government that predated federalism.

Contrasting the two historical contexts illustrates how the framers in each circumstance not only needed to devise mechanisms of promoting stability, but also to devise the right level of stabilization—and, in so doing, avoid governmental failure akin to the Articles of Confederation.

The paper proceeds as follows. In Part II we outline our framework for self-

21 See section IV for further discussion of the Clause’s role in the antebellum United States.
stabilizing constitutions. In Part III we explore the origins of the Takings Clause and describe how the Clause was designed with the three key challenges of constitutional stability in mind. In Part IV we explore the changing role of the Takings Clause after 1787. While traditional narratives of the Takings Clause emphasize the central role of the courts in adapting the clause over time, we argue that legislative and executive action have also powerfully shaped the interpretation and enforcement of the Clause.\textsuperscript{22} In Part V we consider the Takings Clause in a comparative perspective by contrasting it to the compulsory acquisitions power contained in s51(xxxi) of the Australian Constitution. This discussion illustrates how different threats of violence strongly affect how constitutional provisions are drafted. Conclusions follow.

2. The Self-Stabilizing Constitution

Constitutional stability embodies two concepts, one static and one dynamic.\textsuperscript{23} Static self-stability means that the constitution structures incentives at a given time such that (i) those in power honor the constitutional procedures necessary to produce

\begin{itemize}
\item \textsuperscript{22} On constitutional interpretation outside of the courts more generally, see \textsc{Bruce Ackerman}, \textit{We the People: Foundations} (1991); \textsc{Barry Friedman}, \textit{The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution} (2009); \textsc{Larry D. Kramer}, \textit{The People Themselves: Popular Constitutionalism and Judicial Review} (2004); \textsc{Keith E. Whittington}, \textit{Constitutional Construction: Divided Powers and Constitutional Meaning} (2001). \textsc{See also \textsc{Bruce Ackerman}, \textit{We the People: Transformations} 5 (1998); \textsc{Louis Fisher}, \textit{Constitutional Dialogues: Interpretation as a Political Process} (1988); \textsc{Robert C. Post \\& Reva B. Siegel}, \textit{Democratic Constitutionalism}, in \textit{The Constitution in 2020} 27 (Jack M. Balkin \\& Reva B. Siegel eds., 2009); \textsc{Larry D. Kramer}, \textit{The Interest of the Man}”; \textsc{James Madison}, \textit{Popular Constitutionalism, and the Theory of Deliberative Democracy}, 41 \textit{Val. U. L. Rev.} 697, 736–37 (2006); \textsc{Mittal \\& Weingast}, \textit{Constitutional Stability and the Deferential Court}, supra note 5 at 337–52; \textsc{Robert Post \\& Reva Siegel}, \textit{Roe Rage: Democratic Constitutionalism and Backlash}, 42 \textit{Harv. C. R.-C.L. L. Rev.} 373, 376 (2007); \textsc{Robert C. Post \\& Reva B. Siegel}, \textit{Legislative Constitutionalism and Section Five Power: Policentric Interpretation and the Family and Medical Leave Act}, 112 \textit{Yale L.J.} 1943 (2003).
\item \textsuperscript{23} On the distinction between static and dynamic constitutional stability, see \textsc{Sonia Mittal}, \textit{Dynamic Constitutional Stability} 16-26 (unpublished Ph.D. dissertation, Stanford University) (on file with Author).
\end{itemize}
sovereign commands, the rights of the citizenry, and transfer power when they have lost elections; (ii) consequently, the citizenry do not turn to extra-constitutional actions, such as revolutions, out of fear of governmental transgression; and (iii) those out of power have incentives to support the democratic system rather than attempt coups. Dynamic self-stability requires that the political and economic system created by the constitution be capable of adapting to changing circumstances, especially various shocks, crises, and quandaries that inevitably arise over time. Most constitutions fail to meet these criteria. Constitutions fail when political officials do not step down when they lose elections; or those out of power initiate coups; or bargaining to adapt to changing circumstances fails so that the state falls into violence.

To be stable, democracies must be designed so that political officials and groups outside of government have incentives to honor constitutional prescriptions even when it is costly. But when will these conditions occur? In previous work, Mittal and Weingast argued that constitutional systems face three fundamental problems that lead to constitutional failure and described three conditions for self-stabilizing constitutions, each of which solves one of these core problems facing constitutional systems.

First, governments often have the power to provide public goods, ensure the rule

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25 Adam Przeworski, Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America (1991). In highlighting that constitutional stability requires political officials to obey constitutional rules, we do not purport to suggest that perfect compliance with all constitutional rules is necessary, realistic, or even desirable. See Adrian Vermeule’s paper, in this issue, for a discussion of “optimal abuses of power” within the context of the modern administrative state. However, our approach does suggest that certain abuses—particularly those that raise stakes or impede coordination among political stakeholders—are particularly problematic from the perspective of achieving constitutional stability. See Adrian Vermeule, Optimizing Abuse of Power, 109 Nw. U. L. Rev. ___ (forthcoming 2015).

26 Mittal & Weingast, Self-Enforcing Constitutions, supra note XX.
of law, and enhance citizen welfare; to define property rights, designate what forms of contracts will be enforced, decide who can form organizations for what purposes, and determine the conditions under which citizens can speak out or assemble, the rules that define criminal activity, and the nature of economic and social regulation. All of these powers can be abused; and even when not abused, they can significantly harm citizens. For instance, governments may restrict free speech in times of unrest—as the Federalists did in passing the controversial Alien and Sedition Acts in 1798. Citizens rationally fear when the government poses a threat to their assets, livelihood, or well-being. A problem for constitutional stability arises when an incumbent regime threatens to impose policies that harm identifiable groups of citizens. If these harms are large enough—irrespective of whether the government is acting legitimately—many threatened citizens will support extra-constitutional action, such as coups, to protect themselves.

To address this problem, self-stabilizing constitutions lower the stakes of politics by circumscribing the realm of legitimate governmental action. We call this the limit condition. We argue that committing government to limits on its own power is perhaps the most important goal in achieving constitutional stability. When these limits protect citizens, they and their leaders are much more likely to honor the rules. The troubling reality of this insight is that creating a stable constitution in some states may require protecting inimical interests, such as those of a former brutal dictatorship or, as was the

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27 Rui J.P. De Figueiredo Jr. and Barry R. Weingast, supra note XX, at XX.
28 Rui J.P. De Figueiredo Jr. and Barry R. Weingast, supra note XX, at XX. [This paper is cited above at note 8.]
case in America, slaveholders.

A range of constitutional clauses serve the limit function even as they serve their more widely recognized functions. Most notably, the Bill of Rights and the Constitution’s explicit enumeration of powers for the national government have often (though not always) served to lower the stakes of politics over the course of American history. For example, individual clauses such as the direct taxation clause lower the stakes for key political stakeholders by preventing rent-seeking interests from forcing one region of the economy to finance benefits for another region. It also made taxing slaves far more difficult, thereby lowering the stakes for Southern slaveholders. The infamous three-fifths clause also protected slaveholders by expanding representation of slave states in the House of Representatives. A related aspect of the limit condition involves exception clauses—conditions under which parts or all of the constitution can be suspended in times of emergency.\(^{30}\) Nearly all constitutions have such clauses.\(^{31}\) The U.S. Constitution has one of the narrowest exception clauses.\(^{32}\) A narrow exception clause lowers the risk that the governmental officials or the military may legally set aside the Constitution and exercise arbitrary power free of constitutional constraints. Note, however, that there are different ways to satisfy the limit condition, not only the means that the founders chose.\(^{33}\)


\(^{31}\) Loveman argues that “Latin American constitutions almost always include provisions for ‘emergency powers,’ or extraordinary powers.” Id. 5; he mentions “Spain, France, Italy, Germany, Portugal, and the United States” Id., 7; he discusses the British case, Id., 12-13; 15-17. Finally, Loveman says that: “the written constitutions of the new liberal regimes of North America and the former colonies of Spain and Portugal in Central and South America” all had such provisions, id., 17.

\(^{32}\) Id. at 17.

\(^{33}\) For example, Madison proposed a federal legislative veto over state legislation—see e.g. Alison L. LaCroix, What If Madison Had Won? Imagining a Constitutional World of Legislative Supremacy 45 Indiana Law Review 41 (2011)—
The second condition of constitutional stability involves the ability of citizens to coordinate against political officials who attempt constitutional transgressions. When citizens have the ability to coordinate against political officials, they can either force officials contemplating transgressions to back down or can remove them from power. We call the ability to coordinate generated by a common understanding of constitutional limits the *consensus condition*.

Unfortunately, the coordination required by the consensus condition is not easy to engineer. Citizens face many difficulties in coordinating against an overreaching government. For instance, citizens of diverse backgrounds typically disagree about the content of rights, how to specify them, and hence when those rights have been transgressed.

Citizens are also likely to disagree about whether honoring rights is more important than some other value such as providing security, feeding hungry people, or promoting the general welfare. Opportunistic political officials often exploit these differences by taking actions against some groups but not others, thereby inhibiting citizens at large from forming consensus and successfully coordinating against the government. This is a strategy regularly adopted by kleptocratic regimes, as well as by

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but instead, the convention placed specific limits on states’ powers, including on bills of attainder, which some have characterized as a limit on takings. See Oster, *supra* note XX, at 214.


colonial regimes, such as the British Empire, which maintained extended control over India, aided by encouraging linguistic and religious differences, as well as over its African colonies, favoring some groups and thus promoting class and other differences, which in turn forced competition among them and undermined opposition to its rule.37

To solve these coordination dilemmas, constitutions and their engineers create focal points;38 focal points create a constitutional consensus about citizen rights and constitutional procedures, enabling citizens to coordinate their response to government transgressions.39 In the United States, the Federal Constitution—as supreme law—provides the foundational focal point.40 In addition, constitutional engineers create bright-line constitutional provisions—provisions whose meaning is sufficiently clear that citizens can independently assess whether a public action is constitutional or constitutes a transgression, and consistently come to the same conclusion. Brightline provisions constitute an important means of creating focal points around which citizens coordinate.

Taxation alone provides many illustrations. For one, the direct taxation clause requires that direct taxes imposed by the national government be in proportion to

39 The text alone does not establish a focal point, the consensus condition, or self-stabilization. Doing so requires conditions beyond the text, namely that (1) nearly all parties to the constitution believe they are better off under the constitution; and (2) the parties realize that if they fail to defend the constitution, the constitution will fail; implying, by (1) that they will be worse off. In particular, parties must be willing to defend parts of the constitution that benefit others even if it is costly to themselves.
40 James Madison, Federalist, no. 46, 315 (#18)("But ambitious encroachments of the Federal Government, on the authority of the State governments, would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. Every Government would espouse the common cause.") Available at http://press-pubs.uchicago.edu/founders/documents/v1ch8s30.html.
population.\textsuperscript{41} As mentioned, other clauses require that custom duties be uniform across the countries\textsuperscript{42} and, in addition, that the national government may not impose taxes on exports from states.\textsuperscript{43} Similarly, Article V explicitly banned legislation prohibiting the importation of slaves before 1808; this article also prohibits constitutional amendments from changing equal representation of states in the Senate. These provisions and others attempt to clearly delineate unconstitutional conduct. In doing so, they facilitate citizen judgment of governmental actions, allowing citizens to more readily react in concert against potential transgressions by clarifying the extent to which even diverse groups share some central interests in common.

The third issue of constitutional stability involves shocks. All countries face shocks to their environment throughout the histories, created by significant, typically largely unforeseeable, changes in the circumstances, due to effects, such as major demographic changes, natural disasters, economic downturns, wars, or innovations in technology.\textsuperscript{44} These shocks often present new problems, and many result in crises. Sufficiently large shocks reduce the benefits of cooperation achieved under current rules and policies, potentially rendering institutions unstable.

To address the potentially destabilizing effect of shocks, constitutions must create conditions for successful adaptation: that is, they must create institutions that allow citizens and political officials to adjust to changing circumstances by adapting

\textsuperscript{41} A provision that had significance at least until the Sixteenth Amendment’s exemption of income tax from such proportionality requirements. U.S. CONST. amend. XVI.
\textsuperscript{42} U.S. CONST. art. I, § 8, cl. 1. This illustrates that clauses often contribute to multiple conditions.
\textsuperscript{43} U.S. CONST. art. I, § 9, cl. 5.
\textsuperscript{44} DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 103-115 (2005).
constitutional provisions to maintain the limit and consensus constitutions over time. Following Hayek and North, we call this the adaptation condition. In the American context, constitutional mechanisms intended to create some degree of adaptive efficiency include, most obviously, the amendment process. But the difficulty of amending the constitution results in a very high threshold for adaptation. Consequently, other forms of adaptation, such as the legislative process, proved especially important in the Constitution’s first century. Congress dealt with and frequently resolved the most serious crises during this period through legislative pacts, a form of compromise among factions that might have led to serious conflict and possible violence, had the crises not been resolved. Typically called “compromises” in this period, this use of the Constitution’s ordinary legislative process produced a form of super-statutes that were small-c constitutional events. As explored in more detail below, the Compromises of 1820, 1833, 1850, and 1877 each resolved a difficult crisis between the North and South and prevented dissolution of the country. In contrast, each attempt to create a

45 See Mittal, Dynamic Constitutional Stability, supra note XX.
46 Supra note 17.
47 A related view is that “constitutional amendment processes are designed not so much to allow changes to the constitution’s original design but rather to allow legislative and popular actors greater scope to influence constitutional courts’ evolving interpretation of that design.” Dixon, Rosalind, Constitutional Amendment Rules: A Comparative Perspective (May 6, 2011). COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg, ed.), Edward Elgar (2011). Available at SSRN: http://ssrn.com/abstract=1833634.
49 Id.
49 Including, according to Baude, the Supreme Court’s ruling in the 1875 case Kohl v. United States.
Compromise of 1861 during the secession crisis failed, leading to the Civil War. By enabling legislative solutions, the Constitution provided a key mechanism of adaptation that helped maintain stability, even though ultimately that burden proved too great. But this failure must be put in the context that the U.S. has not only faced numerous radical shocks, but has arguably gradually changed in the last 200 years significantly more than other major nations: for instance, it has faced an increase in population of approximately 100 fold in the last 200 years, as compared to a doubling in France. Some may conclude that, consequently, the U.S. is in effect a different country than at the founding; either way, this makes it all the more remarkable that the Constitution has lasted so long, even surviving against the predictions of some of its founders.

3. Designing the Takings Clause as a Self-stabilizing Constitutional Mechanism

The U.S. Constitution was written in a context of deep uncertainty about the ability of democratic republics to endure. At the time, no modern precedent for a long-lasting, stable democratic constitution existed. Early modern Europe offered no example of a large and stable republic; and standard wisdom from Machiavelli through

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51 Thomas Pickety, CAPITAL IN THE TWENTY-FIRST CENTURY (2014), at XX.
52 Id.
53 Thomas Jefferson to James Madison (#23): (“it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”) Available at http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html.
Montesquieu held that republics could be sustained only in small city-states. Prior to 1787, no constitution had successfully protected a substantial collection of individual rights on a scale as large and as varied as that of the United States. Thus, when members of the Constitutional Convention met to craft a new constitution, they operated in largely uncharted waters. As the country began the process of ratification, no one knew whether the Constitution would prove to be a lasting document—or as we characterize it, a self-stabilizing one.

The creation of the U.S. Constitution, its ratification, and its implementation cannot be understood absent appreciation for the framers’ concern with maintaining lasting constitutional stability. The Convention deliberated with the failures of the first national constitution, the Articles of Confederation, at the forefront of the framers’ minds. The newly independent states successfully struck a constitutional bargain in 1776, but that bargain could not be preserved in the rapidly changing, post-war environment of the 1780s. Under the Articles, Congress lacked the power and institutional competence to address a wide range of domestic and international threats. In terms of the tradeoffs inherent in the limit, consensus, and adaptation

55 NICCOLO MACHIAVELLI, DISCOURSES ON LIVY. “Error! Main Document Only. I would well believe that to make a republic that would last a long time, the mode would be to order it within like Sparta or like Venice; to settle it in a strong place of such power that nobody would believe he could crush it at once. On the other hand, it would not be so great as to be formidable to its neighbors; and so it could enjoy its state at length. For war is made on a republic for two causes: one, to become master of it; the other, for fear lest it seize you.” Chicago (1517) I.6.4, p.22; BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 2.9.1 “Error! Main Document Only. If a republic be too small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice.” Cambridge (1748), p 131.

56 See Mittal, Dynamic Constitutional Stability, supra note XX, at 40–42.


conditions, the Articles’ unanimity provisions radically *limited* the *de facto* power of the national government but made *adaptation* nearly impossible. In the mid- to late-1780s, the Articles were failing, and absent a new constitutional bargain, the newly independent states were likely to break apart. 59 Consequently, a pervasive concern with creating and preserving order drove both Federalist approaches to constitutional design *and* Anti-Federalist acquiescence to the new constitution. 60 Above all, the Constitutional Convention was called to redress this imbalance by establishing a new constitutional framework capable of addressing the key public policy and public goods problems of the 1780s and beyond.

The *ex ante* uncertainty about the Convention’s capacity to strike a lasting bargain helps explain important aspects of the Constitution’s original structure, including a wide range of provisions that limit the power of government, and particularly the power of majorities. 61 The inclusion of many of these provisions, including counter-majoritarian provisions such as those establishing the Senate, now criticized by contemporary scholars, 62 were in fact necessary to secure support for the Constitution in 1787.

59 See William H. Riker, *The Lessons of 1787*, 55 *Pub. Choice* 5–34 (1987). 61 In *Federalist 6*, Hamilton, after mentioning the problem of external threats to the United States discussed in the previous papers, begins, “I shall now proceed to delineate dangers of a different, and, perhaps, still more alarming kind, those which will in all probability flow from dissensions between the States themselves, and from domestic factions and convulsions. These have been already in some instances slightly anticipated, but they deserve a more particular and more full investigation.” Available at http://press-pubs.uchicago.edu/founders/documents/v1ch8s30.html


Focusing exclusively on the effects of these institutions in the late twentieth and early twenty-first centuries makes it difficult to fully recover the framers’ driving purpose—to create a self-stabilizing republican constitution where none had previously existed.

Private property protections were a well-recognized part of the project of creating constitutional stability in America.\(^{63}\) Indeed, the notion of private property was widely understood to be foundational to society—liberal theorists, such as John Locke, who considered the very purpose of government to be to protect private property, heavily influenced many of the framers of the American constitution.\(^{64}\) Early American concern with protecting private property also emerged in part in reaction to the lessons of English history, particularly the impoverishment of the English crown, which had led to massive political change in England, and ultimately the rising strength of the parliament. Colonists objected to the English parliament as tyrannical and corrupt; and state legislators (especially Madison) increasingly sought to restrain their legislatures, seeing their power and willingness to pass laws that interfered with private property as particularly problematic.\(^{65}\)

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\(^{63}\) Steven Calabresi, Sarah Agudo, and Kathryn Dore's detailed analysis of state constitutional rights from 1787 to 1791 suggests that by 1791 six states had takings clauses in their constitutions. The clauses protected private property to some degree but often did not specify whether just compensation was required when a taking occurred. Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History*, 85 S. Cal. L. Rev. 1451, 1505 (2012).


\(^{65}\) William Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 709–10 (1985). See also *The Federalist* No. 48 (James
But how does one actually craft specific property protections that can be sustained over time? Advocating strong property protection in the abstract is one thing; it is another to design specific constitutional protections that sustain the Constitution in practice. We argue that a wide range of constitutional provisions contributed to this program: the right to assemble; the right to advocate for alternative policies or against newly proposed ones; and procedural and substantive limits on the government’s ability to impose taxes or to regulate economic and social activity. Another important element was the Takings Clause.

The Takings Clause was unusual in that participants in the Convention hardly discussed it. Unlike every other clause in the proposed Bill of Rights, it was not recommended by any state ratifying convention, and the rationale for adding the Clause remains obscure. Scholars generally attribute the clause’s inclusion to the clever maneuvering of its author—James Madison—who quietly inserted it into his list of rights proposed by the individual state conventions.

The dearth of historical evidence concerning the addition of the Takings Clause suggests that attempting specific inferences about the Clause’s intended purpose or

Madison supra note XX, at XX (“in a democracy, it is the legislature that is dangerous, since the executive is limited in the extent and duration of its power but the legislature is composed of a group “sufficiently numerous to feel all passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions.” In the States, the “legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”) But see THE FEDERALIST NO. 26 (Alexander Hamilton) Id. (“[I]t is better to hazard the abuse of that confidence than to embarrass the government and endanger the public safety by impolitic restrictions on the legislative authority.”).

66 AMAR, THE BILL OF RIGHTS, supra note XX, at 78.

67 Baude, supra note XX, at 1794.

69 AKHIL AMAR, THE BILL OF RIGHTS, supra note XX, at 77–79; DANA & MERRILL, PROPERTY, supra note XX, at 13.
scope can be perilous. Nevertheless, we argue that the Clause’s inclusion into the Federal Constitution, at a minimum, was part of Madison’s more general plan to create a “perpetual constitution”—or in our language, a self-stabilizing one.

More specifically, the Clause was intended to limit the stakes in government for citizens, facilitate coordination against government transgressions, and enable adaptation—to play a part in contributing to the three conditions of stability. First and perhaps most importantly, the Takings Clause was designed to lower the stakes in government—that is, to help satisfy the limit condition. To some the Clause seems to fit somewhat “awkwardly” with the criminally focused grand-jury, double jeopardy, and self-incrimination clauses that precede it, but scholars of the Takings Clause generally agree that it follows its fellow Fifth Amendment clauses in protecting individuals and minority groups from governmental interference.

The Takings Clause limited possible threats to property rights by constraining the extent to which the state can acquire private property through seizure for its own

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70 Baude, supra note XX, at 1742.


72 We argue here that the takings clause contributed to the three conditions of stability, but that does not mean that on its own it ensured constitutional stability; rather, multiple constitutional provisions have a stabilizing purpose, and in combination, they contribute to the constitution’s longevity and stability, even though none would have been adequate on its own.

73 AKHIL AMAR, THE BILL OF RIGHTS, supra note XX, at 77–78.

74 See, e.g., Id.; DANA & MERRILL, supra note XX, at 14. However, the question of exactly which individuals the Clause was intended to protect, and from who, is a complicated one. William Baude has recently argued that, contrary to modern conventional wisdom, the enactment of the Takings Clause did not presuppose or create the existence of a federal eminent domain power. Rather, according to Baude the scant specific evidence about the purpose of the Takings Clause reflects a very limited federal power of eminent domain concerned primarily with the District of Columbia and the territories or perhaps a precautionary measure in the event that a broad federal eminent domain power was found. See Baude, supra note XX, at 1798. The federal Takings Clause, to the extent that it was designed to restrain the states at all, would only do so through its “educative” function described below. See Baude, supra note XX, at 1791–95.
A danger arises from the absence of such a clause, as majorities may seize property of their opponents as a means of financing public goods or rents instead of raising taxes for these purposes. This form of legislative behavior is common among democracies in the developing world. As a state legislator, Madison fought vigorously to restrict takings of property for military or other public uses without just compensation, and he perceived how important a national commitment to protect property rights might be.

The Takings Clause operates first and foremost as a response to the power of eminent domain—the government’s power to condemn or seize land from private individuals and convert its title to public ownership. State eminent domain was a well-established power in 1787: the power had existed since Roman times, was entrenched in English law prior to the founding of the American colonies, and likewise became well established in American common law.

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75 Treanor argues that early progenitors of the Fifth Amendment just compensation requirement in the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787 similarly reflected a “decline of faith in the legislatures and a new concern for individual rights—particularly property rights.” Treanor, Origins, at 701.


77 Treanor, Origins, supra note 37, at 709–10.


79 Katherine M. McFarland, Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain, 14 B.U. PUB. INT. L.J. 142, 144 (2004) (common law eminent domain was used to “facilitate the buildings of public roads, schools, and post offices.”). Common law protections from takings had also been widely established—see Oster, supra note XX at 218 (“The common law required that if the legislature gave its consent on behalf of an unwilling property owner (and thereby a taking occurred), compensation must be given.”)

80 Oster, Id. (“At the time the Fifth Amendment was created, only two of the states had takings compensation language in their constitutions or declarations of rights... However, the majority of the
constitutions explicitly granted the power of eminent domain to state government, every state government exercised the power, and it has subsequently been introduced into most state constitutions and many state statutes.\(^{81}\)

Read in this context, the “just compensation” requirement, and perhaps less obviously, the “public use” requirement, act as limits on the broad powers of eminent domain.\(^{82}\) In this way, the Takings Clause lowers the stakes of politics: by constraining the government’s freedom to seize land or chattels without bearing some of that price itself, the clause somewhat lowered the danger posed to the citizenry. Thus, the Takings Clause helped ensure that propertied citizens would have less reason to resist governmental actions or support extra-constitutional action against the government, thereby making ongoing acceptance of the Constitution more likely.

More subtly, Madison’s design of the Takings Clause was intended to help satisfy states had due process language to protect from arbitrary takings, or language requiring that ‘consent’ be obtained for takings for public use.”).

\(^{81}\) For instance, eminent domain powers were explicitly provided for in Michigan’s constitutions of 1850, 1908, and 1963. Moreover, the Supreme Court has held that the power of eminent domain is an incident to sovereignty, for which no special constitutional provision is required. United States v. Jones, 109 US 513, XX (1883).

\(^{82}\) The limiting force of the “public use” requirement in the post-\textit{Kelo} era remains to be seen. As Stuart Banner notes, “[c]ourts in the twentieth century thus tended to be exceedingly deferential to legislative findings that particular transfers of property actually were for the public good.” Stuart Banner, \textit{American Property: A History of How, Why, and What We Own} 272 (2011). Some scholars have argued that public use ought to be given more substantial meaning – for example, by limiting public use to the provision of public goods, like military defense, highways, and parks, that are open to the public at large and that the state lacks the ability to exclude or maybe even pro rate use of—see Epstein, \textit{supra} note 20, at 166-169—or by defining “public necessity of the extreme sort”; that is, as requiring that the coordinating function of the government in assembling land be activated in the exercise of eminent domain—an approach taken by the Michigan Supreme Court in \textit{City of Wayne v. Hathcock} 471 Mich. 445 (2004), overruling \textit{Poletown v. Detroit} 410 Mich. 616 (1981). There are difficulties with both of these alternatives. In the former, it is unclear where the line should be drawn, for instance, is a state building infrastructure that uses some level of private funding is a public-private cooperative? If so, is it then adequate for the public input to be only 1% of the project? In the latter, instead of assessing public use of public advantage, the courts have to assess the extent to which coordination is required or if public necessity is extreme.
the consensus condition. Madison simultaneously intended the Clause to serve a broader “educative” function; that is, he hoped that the Clause’s inclusion in a new Constitution that represented supreme law would help educate and remind ordinary citizens of their rights, and spur greater federal and state protection of property rights. The Clause “stood for the broad principle, which could be appealed to in political discourse, that governmental acts should not diminish the value of private property.” In our language, Madison included the Clause in the Constitution in part to satisfy the consensus condition by helping to create shared expectations over what constitutes transgression by the government.

One principal purpose of the Constitution—and particularly the Bill of Rights—is to create focal points that familiarize citizens about the appropriate powers of government and their limits and to coordinate citizen expectations. Madison was more inclined to place his faith in institutional design than “parchment barriers” when it came to protecting minority rights against the power of the majority. Nonetheless, using language that closely corresponds to the logic of focal points, Madison conceded that declarations of rights “have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole

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83 Treanor, Original, supra note XX, at 837.
84 Treanor, Origins, supra note XX, at 714.
85 Treanor, supra note XX, at 819. (emphasis added)
86 THE FEDERALIST 48 (James Madison).
community.” 88

Let us consider in greater detail how the Takings Clause facilitated the consensus condition, creating shared expectations over property rights and establishing what constitutes abuse by the government. First, the Clause committed the state to a restrictive method by which it takes property. Although the specifics of how fair market value would later be calculated may not be apparent from the bare phrase of “just compensation,” just compensation at least seems to imply some compensation. Furthermore, systematic failure to meet this requirement would be apparent to the public and enable victims of such a violation to coordinate with one another in opposition to the government, thus making such failure less likely. Similarly, the clause encompasses the interests of potential victims of violations in such opposition, uniting the interests of diverse kinds of property holders in not ignoring uncompensated government takings of property of others, be it slaveholders or real property owners.

Finally, the Takings Clause represents Madison’s attempt to create a constitution that would be capable of adaptation to new geographic and demographic realities, that is, to provide a sophisticated—though ultimately incomplete—attempt to satisfy the adaptation condition. One of the deepest divides that faced the Constitutional Convention was slavery. 89 Southern slaveholders exhibited considerable anxiety over a constitution that might affect their “property.” During the Convention, debate on key questions of structure and process was repeatedly postponed until structural protections

88 James Madison to Edmund Randolph (May 31, 1789), in 5 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 372, 382 (Gaillard Hunt, ed., 1900). See also, RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 290 (1971) (commenting on Madison’s gradual acceptance that an explicit declaration of rights may be useful).

for slaveholders were agreed upon.\textsuperscript{90} According to Treanor and others, Madison’s inclusion of the Takings Clause reflected his desire to protect two specific minority groups—landowners and slaveholders—whose support was necessary to pass the constitution but who, in Madison’s view, would increasingly be left unprotected by the majoritarian political process enshrined in the Constitution.\textsuperscript{91} In 1787, landowners and slaveholders were very powerful, but Madison feared that power would diminish over time as they became a minority; and so he inserted the Takings clause with their future protection in mind.\textsuperscript{92}

Madison keenly recognized that lawmaking inherently involves transfers of property among different groups. As he famously argued in \textit{Federalist 10}, legislation necessarily reflects decisions that harm some groups and benefit others.\textsuperscript{93} In \textit{Federalist 10}, Madison defended his belief that the political process created by the Constitution would generally work to protect individual property interests.\textsuperscript{94} But he also recognized that the system would not always protect minority rights from the power of the majority. As a state legislator, Madison was disgusted by laws that took land for military and other public purposes without compensation.\textsuperscript{95} Looking forward, he feared that landowners and slaveholders were vulnerable to expropriation, and he designed the Clause with the

\textsuperscript{90} Max Farrand, \textit{The Framing of the Constitution of the United States} 94 (1913).
\textsuperscript{92} Treanor, \textit{Original}, supra note XX, at 836–47; Treanor, \textit{supra} note XX, at 698.
\textsuperscript{93} \textit{The Federalist No. 10} (James Madison).
\textsuperscript{94} Id (“The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.”).
\textsuperscript{95} Treanor, \textit{Origins}, supra note XX, at 709–10.
possible future weakness of these groups in mind.

For Madison, the Takings Clause established an absolute requirement that the government compensate the landowner if it were to order a slave freed. Madison expected that slaveholders and landowners would increasingly find themselves a minority over time and without additional protection—or what he called “auxiliary precautions”—both groups would be continually subject to expropriation at the hands of a growing, landless majority. The Takings Clause fits in this category of “auxiliary precautions.” By restricting legislative control over the individual rights of landowners and slaveholders, the Clause helped to lower the stakes in politics on an ongoing basis for two important groups whose support was necessary to secure the Constitution’s adoption and ongoing success. Considered in this light, the Takings Clause complements a range of other counter-majoritarian features of the Constitution – such as bicameralism, equal representation in the Senate, and the taxation and customs clauses – to lower the stakes for slaveholders and landowners.

Yet the construction of the Takings Clause is clearly only a partial, not an absolute, protection against government takings. Constitutions have more and less blunt ways of lowering the stakes and making citizens feel more secure in their lives, liberty, and property. If by the limit condition guaranteeing limited property rights makes citizens feel more secure in their property, why not then make protections stronger still by absolutely prohibiting the taking of private property, rather than merely restricting its terms? For instance, the founders could have worded the clause with stronger rights-protection language, such as “the state shall never seize private property.”

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96 Treanor, Original, supra note XX, at 851.
97 Id. at 849–53; THE FEDERALIST NO. 51 (James Madison).
The answer to this question illustrates how all three conditions interact: an absolute prohibition on takings would have had two effects. First, it would have made property more secure – at least in the short run; but, second, it would make the Constitution less effective in the long-term, since the rigidity of the stronger commitment to property would at once render the clause non-credible, given the needs of government. For example, governments are generally forced to take land to provide basic infrastructure and protect against emergencies, at a minimum. More importantly, because the stronger language would prevent the government from adapting to the changing needs of the country, the stronger language directly clashes with the adaptation condition.98 By specifying how and when the state can take property, the Fifth Amendment not only contributes to the commitment condition, it also weakens the clause’s negative implications for the adaptation while promoting the coordination condition. By spelling out the conditions under which the state can take property, the state is committing to a restricted method by which it takes, making it subject to external review by the courts.

4. Adaptation of the Takings Clause after 1787 (to maintain the Limit and Consensus conditions)

Ensuring the formation of the Union and the adoption of the Constitution was only the initial goal of framers. Although they had little basis for expecting a constitution that would last for over 200 years, they did seek to craft a constitution that would carry the new nation forward into the foreseeable future. The adaptation of the Takings Clause

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98 See Treanor, Original, supra note XX, at 840–47 for a discussion of Madison’s reasons for favoring a partial, as opposed to an absolute, compensation requirement.
after 1787 illustrates the extent of their success, within the inherent limitations of ensuring stability in a nation divided over slavery and sectional disputes. This section describes the role of the Takings Clause in the post-founding period, and argues that although the Civil War could not be avoided, the Takings Clause was one mechanism that delayed the clash, and relative stability promoted for three generations.

The Takings Clause represented Madison’s attempt to lower the stakes, create consensus, and preserve property protections in what he expected would be a rapidly shifting demographic and geographic environment. But in many ways, the Clause did not play an important role until much later in history, and it did so primarily through judicial development. Prior to the New Deal, the Contracts Clause and later the substantive due process doctrine—not the Takings Clause—provided the strongest sources of property protection.

In the early Republic, majoritarian political institutions such as legislatures and juries often determined when to take property and when compensation was due, not just the courts. The post-1787 passage of takings clauses in every state except North Carolina illustrates this point. Many of these state clauses specifically charge juries, not courts, with determining just compensation.

Legislatures also played a leading role in interpreting the meaning of the Takings Clause in the early Republic. As the new country grew in rapid and unexpected ways,

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99 See, Section III, supra.

100 Treanor, Original, supra note XX, at 794.

101 See DANA & MERRILL, supra note XX, at 1.

102 Treanor, Original, at 787.


the federal government found itself under increasing pressure to quickly survey and distribute land in the vast public domain for settlement. This imperative, in turn, increasingly brought state legislatures and Congress—charged with making sense of the Takings Clause—into the middle of a series of land disputes involving settlers and Native Americans.

Efforts by the federal and state governments to enable an orderly expansion of settlement frequently raised important questions about their ability to take land from Native Americans. During the colonial period, settlers routinely asserted a right to land for which they lacked legal title. Prior to the creation of the federal domain, states including Virginia and North Carolina passed preemption acts giving settlers the option to purchase unsold Indian land once it had been purchased from the Indians. Preemption reflected a substantial adjustment to traditional understandings of property rights that generally favored claims based on legal title and first possession. But these preemption laws often left open the question of whether states had authority to grant land still occupied by Indians.

The Supreme Court entered the debate in 1823 in Johnson v. M’Intosh. Chief Justice Marshall, in an opinion that embarked on a detailed discussion of Indian property rights, held that Native Americans merely occupied their land and were thus

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“incapable of transferring the absolute title to others.” The opinion shored up the validity of thousands of state grants of land that had not been purchased from the Native Americans. In doing so, it lent support for the proposition that government could indeed “take” Native American land without compensation—a proposition that the Supreme Court explicitly adopted in 1955 with respect to Congress in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The Takings Clause’s intended protection for property rights in slaves also came under repeated, if episodic, pressure throughout the antebellum era—stressing the limit condition and threatening to undermine constitutional stability. Although Congress never directly tested the application of the Takings Clause to slavery—the Northern-controlled government skirted this problem through constitutional amendment in 1868—throughout this era, the Clause loomed in the background as a potential deterrent to antislavery initiatives that could disrupt constitutional stability.

In this case, other constitutional provisions, rather than the Takings Clause, took a more active part in protecting property rights in slaves. These provisions rendered the

110 *M’Intosh*, 21 U.S. 543 at 591. See BANNER, supra note XX, at 150–190 for a detailed discussion of how Justice Marshall transformed a “very easy case” into a broad discussion of whether American law recognized the Indians as the owners of their unsold land.

111 *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279-82 (1955) (“This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. The great case of Johnson v. McIntosh denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history “that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” . . . No case in this Court has ever held that taking of Indian title or use by Congress required compensation.”) (internal citations omitted); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 124 (2d ed. 2012).

Clause’s promise to protect property rights in slaves credible in a context of rapid and unexpected demographic change. Weingast’s 1998 study of the “balance rule”—the idea that free and slave states would be admitted in equal numbers so both sections held a veto over national legislation through the Senate—illustrates this claim. His study of antebellum antislavery legislation suggests that the United States’ bicameral system in combination with the balance rule repeatedly prevented the passage of destabilizing, antislavery legislation that could have rendered the promise of the Takings Clause hollow. 113 Northerners in the House repeatedly advanced antislavery measures, typically at moments of potential gains in Southern political power. Examples include the 1804 Hillhouse Amendment concerning the Louisiana Purchase, the 1818 Talmadge Amendment concerning the admission of Missouri, and the 1846 Wilmot Proviso concerning the territory gained in the Mexican-American War. These and other potentially destabilizing antislavery measures all failed in the Senate, thereby helping to promote constitutional stability.

As Weingast describes, Americans successfully resolved their episodic differences over slavery within the constitutional framework for three generations. They did so through a series of pacts and institutions that created and preserved sectional balance between the North and South. As long as Southerners held half the states, they could veto threatening legislation. Yet sectional balance ultimately failed. In a rapidly expanding country, maintaining sectional balance required that the two sections grow in virtually equal proportions. Asymmetric demographic expansion and territorial

acquisitions raised many unforeseen problems, plaguing attempts to maintain sectional balance.

The U.S. Constitution faced five sectional crises in the nineteenth century in 1820, 1833, 1850, 1861, and 1877.\textsuperscript{114} In each, the future of constitution and country were at risk; and one—the Crisis of 1861—resulted in a devastating Civil War. Americans solved the other four crises with considerable difficulty. The compromises of 1820, 1833, 1850, and 1877, successfully adapted the constitutional bargain through congressional acts that typically resolved the immediate issue of the crisis but also set rules governing future policies. None of these compromises officially amended the Constitution. Yet, each of the four compromises constituted small-c constitutional events in that they changed the rules of the political game, producing what Eskridge and Ferejohn call “super-statutes.”\textsuperscript{115} For example, the Compromise of 1820 ended the crisis over Missouri statehood and made the balance rule explicit;\textsuperscript{116} and the Compromise of 1833 removed nullification as a possible means by which individual states could block national legislation.

As a result, these antebellum super-statutes proved critical to adjusting the rules and preserving the property rights of slaveholders for three generations. The Takings Clause complemented the balance rule, working in the background to limit Northern antislavery options. Ultimately the conflict could not be managed within the existing constitutional framework. Sectional balance proved impossible to maintain in light of unanticipated changes in demography and resulting territorial expansion. Only the

\begin{footnotesize}
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  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2013).
  \item \textsuperscript{116} Weingast (1998), supra note XX at XX.
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violence of the Civil War and the incorporation of the Reconstruction amendments decisively removed the issue of slavery from the national agenda—restoring constitutional stability and paving the way for new and unexpected interpretations of the Takings Clause. ¹¹⁷

Judicial interpretation of the Takings Clause has become increasingly important in the modern era. Although the jurisprudence has been described as “takings law, without a theory”¹¹⁸, the Takings Clause jurisprudence continues to provide protection against complete dispossession of title. The “just compensation” provision now operates as the primary constraint: the state’s powers of eminent domain are broad, but they may only be exercised with the payment of compensation. In contrast, the “public use” requirement in the takings clause has proved to be a weaker constraint at the federal level because courts have largely deferred to the elected branches as to what constitutes a public use. For instance, courts have upheld eliminating urban blight or redeveloping slums as permissible public uses,¹¹⁹ and similarly economic development has qualified as a valid public use, even when largely resulting in an enforced transfer from one private property owner to another.¹²⁰ Now, only two meaningful limitations on the public use requirement exist, both of which address extreme cases: the requirement prevents seizures made in bad faith and prevents straightforward redistributions or wealth transfers from one

¹¹⁷ Including, according to Baude, the Supreme Court’s ruling in the 1875 case Kohl v. United States—establishing for the first time the existence of a federal eminent domain power. According to Baude, “[T]he Supreme Court has now recognized a federal takings power, and the Takings Clause is the only thing that really restrains it.” See Baude, supra note XX, at 1798.


¹¹⁹ Now, at the state level, public use is considered “coterminous” with the extent of the police power – Berman v. Parker, 348 U.S. 26 (1954) (a slum redevelopment permissible public use)

individual to another, without some associated purpose of public benefit, however indirect the effect.

Beyond those two limits, the Court applies rational basis scrutiny to assess the relationship between the taking and the claimed public benefit, asking only whether the legislature could have rationally believed that the act would achieve its objectives.\(^{121}\) This test gives large deference to the legislature on this question; the Court has declined to substitute its judgment for the legislature’s judgment as to what constitutes a public use “unless the use be palpably without reasonable foundation.”\(^{122}\)

However, the Takings Clause has been found to be expansive enough to protect private property from certain forms of onerous regulation. According to William Treanor, the original understanding of the Takings Clause required compensation when the federal government physically takes private property, but not when it merely regulates it.\(^{123}\) However, in 1922, the Supreme Court held in *Pennsylvania Coal* that regulation could constitute a taking. From the perspective of our theory, the Court’s ruling in *Pennsylvania Coal* satisfies the adaptation condition and reflects the basic necessity of lowering the stakes. Most of what are now termed “regulatory takings” cases are decided according to a balancing test that weighs economic impact, the effect on investment-backed expectations and the nature of the governmental activity, among other factors.\(^{124}\) However, the Supreme Court has developed a number of categorical rules that provide additional and meaningful protection for certain types of regulatory

\(^{121}\) Hawaii Housing v. Midkiff 467 US __ (1984), quoting Berman (“... where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”).


\(^{123}\) Treanor, Original, *supra* note XXX, at 782.

takings. Specifically, in *Lorretto v Teleprompter* the Court held that any permanent physical occupation of private property, no matter how trivial, was necessarily a taking and required just compensation.\textsuperscript{125} Also, in *Lucas*, the Supreme Court declared that regulations that completely deprive an owner of "all economically beneficial use" of her property invariably constitute a taking.\textsuperscript{126} The takings clause has also proved to be a check on government power in the context of regulatory "exactions" – usually where planning approval is made contingent on some sacrifice of property interests (such as dedicating a public easement).\textsuperscript{127}

Many scholars have suggested that the Supreme Court’s decisions after *Pennsylvania Coal* have struggled to clearly define what kinds of regulations constitute takings.\textsuperscript{128} Without taking a position on the Court’s post-*Pennsylvania Coal* regulatory takings jurisprudence, our theory suggests that failing to clearly define property protections risks straining the limit condition—possibly raising the stakes and weakening constitutional stability.

5. The Extent of the Need for Stability—A Comparative Perspective

Constitutional stability does not come without a price; lowering the stakes of

\textsuperscript{125} See *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking)

\textsuperscript{126} *Lucas v. South Carolina Coastal Comm.*, 505 U. S., at 1019.

\textsuperscript{127} *Pennsylvania Coal* was the first case in American constitutional law to apply the takings clause to a law that impacted the value of property but had no effect on title. *Pennsylvania Coal* raised the possibility that laws with an extreme effect on the value of private property might trigger the takings clause because they simply "go too far" but it failed to provide a coherent standard to make this assessment. In Justice Holmes’ cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

\textsuperscript{128} *Id.*; Merrill & Smith, *Property: Principles and Policies* 1337 (2d ed.).
politics through limited government, in particular, raises the potential for weakening the
capacity of government to fully function, as was the case under the Articles of
Confederation. As such, the optimal level of stability is not necessarily the maximum
possible in large part because of the tradeoff between the limit condition and the
adaptation condition. How, then, are constitutional drafters to know the extent to which
each of the three conditions should be promoted? Our partial answer is that the
requisite level of constitutional stability depends upon the level of the threat of violence
that the nation faces. We illustrate this point comparatively in this section, by contrasting
the strong need for stability in the U.S. at the time of the founding, due to the high threat
of violence, with the relatively low need for stability in Australia at its founding in 1901.
This difference manifests itself in contrasting approaches to governmental takings and
demonstrates that reliance on the three stabilizing conditions that we describe here is
not all or nothing, but can be, and must be, calibrated to the practical necessities of time
and place.

Like many other nations, Australia followed the United States’ lead in restricting
governmental eminent domain powers in its constitutional text—in fact, Australia’s
takings scheme, expressed in terms of “compulsory acquisitions,”¹²⁹ was explicitly
modeled on the American clause.¹³⁰ Assuring stability for the Australian and American

¹²⁹ s51(xxxi) of the Australian Constitution provides broad power to the Commonwealth Parliament—
the federal government—for “the acquisition of property on just terms from any State or person for
any purpose in respect of which the Parliament has power to make laws.” AUST. CONST., s51(xxxi).

¹³⁰ RACHELLE ALTERMAN, TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATION
AND COMPENSATION RIGHTS 32 (2011). In the closest Australian equivalent to The Federalist, Quick and
Garran provided the leading contemporary account was almost entirely devoted to how the acquisitions
power compared to the Fifth Amendment. John Quick and Robert Randolph Garran, THE ANNOTATED
CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (Legal Books) (1901, Sydney), 640–642. As the
Australian High Court recognized: “The source of s 51(xxxi) is to be found in the Fifth Amendment of the
constitutions required some way of lowering the stakes, providing coordination, and adaptation. Both countries did so in large part by relying on the compensatory provision. The American and Australian takings clauses now hinge protection largely on one constitutional restriction: just compensation.\footnote{Despite the fact that the Australian text refers to “just terms” rather than “just compensation,” the Australian term was modeled on the American term—Grace Brothers Pty Ltd v The Commonwealth (1946) 72 CLR 269 at 290 (the phrase “on just terms” was “of course, reminiscent of the Fifth Amendment”)—and both provisions ultimately come down to an assessment of fair market value.\footnote{Kelo v. City of New London, 545 U.S. 469, 480 (2005) (refusing to interpret public use as requiring a “public purpose.”); Hawai’i Housing v. Midkiff, 467 U.S. 229, 241 (1984), (citing Berman, 348 U.S. 26 (1954)) (“[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”); STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 272 (2011).}} And whereas the U.S. Constitution also refers to public use being made of the property by the government, as discussed, the U.S. Supreme Court has ruled that this provision generally does not constitute an additional requirement.\footnote{S51(xxxi) the Commonwealth has the power to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.” Mila Versteeg’s paper in this volume categorizes the Australian Constitution as providing one less requirement than its US counterpart—Mila Versteeg, Takings Clauses Fine Print, 109 NW. U. L. REV. (forthcoming 2015). But as Justice Barton, head of the Federation movement and key drafter of the Australian Constitution said when interpreting the acquisitions clause, “In some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms. So in our Federal Constitution not only must the terms be just, but the power is limited to the purposes in respect of which the Parliament has power to make laws.” New South Wales v. Commonwealth (1915) 20 CLR 54.} Following in this jurisprudential tradition, the Australian Constitution simply made no reference to public use, relying entirely on a compensation provision as a constraint on takings.\footnote{131 Constitution of the United States”—Dixon J in Andrews v Howell (1941) 65 CLR 255 at 282; [1941] HCA 20.}

Yet Australia’s takings regime developed quite differently from its American progenitor. Most strikingly, for the compensation requirements of eminent domain to be triggered in Australia, more than a taking is required. Being adversely affected or subject to the termination of a pre-existing right is insufficient for compensation; some
value must also have been transferred to the Commonwealth. In the United States, by contrast, no transfer of value to the state is required to trigger protection under the Takings Clause. Additionally, the Australian acquisition clause does not apply to the states. Since state and local governments are the primarily wielders of eminent domain powers in both the United States and Australia, this difference has a considerable impact. As such, the two clauses have starkly divergent realms of potential protective effect.

Moreover, the regulation of property has historically moved in a similar direction in Australia and the United States, with the expansion of regulation and the move from title to value. Yet whereas the United States developed a broad definition and application of what constitutes property and takings, Australia lacks such a broad interpretation; for instance, it has no equivalent to regulatory takings. What accounts for this difference?

One possible explanation is that these differences are a product of somewhat diverging texts. First, s51(xxxi) refers to “acquisitions” rather than “takings.”

134 Commonwealth v. Tasmania (the Franklin Dam case) (1983) 158 CLR 1, 145 (distinguishing the Fifth Amendment’s “taking” language from s51(xxxi)’s “acquisition” language); see also Id. 247–48, (Brennan J).

135 Although this was considered by the convention, and rejected “primarily because of the American baggage this term would have come with.” – see Oster, supra note XX at 234.

136 The High Court did not find a governmental acquisition in its prohibition of all individualized trade dress, embellishment, and commercial design on the packages of tobacco cigarettes, allowing only a plain statement of the producer’s name in a size and font specified by the state. JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth (the tobacco plain packaging case) [2012] HCA 43 (No S389/2011). Note however, Gummow seems to be suggesting that being merely regulatory is not determinative, and that using the US as a contrast on this point would be a “false frame of reference.” Id. (per Gummow J.) at p39 para 116.

137 See Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health (1990) 22 FCR 73 at 116–17 (identifying nine distinctions between the two provisions)

138 A further textual difference is that Constitution situations the acquisition clause within the section conferring federal powers, rather than contained within an amendment restraining federal power.
Second, in contrast to the eminent domain power implied within the Fifth Amendment, the acquisitions clause explicitly provides for a governmental power as well as a limitation, the inclusion of which was intended to “ensure that parliament would have undisputed power to legislate for the compulsory acquisition of property.”

Third, the acquisition clause is situated within the section of the Constitution conferring federal powers, rather than contained within an amendment restraining federal power.

Nonetheless, we argue that, although the American and Australian takings regimes exhibit some textual differences, their divergent interpretation is more a product of the two nations’ varying historical and political conditions, differences that required quite different stabilization mechanisms.

The textual differences of the two countries’ takings clauses are not the central driver of the American-Australian divergence. First, one standard definition of “taking” is “acquisition,” so the textual argument on this point is precarious. Second, other textual differences between the two clauses that could have been interpreted as significant

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140 The two clauses also exhibit three procedural differences. First, the U.S. takings provision is only one clause of the Fifth Amendment, the heart of which deals with due process, and this shapes the interpretation of the Takings Clause in some circumstances. For example, some questions turning on whether there has been a taking without due process. See, e.g., Corn Products Refining Company v Eddy, 249 US 427, 431–432 (1919). Second, the U.S. doctrine of sovereign immunity against claims in tort against the state “encouraged the treatment of what were primarily, if anything, claims in tort, as claims arising from the taking of private property.” See Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health (1990) 95 ALR 87; United States v Causby 328 US 256, 267, 269–271 (1946). In contrast, the Australian Judiciary Act explicitly allows such suits—Judiciary Act 1903 - Sect 56(1) (“A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth…) & Sect 64 (“In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same…”) Third, the acquisitions power does not confer an enforceable right, with an action to recover just compensation; rather it renders the law invalid, and action taken in reliance upon it may be tortious. Compare Poulton v The Commonwealth (1953) 89 CLR 540 at 569; The Tasmanian Dam Case supra at 289–90, with United States v Great Falls Mfg. Co., 112 U.S. 645, 656–657 (1884); First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 U.S. 386 (1987).
have not been.  

Thus textual differences need not translate to differences in outcomes. Similarly, while the differences could be ascribed to purposive distinctions underlying the construction of the two clauses, a study of the Australian Confederation debates of 1898 does not support this conclusion. The debates instead “demonstrate that the Australian framers’ concern was chiefly to limit the acquisition power, just as the Americans had done with their Fifth Amendment.”

Given all of these factors, the textual differences between U.S. takings law and Australian acquisitions law beg the question of why those differences were drawn in the first place. The answer lies in the different political environments that constituted the difficulties that each Constitution was designed to overcome.

Specifically, the divergence between U.S. takings law and Australian acquisitions law arises from the extent to which each needed to be concerned with constitutional stability. The framers wrote the U.S. Constitution in the context of overcoming the problem of violence. Looking at the United States and other Western constitutions in the 21st century, it is easy to forget the importance of the potential for violence at the founding because our societies have largely solved the problem of political violence—we now have little fear of coups, civil wars, or rebellion. In contrast, many new

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141 For instance, the Australian “fair terms” requirement can be contrasted to the American “just compensation” constraint, both in terms of the nouns and adjectives: arguably compensation implies full monetary equivalence, whereas just terms is concerned with fairness. But the notion of fairness, like compensation, has been interpreted to ultimately reduce down to the market value of the property, as is the case with just compensation. Nelungaloo v. Commonwealth (1948) 75 CLR 495, 569; however, non-commercial purposes, including religious and charitable purposes, may need to be compensated at a premium—Minister of State for the Army v. Padbury Henty & Co Ltd (1945) 70 CLR 459, 491


143 Indeed, Jay opens the Federalist Papers open with a long discussion of the problem of security, numbers 2–5; a portion rarely studied in modern times, but of critical importance to the framers. See Riker, supra note XX, at XX.
democracies now face those problems today that stable democracies faced years ago when they too were first developing,\textsuperscript{144} as did the early United States. The role served by the U.S. and Australian constitutions now appear similar to each other in terms of their political contexts and likely threats when compared to the problem of violence that plagues many new democracies. But in 1787, the U.S. Constitution had to serve a purpose that resembled much more closely the problem of violence that new democracies struggle with today. A core purpose of the framers of the U.S. Constitution was to solve multiple problems of violence, both from within the states and from foreign nations. The solution required a national government strong enough to provide security and a constitution containing both short and long-term stabilizing mechanisms.

Events of the mid-1780’s—culminating in armed rebellions in seemingly the most peaceful of colonies—painfully demonstrated that Congress no longer enjoyed Revolutionary levels of consensus. On hearing the first reports of Shays’ rebellion in 1786, Washington wrote, “without some alteration in our political creed, the superstructure we have been seven years raising at the expense of so much blood and treasure, must fall. We are fast verging to anarchy and confusion!”\textsuperscript{145} In his correspondence, Madison made clear the connection between weak and incompetent government and the eventual failure of cooperation: “I conceive it to be of great importance that the defects of the federal system should be amended, not only because such amendments will make it better answer the purpose for which it was instituted, but because I apprehend danger to its very existence from a continuance of defects which

\textsuperscript{144} ROBERT H. BATES, PROSPERITY AND VIOLENCE: THE POLITICAL ECONOMY OF DEVELOPMENT 2001; Cox, North, & Weingast, supra note XX, at XX.

expose a part if not the whole of the empire to severe distress. The suffering part, even when the minor part, can not long respect a Government which is too feeble to protect their interest\textsuperscript{146}. Above all, the Constitutional Convention was called to establish a new framework capable of addressing the key public policy and public goods problems of the 1780s and beyond.\textsuperscript{147} Stability of the Constitution could not be taken as given; instead, stability was constructed. The Constitution lowered the stakes by preventing a wide range of governmental transgressions—from wrongful criminal prosecution to punitive taxes, and including uncompensated governmental takings.

By contrast, at its constitutional moment, Australia did not face the same threat of violence. When the Australian Constitution was written, the Australia and states were colonies of the British Commonwealth. Although drafted by the colonists, the Constitution was technically part of a U.K. statute.\textsuperscript{148} Moreover, the Australian Commonwealth was not a sovereign state until 1986;\textsuperscript{149} rather it was a “federated community possessing many political powers approaching, with elements resembling, sovereignty, but falling short of it.”\textsuperscript{150} It exercised powers delegated to it by the Parliament of Great Britain, which was then the Australian sovereign. In contrast, the American colonies emerged from the war of independence as a sovereign state. But

\textsuperscript{146}James Madison to James Monroe, August 7, 1785 in JAMES MADISON: WRITINGS 38 1999.

\textsuperscript{147}A discussion of these public goods and public policy problems appears in Sonia Mittal, Jack N. Rakove, & Barry Weingast, The Constitutional Choices of 1787 and Their Consequences, in FOUNDING CHOICES, AMERICAN ECONOMIC POLICY IN THE 1790S 27–30 (Douglass A. Irwin & Richard Sylla eds., 2011)

\textsuperscript{148}Commonwealth of Australia Constitution Act 1900 (Imp).

\textsuperscript{149}The Commonwealth and each of the states in 1986 passed the Australia Act (1986) “An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.” Available at http://www.austlii.edu.au/au/legis/cth/consol_act/aa1986114/

that war, along with the failures of the Articles of Confederation, threatened the breaking apart of the whole into pieces. Australia fought no war of independence from Britain, and so faced less risk of states breaking away and undermining the federal compact.\footnote{The federal-state balance created in each constitution also starkly diverged. Although Australia, like the United States, has a central government of limited powers, its constitutional provision of exclusive power over customs, excises and bounties was deliberately written in a way to disempower states and make them depend on federal money. To an important degree, Australian states were, from inception, dependent on the federal government. Commonwealth of Australia Constitution Act, Sect 90. The leader of the Australian Federation movement, Alfred Deakin, predicted immediately after Federation: "The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the central Government." However, at the Adelaide Convention in 1897, "Deakin asserted that it had to be remembered by the delegates that 'the States are only parting with a small part of their powers of self-government, and that the Federal Government has but a strictly defined and limited sphere of action'—a prediction "long since been eclipsed" his quoted prediction from 1902—Gareth Griffin, The Future of State Revenue: the High Court Decision in Ha and Hammond, briefing paper No. 16/97 (New South Wales Parliamentary Library research service), at 25. Available at www.parliament.nsw.gov.au/prod/parlment/publications.../16-97.pdf. See also Official Report of the National Australasian Convention Debates, Adelaide 1897, p 292; JA La Nauze editor, FEDERATED AUSTRALIA (Melbourne University Press) (1968), p 97.}

Furthermore, U.S. states remain considerably independent in the United States, and they provide a second layer of protection to individual rights.\footnote{E.g., the Senate as representing the states, the electoral college system for the president etc. all divide federal power among various minoritarian factions—Federalist number 10.} In contrast, in combination with the federal taxation power,\footnote{AUST. CONST., s51(ii) (granting power over "taxation; but so as not to discriminate between States or parts of States").} the central government has almost complete vertical fiscal control over the states and Australia,\footnote{See, e.g., Select Committee on the Reform of the Australian Federation, Australia’s Federation: an agenda for reform, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=reffed_ctte/reff ed/report/c04.htm, Chapter 4 (“Unless financial adjustments are made, the constitutional responsibilities of one level of government can become misaligned with the capacity of that government to raise revenues needed to meet financial demands made upon it. If the misalignment becomes too substantial it can have serious consequences for the way the federation operates, with constitutional balances of power shifting often without formal constitutional reform.”)} rendering them far more dependent on the central government. The American scheme thus lowered the stakes of Federation in multiple ways, of which the Takings Clause was a vital part, an effect that was far less necessary for Australian Federation and the more gradual transition...
toward sovereignty that process demarcated.  

Since Australia did not face a high threat of violence, its clauses supporting the limit condition did not need to be as stringent. The focal points developed by the Constitution therefore differ as well. As a result, Australian law does not deem all interests in land as proprietary. Australian judges have expressed concern that an extended interpretation of the meaning of property would “so fetter other legislative powers as to reduce the capacity of the Parliament to exercise them effectively.” Consequently, under Australian compulsory acquisitions law, “not every compulsory divesting of property is an acquisition within s 51(xxxi).”

The divergences between Australian acquisition and American Takings reflect more than different judicial preferences or tendencies; they are also a product of contrasting political histories. Each respective governmental takings power reflected the lesser and greater need for a stringent limit condition, respectively, and of a general legal and policy disposition, tied to the notion of fairness and justice in each emerging nation. The Australian framers saw greater need, or opportunity, for heightened legislative power to address the requirements of Australian society at Federation and less need for a stringent limit condition. As an ex-prison colony still subject to oversight by the British Commonwealth, the Australian body politic was used to strong central

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155 For a somewhat different view, see Duane L. Ostler, supra note XX at 240 (2009)(“While the wording of the acquisition or takings clauses in Australia and the U.S. was different, the intent and purpose of the limitations was essentially the same. Indeed, when a careful comparison is made of the two clauses, it is seen that each was intended to cover essentially the same ground. Hence, the differences between the U.S. and Australian acquisition clauses are more illusory than real.”)

156 Mutual Pools and Staff Pty Limited v. Commonwealth (1994) 179 CLR 155, 180, per Brandon J.

regulation,\textsuperscript{158} and so less concerned with limiting the extent that takings of property could be used as a means of stringent regulation. In the early United States, property was commonly understood to constitute the happiness condition of the triad pursuits, “life, liberty and happiness.”\textsuperscript{159} Consequently, the American framers crafted a more stringent Takings Clause that reflected and reconfirmed an expansive view of property rights.

Thus the relative threat of violence that each nation faced determined the extent to which its constitutional scheme necessitated reliance on the three stabilizing mechanisms we have described herein. This comparative jurisprudence illustrates that reliance on the three stabilizing conditions that we describe here are not dichotomous but rather highly contingent on the practical necessities of the time, depending particularly on the threat of violence. To succeed, constitutions must make appropriate tradeoffs among the clauses that match their environment.

\textbf{6. Conclusion}

Perhaps because constitutional scholars typically take the Constitution’s survival as given, they rarely investigate how various provisions contribute to the goal of maintaining constitutional stability over time. However, many clauses of the Constitution serve not only their well-known doctrinal roles, but also contribute to the Constitution’s stability through three mechanisms: (1) by lowering the stakes of politics, which lowers

\begin{footnotesize}
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\item \textsuperscript{158} Clark, C. H. M. A \textsc{History of Australia. Vol. V.}, at 18 (Melbourne: Melbourne University Press)(1981)(The Australian founders simultaneously “wanted a constitution that would reconcile the claims of defence, that pointed to a large state and centralized power, with their idea of liberty, that pointed to a small state and decentralized power - hence, the choice of a federal constitution.”)
\item \textsuperscript{159} In fact, in the original Lockean construction, the reference was to the power of man “to preserve his property, that is, his life, liberty, and estate” – Locke, supra note XX.
\end{itemize}
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the likelihood that people will resort to extra-constitutional action to protect themselves and their property; (2) by creating focal points to help citizens coordinate against governmental transgressions of rights; and (3) by facilitating adaptation to changing circumstances.

The American Takings Clause starkly illustrates this effect. Although there was little public demand for the Takings Clause in 1787, James Madison developed the Clause with the three conditions of constitutional stability in mind. Examined through this lens, important but often overlooked elements of the history of the Takings Clause become clear. In addition, the Clause, along with other counter-majoritarian features of the Constitution, also helped to make a range of destabilizing antislavery measures more difficult, such as immediate, uncompensated emancipation by congressional legislation. The Clause therefore served Madison’s seeming purpose of creating constitutional stability by protecting slaveholders over time. Because no major antislavery initiative became law, let alone an extreme one, this aspect of Takings was never tested.

The Takings Clause provides only one example of the self-sustaining features of constitutional clauses. In fact many, if not most, of the U.S. Constitution’s clauses serve stabilizing purposes—whether to limit the stakes in politics, facilitate coordination, or enable adaptation to new and unanticipated circumstances—a phenomenon we intend to explore further elsewhere. Examining the self-stabilizing role of specific constitutional provisions alongside their more traditional roles enables a more holistic analysis of the

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160 While according to some scholars the addition of the Takings Clause did not create or imply a federal eminent domain power and this understanding was reflected in seventy-five years of subsequent practice and precedent, the federal eminent domain power was later unquestionably established by Kohl v. United States. According to Baude, “the Supreme Court has now recognized a federal takings power, and the Takings Clause is the only thing that really restrains it.”—supra note XX.
Constitution, providing a fuller picture of why American democracy has been stable for so long, and ultimately revealing which features of the American experience are replicable in other nations.