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*** **WORKING DRAFT** ***

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SLAVERY AND THE POLITICAL ORIGINS OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE

Stephan Stohler
Department of Political Science
University of Pennsylvania
sstohler@sas.upenn.edu

Abstract: Litigants throughout American history have exercised their private property rights under the Fifth Amendment's Takings Clause to encourage the expansion of new markets or, conversely, to resist market reforms. Before we can examine the politics that animate the changing relationship between democracy and markets through a study of the Takings Clause, however, we must account for the existence of this institution itself. In this paper, I argue that the current scholarship (which traces the origins of the Constitution's compensation principle back to colonial origins, liberal backlash against republican principles, or wartime appropriations) insufficiently accounts for the promulgation of the compensation principle across the American legal landscape. Instead I offer a new argument that the Takings Clause must be understood alongside the creation and protection of slavery from threats and consequences of emancipation. The timing of adoption coincided best with efforts to gradually limit or otherwise abolish slavery in northern states, while protect investments in growing slavery markets in new southern states. In this paper, I test these competing claim against data generated from the Constitutions of the World archive. The paper concludes with an application of the general findings to the decision to adopt the Takings Clause in the U.S. Bill of Rights.

I. *Introduction*

Any attempt to reconcile the puzzles that animate the ‘Takings Muddle’ must ultimately wrestle with the origins of the Takings Clause itself.¹ We know little about the motivations which drove James Madison to deprive Congress of the power to take private property “for public use without just compensation.”² Congress failed to debate only a handful of provisions found in the Bill of Rights, Takings among them.³ Unlike any other provision, ‘the People’ did not debate the Takings Clause in any of the state ratifying conventions.⁴ Moreover, no court during the Founding Period clearly articulated the scope of the federal government’s power to take private property. Our knowledge about the origins of the Takings Clause is severely limited because we do not have access to the types of evidence that standard tools of constitutional interpretation often employ to uncover the framers’ intentions or judicial precedent. Yet, even if we had such access, it does not necessarily follow that an articulation of framers’ intentions or judicial interpretation fully captures the controversial political choices that gave rise to a particular constitutional provision. How then should we account for the rise of the Takings Clause?

In this paper, I argue that the origins of the Takings Clause must be understood alongside the creation and protection of slave markets. This argument differs from the three dominant explanations found in the literature on early uses of the Takings Clause. One group of scholars

¹ The ‘Takings Muddle’ refers to a set of seven legal puzzles or mysteries that characterize the law concerning regulatory takings and condemnation. These puzzles concern legislative framing (why, when a legislature frames a regulation as preventing harm, does it immunize itself from takings liability when framing the same regulation as conferring a benefit does not?); conceptual severance (why would a legislature incur liability for regulatory takings when a property owner severs his parcel into two parts, but not when it remains as one?); air and support rights (why does the Takings Clause protect the property holder’s support estate but not his air rights?); the preeminence of physical invasion (why does the law always compensate for physical invasion when devaluation may be far more severe?); temporal takings (why does the Takings Clause sometimes protect non-existent things while not protecting existing things?); phantom incorporation (why does the Takings Clause constrain the states?); and phantom adoption. The last puzzle is the subject of this paper.

² U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation”).

³ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

⁴ *Id.*

focuses on the material basis of takings, pointing to the habits of colonial governments as they procured private property for courthouses, custom houses, forts lighthouses, shipyards, prisons, chapels, and public pastures.⁵ A second group emphasizes the public exigencies that link the Takings Clause to the behavior of militaries during war time.⁶ Finally, a third group stresses the role the Takings Clause played in negotiating between competing ideological traditions that governed the legitimate relationship between states, citizens, and private property.⁷ While each of these accounts offers important insights into the early history of the compensation principle, the various hypotheses fail to convincingly account for similar decisions to include takings clauses in state constitutions. To remedy this shortcoming in takings scholarship, this chapter makes use of a new dataset created from the Constitutions of the World archive, which contains every constitution promulgated by an American state between 1776 and 1860.⁸ This dataset allows us to test the various hypotheses about the historical origins of the Fifth Amendment's Takings Clause.

In Part II, I systematically test implications from these competing hypotheses and conclude that they do not accurately account for the variation in states' decisions to adopt Takings Clauses in state constitutions. In Part III, I trace the role that slavery played in motivating decisions about whether to include a Takings Clause in various state constitutions. The timing of adoption coincided with efforts to gradually limit or otherwise abolish slavery in northern states, while protect investments in growing slavery markets in new southern states. The takings clause, therefore, acted as a form of insurance during periods where investments in slavery were called into question. But

⁵ John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U.L. REV. 1099 (1999); James W. Jr Ely, *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673 (2008).

⁶ Matthew P. Harrington, *Public Use and the Original Understanding of the So-Called Takings Clause*, 53 HASTINGS L.J. 1245 (2001); Matthew P. Harrington, *Regulatory Taking and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053 (2003).

⁷ RICHARD ALLEN EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); Treanor, *supra* note ___; William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633 (2008).

⁸ *Constitutions of the World from the Late 18th Century to the Middle of the 19th Century Online* (available at: http://proxy.library.upenn.edu:5419/nbu.php?page_id=cf2bf1a9ce737906a2cc483486798452).

my argument does not reduce the Takings Clause to economic considerations alone; nor does the argument link considerations about compensation entirely to slavery. I do, however, argue that the interests of slave-holders played a central – and often decisive – role in a larger coalition of interests formed around the idea that the state should compensate private individuals for the taking of property. Furthermore, those slave-holders occupied a crucial position within an institutional framework that allowed them to insist on the inclusion of takings clauses in state constitutions.

In Part IV, I apply the lessons from Part III to conclude that slavery also played a central role in the decision to include the Takings Clause in the Fifth Amendment. The Revolutionary War challenged the institution of slavery unlike any previous historical episode in North America. In a very direct sense, the necessities of recruiting short-falls triggered calls for compensation of property. Under the Articles of Confederation, many states – constitutionally charged with supplying troops to the Continental Army – proposed to overcome persistent recruiting shortfalls through the impressments of slaves. In exchange for a slave’s service, these governments promised a path to freedom. Southern states objects vigorously and ultimately carried the day; however, the transition away from the Articles of Confederation to the U.S. Constitution raised the anxieties of slave-owners, who felt their property interests threatened by the federal government’s newly allocated powers to staff all ranks of the military. Following the lead of states who also attempted to manage uncertainties regarding property rights in slavery, the drafters of the Bill of Rights included the Takings Clause to guard against the *regulatory* taking of private property for public use in the form of manumission. The chapter concludes by looking at two historical episodes where the federal government insisted on compensation for freed slaves in the international arena – the first in treaty negotiations with the British Empire; the second involving the 1803 slave rebellion in Haiti.

II. *Testing Hypotheses in Legal Scholarship*

Law does not necessarily reflect the politics which drive it. Nor can we assume that the purposes which originally motivated the adoption of a specific legal institution continue to do so. Rather, any hypothesis about the origin of a legal institution must test the implications of such an argument against the historic record. This section attempts to do this for the three most prominent accounts for the origins of the Fifth Amendment's Takings Clause.

A. *Colonial Assemblies and Public Projects*

One hypothesis that emerges from the literature on the compensation principle relates the Fifth Amendment's Takings Clause to the patterns of behavior of colonial governments. For example, scholars like James W. Ely⁹ and John F. Hart¹⁰ argue that the compensation principle can be traced back to the practices of colonial assemblies and state legislatures, which regularly took land "to construct storehouses, courthouses, custom houses, forts, powder magazines, lighthouses, shipyards, prisons, chapels, and public pastures" all received compensation.¹¹ Following Ely and Hart, we should conclude that states with a colonial history of frequently taking private lands for public projects would be more likely to demonstrate a commitment to a takings clause in their respective constitutions. This argument seems plausible: perhaps anxious citizens insisted that their government limit itself after such behavior.

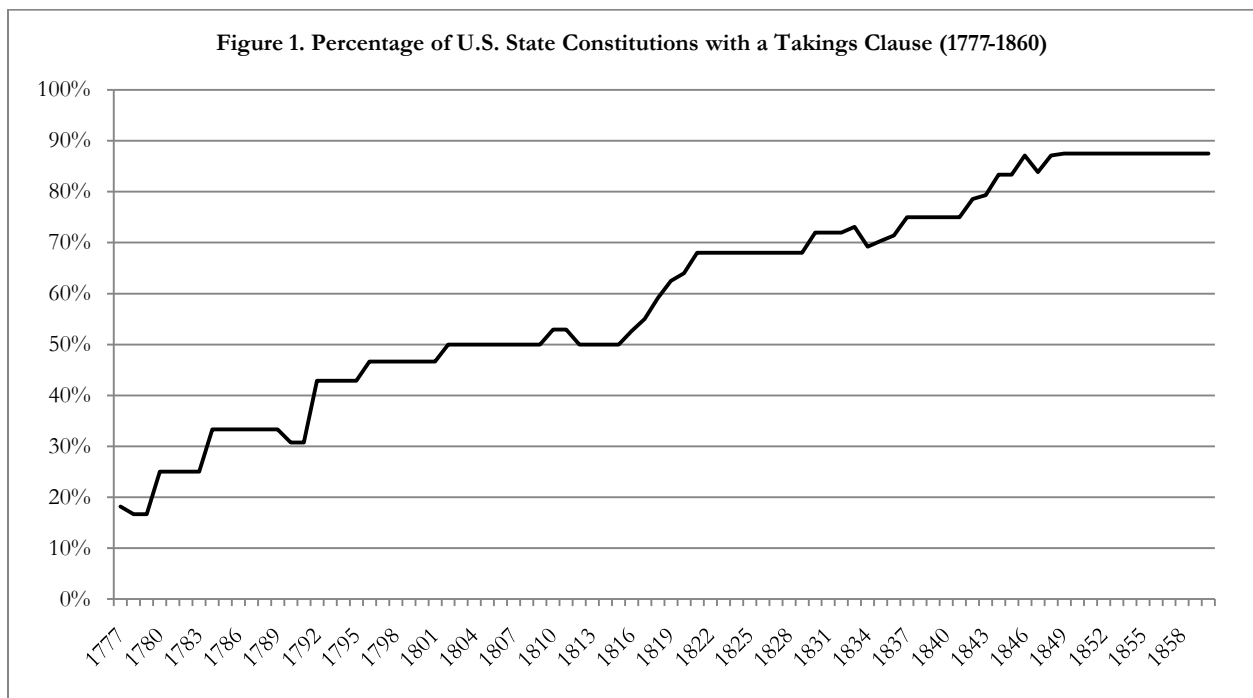
We can test this hypothesis by looking at the proliferation of Takings Clauses in state constitutions during the antebellum period. Figure 1 shows the proliferation of state constitutions with a takings clause across the antebellum period as a percentage of total state constitutions in

⁹ James W. Ely, *"That Due Satisfaction May be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J.L. HIST. 1 (1992).

¹⁰ Hart, *supra* note ____.

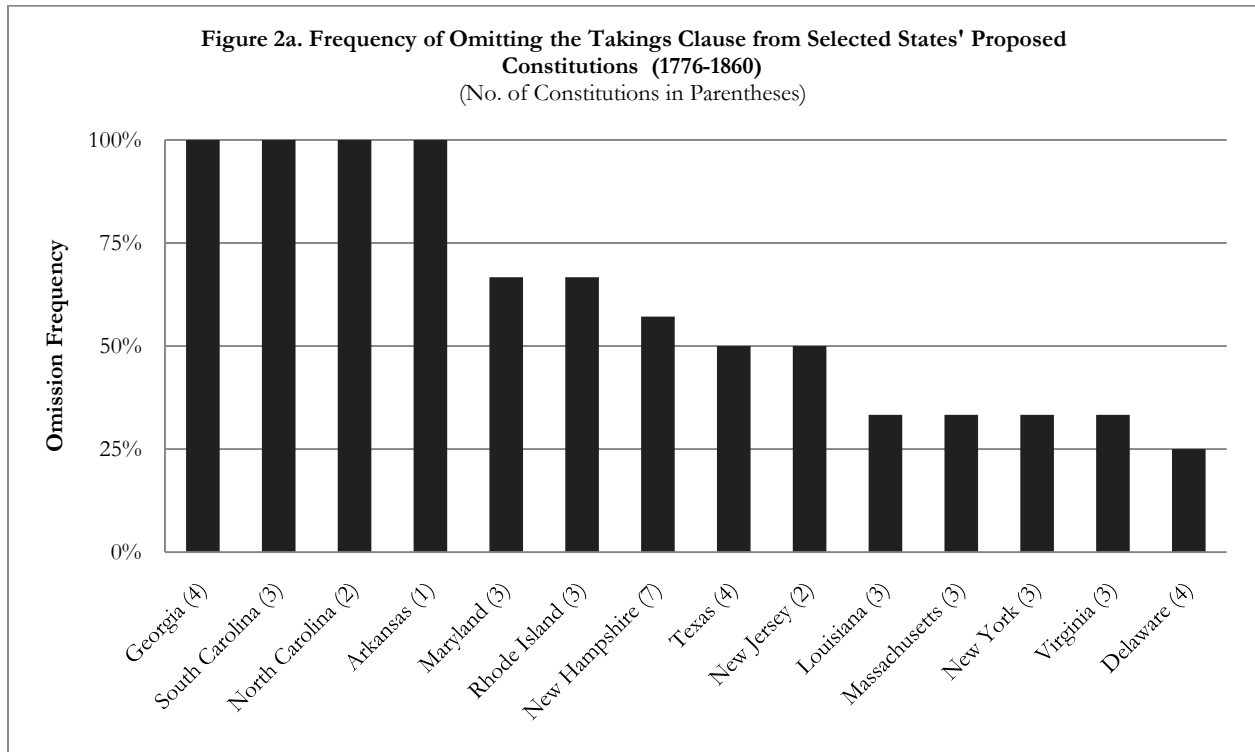
¹¹ Ely, *supra* note ____ at 5, n. 17-26.

effect. These data undermine the expectations that follow from Ely and Hart’s arguments. Both of these authors suggest that colonial governments took liberally, developing a fairly widespread pattern of confiscation across the colonies during the colonial period. If the behavior of colonial assemblies had troubled drafters of early constitutions, we would expect to see a much steeper curve, reflecting the practice of including a takings provision in state constitutions as soon as the opportunity arose. Instead, fewer than twenty percent of the original thirteen state constitutions contained takings clauses.



While the pattern of adopting increased at a fairly steady rate, states frequently omitted takings clauses from amendments or completely new constitutions. Figure 2a shows those states that did not adopted a takings clause shortly after independence and the frequency with which their proposed constitutions omitted takings clauses. Each of these states demonstrated some capacity for constitution change, undermining potential counter-arguments that those states, which did not adopt the compensation principle, did not have a meaningful opportunity to do so. Some states, like

Georgia, North Carolina, and South Carolina repeatedly omitted a Takings Clause when drafting new constitutions during the antebellum period. I interpret this data to mean that, despite the existence of common practices regarding Bills of Rights, states who did not possess takings clauses intentionally chose not to bind themselves to this guarantee.



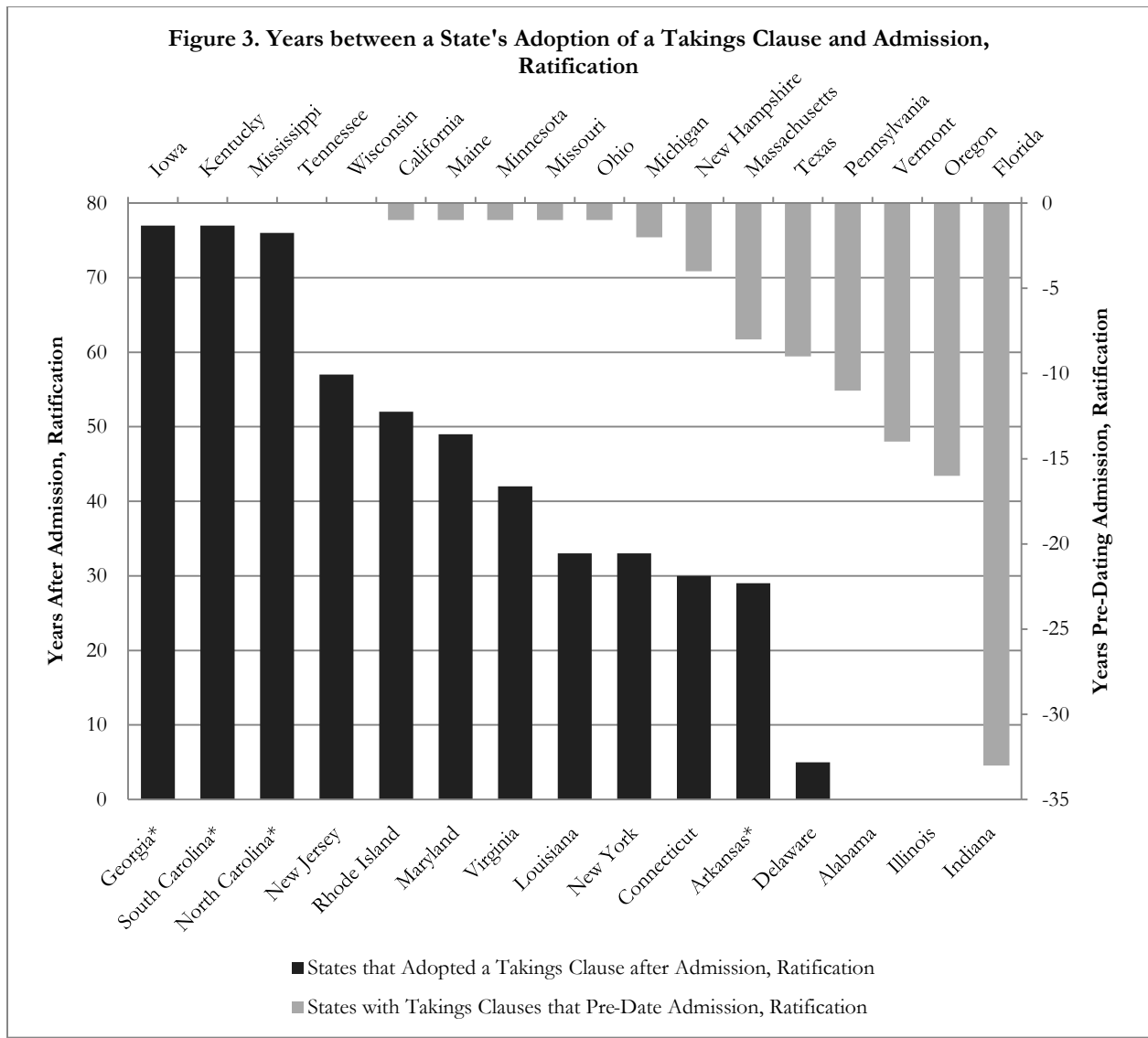
Furthermore, each state had the opportunity to add a takings clause to its constitution through the amendment process. Figure 2b further lists the number of times these states amended their constitutions through the formal amendment procedures. Of the 209 amendments to state constitutions proposed between 1776 and 1860, however, only one – Maryland’s successful 1837 amendment to its constitution – included a takings provision. Maryland’s decision to adopt a Takings Clause therefore supplies us with the exception that proves the rule. Each state could have used the amendment process to enshrine the compensation principle had the circumstances been right, but many states chose not to do so.

Figure 2b. Opportunities for Constitutional Change

State	Constitutional Conventions	Constitutional Amendments
Georgia*	3	29
S. Carolina*	2	13
Delaware	1	7
Louisiana	1	2
Maryland	1	43
New Jersey	1	1
New York	1	9
N. Carolina*	1	3
Rhode Island	1	2
Virginia	1	0
Arkansas*	0	5
Connecticut	0	10

* = states which did not adopted a Takings Clause

Others may interpret Figure 1 to reflect the emergence of a constitutional drafting norm. This idea has some merit. Every state chiseled from the Northwest Territories entered into the Union with a Takings Clause in its constitution. Similar patterns marked the expansion of the United States through the southwest. Tennessee, Kentucky, Missouri, Mississippi, and California each joined the United States with a constitution that protected against the public use of private property. But this explanation fails to account for the behavior of older states, which – as we have already seen – regularly revisited and altered their constitutions through amendments and constitutional conventions. Figure 3 further reveals that most states enshrined the compensation principle well before or well after admission into the Union or ratification of the U.S. Constitution. Therefore, while admission to the Union offered states an occasion to rethink their constitutional commitments, states did not blindly follow the drafting conventions of their predecessors.



B. Military Takings under the Pressures of War

By changing our focus to state constitutions, we can test other hypotheses about the decision to include the Taking Clause alongside the Fifth Amendment’s other protections. A second class of arguments construes the Takings Clause as a response to military impressments and other appropriations of property during wartime. Scholars like Matthew Harrington have noted that governments “did not hesitate to engage in widespread confiscations to support the Continental

Army during the Revolutionary War.”¹² Certainly, war exacerbated the needs of the state and federal government and the demands those governments placed on their citizens.

But, much like Hart and Ely, Harrington disregards the constitutional allocation of powers on this matter. Under the Articles of Confederation, the obligation to staff the military fell largely to the individual states, but those obligations shifted to the federal government under the U.S. Constitution. Undoubtedly, many decisions to confiscate property were made by military commanders. But personnel decisions remained with the state legislatures. If Harrington’s argument is correct, then we would expect to see the states exhibit different Takings Clause adoption rates under America’s two different federal constitutional regimes.¹³ To test this expectation, we can again rely on the Constitutions of the World dataset and simply count the number of takings clauses adopted by the thirteen original states during two comparable periods. The first period is comprised of the first twelve years of American political history under the Articles of Confederation. The second period is composed of the first twelve years under the U.S. Constitution. States that entered the Union subsequent to the adoption of the U.S. Constitution were excluded from the sample because their decision to adopt or not adopt a takings clause under the Articles of Confederation cannot be inferred.

The change the constitutional allocation of powers did not produce a difference in the rate at which states adopted a takings clause. The cross-tabulation in Figure 4 reveals that while fewer states adopted takings clauses under the U.S. Constitution, as Harrington’s hypothesis would predict, the rate remained the same. Only one attempted or adopted constitution in every five contained a

¹² Harrington, *supra* note____ at 2057.

¹³ Many of the state takings clauses combine language about property and impressments (or service). [[I need to double check this language and add this new coded the relevant data. It would be a MUCH better test.]]

takings clause during both periods. Figure 4 also shows [[or will show]] the adoption rates throughout the remainder of the antebellum period.

Figure 4. Takings Adoption Rates and Attempted Constitutional Changes

	Period					
	1776-1788	1788-1810	1810-1822	1822-1834	1834-1846	1846-1858
New Takings Clause?						
Yes	4	1	[n/a]	[n/a]	[n/a]	[n/a]
No	16	4	[n/a]	[n/a]	[n/a]	[n/a]

Harrington also makes some more specific assertions that we can test against this data. He identifies the middle states as the primary victims of widespread impressments (by which I presume he means New Jersey, Pennsylvania, Delaware, Maryland, and Virginia).¹⁴ Pennsylvania’s Takings Clause, adopted in 1776, preceded the widespread use of such impressments. Delaware joined Pennsylvania in 1792 as the only other state in the region to adopt a Takings Clause until the nineteenth century. (Kentucky and Tennessee would join in 1792 and 1796, respectively). Instead, takings clauses proliferated throughout the Northeast: Vermont in 1777, Massachusetts in 1780, and New Hampshire in 1784. This geographical pattern suggests that the intensity of impressments may not have had the impact Harrington suspects, suggesting that other causes better capture the variation in takings clause adoption rates. Harrington’s argument captures an important dynamic that will shed light on the decisions of the federal Congress to adopt the compensation principle, but as a general explanation, the focus on military takings alone cannot account for the propagation of the takings clause across the constitutional landscape.

C. *Lockean Ideas and the Proliferation of the Takings Clause*

A third group of scholars has emphasized the influence of different ideological traditions – especially Lockeanism – on the decision to include the Takings Clause into the Bill of Rights.

¹⁴ Harrington, *supra* note ____.

Richard Epstein, for example, argues that the Takings Clause recognizes the “implicit normative limits upon the use of political power” to “preserve the relative entitlements among the members” of society, “both in the formation of the social order and in its ongoing operation.”¹⁵ That principle, Epstein argues, follows from the strong commitments on behalf of Americans to Lockean principles. While Epstein claims to recognize the impact that a takings clause has on state action,¹⁶ he fails to test his ideas on the patterns of state adoption rates. Furthermore, if the Takings Clause arose from Lockean commitments to private property, then we should expect to see the takings clause proliferate across all state constitutions, especially those where Locke’s ideas most directly influenced the drafting of colonial or state constitutions. Locke’s contributions to South Carolina’s colonial charter have been well documented. The extent to which South Carolina then reincorporated those commitments into its early constitutions has not been documented thoroughly, but we might expect that if Epstein’s Lockean thesis were correct, then we should see a Takings Clause in South Carolina. More generally, Lockean ideas about property proliferated broadly across the colonial and American landscape.

Relying again on the Constitutions of the World dataset, we find, however, that a different pattern emerges. South Carolina, along with North Carolina and Georgia, failed to adopt a Takings Clause during the antebellum period (Fig. 2). Virginia and Maryland adopted clauses relatively late in the antebellum period, 1830 and 1837 respectively. On the other hand, the takings clauses proliferated in constitutions in the northern states first: Pennsylvania in 1776; Vermont in 1777; Massachusetts in 1780; and New Hampshire in 1784. In other words, Epstein severely over-predicts the influence of Lockean ideas in his easy cases, and woefully under-predicts the proliferation of

¹⁵ Epstein, *supra* note ___ at 4.

¹⁶ See *supra* note ___ (“Since this book is a mix of *political and constitutional* theory, I shall follow the present law and treat the clause as though it applies both to state and federal action, which is consistent with the basic Lockean design, as is reflected by the inclusion of some version of the eminent domain clause in all state constitutions.”) (emphasis added).

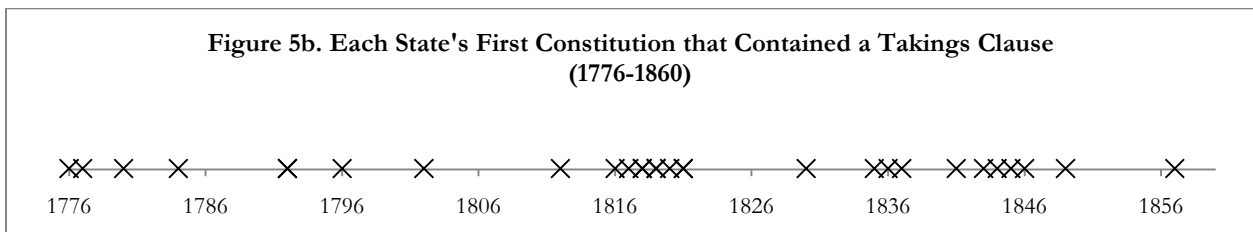
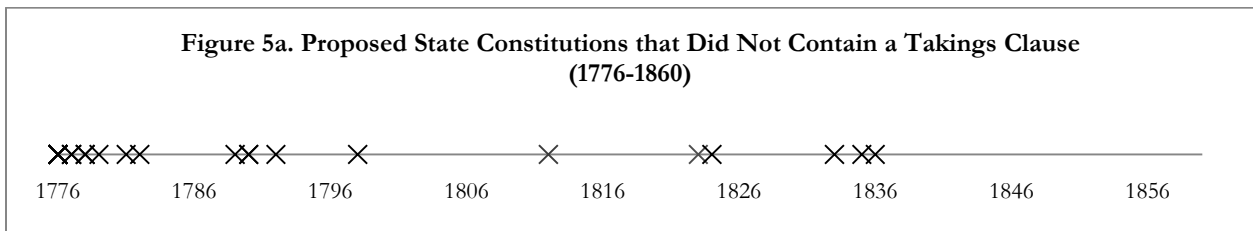
Takings Clauses in his most difficult cases. Since Lockean ideas about property pervaded widely across the American constitutional landscape, Epstein's reliance on the causal power of ideas fails to account for the timing of adoption of takings clauses.

Unlike Epstein's singular focus on Lockean liberalism, William Treanor's account of the historical origins of the Takings Clause acknowledges the influence of competing republican and Lockean ideological traditions. By emphasizing the influence of multiple ideological orders, Treanor's account retains the dynamism necessary for any causal explanation concerning the proliferation of the takings clause. He argues that members of the founding generation largely displayed republican commitments to private property. While private property plays an important role in republican citizenship – allowing full citizens to participate freely in political life – many, including James Madison, found the political process ill-equipped to handle decisions about compensation, rendering private property owners particularly vulnerable to the physical taking of property. Madison and other founders replaced previous commitments to radical republicanism with more absolutist orientations regarding the rights of private property found in Lockean thought. By joining the liberal and republican traditions, Treanor concludes, the Takings Clause created a constitutional safety measure restraining republican majority in areas where they might otherwise be unconstrained by procedural mechanisms and individuals faced increased risk of public possession.¹⁷

Treanor's contributions to the study of the Takings Clause cannot be discounted. He engages with a vast array of evidence and interprets it fairly in support of his argument. We can still test those ideas against the pattern of adopt at the state level, however. While Treanor does not offer much specificity about why different ideologies come to dominate at various points, we can conclude that liberal ideas began to exercise greater influence on drafters after the adoption of the

¹⁷ Treanor, *supra* note ____ at 784.

U.S. Constitution, since it did not contain a Takings Clause. Treanor’s argument is well supported by the 16 constitutions proposed in states prior to 1788 that did not contain a Takings Clause. Yet, as Figure 5a shows, drafters continued to propose constitutions that did not their respective states to the compensation principle. Furthermore, some states did bind themselves to the compensation principle prior to 1788. These data reinforce the argument developed alongside Figure 4, which did not reveal a different adoption rate during the twelve-year period preceding and following 1788, though Treanor would have predicted otherwise. Therefore, unless Treanor spells out in greater detail how certain political ideologies come to exercise greater influence at certain moments, his argument does not adequately capture the temporal variation associated with compensation principle (Fig. 5a and Fig. 5b).



III. *Slavery and the Takings Clause*

By testing the various hypotheses regarding the origins of the Takings Clause against data extracted from the Constitutions of the World archive, we have uncovered certain patterns in the behavior of states. Some of these patterns capture a geographical dimension. States in the north

adopted takings clauses earlier than those in the south; some southern states failed to adopt a takings clause at all; new states frequently entered into the union with takings clauses in their first constitution. Furthermore, as a qualitative review of the language of state takings clauses will reveal, concerns over slavery often accompanied takings language.¹⁸

The fact that the Fifth Amendment's Takings Clause does not contain an explicit reference to slavery should not surprise us. Slavery's influence on the constitution has been well established.¹⁹ While slavery "was never explicitly mentioned or acknowledge by the Constitution,"²⁰ few would dispute the fact that slavery created *one of the* central division around which the constitution was framed.²¹ As James Madison pointed out, "the real difference of interests lay, not between the large & small [state] but between the N. & Southn. States The institution of slavery & its consequences formed the line of discrimination."²² Slavery and property do not find significant attention because the framers thought it "wrong to admit in the Constitution the idea that there could be property in men."²³ But "S. Carolina & Georgia were inflexible on the point of slaves."²⁴ Accordingly, "Northerners were assuaged by the paucity of explicit textual protections of slavery."²⁵ Therefore, since the law of property formed the backbone of the legal regime governing slavery, changes to the rules implicating the rights of property almost certainly invoked considerations about slavery.

¹⁸ See *infra*, note ____ and accompanying text.

¹⁹ See, e.g., MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009).

²⁰ Graber, *supra* note ____ at 101.

²¹ Robert M. Weir, *South Carolina: Slavery and the Structure of the Union*, RATIFYING THE CONSTITUTION 208 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (arguing that slavery "was an every-present incubus, dominating some very explicit debates and affecting questions in which the words 'slave' and 'slavery' were never mentioned").

²² Max Farrand, ed., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 10 (1937). See, Farrand, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 146 (1937) (Alexander Hamilton); *id.* at 486-87 (Madison); *id.*, at 556 (Rufus King); Farrand, 2 RECORDS at 362 (George Mason).

²³ Farrand, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 417 (1937) (Madison).

²⁴ 8 DOCUMENTARY HISTORY at 105 (xxxx).

²⁵ MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 109 (2006).

The general historical approach to takings, save for two important exceptions,²⁶ ignores the antebellum period's political preoccupation with the question of slavery. Efforts to reduce all of colonial and antebellum legal history to the issue of slavery seem unpromising or even implausible, but the conflict certainly exercised a broad influence, even when not intuitively obvious at first glance.²⁷ In the previous section, I looked to state constitutions to test many of the prevailing hypotheses about the existence of takings and arguing that most of these hypotheses failed to appropriately account for the variation in the adoption of takings. In this section, I propose and hopefully support the claim that the Takings Clause found supporters who sought to decrease the uncertainty regarding the regulation of slavery. But uncertainty was not simply an economic phenomenon. Rather, legal uncertainty – in the form of regulation or abolition of slavery – threatened emerging slave markets. Similarly, in states where the commitment to slavery waned, takings was used to manage a time of transition, guaranteeing that diminishing slave-power would remain secure in their slave-holdings despite relinquishing power to interests dedicated to free labor.

The evidence in support of these divergent hypotheses is well supported in those states that adopted a takings clause early in American history. Figure 6 shows that those northern states with small slave populations adopted takings clauses during periods of transition away from societies with slaves to free market systems.²⁸ Many of these states simultaneously outlined rules governing the gradual abolition of slavery. In Massachusetts and Vermont, for example, their respective constitution simultaneously outlined the conditions under which slaves would gain their freedom. Frequently in close proximity, those constitutions also enshrined the compensation principle. [[Add example and footnotes]]. Conversely, those states which projected a rise in slave economies moved

²⁶ Two important but limited exceptions exist. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 63-64 (1977); Treanor, *supra* note ____.

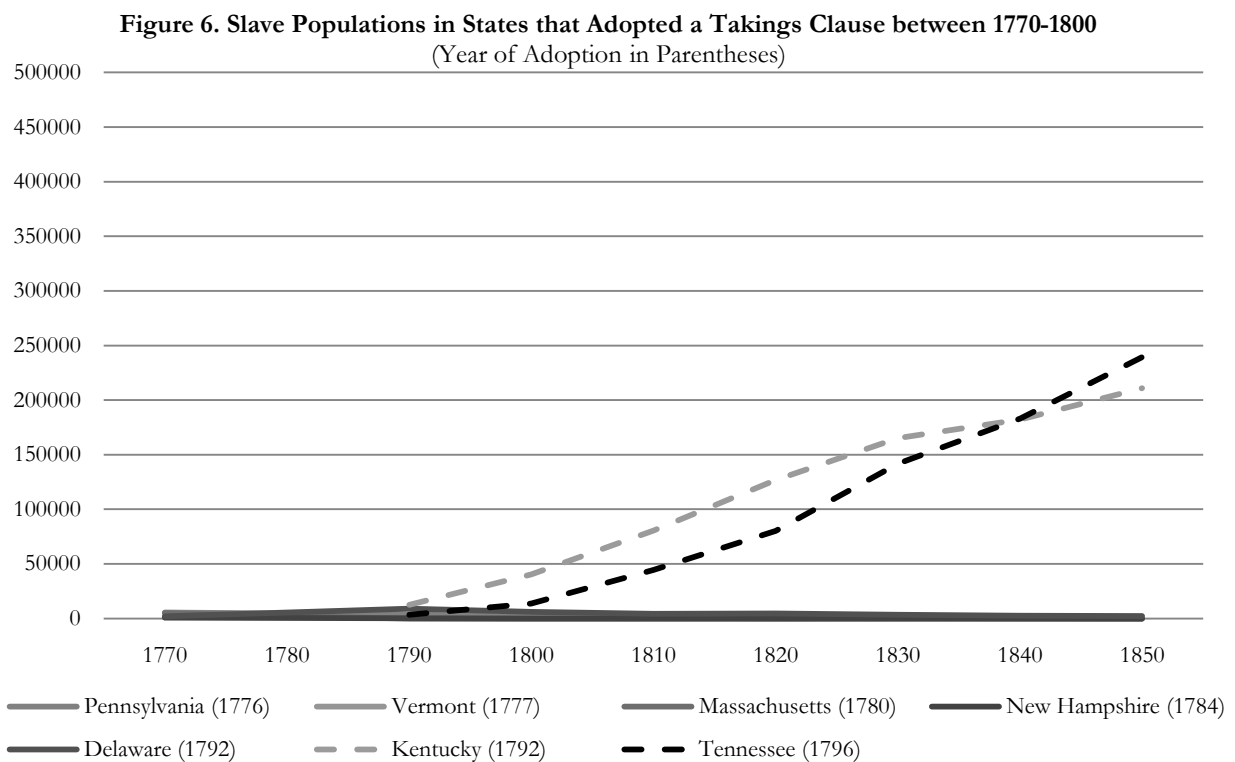
²⁷ Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005).

²⁸ Data on slave populations taken from the U.S. Census or, where they differed, from Ira Berlin's data on slavery. See IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* (1998).

to adopted takings clauses to protect such investments. Kentucky’s Constitution made this claim explicitly. Section One of the Slavery Article held that

“The legislature shall have no power to pass laws for the emancipation of slaves without the consent of their owners, or without paying their owners previous to such emancipation a full equivalent in money for the slaves so emancipated.”

The Kentucky constitution also contains a more general takings clause in the Article dedicated to individual rights. I interpret the existence of two takings clauses within the same constitution as an act of clarification to quell the possible anxieties of slaveholders by closing off alternative interpretations of the takings clause when applied to the question of slaves.



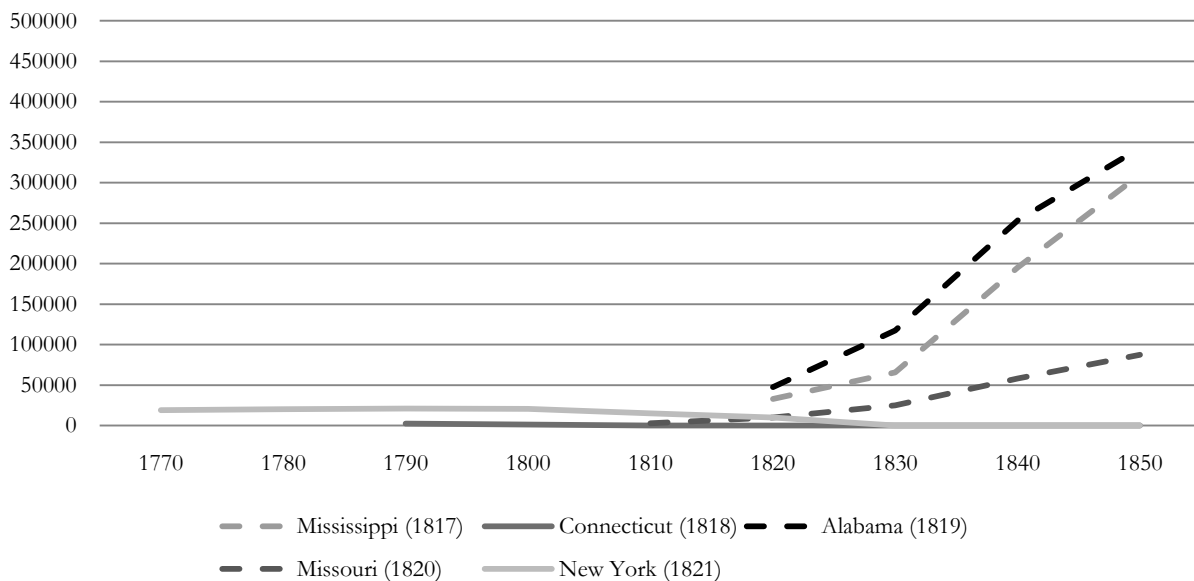
(Note: For the sake of identifying the two patterns at issue, these graphs exclude the states created out of the Northwest Territories; they are treated in Part IV of this chapter).

A similar pattern emerges in the following thirty year period. As Figure 7 shows, Connecticut and New York – the North’s primary slave states – adopted takings clauses during the period where they transition towards a predominantly free-labor economy. Mississippi, Alabama, and Missouri adopted such clauses as the presence of slaves increased within their territories. If we look at Mississippi’s constitution in greater detail, it follows the drafting conventions established in Kentucky a generation earlier, explicitly applying the compensation principle to abolition. Section One of the 1817 Mississippi Constitution similarly holds that

“The General Assembly shall have no power to pass laws for the emancipation of Slaves, without the consent of their owners, unless where a Slave shall have rendered to the State some distinguished service, in which case the owner shall be paid a full equivalent for the Slave so emancipated.”

Mississippi would again repeat this language in its 1832 Constitution.

Figure 7. Slavery Populations in States that Adopted a Takings Clause (1800-1830)
(Year of Adoption in Parentheses)



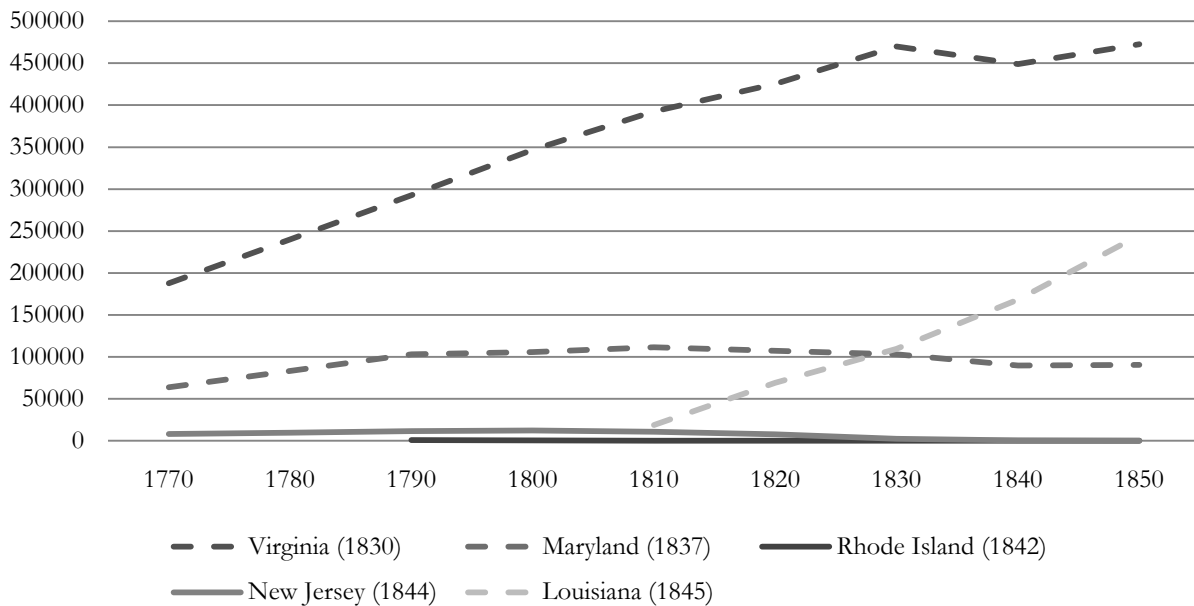
The pattern loses some of its clarity in the final third of the antebellum period, but the general propositions are not falsified. Figure 8 again shows that two northern states, New Jersey

and Rhode Island, relied on the Takings Clause to protect the interests of slave owners as the state navigated through a period of transition. At the same time, Virginia and Maryland, for the first time, witnessed declines in the growth of slavery, potentially creating anxieties among slaveholding elites. Maryland’s 1837 amendment makes the relationship between slavery and the takings clause explicitly clear.

“And be it enacted, That the relation of master and slave, in this State, shall not be abolished unless a bill so to abolish the same, shall be passed by a unanimous vote of the members of each branch of the General Assembly, and shall be published at least three months before a new election of delegates, and shall be confirmed by a unanimous vote of the members of each branch of the General Assembly, at the next regular constitutional session after such new election, nor then, without full compensation to the master for the property of which he shall be thereby deprived.”

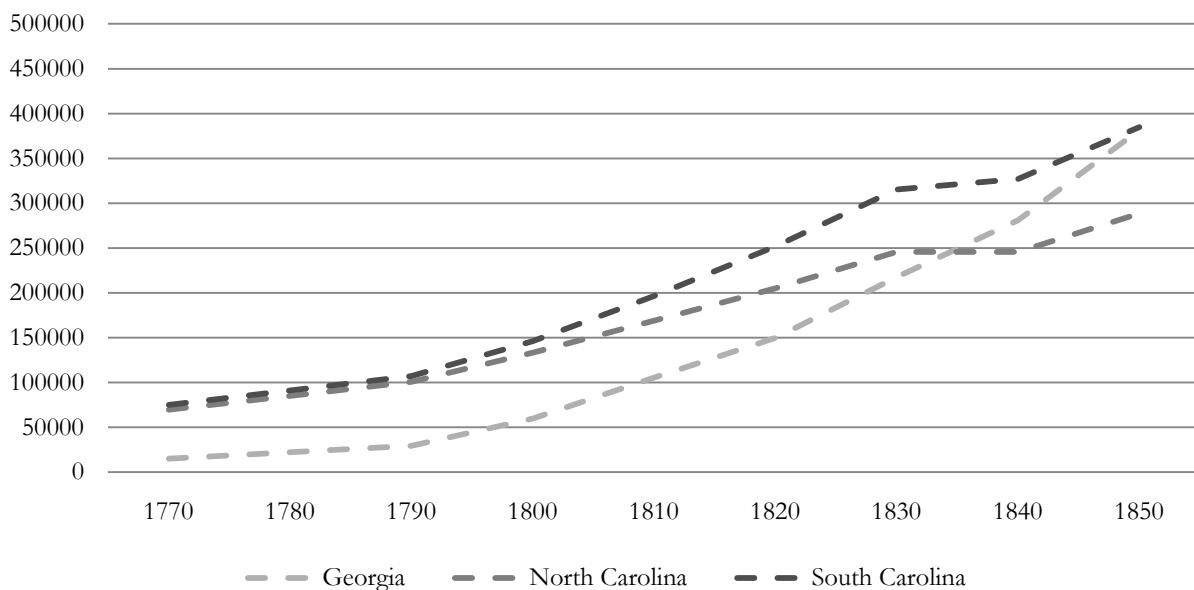
Louisiana fails to follow the general pattern adopting a takings clause in 1845, far later than this argument would predict.

Figure 8. Slavery Populations in States that Adopted Takings Clauses (1830-1860)
(Year of Adoption in Parentheses)



Finally, four states did not rely on a takings clause at all in their constitutions. Figure 9 shows the growth rates of slavery in Arkansas, Georgia, North Carolina, and South Carolina. The latter three states represent the oldest slave powers in the United States. Those constitutions explicitly deprived their respective state legislature from abolishing slavery, thereby eliminating the need for a takings clause. But Figure 8 also reveals that the takings clause does not reduce entirely to the growth rate of slavery in each state. Rather, the decision to adopt or not adopt a takings clause depends on whether slave-holding elites controlled a state’s governing institutions. In those places where slave-owners exercised exclusive control over these institutions, slavery’s legal future remained unambiguous.²⁹

Figure 9. Slavery Populations in States that Failed to Adopt a Takings Clause



[[To complete this argument, I need 1) data on Ira Berlin’s society type for each state-year and 2) to determine whether a correlation exists between takings decision and who controlled the governing institutions of each state]]

²⁹ See *Id.* Ira Berlin develops two concepts to describe the legal and economic impact that slavery had on a society. In a ‘society with slaves,’ many relied on slaves to contribute to the overall economic system. In ‘slave societies,’ however, slaves provided the economy with its central form of labor, which was used to farm a single cash crop. Equally important, these societies protected the economic order by limiting access to the tasks of governance, ensuring that slave-owners retained their property rights in slaves.

IV. *Slavery and the Fifth Amendment*

In this section, I apply the insights derived from the previous parts of the chapter to conclude that the Fifth Amendment's Takings Clause helped to reduce some of the legal uncertainty around slavery by requiring that the federal government to pay compensation if it took private property for public use.

A. The Politics of Slavery in the Eighteenth and Nineteenth Centuries

By the turn of the eighteenth century, each American colony demonstrated a firm commitment to the institution of slavery. Those commitments differed only as a matter of degree depending on the role that slave labor played in the predominant economy of each colony. In northern colonies, like New York and New Jersey, slaves served primarily on small private farms and in close proximity to their owners. They made secondary contributions to the colony's overall economy while existing alongside their owners in relatively small numbers (compared to the overall population).³⁰ As John Jay noted in the 1750s, "very few among [the colonists] even doubted the propriety and rectitude of" slavery.³¹ Moreover, by this point in American history, the racialization of chattel slavery was complete. Most blacks were slaves in the American colonies at this time, constituting 20 percent of the overall population and nearly 40 percent of the southern colonies.³² The slavery issues that did command attention were largely related to security. Georgia, for example, outlawed slavery during the first half of the seventeenth century because it feared that the Spanish would incite a slave revolt to destabilize the South.³³

³⁰ *Id.* at 47-63.

³¹ William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81, 86 (1972).

³² PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 12 (1999).

³³ PETER KOLCHIN, *AMERICAN SLAVERY, 1619-1877* 64 (1993). Georgia would reinstate slavery in 1750 on the belief that slave labor was a necessary form of labor in subtropical climates.

After 1750, slavery's future grew less certain. Most believed that economic profitability would determine the institution's prospect. For example Oliver Ellsworth, the U.S. Supreme Court's third Chief Justice, predicted that slavery would "not be a speck in [his] Country;" as the general "population increase[d], poor laborers [would] be so plenty as to render slavery useless."³⁴ Roger Sherman also thought that abolition "of slavery seemed to be going on in the U.S. & that the good sense of the several states would probably by degrees complete [sic.] it."³⁵ With dim economic prospects, policy debates shifted to contemplate the speed with which slavery ought to be abolished. In those Northern states that harbored large slave populations, "emancipation was [to be] gradual, so as to provide as little shock to society (and the masters' pocketbooks) as possible."³⁶ Noah Webster envisaged catastrophe if the colonies sought to bring about the "immediate abolition of slavery," bringing "ruin upon the whites and misery upon the blacks, in the southern states."³⁷ Madison likewise agreed with Webster. "The general emancipation of slaves ou[gh]t to be 1. gradual. 2. Equitable & satisfactory to the individuals immediately concerned. 3. Consistent with the existing & durable prejudices of the nation."³⁸

But the economic arguments were not dispositive. Others feared that gradual emancipation left the Americans vulnerable to the destabilizing potential of slavery. Caribbean slave revolts served as a constant reminder of the dangers that slavery presented for the colonies. Klinkner and Smith argue that by "the middle of the 1780s, an increasing number of political economic elites worried that, if allowed to continue, these radical sentiments would sabotage the nation's economic

³⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 369-71 (Max Farrand ed., 1966).

³⁵ 2 The Records of the Federal Convention of 1787, *supra* note___ at 369-71 (Roger Sherman).

³⁶ Kolchin, *supra* note___ at 78. (parenthetical comment in the original).

³⁷ Noah Webster, *An Examination into the Leading Principles of the Federal Government*, A NECESSARY EVIL? at 118.

³⁸ JAMES MADISON, 8 WRITINGS OF JAMES MADISON 439 (Gaillard Hunt ed., 1900). Some even predicted that economics would abolish slavery in the Deep South. The economic forecasts for cotton were certainly better than for tobacco, but South Carolina and Georgia; it was only in 1790, with the invention of the cotton gin, that those forecasts changed.

development and leave it vulnerable to foreign aggression or domestic uprisings such as Shay's Rebellion."³⁹ Shay's Rebellion served as a particularly important example because it highlighted the interests that poor whites and black shared and the unsettling results that could follow if such an alliance were realized.⁴⁰

Ideological factors also triggered changes in the legal status of slavery in some places. American aspirations for independence placed the institution of slavery in stark relief. As tensions rose between the colonies and the British Empire, political elites began to reformulate their appeals not only in terms of the injustices associated with taxation, but also on broader claims to natural rights inherent to man's condition. Benjamin Franklin and others began framing the relationship between Britain and her colonies in terms of the master-slave relationship.⁴¹ British rebuttals all too easily pointed out the hypocrisies associated with such claims, as the colonies struggled with the moral implications of an economic system grounded in servitude.⁴² The existence of slavery proved to be an ideological impediment to the independence movement, undermining the moral claim that colonists sought to advance against the British.

Within the constellation of these factors, the newly independent states in the North began emancipating slaves. Vermont was the first state to abolish slavery through the adoption of its 1777 Constitution,⁴³ holding that

“all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty;

³⁹ Klinkner and Smith, *supra* note ___ at 24.

⁴⁰ Edmund Morgan's discussion of Shay's Rebellion highlights the potential coalition that would emerge from shared interests between poor whites and blacks.

⁴¹ Klinkner and Smith, *supra* note ___. [[Also, add language from early draft of the Declaration of Independence.]] For a fuller discussion of the ideological formulations that supported the legal positions of colonists and imperialist, see Jack P. Greene, *Law and the Origins of the American Revolution*, 1 in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580-1815)* 447 (Michael Grossberg & Christopher L Tomlins eds., 2008).

⁴² Klinkner and Smith, *supra* note ___ at 12-15.

⁴³ Kolchin, *supra* note ___ at 78.

acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one Years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.”⁴⁴

Massachusetts followed shortly thereafter, abolishing slavery through judicial decree.⁴⁵ In *Commonwealth v. Jennison*, the Massachusetts [[Supreme Court]] held that “slavery is [. . .] effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence.”⁴⁶ The impact of the case has been debated among historians. First, it was not widely reported and while the 1790 census did not list any slaves, other historians have argued that many slaves were taken elsewhere to be sold. More generally, the actions taken by Vermont and Massachusetts did not make a significant impact on the institution of slavery more broadly. Even within their own respective jurisdictions, Vermont’s constitutional emancipation impacted only about [[#]] slaves. The Massachusetts decision, if it had an impact at all, only emancipated about [[#]] slaves. This early abolitionist movement did not cascade into the mid-Atlantic and southern states.

Despite these ideological and economic factors, the American Revolution did not have a universally liberating impact on the institution of slavery. Instead, the degree of each colony’s

⁴⁴ Vt. Const. of 1777 ch. 1 §1.

⁴⁵ Kolchin, *supra* note ___ at 78.

⁴⁶ *Commonwealth v. Jennison* (available at <http://www.mass.gov/courts/sjc/constitution-slavery-e.html>). See also <http://www.masshist.org/endofslavery/?queryID=54>. Quock Walker filed a series of cases against his master, seeking civil and criminal remedies after James Caldwell, Walkers owner, failed to manumit him despite earlier promises. Walker sued and subsequently appealed the decision to the Massachusetts Supreme Judicial Court on constitutional grounds. The Massachusetts Constitution of 1780 held that

“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”

Walker’s appeal proved successful.

commitment to slavery's future depended on the type of economy that supported the colony and whether slave-owners monopolized the political system.⁴⁷ In places, like North Carolina, South Carolina and Georgia, where cotton and sugar thrived and plantation owners also control the levers of political power, the state's legal institutions protected and stabilized these 'slave societies' through detailed slave codes.⁴⁸

B. Early Threat to the Institution of Slavery

The variation in each state's commitment to the institution of slavery would come to animate the politics of the Constitutional Convention. Indeed, the constitution has been read as successfully negotiating between free- and slave-labor economies for almost fifty years. Figure 9 shows the number of roll call votes on slavery issues in the U.S. Congress. Until the 24th Congress (1835-1836), the issue of slavery has largely kept off of the national legislative agenda. Indeed, the only major slavery issue that was debated involved the Fugitive Slave Act, which constituted one roll call vote in 1790.⁴⁹ Legislators indicated their stance on slavery through a series of roll call votes establishing policy on the importation of slaves before 1808;⁵⁰ questions concerning taxes on imported slaves;⁵¹ and questions about slave-carrying vessels and maritime law.⁵²

⁴⁷ Berlin, *supra* note ____ at 10.

⁴⁸ A.LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS - THE COLONIAL PERIOD (1978); Berlin, *supra* note ____.

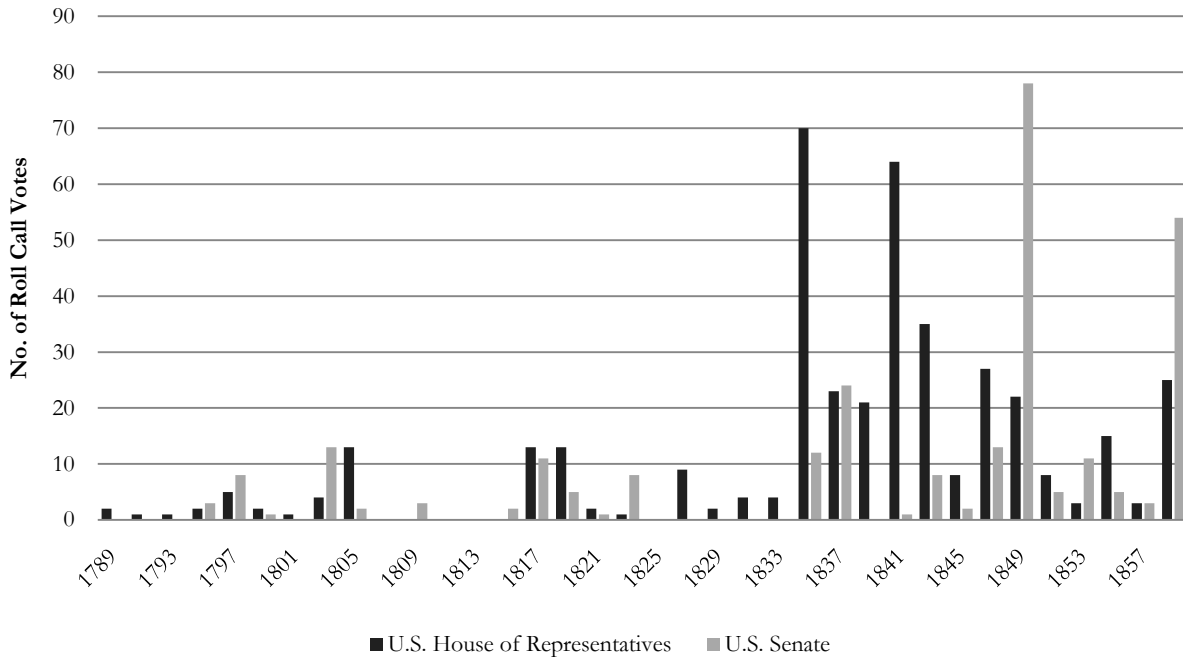
⁴⁹ Inferences from roll call votes should always be made with some caution, since they only offer a sample of the larger set of votes within a legislative body. Furthermore, the sample is probably biased insofar as representatives only use roll call votes to publically take positions on issues. Since slavery was a prominent issue and the federal government did not pass major slavery legislation (except for the Fugitive Slave Act) it is highly plausible that slavery roll call votes constitute an adequate, if not near complete, sample of slavery debates at the federal level. For a more complete discussion of the methodological issues associated with the study of legislative roll call votes, see THE MACROPOLITICS OF CONGRESS (E. Scott Adler & John S Lapinski eds., 2006).

⁵⁰ See, e.g., U.S. House of Representatives Roll Call Vote no. 110 (Dec. 12th 1806); no. 112 and 113 (Jan. 7th, 1807), 114 (Jan. 8th, 1807).

⁵¹ See, e.g., U.S. House of Representatives Roll Call Vote no. 94 (June 29th, 1798).

⁵² See, e.g., U.S. House of Representatives Roll Call Vote no. 130 (Feb. 12th 1807).

Figure 10. No. of Roll Call Votes on Slavery Issues in the U.S. Congress



But, of course, there was no guarantee that the constitution provided adequate protection prior to 1787. Indeed, with the transition from the Articles of Confederation to the new Constitution, those invested in slavery’s future looked with great suspicion on the increase in the federal government’s increased power to manage a growing national economy.⁵³

Ironically, however, the primary threat to slavery during the founding period stemmed not from the allocation of too much power to the federal government, but rather from the confusion and loss of authority that accompanied the Revolutionary War.⁵⁴ Philip Morgan has argued that wartime “anarchy created a power vacuum in the countryside that allowed slaves to expand their liberty.”⁵⁵ Over the course of the war, some analysts estimate, that “30 percent of South Carolina’s

⁵³ See, e.g., DAVID BRIAN ROBERTSON, *THE CONSTITUTION AND AMERICA'S DESTINY* (2005).

⁵⁴ Kolchin, *supra* note ___ at 72.

⁵⁵ Philip D. Morgan, *Black Society in the Lowcountry, 1760-1810*, in *SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION*, 110 (Ira Berlin & Ronald Hoffman eds., 1983).

slaves and 75 percent of Georgia's fled, migrated, or died as a result of the war."⁵⁶ More generally, the Revolutionary War saw more than "one hundred thousand slaves, approximately 20 percent of the total slave population, [take] advantage of the war to gain their freedom."⁵⁷ Morgan is most certainly correct that wartime anarchy resulted in significant opportunities for slaves many slaves to pursue their freedom. But many other avenues also existed.

Most importantly for this argument, under the Articles of Confederation the task of staffing the lower ranks of the military fell to the states. Under the Articles of Confederation, the Congress had the power to appoint officers above the rank of colonel to the Armed Forces;⁵⁸ the thirteen state governments raised troops in proportion to their respective white male population. But the devolution of military duties to the states resulted in chronic military shortages. The Navy, for example, relied heavily on military impressments to staff its vessels. So pervasive was the problem that Maryland's 1776 Declaration of rights held that "no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land."⁵⁹ Rhode Island's Declaration of Rights made similar guarantees.⁶⁰

Faced with chronic shortages, the states began exploring alternative strategies to make up for shortfalls in their recruitment numbers. Many of the northeastern states found it difficult to raise adequate numbers. For example, the state of Rhode Island found itself in a critical situation; its

⁵⁶ Klinkner and Smith, *supra* note ___ at 19.

⁵⁷ *Id.* at 19.

⁵⁸ Articles of Confederation art. VII ("When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.").

⁵⁹ MD. DECLARATION OF RIGHTS §21 (1776).

⁶⁰ RHODE ISLAND DECLARATION OF RIGHTS art. 1, §9 (1790) ("That no freeman ought to be taken, imprisoned or disseized of his freehold, liberties, privileges or franchises, or outlawed or exiled or in any manner destroyed, or deprived of his life, liberty or property, but by the trial by jury or by the law of the land.").

capital and two-thirds of the state were occupied by British troops, “its farms had been destroyed, its commerce blighted, its treasury exhausted, and the slave trade, the source of much of its wealth, had been ruined by the British blockade.”⁶¹ Still under an obligation to raise the required number of troops, General James Varnum of Rhode Island explored his alternatives in a letter to Washington on 2 January 1778. He first suggested that Rhode Island’s two battalions be combined into a single unit so as to relieve the officer corps and allow them to raise new recruits.⁶² He then suggested that as an alternative “a battalion of negroes [could] be easily raised.”⁶³ With its back to the wall, Rhode Island’s legislature ultimately opened enlistment to slaves. The legislative move granted unconditional manumission to each slave who enlisted and further bestowed all the entitlement and benefits granted to normal soldiers.⁶⁴ Furthermore, the new law compensated slave-owners “for the loss of their Negroes according to their value, and up to a maximum of £120.”⁶⁵ The dissenting votes for the proposition paid explicit attention to the impact such a proposal would mean for Rhode Island’s relationship with other states – eagerly desiring not to be the subject of contempt of other states.⁶⁶

Some of the states in the upper South also contemplated the enlistment of slaves, but those plans met with greater resistance. James Madison proposed the idea to enlist slaves to fulfill its quota to the Virginia legislature. “Madison also argued on behalf of his plan that there would be “no danger” from the slaves liberated and armed, and there would be no reason to fear any effect on those who would still remain in bondage, ‘experience having shown that a freedman immediately

⁶¹ Foner, *supra* note ___ at 326.

⁶² *Id.* at 325.

⁶³ *Id.* at 325.

⁶⁴ ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 119 (1967).

⁶⁵ Foner, *supra* note ___ at 326; Zilversmit, *supra* note ___ at 119.

⁶⁶ Foner, *supra* note ___ at 326; citing “Protest Against Enlisting Slaves to Serve in the Army” in GEORGE WASHINGTON WILLIAMS, *HISTORY OF THE NEGRO RACE IN AMERICA, 1619-1880* (1968). Zilversmit, *supra* note ___ at 119 (“In the four months that the law was in effect, only 88 or 89 Negroes were actually emancipated at a cost to the state of over £10,000.”).

loses all attachment and sympathy with his former fellow-slaves.”⁶⁷ But the Virginia legislature strongly rebuked Madison’s proposal, even when it was assured that the concentration of slave enlistments would be diluted among white soldiers and placed under the close supervision of white officers.⁶⁸ The legislature feared the long-term consequences for the institution and their own slavery if it elected to arm and train slaves in the ways of war.

Even in the face of occupation and defeat, the Deep South categorically rejected the idea of arming slaves. By 1778, the focus of the Revolutionary War shifted to the Deep South. With the fall of South Carolina and Georgia to British occupation, those colonies also had to consider the possibility of using slaves to staff their militias.⁶⁹ Hamilton forwarded plans to enlist slaves “to John Jay, Congress President, and added his own recommendation, in which he pointed out that it appeared to be ‘most rational’ and, indeed, the only feasible way to meet ‘the enemy’s operations’ in South Carolina, which were ‘growing infinitely serious and formidable.’”⁷⁰ Upon the request of South Carolina’s Governor, John Rutledge, the Congress established a committee to determine the “ways and means for” the “safety and defense” of South Carolina and Georgia. That committee concluded that the “arming of blacks could save South Carolina and Georgia for the American cause.”⁷¹ Furthermore, since the plan might “‘involve inconveniences’ to the two states affected, the committee suggested it be submitted as a recommendation with the assurance that the United States would ‘defray the expense.’”⁷² “The recommendation to South Carolina and Georgia called for ‘immediately . . . raising’ 3,000 ‘able-bodied negroes,’ their formation into separate battalions, commanded by white officers, with Congress compensating the owners up to \$1,000 for each Negro

⁶⁷ Foner, *supra* note ____ at 329.

⁶⁸ *Id.* at 329.

⁶⁹ *Id.* at 331.

⁷⁰ *Id.* at 331.

⁷¹ *Id.* at 331.

⁷² *Id.* at 331.

man of ‘standard size’ not older than 35 years of age, who enlisted for the duration of the war and passed muster.”⁷³

This plan retained a veto in South Carolina and Georgia’s legislature and since slave-owning elites controlled those bodies, the plan never materialized. The story did not end there, however. When General Benjamin Lincoln took over the command of southern troops, he again called for the deployment of slave battalions. But it “was all in vain, and anyway the South Carolina slave-owners regarded the fact that Lincoln was not a Southerner, but a Massachusetts man, as evidence that he was using military necessity as a device to achieve the abolition of slavery.”⁷⁴ While this speaks less to the compensation issue, it does reveal the deep suspicion among southern political elites about the intentions of Northerners. Even in the face of occupation and, perhaps, the first step to the ultimate downfall of the young nation’s aspiration for independence, the empowerment of blacks would be too high of a cost for the South. Furthermore, Georgia and South Carolina’s rejection foreshadow the political guarantees that would be necessary to alleviate those fears.

In the areas of the country where the prospects of slavery’s future remained high, political elites were remarkably hesitant to arm slaves and grant them their freedom in exchange for service. In areas where the prospects of slavery’s future were small, we find evidence of the states experimenting with the possibility of slave soldiers. But even in those cases, the states exhibited remarkable hesitation, fearing the contempt such actions would draw from other states. Nonetheless, the states in the North did engage in policy innovation emerging from their individual powers to raise armies and militias.

⁷³ *Id.* at 331.

⁷⁴ *Id.* at 334.

Similarly, General George Washington initially rejected the idea of enlisting slaves into the Revolutionary Army. But when Lord Dunmore, the royal governor of Virginia, decided to enlist blacks as soldiers, Washington was ultimately forced to follow suit. Dunmore proclaimed that “all indentured servants, Negroes, or others (appertaining to Rebels) free, that are able and willing to bear arms, they joining His Majesty’s Troops, as soon as may be, for speedily reducing the Colony to a proper sense of their duty, to His Majesty’s crown and dignity.”⁷⁵ In response, Washington calculated that success would “depend on which side [could] arm the Negroes the faster.”⁷⁶ Washington was reluctant to arm slaves, permitting Freemen to enter the military’s ranks but hesitating to encroach upon the property rights of slave-owners.⁷⁷

C. The Emergence of Takings Doctrine as Insurance for Slave-owners

The impact of the dissolution of slavery prompted a sharp increase in the importation of slaves. “A postwar surge in slave arrivals from Africa, prompted in part by a conscious effort to make up for the heavy wartime losses and in part by a determination to secure as many laborers as possible while the federal government still tolerated the importation of slaves.”⁷⁸ Also, to recover the losses of slaves to the British military, the “demand of Southerners for compensation for the slaves the British took off with was a major question in postwar negotiations with Britain.”⁷⁹ The military victory allowed the Americans to force settlement terms, which guaranteed that the British could not carry “away any Negroes or other property of the American inhabitants.”⁸⁰ It seems,

⁷⁵ BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* 19 (1996).

⁷⁶ PHILIP S. FONER, *HISTORY OF BLACK AMERICANS* 316 (1975).

⁷⁷ *Id.* at 324.

⁷⁸ Kolchin, *supra* note ___ at 75.

⁷⁹ Foner, *supra* note ___ at 334.

⁸⁰ TREATY OF PARIS art. 7 (1783) (“There shall be a firm and perpetual peace between his Britannic Majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease. All prisoners on both sides shall be set at liberty, and his Britannic Majesty shall with all convenient speed, *and without causing any destruction, or carrying away any Negroes or other property of the American inhabitants*, withdraw all his armies, garrisons, and fleets from the said United States, and from every post, place, and harbor within

however, that the British did not adhere strictly to this particular provision of the Treaty of Paris. In subsequent foreign policy negotiations, the Senate debated at length how to enforce the compensation requirement under Article VII of the Treaty. Several new proposals reached the Senate floor during June of 1795 as various Southern senators sought to recapture some of the losses sustained in the war.⁸¹ The Senate ultimately resolved to

“recommend to the President of the United States, to renew, by friendly negotiation with his said Majesty, the claims of the American citizens, to compensation for the negroes and other property, so alleged to have been carried away.”⁸²

With the adoption of the Constitution of the United States the equation changed dramatically. The power to raise armies was now reserved to the federal Congress.⁸³ Slave-owners could no longer rely on the constitutional safeguards that previously protected their slave-holding interests. The Philadelphia convention sought to create a “government that could establish and maintain social order *and* protect the rights of property owners.”⁸⁴ But with increased federal power

the same; leaving in all fortifications, the American artillery that may be therein; and shall also order and cause all archives, records, deeds, and papers belonging to any of the said states, or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper states and persons to whom they belong.” (italics added for emphasis).

⁸¹ History of Congress: Senate Proceeding (June 22nd, 1795) (proposing that the value of the negroes and other property carried away, contrary to the 7th article of the Treaty of 1783, *and the loss and damage sustained by the United States by the detention of the posts*, be paid for by the British Government; the amount to be ascertained by the Commissioners who may be appointed to liquidate the claims of the British creditors.”). *Id.* (June 24th, 1795) (“The Senate resumed the consideration of the motion made on the 17th instant, respecting the 12 article of the Treaty communicated with the Message of the President of the United States of the 8th instant; and . . .

also for obtaining adequate compensation for the negroes, or other property of the American inhabitants, carried off from the United States, in violation of the definitive Treaty of Peace and Friendship, between his said Majesty and the United States, signed at Paris, the 3d day of September, 1783.”). *Id.* (June 24th, 1795) (“Because so much of the Treaty was intended to terminate the complaints flowing from the inexecution of the Treaty of 1783, contains stipulations that were not rightfully or justly requirable of the United States, and which were both impolitic and injurious to their interests; and because the Treaty hath not so cured that satisfaction from the British Government, for the removal of negros in violation of the Treaty of 1783, to which the citizens of the United States were justly entitled.”).

⁸² History of Congress: Senate Proceeding (June 24th, 1795)

⁸³ U.S. CONST. Art I.

⁸⁴ Klinkner and Smith, *supra* note ___ at 24 (italics added for emphasis). Klinkner and Smith further argue that “these concerns were so paramount that, almost to a man, the delegates from the ostensibly anti-slavery North would make common cause with those Southerners who sought to stop or roll back the racial progress of the previous decade. In

to raise armies, Southern slave-owners learned that they required greater constitutional guarantees to secure their slave-holdings.

To properly understand the antebellum constitution, it is important to understand the political dimensions which shaped it. The inter-regional dynamics surrounding slavery served as the central dimension along which the constitutional bargain would be forged. “The institution of slavery & its consequences formed the line of discrimination.”⁸⁵ James Madison commented that the Founding’s “real difference of interests lay, not between the large & small but between the N. & Southn. States.”⁸⁶

For the most part, the Constitution’s designers sought to protect those interests primarily through structural arrangements.⁸⁷ The U.S. Constitution is marked by institutional innovations which promoted power-sharing consensus across the country’s various geographical regions.⁸⁸ “The Constitution of 1787 adopted those institutional practices presently associated with the ‘federal-unitary dimension’ of consensus democracy. Consensus democracies are characterized by federalism, bicameralism, hard-to-amend constitutions, judicial review, and independent central banks. The original Constitution explicitly established the first three, implicitly established the fourth, and was immediately interpreted as sanctioning the fifth.”⁸⁹ More specifically, the constitutional power-sharing arrangement used the bi-cameral legislature, the Electoral College, and the three-fifths

doing so, the framers of the Constitution compromised the rights and liberties of those Americans held as slaves and undercut the antislavery impulse of the age in order to achieve their goals.” *Id.*

⁸⁵ 2 The Records of the Federal Convention of 1787, *supra* note ____ at 10 (James Madison). See 1 RECORDS, *supra* note ____ at 146 (Alexander Hamilton); 486-87 (Madison); 566 (Rufus King); 2 RECORDS, *supra* note ____ at 362 (George Mason).

⁸⁶ *Id.*

⁸⁷ This is, of course, not exclusively true. See 10 DOCUMENTARY HISTORY 1338-39 (James Madison) (“The Southern States would not have entered the Union of America, without temporary permission of [the slave] trade.”).

⁸⁸ Graber, *supra* note ____.

⁸⁹ *Id.* at 192. For further discussion on the federal-unitary dimension and constitutional structures which require consensus decision-making, see AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

compromise to ensure that neither the North nor the South could impose its will on the other region without its consent. Given the believed trajectory of population growth, the Constitution's founding bargain was designed to allow Southern control of the House of Representatives and, as the population of the South increased, the executive and (through the executive's power to appoint judges) the judiciary. The North was expected to retain control over the Senate.⁹⁰

This reading of the Constitution has traditionally viewed the crucial political dimension lying between the North and the South. But, as discussed above, the future prospects of slavery prior to the invention of the cotton gin in 1791 were not homogeneous. Slave-owners in South Carolina and Georgia were not entirely certain that the states in the Upper South would act in coordination with their own interests as the prospects of slave-labor tobacco declined. Without their support, the regional constitutional veto was not guaranteed under the U.S. Constitution. Therefore, the Deep South required further substantive constitutional protections in property.

One more document provides insight into the relationship between military takings and the expectation of compensation. The Northwest Ordinance of 1787 required the following: “[. . .] should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.”⁹¹ Unlike the early colonial documents containing provisions for public use, the Northwest Ordinance of 1787 explicitly linked compensation with the taking of property for “common preservation” (i.e. the taking of property within the security context). This challenges an interpretation of the Takings Clause based on economic impact alone. Instead, for a taking to occur, the state had to appropriate

⁹⁰ Graber, *supra* note ___ at 192.

⁹¹ NORTHWEST ORDINANCE OF 1787 Art. 2.

property *and* use it for the public’s benefit.⁹² The Northwest Ordinance is commonly cited as the source of Madison’s inspiration for the Takings Clause. “Madison no doubt knew that Article II of the then-recent Northwest Ordinance of 1787 had featured prototypes of the due-process and just-compensation clauses.”⁹³ Even so, little has been made its relationship to common preservation.

With the Revolutionary War over and a new Constitution that could mediate between slave-holding and free labor principles, it would seem that the Takings Clause was a constitutional mechanism that had outdated its threat. Judging from the behavior of Congress, however, the threat of war remained even beyond the adoption of the U.S. Constitution. During the First Congress, most “of the public bills dealt with the establishment of the new government and its relations with the states and with matters of defense or foreign policy.”⁹⁴ Tensions that resulted from British presence to the North remained high well into the nineteenth century.⁹⁵

With the threat of war, the threat of the impressments of slaves into the military remained. Along with its preoccupation toward foreign affairs,⁹⁶ the First Congress “was devoted mainly to the drafting of the Bill of Rights.”⁹⁷ The history of the Bill of Rights has been well documented.⁹⁸ “In ratifying the Constitution, six states had suggested amendments to safeguard individual rights. Many legislators elected to the First Congress arrived in New York prepared to vote to adopt these constitutional amendments.”⁹⁹ It is commonly told that the Bill of Rights was not adopted because many feared that, by enumerating certain rights, the Constitution could be read as only protected

⁹² This is consistent with Jed Rubenfeld’s argument, in which he encourages a reading of the Takings Clause that emphasizes the “for public use” language. See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993).

⁹³ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 78 (1998).

⁹⁴ STEPHEN W STATHIS, *LANDMARK LEGISLATION, 1774-2002: MAJOR U.S. ACTS AND TREATIES* 10 (2003).

⁹⁵ Consider the War of 1812.

⁹⁶ DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820* 250, 256 (1979).

⁹⁷ *Id.* at 250, 256.

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⁹⁹ Stathis, *supra* note ____ at 10-11.

this rights it expressly articulated. Many, including “Madison[,] had opposed a bill of rights both before and during ratification,” but “when a national consensus emerged favoring one, he decided to draft it himself.”¹⁰⁰

Compared to the state constitutions drafted during this period which exhibited compensation clauses, Madison crafted the Fifth Amendment’s version in more general terms.¹⁰¹ Section 21 of Tennessee’s 1796 Constitution held that “no mans particular Services shall be demanded or property taken or applied to public use without the Consent of his Representatives or without Just compensation.”¹⁰² Like the Fifth Amendment, Section 21 does not make explicitly clear the use of slaves, but it did retain the mechanism that allowed South Carolina and Georgia to veto federal attempts to control slaves during wartime. Mississippi’s Constitution of 1817 was less ambiguous. It held that the “General Assembly shall have no power to pass laws for the emancipation of slaves, without the consent of their owners, unless where a slave shall have rendered to the State some distinguished service, in which case the owner shall be paid a full equivalent for the slaves so emancipated.”¹⁰³ Two years later, the Alabama Constitution similarly held that “General Assembly shall have no power to pass laws for the emancipation of slaves, without the consent of their owners, or without paying their owners, previous to such emancipation, a full equivalent in money for the slaves so emancipated.”¹⁰⁴

It is important to keep in mind Garnett’s objection that we ought to be suspicious of any evidence that is not proximately related to the founding period. That point is well taken, but it is subject to rebuttal. The issue of taking of slaves remained on the federal agenda not only after the

¹⁰⁰ *Id.* at 11.

¹⁰¹ U.S. CONST. amend V (“ . . . nor shall private property be taken for public use without just compensation).

¹⁰² Tennessee Constitution of 1796 §21.

¹⁰³ Mississippi Constitution of 1817 §1 (Slaves).

¹⁰⁴ Alabama Constitution of 1819 §1 (Slaves).

revolutionary war, but also after the War of 1812. In 1824, the U.S. House of Representatives sought to appropriate funds amounting to \$2000 per year for an attorney employed by the President to determine the value of the slaves taken by England in the last war.”¹⁰⁵ Furthermore, it is the consistency of this story that helps to reconcile early comments made by St. George Tucker with those of Madison’s. Tucker concluded that “the Takings Clause was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war.”¹⁰⁶ While he was most certainly correct, the salience of the issue only attached to a particular kind of property – namely, slavery. It was this dimension of the slavery debate that Madison later acknowledged in his letter to Robert J. Evans.

“Whatever may be the intrinsic character of that property [slavery], it is one known to the constitution and, as such, could not be constitutionally taken away without compensation. [. . .] An emancipation program would have to include “a provision in the plan for compensating a loss of what [the slave-owner] held as property guaranteed by the laws, and recognized by the Constitution.”¹⁰⁷

V. *Conclusion*

This chapter has evaluated some of the dominant account about the origins of the takings clause by systematically testing the implications of those arguments against a new dataset composed of state constitutions. Since these accounts failed to capture the variation in state behavior with respect to adoption rates, this chapter offers an alternative hypothesis regarding the issues and ideas which marked the origins of the Fifth Amendment’s Takings Clause.

¹⁰⁵ House Roll Call Vote No. 17 (1823-24).

¹⁰⁶ ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES (1803).

¹⁰⁷ 1 THE FOUNDERS’ CONSTITUTION 573 (Philip B Kurland & Ralph Lerner eds., 1987).