

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 the Civil War and numerous other crises. In contrast, most national constitutions last less than two decades. Why has the 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. 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? Drawing on the example of the federal Takings Clause, we argue that in addition to their explicit roles in defining rights and powers of government, constitutional clauses often serve a deeper structural purpose: providing the foundations for long-term constitutional stability. In this Article 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. This clause was also 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.

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INTRODUCTION

Most constitutions fail in less than two decades.¹ The median country faces violent political change about once every eight years, and these changes are often accompanied by changes in constitutional arrangements.² 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 1787.³ Now, because the Constitution has endured, we 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.⁴ The reason, we argue, is that the

¹ ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 135 tbl.6.1 (2009).

² Gary W. Cox, Douglass C. North & Barry R. Weingast, *The Violence Trap: A Political-Economic Approach to the Problems of Development* 4–6 (Sept. 2013) (working paper) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370622 [<http://perma.cc/NG4Q-AXMR>]).

³ See, e.g., DAVID J. SIEMERS, *RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME*, at xi–xii, 1–2 (2002).

⁴ 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 fundamental textual and nontextual change in the Constitution. See, e.g., 1 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. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 6–7 (2010). Nonetheless, it is difficult to argue that these episodes have resulted in constitutional failure. As William Baude has noted in the context of the Civil War, “The Constitution was not abolished and replaced; it was amended.” William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1812 (2013); see also Richard A. Primus, *The Riddle of Hiram Revels*, 119 *HARV. L. REV.* 1681, 1709 (2006) (“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

Constitution is “self-stabilizing”: embedded within its text are mechanisms for its own survival. We argue that stabilization is a major aspect of the Constitution. Many constitutional clauses, in addition to their explicit 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 ordinarily fail to consider the problem of how constitutions provide for their own stability and, in particular, how the Constitution does so.⁵ Understanding how the 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, Mittal and Weingast argue that constitutional systems face three fundamental problems that perennially lead to constitutional failure; further, they identify three conditions for self-stabilizing constitutions, each of which solves one of the three fundamental problems.⁶ First, citizens are rationally fearful when the government poses a threat to their assets, livelihood, or well-being.⁷ When an incumbent regime sufficiently threatens citizens, citizens are often willing to support extraconstitutional action, such as coups, to protect themselves. To address this problem, self-stabilizing constitutions lower the stakes of politics for

constitutions, ELKINS ET AL., *supra* note 1, provides a detailed discussion of indicators of longevity and presents the Constitution’s unusual endurance as a problem requiring explanation.

⁵ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁶ This paper builds on the authors’ ongoing research on self-enforcing constitutions. See Sonia Mittal, Jack N. Rakove & Barry R. Weingast, *The Constitutional Choices of 1787 and Their Consequences*, in *FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S*, at 25, 25–56 (Douglas A. Irwin & Richard Sylla eds., 2011) [hereinafter Mittal, Rakove & Weingast, *Constitutional Choices*]; Sonia Mittal & Barry R. Weingast, *Constitutional Stability and the Deferential Court*, 13 U. PA. J. CONST. L. 337 (2010) [hereinafter Mittal & Weingast, *Deferential Court*]; Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century*, 29 J.L. ECON. & ORG. 278 (2013) [hereinafter Mittal & Weingast, *Self-Enforcing Constitutions*]; Sonia Mittal, *Dynamic Constitutional Stability* (July 2010) (unpublished Ph.D. dissertation, Stanford University) (on file with author) [hereinafter Mittal, *Dynamic Constitutional Stability*].

⁷ Rui J.P. de Figueiredo Jr. & Barry R. Weingast, *The Rationality of Fear: Political Opportunism and Ethnic Conflict*, in *CIVIL WARS, INSECURITY, AND INTERVENTION* 261, 261–302 (Barbara F. Walter & Jack Snyder eds., 1999).

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 their 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 the government’s capacity for such intrusion is curtailed.⁸ 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 U.S. Constitution is both more widespread and more complex than generally appreciated. Familiar examples of mechanisms that illustrate the limit condition include Article I, Section 8’s enumeration of the powers of Congress, which implicitly limits the power of the federal legislature,⁹ and perhaps, most noticeably, the language contained in the Bill of Rights defining areas of immunity from government action, intrusions on free speech,¹⁰ and takings of property without just compensation.¹¹ Moreover, a wide range of Fifth Amendment 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.¹²

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.¹³ 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

⁸ As discussed *infra*, lowering the stakes of politics is not synonymous with limited government.

⁹ U.S. CONST. art. I, § 8.

¹⁰ *Id.* amend. I.

¹¹ *Id.* amend. V.

¹² *Id.*; see also *id.* art. I, § 9.

¹³ Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 251–52 (1997); see also Roger B. Myerson, *Federalism and Incentives for Success of Democracy*, 1 Q. J. POL. SCI. 3, 5 (2006).

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.¹⁴ Examples include the Taxation Clause's provision that "all Duties, Imposts and Excises shall be uniform throughout the United States,"¹⁵ 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.¹⁶

Third, every country faces shocks to its environment, including demographic change, natural disasters, economic downturns, wars, and technological innovations.¹⁷ 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*.¹⁸

Over the course of American history, mechanisms that have facilitated adaptation include the amendment process, which is a relatively clear but sluggish form of adaptation; legislative pacts, which are enabled by the ordinary legislative process set forth in the Constitution, and which

¹⁴ James D. Fearon makes this argument with respect to elections in general. See James D. Fearon, *Self-Enforcing Democracy*, 126 Q. J. ECON. 1661 (2011).

¹⁵ U.S. CONST. art. I, § 8, cl. 1.

¹⁶ See *id.* art. I, §§ 2–3; *id.* art. II, § 1.

¹⁷ See DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 103–15 (2005).

¹⁸ On adaptive efficiency, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY 22–38 (1960), and NORTH, *supra* note 17, at 166–70; NORMAN SCHOFIELD, ARCHITECTS OF POLITICAL CHANGE: CONSTITUTIONAL QUANDARIES AND SOCIAL CHOICE THEORY 3, 8–9, 14, 21 (2006). North's concept of adaptive efficiency was applied to the development of the U.S. Constitution in Mittal, *Dynamic Constitutional Stability*, *supra* note 6, at 1–8.

constituted a central form of adaptation in the nineteenth century; the necessary and proper clause; and later, judicial review.¹⁹

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 Essay, we begin our examination of the self-stabilizing features of constitutional text by considering how the United States' Takings Clause contributes to the self-stabilizing Constitution. Although there was little demand for the protections provided by the Takings Clause in 1787 in the states, James Madison—the Clause's author—appears to have 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 this way, 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

¹⁹ However, as we discuss below, such mechanisms also can and have raised the stakes for key political stakeholders.

²⁰ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 18 (1985).

²¹ See *infra* Part III for further discussion of the Clause's role in the antebellum United States.

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, because 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 the 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 a 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 constitutional failure akin to the failure of the Articles of Confederation in the United States.

This Essay proceeds as follows. In Part I we outline our framework for self-stabilizing constitutions. In Part II 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 III we explore the changing role of the Takings Clause after 1787. While traditional narratives of the Takings Clause emphasize the central role of 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.²² In Part IV we consider the Takings Clause in a comparative perspective by contrasting it to the compulsory acquisitions power contained in s 51(xxxi) of the Australian Constitution. This discussion illustrates how different

²² On constitutional interpretation outside of the courts more generally, see 1 ACKERMAN, *supra* note 4; BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); and KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (2001); as well as 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS 5* (1998); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); Larry D. Kramer, “*The Interest of the Man*”: *James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 736–37 (2006); Mittal & Weingast, *Deferential Court*, *supra* note 6; Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 27 (Jack M. Balkin & Reva B. Siegel eds., 2009); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); and Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 376 (2007).

threats of violence strongly affect how constitutional provisions are drafted. Our conclusions follow.

I. THE SELF-STABILIZING CONSTITUTION

Constitutional stability embodies two concepts, one static and one dynamic.²³ “Static self-stability” means that the constitution structures incentives *at a given time* such that (1) those in power honor the constitutional procedures necessary to produce sovereign commands and transfer power when political officials have lost elections; (2) consequently, the citizenry do not turn to extra-constitutional actions, such as revolutions, out of fear of governmental transgression; and (3) those out of power have incentives to support the democratic system rather than to 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.²⁴ Constitutions fail when political officials do not step down when they lose elections, or when those out of power initiate coups, or when 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.²⁵ 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.²⁶

First, governments often have power to provide public goods, ensure the rule of law, and enhance citizen welfare; to define property rights,

²³ On the distinction between static and dynamic constitutional stability, see Mittal, *Dynamic Constitutional Stability*, *supra* note 6, at 16–26.

²⁴ See ELKINS ET AL., *supra* note 1, at 1–11; Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6.

²⁵ ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 36–37 (1991). In highlighting that constitutional stability requires political officials to obey constitutional rules, we do not suggest that perfect compliance with all constitutional rules is necessary, realistic, or even desirable. See Adrian Vermeule’s essay in this issue for a discussion of “optimal abuses of power” within the context of the modern administrative state. See Adrian Vermeule, *Optimizing Abuse of Power*, 109 NW. U. L. REV. 673 (2015). 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 and maintaining constitutional stability.

²⁶ Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6.

designate what forms of contracts will be enforced, and decide who can form organizations for what purposes; and to 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.²⁷ Citizens rationally fear when government poses a threat to their assets, livelihood, or well-being.²⁸ 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 within its powers—many threatened citizens will support extraconstitutional action, such as coups, to protect themselves.²⁹

To address this problem, self-stabilizing constitutions lower the stakes of politics by circumscribing the realm of legitimate governmental action.³⁰ 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 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 by no means always) served to lower the stakes of politics over the course of American history. For example, individual clauses such as the direct taxation clause have lowered 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

²⁷ See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 590–93, 694–95, 700–01 (1993).

²⁸ de Figueiredo & Weingast, *supra* note 7, at 263.

²⁹ *Id.* at 265.

³⁰ See Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6, at 283–84.

can be suspended in times of emergency.³¹ Nearly all constitutions have such clauses.³² The U.S. Constitution has one of the narrowest exception clauses.³³ 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 framers chose.³⁴

The second condition of constitutional stability involves the ability of citizens to coordinate against political officials who attempt constitutional transgressions.³⁵ 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.³⁶ 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

³¹ See BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 3–9 (1993).

³² Loveman argues that “Latin American constitutions almost always include[] provisions for ‘emergency powers,’ or ‘extraordinary powers.’” *Id.* at 5. He mentions “Spain, France, Italy, Germany, Portugal, and the United States” also contain exception clauses in their constitutions. *Id.* at 7. He then compares the British case to these countries’ governing documents. *Id.* at 12–13, 15–17. Loveman also writes 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.* at 17.

³³ *Id.* at 17.

³⁴ 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 *IND. L. REV.* 41 (2011), 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* Duane L. Ostler, *The Drafting of the Australian Commonwealth Acquisition Clause*, 28 *U. TASMANIA L. REV.* 211, 214–15 (2009).

³⁵ Myerson, *supra* note 13, at 4–5; Weingast, *supra* note 13, at 251–52; *see* Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6, at 288.

³⁶ Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6, at 284–85.

regularly adopted by kleptocratic regimes,³⁷ as well as by colonial regimes. For example, the British Empire 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.³⁸

To solve these coordination dilemmas, constitutions and their engineers create “focal points.”³⁹ Focal points create a constitutional consensus about citizen rights and constitutional procedures, enabling citizens to coordinate their response to government transgressions.⁴⁰ In the United States, the Constitution—as supreme law—provides a foundational focal point.⁴¹ 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. Bright-line 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 population.⁴² As previously mentioned, other clauses in the Constitution require that custom duties be uniform across the country⁴³ and, in addition, that the national government may not

³⁷ Daron Acemoglu et al., *Kleptocracy and Divide-and-Rule: A Model of Personal Rule*, 2 J. EUR. ECON. ASS'N 162 (2004) (describing how kleptocratic regimes impose punitive sanctions on opponents and redistribute that wealth to those who consent to their rule, and explaining how this strategy is more effective when inequality exists or is promoted because unproductive groups are harder to “buy off”).

³⁸ See Robert Blanton et al., *Colonial Style and Post-Colonial Ethnic Conflict in Africa*, 38 J. PEACE RES. 473, 473 (2001) (“[T]he indirect, decentralized rule of the British fostered an unranked system of ethnic stratification . . . [which] foster[ed] competition between ethnic groups . . .”).

³⁹ THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57 (1960); Myerson, *supra* note 13, at 4; Weingast, *supra* note 13.

⁴⁰ The text alone does not establish a focal point, the consensus condition, or self-stabilization. Self-stabilization 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 them.

⁴¹ See THE FEDERALIST NO. 46, at 315 (James Madison), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch8s30.html> [<http://perma.cc/JAS2-MFWS>] (“But ambitious encroachments of the Foederal [sic] 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.”).

⁴² U.S. CONST. art. I, § 9, cl. 4. This provision had significance at least until the Sixteenth Amendment’s exemption of income tax from such proportionality requirements. *Id.* amend. XVI.

⁴³ *Id.* art. I, § 8, cl. 1. This illustrates that clauses often contribute to multiple conditions.

impose taxes on exports from states.⁴⁴ 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.⁴⁵ 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 their histories, created by significant, sometimes unforeseeable, changes in circumstances due to effects such as major demographic changes, natural disasters, economic downturns, wars, or innovations in technology.⁴⁶ 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 constitutional provisions to maintain the limit and consensus constitutions over time.⁴⁷ Following Hayek and North, we call this the “adaptation condition.”⁴⁸ 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.⁴⁹ 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

⁴⁴ *Id.* art. I, § 9, cl. 5.

⁴⁵ *Id.* art. V.

⁴⁶ See NORTH, *supra* note 17, at 103–15.

⁴⁷ See Mittal, *Dynamic Constitutional Stability*, *supra* note 6, at 11–12.

⁴⁸ HAYEK, *supra* note 18, at 22–38; NORTH, *supra* note 17, at 111.

⁴⁹ 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.” Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 96 (Tom Ginsburg & Rosalind Dixon eds., 2011), available at <http://ssrn.com/abstract=1833634> [http://perma.cc/4E8D-62RS].

of the Constitution's ordinary legislative process produced a form of super-statutes that were small "c" constitutional events.⁵⁰ 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.⁵¹ In contrast, each attempt to create a Compromise of 1861 during the secession crisis failed, leading to the Civil War.⁵² 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 United States has faced numerous shocks, and has changed significantly in the last 200 years: for instance, it has faced an increase in population of approximately one hundredfold in the last 200 years, as compared to a doubling in France.⁵³ Ultimately events such as the Civil War make it all the more remarkable that the Constitution has lasted so long, even surviving against the predictions of some of its framers.⁵⁴

II. DESIGNING THE TAKINGS CLAUSE AS A SELF-STABILIZING CONSTITUTIONAL MECHANISM

The U.S. Constitution was written in a context of profound uncertainty about the ability of democratic republics to endure.⁵⁵ 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 Montesquieu held that republics could be sustained only in small city-states.⁵⁶ Prior to 1787, no

⁵⁰ ESKRIDGE & FERREJOHN, *supra* note 4, at 6–7.

⁵¹ Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in *ANALYTIC NARRATIVES* 148, 148–93 (Robert H. Bates et al. eds., 1998) [hereinafter Weingast, *Political Stability*]; see also Barry R. Weingast, *Institutions and Political Commitment: A New Political Economy of the American Civil War Era* (2002) (unpublished manuscript) (on file with author) [hereinafter Weingast, *Institutions*].

⁵² See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 523–36, 548–54 (1976) for a discussion of the failed compromises.

⁵³ THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 29 (2014).

⁵⁴ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> [<http://perma.cc/SQ37-7UHL>] (“[I]t may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”).

⁵⁵ See generally Brutus, *Essays of Brutus (I)*, in 1 *THE COMPLETE ANTI-FEDERALIST* 2.9.10–21 (Herbert J. Storing ed., 1981), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html> [<http://perma.cc/WQ69-T6QS>]; *THE FEDERALIST* NO. 9, *supra* note 41, at 50–55 (Alexander Hamilton); *id.* NOS. 10, 14, 51, at 56–65, 88–89, 347–53 (James Madison); HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 15–23 (1981).

⁵⁶ NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 22 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press 1998) (1517) (“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

constitution had successfully protected such 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.⁵⁷ The Convention deliberated with the failures of the first national constitution—the Articles of Confederation—at the forefront of the framers' minds.⁵⁸ The newly independent states successfully struck a constitutional bargain in 1776, but that bargain could not be preserved in the rapidly changing, postwar environment of the 1780s. Under the Articles, Congress lacked the power and institutional competence to address a wide range of domestic and international threats.⁵⁹ In terms of the tradeoffs inherent in the limit, consensus, and adaptation 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.⁶⁰ Consequently, a pervasive concern with creating and preserving order drove both Federalist approaches to constitutional design *and* Antifederalist acquiescence to the new

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.”); MONTESQUIEU, *THE SPIRIT OF THE LAWS* 131 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice.”).

⁵⁷ See Mittal, *Dynamic Constitutional Stability*, *supra* note 6, at 40–43.

⁵⁸ THE FEDERALIST NOS. 15–17, 21–22, *supra* note 41, at 90–108, 129–33, 135–41, 143–46 (Alexander Hamilton); *id.* NOS. 18–20 (Alexander Hamilton & James Madison); SIEMERS, *supra* note 3, at xi–xii, 1–2; MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 42–52 (1913).

⁵⁹ See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 143–83 (1985); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 393–429 (1969); Mittal et al., *Constitutional Choices*, *supra* note 6, at 27–31.

⁶⁰ See William H. Riker, *The Lessons of 1787*, 55 *PUB. CHOICE* 5, 6 (1987). In *Federalist 6*, Hamilton, after considering 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.” THE FEDERALIST NO. 6, *supra* note 41, at 28–36 (Alexander Hamilton).

Constitution.⁶¹ 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.⁶² The inclusion of many of these provisions, including counter-majoritarian provisions such as those establishing the Senate, now criticized by contemporary scholars,⁶³ was in fact necessary to secure support for the Constitution in 1787. 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.⁶⁴ 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,⁶⁵ heavily influenced many of the framers of the Constitution. 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. American colonists objected to the English parliament as tyrannical and corrupt; state legislators (especially Madison)

⁶¹ See SIEMERS, *supra* note 3, at xi.

⁶² See Susan Alberts, Chris Warshaw & Barry R. Weingast, *Democratization and Counter-majoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy*, in COMPARATIVE CONSTITUTIONAL DESIGN 69, 69–100 (Tom Ginsburg ed., 2012).

⁶³ See, e.g., ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006). *But see* Alberts et al., *supra* note 62.

⁶⁴ 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. Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1505 (2012). The clauses protected private property to some degree but often "did not specify whether just compensation was required when a taking occurred." *Id.*

⁶⁵ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 122 (Hackett Publ'g Co. 1980) (1690); *see also, e.g.*, William Blackstone, *Commentaries on the Laws of England*, in PERSPECTIVES ON PROPERTY LAW 45, 47 (Robert C. Ellickson et al. eds., 2002) (stating that "the good order of the world" rests on the elucidation of property law). According to William Treanor, the ratification of takings clauses at the state and federal levels reflected a broader ideological shift from republicanism to liberalism. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694 (1985).

increasingly sought to restrain their legislatures, seeing their power and willingness to pass laws that interfered with private property as particularly problematic.⁶⁶

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.⁶⁷ Unlike every other clause in the proposed Bill of Rights, it was not recommended by any state ratifying convention,⁶⁸ and the rationale for adding the Clause remains obscure.⁶⁹ 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.⁷⁰

The dearth of historical evidence concerning the addition of the Takings Clause suggests that attempting specific inferences about the Clause's intended purpose or scope can be perilous.⁷¹ Nevertheless, we argue that the Clause's inclusion into the Constitution, at a minimum, was part of Madison's more general plan to create a lasting constitution⁷²—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

⁶⁶ Treanor, *supra* note 65, at 709; *see also* THE FEDERALIST NO. 48, *supra* note 41, at 332–38 (James Madison) (arguing that, in a democracy, it is the legislature that is dangerous because 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 the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions.” In the United States, the “legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex”). *But see* THE FEDERALIST NO. 26 *supra* note 41, at 164–71 (Alexander Hamilton) (“[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.”).

⁶⁷ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 78 (1998).

⁶⁸ Baude, *supra* note 4, at 1794.

⁶⁹ *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

⁷⁰ AMAR, *supra* note 67, at 77–79; DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 13 (2002).

⁷¹ Baude, *supra* note 4, at 1742.

⁷² *See* Letter from Thomas Jefferson to James Madison, *supra* note 54.

transgressions, and enable adaptation—to play a part in contributing to the three conditions of stability.⁷³ 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 more criminally focused grand jury, double jeopardy, and self-incrimination clauses that precede it,⁷⁴ 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.⁷⁵

The Takings Clause originally limited possible threats to property rights by constraining the extent to which the federal government could acquire private property through seizure for its own benefit.⁷⁶ A danger arises from the absence of such a clause because 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.⁷⁷ As a state legislator, Madison fought vigorously to restrict takings of property for military or other public uses without just compensation, and he perceived the importance of a national commitment to protect property rights.⁷⁸

⁷³ 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.

⁷⁴ AMAR, *supra* note 67, at 78.

⁷⁵ See, e.g., *id.*; DANA & MERRILL, *supra* note 70, at 14. However, the question of exactly which individuals the Clause was intended to protect, from whom (and at what time) is a complicated one. 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 4, at 1792–94. 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 *id.* at 1795–96. For a contrasting account of the history of federal eminent domain power, see Christian R. Burset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CALIF. L. REV. CIRCUIT 187 (2013).

⁷⁶ 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 legislatures and a new concern for individual rights—particularly property rights.” Treanor, *supra* note 65, at 701.

⁷⁷ Haber et al. discuss bank expropriations in Mexico. STEPHEN HABER ET AL., MEXICO SINCE 1980, at 1–19 (2008). We note below Madison’s observation that, under the Articles, state laws allowed taking land for military and other public purposes without compensation. See *infra* note 96 and accompanying text.

⁷⁸ Treanor, *supra* note 65, at 709–10.

The Takings Clause operates in part as a response to the power of eminent domain—a 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,⁷⁹ was entrenched in English law prior to the founding of the American colonies,⁸⁰ and likewise became well established in American common law.⁸¹ Although none of the early state constitutions explicitly granted the power of eminent domain to state governments, every state government exercised the power, and it has subsequently been introduced into most state constitutions and many state statutes.⁸²

Read in this context, the “just compensation” requirement, and perhaps less obviously, the “public use” requirement, act as limits on powers of eminent domain.⁸³ In this way, the Takings Clause lowers the stakes of politics: by constraining the federal government’s (and later the states’) freedom to seize land or chattels without bearing some of that price itself, the Clause mitigated the danger posed to the citizenry. Thus, the Takings Clause helped ensure that propertied citizens would have less

⁷⁹ Olga V. Kotlyarevskaya, Note, “Public Use” Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development, 5 CONN. PUB. INT. L.J. 197, 199 (2005).

⁸⁰ 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, 143 (2004) (noting that 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 Ostler, *supra* note 34, 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.”).

⁸¹ Ostler, *supra* note 34, at 218 (“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 states had due process language to protect from arbitrary takings, or language requiring that ‘consent’ be obtained for takings for public use.”).

⁸² For instance, eminent domain powers were explicitly provided for in Michigan’s constitutions of 1850, 1908, and 1963. MICH. CONST. of 1850, art. 15, § 15; *id.* art. 18, § 2; MICH. CONST. of 1908, art. XIII; MICH. CONST. of 1963, art. X, § 2. Moreover, the Supreme Court has found that the power of eminent domain is an incident to sovereignty, for which no special constitutional provision is required. *United States v. Jones*, 109 U.S. 513, 518 (1883).

⁸³ See *supra* note 75 regarding scholarly debate concerning the existence and scope of the federal eminent domain power. The limiting force of the “public use” requirement in the post-*Kelo* era remains to be seen. As Stuart Banner notes, “Courts 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, *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 by, for example, 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 prorate use of, see Epstein, *supra* note 20, at 166–69, or by defining “public necessity of the extreme sort” 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 *County of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004), overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

reason to resist governmental actions or support extraconstitutional 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 the consensus condition. Madison simultaneously intended the Clause to serve a broader "educative" function;⁸⁴ that is, he hoped 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.⁸⁵ 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."⁸⁶ 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"⁸⁷ when it came to protecting minority rights against the power of the majority.⁸⁸ 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 community."⁸⁹

The Takings Clause facilitated the consensus condition in a number of ways, by 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

⁸⁴ Treanor, *supra* note 69, at 837.

⁸⁵ Treanor, *supra* note 65, at 714.

⁸⁶ Treanor, *supra* note 69, at 819 (emphasis added).

⁸⁷ THE FEDERALIST NO. 48, *supra* note 41, at 332–38 (James Madison).

⁸⁸ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 272 (Gaillard Hunt ed., 1904), available at <http://oll.libertyfund.org/titles/1937> [<http://perma.cc/KT4T-HESG>]; see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 316 (1996) (arguing that Madison generally found a separate Bill of Rights "redundant or pointless").

⁸⁹ Letter from James Madison to Edmund Randolph (May 31, 1789), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 88, at 372, 382; see also RALPH KETCHAM, JAMES MADISON 290 (1990) (commenting on Madison's gradual acceptance that an explicit declaration of rights may be useful).

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.⁹⁰ 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 for slaveholders were agreed upon.⁹¹ 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.⁹² In 1787, landowners and slaveholders were very powerful, but Madison feared their power would diminish over time as they became a minority, and he crafted the Takings Clause with their future protection in mind.⁹³

Madison keenly recognized that lawmaking inherently involves transfers of property among different groups. As he famously argued in *Federalist 10*, legislation necessarily reflects decisions that harm some groups and benefit others.⁹⁴ Madison defended his belief that the political process created by the Constitution would generally work to protect individual property interests.⁹⁵ But he also recognized that the system

⁹⁰ RAKOVE, *supra* note 88, at 92.

⁹¹ FARRAND, *supra* note 58, at 94.

⁹² See, e.g., Treanor, *supra* note 69, at 836–47; see also DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 192–97* (1991); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 27–28, 204–05* (1990).

⁹³ Treanor, *supra* note 69, at 836–47.

⁹⁴ *THE FEDERALIST* NO. 10, *supra* note 41, at 56–65 (James Madison).

⁹⁵ *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.”).

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.⁹⁶ Looking forward, he feared that landowners and slaveholders were vulnerable to expropriation, and he designed the Clause with the 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.⁹⁷ Madison expected that slaveholders and landowners would increasingly find themselves a minority over time and that without additional protection—or what he occasionally called “auxiliary precautions”—both groups would be continually subject to expropriation at the hands of a growing, landless majority.⁹⁸ 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 countermajoritarian 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 takings by government. Constitutions have more and less blunt ways of lowering the stakes and making citizens feel more secure in their lives, liberty, and property. If guaranteeing protection of property rights via the limit condition 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 framers could have worded the Clause with stronger rights-protection language, such as “the state shall never seize private property.”

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 because the rigidity of the stronger commitment to property would at once

⁹⁶ Treanor, *supra* note 65, at 709–10.

⁹⁷ Treanor, *supra* note 69, at 851.

⁹⁸ THE FEDERALIST NO. 51, *supra* note 41, at 347–53 (James Madison); Treanor, *supra* note 69, at 849–53.

have rendered the clause noncredible, given the needs of government (governments are generally forced to take land to provide basic infrastructure and protect against emergencies, at a minimum). More importantly, because stronger language would prevent the government from adapting to the changing needs of the country, stronger language would have directly clashed with the adaptation condition.⁹⁹ By instead 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 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, facilitating external review by courts.

III. 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 one of the framers' goals. 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 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 Part describes the role of the Takings Clause after 1787 and argues that although the Civil War could not ultimately be avoided, the Takings Clause was one mechanism that delayed the clash and promoted relative stability for three generations.

The Takings Clause represented one part of 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.¹⁰⁰ 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.¹⁰¹ Prior to the New Deal, it was the Contracts Clause, and later, the substantive due process doctrine—not the Takings Clause—that provided the strongest sources of property protection.¹⁰²

In the early Republic, majoritarian political institutions such as legislatures and juries often determined when to take property and when

⁹⁹ See Treanor, *supra* note 69, at 840–47 for a discussion of Madison's reasons for favoring a partial, as opposed to an absolute, compensation requirement.

¹⁰⁰ See *supra* Part II.

¹⁰¹ See Treanor, *supra* note 69, at 794.

¹⁰² See DANA & MERRILL, *supra* note 70, at 1.

compensation was due, not just the courts.¹⁰³ The post-1787 passage of takings clauses in every state except North Carolina illustrates this point.¹⁰⁴ Many of these state clauses specifically charge juries, not courts, with determining just compensation.¹⁰⁵

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, the federal government found itself under increasing pressure to quickly survey and distribute land in the vast public domain for settlement.¹⁰⁶ 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 formal legal title.¹⁰⁷ Prior to the creation of the federal domain, states including Virginia and North Carolina passed preemption acts giving settlers the option to purchase unsold Native American land once it had been purchased from the Native Americans.¹⁰⁸ 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 Native Americans.¹⁰⁹

The Supreme Court entered the debate in 1823 in *Johnson v. M’Intosh*.¹¹⁰ Chief Justice Marshall, in an opinion that embarked on a detailed discussion of Native American property rights, held that Native Americans merely occupied their land and were thus “incapable of

¹⁰³ Treanor, *supra* note 69, at 787.

¹⁰⁴ DANA & MERRILL, *supra* note 70, at 2.

¹⁰⁵ Donna M. Nakagiri, Takings Provisions in State Constitutions: Do They Provide Greater Protections of Private Property than the Federal Takings Clause? 29 (1999) (unpublished research paper, Michigan State University College of Law) (*available at* <http://www.law.msu.edu/king/1999/1999-Nakagiri.pdf> [<http://perma.cc/WS6C-G8P6>]).

¹⁰⁶ STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 190 (2005); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 124–26 (2d ed. 2012).

¹⁰⁷ MERRILL & SMITH, *supra* note 106, at 126.

¹⁰⁸ *Id.*

¹⁰⁹ BANNER, *supra* note 106, at 180–81.

¹¹⁰ 21 U.S. (8 Wheat.) 543 (1823).

transferring the absolute title to others.”¹¹¹ 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 tacit 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*.¹¹²

The 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 fully 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.¹¹³

In this case, other constitutional provisions, rather than the Takings Clause, took a more active part in protecting property rights in slaves. These provisions—and not the Taking Clause itself—rendered the 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 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.¹¹⁴ 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

¹¹¹ *Id.* at 591. See BANNER, *supra* note 106, at 150–90 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.

¹¹² 348 U.S. 272, 279–81 (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. [M’Intosh]* 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.” (citations omitted)); MERRILL & SMITH, *supra* note 106, at 124.

¹¹³ Goldin shows that the costs of compensated emancipation would have been an enormous sum, around the estimated value of total U.S. gross domestic product. Claudia Dale Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 66 (1973).

¹¹⁴ Weingast, *Political Stability*, *supra* note 51, at 148–93; see also Weingast, *Institutions*, *supra* note 51.

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.¹¹⁵ 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, 1846–50, 1861, and 1877.¹¹⁶ In each, the future of Constitution and country were at risk; and one—the Crisis of 1861—resulted in the devastating Civil War. Americans solved the other four crises with considerable difficulty.¹¹⁷ The compromises of 1820, 1833, 1850, and 1877 not only successfully adapted the constitutional bargain through congressional acts that typically resolved the immediate issue of the crisis, but also set rules governing future policies.¹¹⁸ 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 “superstatutes.”¹¹⁹ For example, the Compromise of 1820 ended the crisis over Missouri statehood and made the balance rule explicit,¹²⁰ and in the Compromise of 1833, Southerners backed down off the use of nullification as a possible means by which individual states could block national legislation.¹²¹

As a result, these antebellum superstatutes proved critical to adjusting the rules and preserving the property rights of slaveholders for three

¹¹⁵ Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6, at 293.

¹¹⁶ Weingast, *Political Stability*, *supra* note 51; *see also* Weingast, *Institutions*, *supra* note 51.

¹¹⁷ C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3 (1966).

¹¹⁸ Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 6, at 287.

¹¹⁹ ESKRIDGE & FEREJOHN, *supra* note 4, at 7.

¹²⁰ Weingast, *Institutions*, *supra* note 51, at 57.

¹²¹ *See* CHARLES M. WILTSE, JOHN C. CALHOUN: NULLIFIER, 1829–1839, at 193–99 (1949).

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 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.¹²²

Judicial interpretation of the Takings Clause has become increasingly important in the modern era. Although Takings Clause jurisprudence has been described as “takings law, without a theory,”¹²³ it 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, as 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;¹²⁴ 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.¹²⁵ Now, only two meaningful limitations on the public use requirement exist, both of which address extreme cases: preventing seizures made in bad faith and straightforward redistributions or wealth transfers from one individual to another, without some associated purpose of public benefit, however indirect the effect.¹²⁶

¹²² This included, according to Baude, the Supreme Court’s ruling in the 1875 case *Kohl v. United States*, 91 U.S. 367 (1875), which established, for the first time, 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 4, at 1798.

¹²³ Isaac Gorodetski, *Richard Epstein: Takings Law, Without a Theory*, POINTOFLAW.COM (Dec. 12, 2012, 1:27 PM), <http://www.pointoflaw.com/archives/2012/12/richard-epstein-takings-law-without-a-theory.php> [<http://perma.cc/YKG3-KQN7>].

¹²⁴ 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) (finding a slum redevelopment to be a permissible public use).

¹²⁵ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹²⁶ See, e.g., Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 57 (2008) (“In short, when the alleged ‘purpose is to cloak to some sinister scheme,’ the courts can intervene to redress bad faith actions by the legislature. Short of these types of clearly untenable actions, however, it would appear that almost anything goes in terms of legislative determinations of public uses.” (footnotes omitted) (quoting *Timmons v. S.C. Tricentennial Comm’n*, 175 S.E.2d 805, 814 (S.C. 1970))).

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.¹²⁷ This test gives great 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."¹²⁸

However, courts have found the Takings Clause to be expansive enough to protect private property from certain forms of onerous regulation. According to 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.¹²⁹ However, in 1922, the Supreme Court held in *Pennsylvania Coal Co. v. Mahon* that regulation could constitute a taking.¹³⁰ 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 on an ongoing basis. Most of what are now termed "regulatory takings" cases are decided according to a balancing test weighing, among other factors: economic impact, the effect on investment-backed expectations, and the nature of the governmental activity.¹³¹ However, the Supreme Court has developed a number of categorical rules that provide additional and meaningful protection for certain types of regulatory takings. Specifically, in *Lorretto v. Teleprompter Manhattan CATV Corp.* the Court held that any permanent physical occupation of private property, no matter how trivial, was necessarily a taking and required just compensation.¹³² Also, in *Lucas v. South Carolina Coastal Council*, the Supreme Court declared that regulations that completely deprive an owner of "all economically beneficial use[]" of her property invariably constitute a taking.¹³³ The Takings Clause has also proved a check on government power in the context of regulatory "exactions"—usually where planning approval is

¹²⁷ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[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." (citing *Berman*, 348 U.S. 26)).

¹²⁸ *Id.* (quoting *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)).

¹²⁹ Treanor, *supra* note 69, at 782.

¹³⁰ 260 U.S. 393 (1922).

¹³¹ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

¹³² *See* 458 U.S. 419 (1982) (holding that state law requiring landlords to permit cable companies to install cable facilities in apartment buildings was effectively a taking).

¹³³ 505 U.S. 1003, 1019 (1992).

made contingent on some sacrifice of property interests (such as dedicating a public easement).¹³⁴

Many scholars have suggested that the Supreme Court's decisions after *Pennsylvania Coal* have struggled to clearly define what kinds of regulations constitute takings.¹³⁵ 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.

IV. THE EXTENT OF THE NEED FOR STABILITY— A COMPARATIVE PERSPECTIVE

Constitutional stability does not come without a price; lowering the stakes of 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 answer is that the requisite level of constitutional stability depends in part 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 United States at the moment of the Constitution's creation, due to the high threat of violence, with the relatively low need for stability in Australia in 1901 at the time of its constitution's creation. 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

¹³⁴ *Pennsylvania Coal* applied 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 clear standard to make this assessment. According to Justice Holmes's cryptic formulation, “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” 260 U.S. at 415.

¹³⁵ *Id.*; MERRILL & SMITH, *supra* note 106, at 1337.

acquisitions,”¹³⁶ was explicitly modeled on the American clause.¹³⁷ Assuring stability for the Australian and American constitutions required some way of lowering the stakes, and providing coordination and adaptation. Both countries did so in large part by relying on the compensatory provision. The American and Australian takings clauses now both hinge protection largely on one constitutional restriction: just compensation.¹³⁸ And whereas the U.S. Constitution also refers to public use, as discussed, recent U.S. Supreme Court cases have suggested that this provision generally does not constitute a substantial requirement.¹³⁹ 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.¹⁴⁰

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

¹³⁶ Section 51(xxxi) of the Australian Constitution provides broad power to the Commonwealth Parliament—i.e., the federal legislature—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.” AUSTRALIAN CONSTITUTION s 51(xxxi).

¹³⁷ RACHELLE ALTERMAN, TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 32 (2010). In the closest Australian equivalent to *The Federalist*, Quick and Garran provided the leading contemporary account that was almost entirely devoted to how the acquisitions power compared to the Fifth Amendment. JOHN QUICK & ROBERT RANDOLPH GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 640–42 (1901). As the Australian High Court recognized, “The source of [s] 51(xxxi) is to be found in the [F]ifth [A]mendment of the Constitution of the United States . . .” *Andrews v Howell* (1941) 65 CLR 255, 282 (Austl.).

¹³⁸ 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 Bros. Proprietary Ltd. v Commonwealth* (1946) 72 CLR 269, 290 (noting that 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.

¹³⁹ *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (refusing to interpret public use as requiring a “public purpose”); *Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (“[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.” (citing *Berman v. Parker*, 348 U.S. 26 (1954))); BANNER, *supra* note 83, at 272.

¹⁴⁰ 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.” AUSTRALIAN CONSTITUTION s 51(xxxi). Mila Versteeg’s essay in this Volume categorizes the Australian Constitution as providing one less requirement than its U.S. counterpart. Mila Versteeg, *The Politics of Takings Clauses*, 109 NW. U. L. REV. 695 (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, 78 (Austl.).

preexisting right is insufficient for compensation; some value must also have been transferred to the Commonwealth.¹⁴¹ 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.¹⁴² Because 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. 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.¹⁴³ What accounts for this difference?

One possible explanation is that these differences are a product of somewhat diverging texts.¹⁴⁴ First, s 51(xxxi) refers to “acquisitions” rather than “takings.”¹⁴⁵ 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.”¹⁴⁶ Third, the acquisition clause is situated within the section of the Australian Constitution conferring federal powers, rather than contained within an amendment restraining federal power.¹⁴⁷ Nonetheless, although the

¹⁴¹ *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, 145 (Austl.) (distinguishing the Fifth Amendment’s “taking” language from s 51(xxxi)’s “acquisition” language); see also *id.* at 247–48 (Brennan, J).

¹⁴² This was considered by the convention, but rejected “primarily because of the American baggage this term would have come with.” See Ostler, *supra* note 34, at 234.

¹⁴³ 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 Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* (2012) 291 ALR 669 (Austl.). Note, however, that Justice Gummow seems to be suggesting that being merely regulatory is not determinative, and that using the United States as a contrast on this point would be a “false frame of reference.” *Id.* at 699 (Gummow, J).

¹⁴⁴ See *Smith Kline & French Labs. (Aust) Ltd. v Dep’t of Cmty. Servs. & Health* (1990) 22 FCR 73, 116–17 (identifying nine distinctions between the two provisions).

¹⁴⁵ AUSTRALIAN CONSTITUTION s 51 (xxxi) (stating that 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.”).

¹⁴⁶ PETER HANKS & DEBRA CASS, AUSTRALIAN CONSTITUTIONAL LAW: MATERIALS AND COMMENTARY 853 (6th ed. 2000).

¹⁴⁷ 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

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

There are many reasons to think that 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 have not been.¹⁴⁸ Thus textual differences need not translate to differences in outcomes. Similarly, although 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 founders concern was chiefly to limit the acquisition power, just as the Americans had done with their Fifth Amendment.”¹⁴⁹ Given all of these factors, rather than explaining the differences in takings jurisprudence, 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.

interpretation of the Takings Clause in some circumstances. For example, some questions turn on whether there has been a taking without due process. *See, e.g.*, *Corn Products Ref. Co. v. Eddy*, 249 U.S. 427, 431–32 (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*, 22 FCR at 116–17; *United States v. Causby*, 328 U.S. 256, 267 (1946); *id.* at 269–71 (Black, J., dissenting). In contrast, the Australian Judiciary Act explicitly allows such suits. *Judiciary Act 1903* (Cth) s 56 (Austl.) (“Any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth . . .”); *id.* s 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 of action to recover just compensation; rather, it renders the law invalid, and action taken in reliance upon it may be tortious. *Compare Poulton v Commonwealth* (1953) 89 CLR 540, 569 (Austl.), and *The Tasmanian Dam Case* (1983) 158 CLR 1, 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. 304 (1987).

¹⁴⁸ 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 Proprietary Ltd. v Commonwealth* (1948) 75 CLR 495, 569 (Austl.). However, noncommercial purposes, including religious and charitable purposes, may need to be compensated at a premium. *Minister of State for the Army v Parbury Henty & Co. Proprietary Ltd.* (1945) 70 CLR 459, 491–92 (Austl.).

¹⁴⁹ Ostler, *supra* 34, at 211.

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.¹⁵⁰ Looking at the United States and other Western constitutions in the twenty-first century, it is easy to forget the importance of the potential for violence at the framing 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 democracies now face those problems today that stable democracies faced years ago when they, too, were first developing,¹⁵¹ 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 Era 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!"¹⁵² 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 expose a part if not the whole of the empire to severe distress. The suffering part, even when

¹⁵⁰ Indeed, Jay opens *The Federalist* with a long discussion of the problem of security, THE FEDERALIST NOS. 2–5, *supra* note 41 (John Jay), a portion rarely studied in modern times, but of critical importance to the framers, see Riker, *supra* note 60, at 21, 27.

¹⁵¹ See ROBERT H. BATES, PROSPERITY AND VIOLENCE: THE POLITICAL ECONOMY OF DEVELOPMENT 101–04 (2001); Cox et al., *supra* note 2, at 2–3.

¹⁵² DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 16 (2007).

the minor part, can not long respect a Government which is too feeble to protect their interest¹⁵³

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.¹⁵⁴ Stability of the U.S. 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 to uncompensated governmental takings.

By contrast, at its constitutional moment, Australia did not face the same threat of violence. When the Australian Constitution was written, what are now the six Australian states were then self-governing colonies of the British Commonwealth. Although drafted by the colonists, the Australian Constitution was technically part of a U.K. statute.¹⁵⁵ Moreover, the Australian Commonwealth was not a sovereign state until 1986;¹⁵⁶ rather it was a “federated community possessing many political powers approaching, and elements resembling, sovereignty, but falling short of it.”¹⁵⁷ 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 their war of independence as a sovereign state. But 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.¹⁵⁸ Furthermore, U.S. states

¹⁵³ Letter from James Madison to James Monroe (Aug. 7, 1785), in JAMES MADISON: WRITINGS 36, 38 (1999).

¹⁵⁴ A discussion of these public goods and public policy problems appears in Mittal et al., *Constitutional Choices*, *supra* note 6, at 27–30.

¹⁵⁵ Commonwealth of Australia Constitution Act, 1900 (Imp), 63 & 64 Victoria, c. 12 (U.K.).

¹⁵⁶ 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.” *Australia Act 1986* (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_act/aa1986114/ [<http://perma.cc/Z8HA-D5SH>].

¹⁵⁷ QUICK & GARRAN, *supra* note 137, at 641.

¹⁵⁸ 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. *See* Commonwealth of Australia Constitution Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9, c. IV, § 90 (U.K.). The leader of the Australian Federation movement, Alfred Deakin, stated 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.” ALFRED DEAKIN, *FEDERATED AUSTRALIA* 97 (J.A. La Nauze ed., 1968). However, at the Adelaide Convention in 1897, “Deakin

remain considerably independent in the United States and they provide a second layer of protection to individual rights.¹⁵⁹ In contrast, in combination with the federal taxation power,¹⁶⁰ the Australian central government has almost complete vertical fiscal control over the states,¹⁶¹ 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 the Australian Federation and the more gradual transition toward sovereignty that process demarcated.¹⁶²

Because 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 its 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.”¹⁶³ Consequently, under Australian compulsory acquisitions law, “not every compulsory divesting of property is an acquisition within s 51(xxxi).”¹⁶⁴

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 . . . eclipsed” by his quoted prediction from 1902. Gareth Griffith, *The Future of State Revenue: The High Court Decision in Ha and Hammond* 25 (N.S.W. Parliamentary Library Research Serv., Briefing Paper No. 16/97, 1997), available at [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/130c730fbc22a24fca256ecf00096add/\\$FILE/16-97.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/130c730fbc22a24fca256ecf00096add/$FILE/16-97.pdf) [<http://perma.cc/K9FF-XXS6>]; see also OFFICIAL REPORT OF THE NATIONAL AUSTRALASIAN CONVENTION DEBATES, ADELAIDE, MARCH 22 TO MAY 5, 1897, at 292–93 (1897).

¹⁵⁹ Examples include: the Senate being determined not by population but by the number of states, using the electoral college system to elect the President instead of the popular vote, etc. These all divide federal power among various minoritarian factions. THE FEDERALIST NO. 10, *supra* note 41, at 56–65 (James Madison).

¹⁶⁰ AUSTRALIAN CONSTITUTION, s 51(ii) (granting power over “taxation; but so as not to discriminate between States or parts of States”).

¹⁶¹ See, e.g., SENATE SELECT COMM. ON THE REFORM OF THE AUSTRALIAN FED’N, AUSTRALIA’S FEDERATION: AN AGENDA FOR REFORM 55 (2011), available at http://www.aph.gov.au/~media/wopapub/senate/committee/reffed_ctte/reffed/report/report_pdf.ashx [<http://perma.cc/4LHL-Z6N2>] (“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.”).

¹⁶² For a somewhat different view, see Ostler, *supra* note 34, at 240, which states:

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.

¹⁶³ *Mut. Pools & Staff Pty. Ltd. v Commonwealth* (1994) 179 CLR 155, 180 (Austl.) (Brennan, J.).

¹⁶⁴ *Trade Practices Comm’n v Tooth & Co.* (1979) 142 CLR 397, 408 (Austl.).

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 accustomed to strong central regulation,¹⁶⁵ and so less concerned with limiting the extent that takings of property could be used as a means of rigid regulation. In the early United States, property was commonly understood to constitute the happiness condition of the triad pursuits: life, liberty, and happiness.¹⁶⁶ 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 in large part the extent to which its constitutional scheme necessitated reliance on the three stabilizing mechanisms we have described. 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 conditions so as to match their environment.

CONCLUSION

Perhaps because constitutional scholars typically take the U.S. 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 the likelihood that people will resort to extra-constitutional action to

¹⁶⁵ Manning Clark, *The People and the Constitution*, in *CHANGE THE RULES!: TOWARDS A DEMOCRATIC CONSTITUTION* 9, 18 (Sol Encel et al. eds., 1977) (arguing that the Australian framers 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").

¹⁶⁶ 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 65, at 46.

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.¹⁶⁷ Examined through this lens, important but often overlooked elements of the history of the Takings Clause become clear. The Clause, along with other countermajoritarian features of the Constitution, 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 lasting constitutional stability.¹⁶⁸

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 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.

¹⁶⁷ Although, 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*, 91 U.S. 367 (1875). 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.” Baude, *supra* note 4, at 1798.

¹⁶⁸ Because no major antislavery initiative became law, let alone an extreme one, this aspect of takings was never tested.

