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ARTICLES

WHAT IS JUST COMPENSATION?

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The Supreme Court has held that "[t]he word 'just' in ['just compensation'] . . . evokes ideas of 'fairness.'" But the Court has not been able to discern how it ensures fairness. Scholars have responded with a number of novel policy proposals designed to assess a fairer compensation in takings.

This Article approaches the ambiguity as a problem of history. It traces the history of the "just compensation" clause to the English writ of ad quod damnum in search of evidence that may shed light on how the clause was intended to ensure fairness. This historical inquiry yields a striking result. The word "just" imposes a procedural requirement on compensation: a jury must set compensation for it to be just.

This historical understanding is especially important to modern law since the Supreme Court applies a historical test to determine whether the Seventh Amendment guarantees the right to a jury. This Article

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corrects the common misperception that juries did not determine just compensation in eighteenth-century English and colonial practice.

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INTRODUCTION

The Federal Rules of Civil Procedure allow courts to deny jury demands in takings cases and appoint a three-person commission to assess compensation instead.[1] The Land Acquisition Section of the Department

[1] Fed. R. Civ. P. 71.1(h)(2)(A) ("If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.").

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of Justice—the agency responsible for litigating takings cases on behalf of the United States government—has argued against this provision since its inception. In fact, at one point, the Department of Justice wrote a public letter to the Chairman of the House Committee on Public Works supporting the right to a jury in all takings cases:

> The Department of Justice has every confidence in the jury system, for the determination of the issue of just compensation in land condemnation cases as well as for other purposes. The Department's long experience with both the jury system and the commissioner system in condemnation cases indicates a preponderance of advantages in the use of the jury system.[2]

Scholars have similarly contended that juries are particularly effective in those cases "pitting the government against an individual citizen in the context of civil liability."[3] As George Priest writes, "[T]here is widespread consensus that the institution of the jury is particularly appropriate for the resolution of . . . cases . . . involving damage measurements that implicate complex societal values . . . ."[4]

The value placed on a condemned home necessarily implicates complex societal values. This complexity was popularized by Margaret Radin's work on personhood.[5] Other scholars have elaborated on the difficulty of making families whole after condemning their homes.[6]

The Supreme Court's goal in giving context to the compensation requirement of the Takings Clause is "to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been

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[2] H.R. Rep. No. 90-1840, at 9 (1968).

[3] George L. Priest, The Role of the Civil Jury in a System of Private Litigation, 1990 U. Chi. Legal F. 161, 167.

[4] Id. at 166.

[5] See Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1691 (1988) (arguing that "from the points of view of interests of personhood and community, decisions that change the entitlement of personal property into a 'liability rule' should be . . . deeply suspect" because such decisions "treat[] personal property as fungible"); see also Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959 (1982) (observing that property "is closely related to one's personhood if its loss causes pain that cannot be relieved by [its] replacement. . . . For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo").

[6] See, e.g., Abraham Bell & Gideon Parchomovsky, Taking Compensation Private, 59 Stan. L. Rev. 871, 885 & n.77 (2007); Michael Heller & Rick Hills, Land Assembly Districts, 121 Harv. L. Rev. 1465, 1475 (2008).

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taken.'"[7] But even the Court admits that it has been unable to give this principle "its full and literal force" due to "serious practical difficulties in assessing the worth an individual places on particular property at a given time."[8]

The difficulty is in distinguishing a genuine disagreement about the value of a home from what economists call the holdout problem. Holdout behavior arises when homeowners seek to take advantage of the government's weak bargaining position.[9] In other words, the homeowner would agree to sell in a one-on-one negotiation but refuses in order to take advantage of group negotiation dynamics.

The holdout problem is the rationale for the Takings Clause.[10] It prevents strategically motivated holdouts from profiting at their community's expense.[11] A growing body of scholarship demonstrates that juries are uniquely positioned to determine civil damages in these overtly political contexts.

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[7] United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

[8] Id. at 511. Scholars have proposed a number of novel, largely tax-driven policy mechanisms to address this inherent difficulty. See, e.g., Lee Anne Fennell, Taking Eminent Domain Apart, 2004 Mich. St. L. Rev. 957, 995 ("The basic idea would be to provide a way for property owners to 'opt in' to a system of takings for private transfer in exchange for tax benefits."); Bell & Parchomovsky, supra note 6, at 871 (proposing "a novel self-assessment mechanism that enables the payment of full compensation at subjective value when private property is taken by eminent domain").

[9] See Kenneth J. Arrow, The Property Rights Doctrine and Demand Revelation Under Incomplete Information, *in* Economics and Human Welfare 23, 24–25 (M. Boskin ed., Acad. Press 1979), *reprinted in* 4 Collected Papers of Kenneth J. Arrow: The Economics of Information 216, 218 (1984) (discussing the incentives that landowners would have to misstate their preferences when approached by a factory owner seeking to buy permission to emit smoke).

[10] See Fennell, supra note 8, at 971 (citing Thomas W. Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61, 83 (1986); Richard A. Posner, Economic Analysis of Law 55 (6th ed. 2003); William A. Fischel, The Political Economy of Public Use in *Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain, 2004 Mich. St. L. Rev. 929, 947) (noting "the importance of overcoming strategic holdouts in order to achieve important objectives constitutes a primary justification for eminent domain").

[11] See Robert C. Ellickson, New Institutions for Old Neighborhoods, 48 Duke L.J. 75, 103 (1998) (observing that "holdout strategies" increase transaction costs); Lee Anne Fennell, Common Interest Tragedies, 98 Nw. U. L. Rev. 907, 928 (2004) ("Holdout behavior imposes externalities on other people. . . ." (footnote omitted)); Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621, 639 (1998) (describing the "forgone economic opportunity and lost jobs" caused by fragmentation and holdouts as the tragedy of the anticommons); Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209, 273 (1986) (discussing "transaction costs in the form of 'holdout' problems").

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What determines the right to a jury in takings? The Seventh Amendment's historical test. The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[12] The Supreme Court has held that the Seventh Amendment "preserves" the right to a jury only to the extent it existed in 1791 English practice—the date of ratification.[13]

A leading civil procedure treatise—Moore's Federal Practice—asserts no right existed in 1791 English or Colonial practice: "[A]lthough an action to condemn property is an action at common law, . . . there was no uniform and established right to a common law jury trial in England or the colonies at the time when the Seventh Amendment was adopted."[14] Yet Moore's Federal Practice does not offer a single citation for this sweeping historical claim.[15]

A close examination of the historical record reveals that this mistaken view stems from late nineteenth century dicta. Part I of this Article traces the origin of "just compensation" to Chapter 29 of the Magna Carta and catalogs English and colonial sources documenting the use of juries to assess compensation in takings. Part I also surveys cases dating from the Founding to the Civil War—including two Supreme Court cases—upholding the right to a jury in takings.

This historical understanding, however, was forgotten with time. Part II goes on to tell the story of how an accident—a litigant wrongly

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[12] U.S. Const. amend. VII.

[13] See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999) ("Consistent with the textual mandate that the jury right be preserved, our interpretation of the Amendment has been guided by historical analysis . . . . '[We] . . . ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.'" (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996))).

[14] 5 James William Moore, Moore's Federal Practice ¶ 38.32[1], at 38–268 (2d ed. 1996).

[15] Id. William Treanor has documented that some colonies, particularly in the early years of their existence, took unimproved land for roads without compensation, but as discussed in Section I.E, the apathetic approach to unimproved land effectively amounted to a de minimis exception. William Michael Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 695 (1985). Contra Walker v. City Council, 1 S.C. Eq. (Bail. Eq.) 443, 452–53 (S.C. Ct. App. 1831) (holding that a statutory provision guaranteeing compensation for takings is not necessary as such provisions are simply "a re-enactment of the common law"); Eric Grant, A Revolutionary View of the Seventh Amendment and the Just Compensation Clause, 91 Nw. U. L. Rev. 144, 182–83 (1996) (noting that by 1791 three states—New Jersey, South Carolina, and Georgia—did not maintain a statutory or constitutional provision guaranteeing compensation for takings of unimproved land).

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conceding his right to a jury—shaped our current understanding of juries. This story speaks to the challenge—particularly a century ago—of accessing the volume and breadth of English and early American primary sources necessary to apply a historical test. Indeed, the digitization of these records is a recent phenomenon, only possible thanks to advancements in imaging technology and the development of academic libraries.[16]

Even the Supreme Court has noted its limited resources in this respect: "We have long acknowledged that, of the factors relevant to the jury trial right, comparison of the claim to ancient forms of action, 'requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.'"[17]

Part III examines whether the right to a jury affects compensation awards. Even small differences can make a big difference to homeowners. Indeed, Federal Reserve data shows that the median homeowner has invested almost 2.6 years of the family's income in its home.[18]

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[16] See Lara Putnam, The Transnational and the Text-Searchable: Digitized Sources and the Shadows They Cast, 121 Am. Hist. Rev. 377, 379 (2016) ("Precisely because web-enabled digital search simply accelerates the kinds of information-gathering that historians were already doing, its integration into our practice has felt smooth rather than revolutionary. But increasing reach and speed by multiple orders of magnitude is transformative. It makes new realms of connection visible, new kinds of questions answerable."); Alexandra Chassanoff, Historians and the Use of Primary Source Materials in the Digital Age, 76 Am. Archivist 458, 459 (2013) ("There have been widespread changes in access to archival materials over the last decade."); see also Lawrence M. Friedman, American Legal History: Past and Present, 34 J. Legal Educ. 563, 576 (1984) ("There is plenty of material in our constitutional past to be explored, and yes, even measured. Constitutional history is bound to wake . . . .").

[17] Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 576 (1990) (Brennan, J., concurring in part and concurring in the judgment) (quoting Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)); see also Darrell A.H. Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. 852, 885 (2013) [hereinafter Miller, Text, History, and Tradition] ("One difficulty with reasoning from historical analogy is a basic matter of judicial competence."). See generally Charles A. Miller, The Supreme Court and the Uses of History 22–23 (1969) (highlighting *United States v. Barnett*, 376 U.S. 681 (1964), in which half of the Court's opinion "plus a twenty-three page appendix of 'statutes and cases relevant to the punishment for contempt imposed by colonial courts' [was] devoted to legal history" in determining defendants' right to a jury trial).

[18] Bd. of Governors of the Fed. Reserve Sys., Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances, Fed. Res. Bull., Sept. 2017, at 1, 4, 21 (documenting that among families who own their own home, the median family's home was worth $185,000 in 2016—multiples of the family's $71,200 annual income); see also John D. Benjamin et al., Why Do Households Concentrate Their Wealth in Housing?, 26 J. Real Est. Res 329, 329 (2004) (noting empirical observation that households in the United States "concentrate their wealth holding in housing and hold relatively limited financial assets").

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The answer is not what intuition would suggest. The alternative—commissions appointed by government agencies or the courts—are less accurate than juries in assessing compensation. Indeed, empirical evidence indicates government appointed commissions systematically misvalue homes.[19] The data, however, does not indicate bias or capture—commissions are as likely to overvalue homes as they are to undervalue them. The problem is their remarkably high error rate. In fact, the government is more likely to move for a retrial and more likely to appeal in a commission-tried proceeding than in a jury-tried proceeding.[20]

Part III provides insight into why government commissions are less accurate in their assessment of compensation than jurors. The answer lies in a subtle difference in incentives: jurors are laymen who are free to voice disagreement without fear of professional repercussions; the same is not true for government-appointed commissioners. Reputational concerns induce rational commissioners to "deliberately suppress what they believe or know."[21] Group deliberations in effect serve as an echo chamber rather than as a sounding board.

Therefore, in addition to the careful and comprehensive look at the historical record, this Article offers a principled yet practical reading of "just compensation."

I. APPLYING THE SEVENTH AMENDMENT'S HISTORICAL TEST

The Takings Clause reads "nor shall private property be taken for public use, without just compensation."[22] The Supreme Court has spent considerable effort interpreting the text of the Takings Clause over the past century, calling it "happily chosen."[23] Yet one word continues to confound the Court: "just."

[19] See, e.g., Yun-chien Chang, An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002, 39 J. Legal Stud. 201, 204 (2010).

[20] See Julian Conrad Juergensmeyer, Federal Rule of Civil Procedure 71A(h) Land Commissions: The First Fifteen Years, 43 Ind. L.J. 677, 724 & n.163 (1968) (citing Special Committee on the Use of Land Commissioners, Report to the Chief Justice of the United States and the Members of the Judicial Conference of States 8 (1961)).

[21] Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking About the Law 142 (2007); see also Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71, 84 (2000) ("A precondition . . . is that in making the decision at issue, reputational considerations loom large. If people do not care about their reputations, or if reputation is a small component of the choice involved, the perceived intrinsic merits will be crucial, and [inefficiencies] are unlikely to result.").

[22] U.S. Const. amend. V.

[23] Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893).

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The Court has not been able to discern what makes compensation just. "[T]he first principle of constitutional interpretation [provides] 'no word was unnecessarily used, or needlessly added.'"[24] The Court has reluctantly set aside this first principle here.

This Article seeks to solve the puzzle. It traces the historical understanding of "just compensation" to the English writ of ad quod damnum. A careful study of this ancient writ offers an unexpected result. "Just compensation" was historically understood to ensure procedural fairness, but not necessarily substantive fairness.[25] The provision guaranteed homeowners the right to a jury in takings.[26]

This understanding of "just compensation" dominated American jurisprudence well into the nineteenth century. By the turn of the twentieth century, however, the provision's historical context had been all but forgotten. In fact, by 1951, the opposite view took hold. The Federal Rules of Civil Procedure were amended to permit the legislature or courts to replace juries with government-appointed commissions.[27]

Historical records cast doubt on the constitutionality of this practice. The Seventh Amendment preserves the right to a jury as it existed under

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[24] Wright v. United States, 302 U.S. 583, 588 (1938) (quoting Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571 (1840)).

[25] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 97 (1980) ("[N]ote that property is not shielded from condemnation by this provision. On the contrary, the amendment assumes that property will sometimes be taken and provides instead for compensation."). The placement of the Takings Clause in the Fifth Amendment similarly suggests that the clause was intended as a procedural guarantee: "Amendments five through eight tend to become relevant only during lawsuits, and we tend therefore to think of them as procedural—instrumental provisions calculated to enhance the fairness and efficiency of the litigation process." Id. at 95; cf. Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 779 (1999) ("Ely thinks that there are indeed larger patterns and structures implicit in the document as a whole and that careful examination of the entire text is the proper starting point for analysis.").

[26] See generally Akhil Reed Amar, The Creation and Reconstruction of the Bill of Rights, 16 S. Ill. U. L.J. 337, 345 (1992) ("Even provisions that at first might not seem to be about jury trial really are . . . . When you look at the Fifth and Sixth Amendments, once again, you will find provisions that at first might not seem as if they're about a jury trial really are.").

[27] See William E. Miller, Federal and State Condemnation Proceedings—Procedure and Statutory Background, 14 Vand. L. Rev. 1085, 1091 (1961) ("Rule 71A of the Federal Rules of Civil Procedure, which became effective on August 1, 1951, revolutionized condemnation practice in the federal courts by abolishing the requirement of conformity to state practices . . . . Before the adoption of the rule federal condemnation practice was a hodgepodge of diverse state practices and procedures."); John Paul, Condemnation Procedure Under Federal Rule 71A, 43 Iowa L. Rev. 231, 231 (1958) ("Although the Federal Rules of Civil Procedure became effective in September, 1938, it was not until April, 1951, that there was promulgated Rule 71A governing the procedure for the condemnation of property by the United States.").

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English common law when the Amendment was adopted in 1791.[28] If a jury would have been impaneled in takings proceedings in England in 1791, then a jury is required by the Seventh Amendment.

Notably, the Seventh Amendment's historical test turns on English common law, not state common law. Justice Story, noting the possibility of a discrepancy, clarified this focus on English common law in particular:

> Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.[29]

"No [later] federal case . . . seems to have challenged this sweeping proclamation . . . ."[30] That said, the Supreme Court has never dealt directly with a discrepancy between English and American common law practice: "Our formulations of the historical test do not deal with the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time."[31]

The Supreme Court has noted that "[p]rior to the [Seventh] Amendment's adoption, a jury trial was customary" in actions at law.[32] "In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial."[33] As the Court clarified, "The phrase 'common law,' found in [the Seventh Amendment], is used in contradistinction to equity, and admiralty, and maritime jurisprudence."[34]

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[28] Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (citing Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)).

[29] United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

[30] Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 641 (1973); see also Ex parte Peterson, 253 U.S. 300, 309 n.1 (1920) ("The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute."); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377–78 (1913).

[31] *Markman*, 517 U.S. at 376 n.3.

[32] Tull v. United States, 481 U.S. 412, 417 (1987).

[33] Id.

[34] Curtis v. Loether, 415 U.S. 189, 193 (1974) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830)).

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The Supreme Court has consistently held that a takings proceeding is an action tried at law:

> The right of eminent domain always was a right at common law. It was not a right in equity . . . . It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right.[35]

The only question, then, is whether takings were the exception to the rule—that is, if English courts of law waived their customary practice of impaneling juries when it came to takings. The historical records documenting both English and American practice in 1791 are surprisingly clear: they did not.

A. English Practice at Ratification

Common law is perhaps best preserved in leading treatises of the time.[36] Treatises capture the prevailing judicial attitude with less idiosyncratic risk than that of a single court opinion.

"As a matter of legal precedent, the Court has decreed that"[37] one such treatise, *Commentaries on the Laws of England* by Sir William Blackstone, "constituted the preeminent authority on English law for the founding generation."[38] The Court in particular identified St. George

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[35] Kohl v. United States, 91 U.S. 367, 376 (1875); see also Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 458 (1977) ("Condemnation was a suit at common law . . . ."); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) ("[A]n eminent domain proceeding is . . . a 'suit at common law . . . .'" (quoting *Kohl*, 91 U.S. at 375–76)).

[36] See William D. McNulty, The Power of "Compulsory Purchase" Under the Law of England, 21 Yale L.J. 639, 639 (1912) (noting English common law is "preserved . . . in the treatises of learned writers of the profession").

[37] Martin Jordan Minot, Note, The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the *Commentaries*, 104 Va. L. Rev. 1359, 1361 (2018).

[38] Alden v. Maine, 527 U.S. 706, 715 (1999); see also Robert A. Ferguson, Law and Letters in American Culture 11 (1984) (noting that the Bill of Rights was "drafted by attorneys steeped in Sir William Blackstone's *Commentaries*"); David A. Lockmiller, Sir William Blackstone 170, 180–81 (1938) (documenting that American cases between 1789 and 1915 cited Blackstone's *Commentaries* more than 10,000 times); Albert W. Alschuler, Rediscovering Blackstone, 145 U. Pa. L. Rev. 1, 2 (1996) (calling Blackstone's *Commentaries* "the most influential law book in Anglo-American history"); William D. Bader, Some Thoughts on Blackstone, Precedent, and Originalism, 19 Vt. L. Rev. 5, 7–8 (1994) ("The members of the Constitutional Convention of 1787 were so immersed in the common law as expounded by Blackstone, as were the members of the early state constitutional conventions, that . . . 'the

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Tucker's five-volume annotated edition published in 1803 "[a]s the most important early American edition of Blackstone's *Commentaries*."[39] Indeed, "[t]he United States Supreme Court . . . , has cited Tucker's *Blackstone* in more than forty cases as authority for eighteenth-century understandings of certain points of law."[40]

Tucker's edition originated in lectures delivered at the College of William & Mary beginning in 1790—an ambitious attempt to adapt Blackstone's work to a nascent America.[41] Indeed, "Tucker added more than one thousand footnotes to Blackstone's text" in an attempt to clarify American legal practice for his students.[42]

Tucker initially had some trouble finding a publisher.[43] Indeed, "[t]he edition of *Blackstone's Commentaries* published in 1803 was essentially the manuscript Tucker had completed seven years earlier."[44] His

language of constitutions in the United States cannot well be understood without reference to . . . Blackstone's classic.'" (quoting Lockmiller, supra, at 174)); Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205, 209 (1979) ("Blackstone's work is . . . the single most important source on English legal thinking in the 18th century, and it has had as much (or more) influence on American legal thought as it has had on British."); Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 7 (1985) (calling Blackstone's influence on the Constitution "pervasive"); A.W.B. Simpson, The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature, 48 U. Chi. L. Rev. 632, 652 (1981) (calling the *Commentaries*' appearance in 1765–69 "[t]he great legal publishing event of the [eighteenth] century"). See generally M.H. Hoeflich, Legal Publishing in Antebellum America 131–34 (2010) (noting Blackstone's *Commentaries* very quickly became a best-seller in the colonies); Alschuler, supra, at 5 ("Edmund Burke remarked in Parliament that nearly as many copies of the *Commentaries* had been sold on the American as on the English side of the Atlantic." (citing Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* 2 Edmund Burke, The Works of the Right Honorable Edmund Burke 99, 125 (rev. ed., Boston, Little, Brown, & Co. 1865))). But see Minot, supra note 37, at 1362–64 (disputing Blackstone's influence on legal education in the decades preceding the Constitutional Convention).

[39] District of Columbia v. Heller, 554 U.S. 570, 594 (2008); see also Paul D. Carrington, Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley, 49 Stan. L. Rev. 495, 516 (1997) ("Blackstone had been through many previous American editions, the first and most important having been prepared by St. George Tucker. . . .").

[40] Davison M. Douglas, Foreword: The Legacy of St. George Tucker, 47 Wm. & Mary L. Rev. 1111, 1115 (2006).

[41] See Charles F. Hobson, St. George Tucker: Judge, Legal Scholar, and Reformer of Virginia Law, *in* "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia 195, 200–02 (Warren M. Billings & Brent Tarter eds., 2017).

[42] Alschuler, supra note 38, at 12; see also Horne v. USDA, 135 S. Ct. 2419, 2426 (2015) (referring to Tucker as the author of "the first treatise on the Constitution").

[43] See Alschuler, supra note 38, at 11.

[44] Hobson, supra note 41, at 206.

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annotated edition, however, was "an instant success"[45] and quickly "became the leading legal text in the United States, enjoying wide circulation throughout the country."[46]

"Tucker's *Blackstone* continues to be held in the highest regard by legal and constitutional historians as an indispensable source for understanding American law and the Constitution in their formative era."[47] Indeed, it was written almost contemporaneously with the Bill of Rights' framing and adoption.[48]

Notably, Tucker adds a clarifying footnote to the portion of Blackstone's text[49] that requires the government to provide compensation for taken property: "The compensation to be allowed is assessed by a jury, assembled by virtue of a writ of *ad quod damnum*."[50]

1. Writ of Ad Quod Damnum

The writ of ad quod damnum ("to what damage") is an ancient common law writ that calls for a jury to assess compensation due in takings.[51] As the Virginia Supreme Court explained it: "[A] writ of *ad quod damnum* . . . immediately devests the title of the individual owner to the

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[45] Alschuler, supra note 38, at 11.

[46] Douglas, supra note 40, at 1114.

[47] Charles F. Hobson, St. George Tucker's Law Papers, 47 Wm. & Mary L. Rev. 1245, 1247 (2006); see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 296 (1964) (Black, J., concurring) (praising Tucker as expressing "the general view held when the First Amendment was adopted"); David Thomas Konig, St. George Tucker and the Limits of States' Rights Constitutionalism: Understanding the Federal Compact in the Early Republic, 47 Wm. & Mary L. Rev. 1279, 1281 (2006) ("[T]he views Tucker expounded in his law lectures and in his essays on Blackstone provide deep insight into the way the founding generation understood the theory and purpose of the federal compact.").

[48] See Douglas, supra note 40, at 1115 (noting that "Tucker wrote many of the essays that appeared in his edition of *Blackstone* during the early 1790s, and was quite familiar with the ratification controversy and the contemporary debates over the Bill of Rights").

[49] See 1 William Blackstone, Commentaries on the Laws of England 139 (St. George Tucker ed., 1803) ("If a new road, for instance, were to be made through the grounds of a private person . . . . In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price . . . ." (footnote omitted)).

[50] Id. at 139 n.28.

[51] See Fred P. Bosselman, Limitations Inherent in the Title to Wetlands at Common Law, 15 Stan. Envtl. L.J. 247, 292–93 (1996).

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land so valued, and transfers it to the [state] . . . ; such owner remaining entitled only to the *valuation money* and *damages* assessed by the Jury."[52]

Although forgotten in modern times,[53] the writ of ad quod damnum was well known to the Founders. Indeed, they described the common law writ as required under the Takings Clause.

For example, in a message to the Department of State in March 1808, then-President Thomas Jefferson referred to the necessity of the writ of ad quod damnum to obtain "sites most advantageous for the defense of our harbors and rivers" when held by minors who could not consent or people who refused to sell or demanded "exaggerated compensation":

> [O]bserving . . . the amendment to the constitution which provides that private property shall not be taken for public use without just compensation[,] I submit therefore to the consideration of Congress, where the necessary sites cannot be obtained by the joint and valid consent of the parties, whether provision should be made by a process of *ad quod damnum* . . . for authorizing the sites which are necessary for the public defense to be appropriated to that purpose.[54]

As seen from Jefferson's letter, the Founders considered the writ of ad quod damnum a requirement of the Takings Clause. The United States Attorney General in 1819 spoke in similar terms, describing the "basis of the writ of *ad quod damnum*" as "individual property shall not be taken for the public good, without compensation from the individual from whom it is taken; . . . and that he who has been compelled to contribute more than his fair proportion shall be restored to the footing of equality by reimbursement."[55]

State courts similarly spoke of the writ of ad quod damnum as the common law right to a jury assessment of compensation when private property is taken for public use. As the South Carolina Appellate Court wrote in 1831:

> The road-making power was anciently a part of the royal prerogative, but before it could be exercised, it was necessary that a writ of *ad quod damnum* should issue. In New York, a similar process issues from the

[52] Att'y Gen. v. Turpin, 13 Va. (3 Hen. & M.) 548, 548 (1809).

[53] See Bosselman, supra note 51, at 292 ("[V]ery little has been written about the history of the writ of *ad quod damnum* . . . .").

[54] Message on the Act for the Defence of Rivers and Harbors (Mar. 1808), *in* 3 The Writings of Thomas Jefferson 325, 325–26 (Albert Ellery Bergh ed., definitive ed. 1907).

[55] Claim for Damage by Fire, 1 U.S. Op. Att'y Gen. 255, 257–58 (1819).

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> Court of Chancery, whenever private property is taken for public purposes. This is however but a re-enactment of the common law. The writ of *ad quod damnum* is a common law writ, and secures to the citizen the right of a trial by jury, whenever his property is to be taken from him.[56]

The New York Supreme Court confirmed this practice in its own state in an opinion dated just a few years later: "When lands are taken for the use of the state" and "[t]he property is taken without the owner's consent," then "the writ of *ad quod damnum* directs the jury to assess damages to the owner."[57]

As the New York Appellate Court later wrote, the writ of ad quod damnum is not a creation of statute, but rather has its origins in English common law:

> It is clear that at common law a common highway could not be changed without the king's license, first obtained upon a writ of *ad quod damnum* . . . . From the form of the writ, and the cases cited, I think it clear that the writ of *ad quod damnum* stood between the crown and the *jus publicum* . . . .[58]

Delaware courts likewise viewed the writ of ad quod damnum as inherent in the state's common law:

> The writ of ad quod damnum is of ancient origin and could be issued as a writ of right when a landowner was dissatisfied with the assessment of damages by a condemnation commission. . . . The mandate of the writ requires . . . a jury of twelve substantial and impartial men . . . under their oaths and affirmations to inquire of the damages that will result from the taking of the property. . . . It is to be regarded as the common law of this State.[59]

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[56] Walker v. City Council, 1 S.C. Eq. (1 Bail.) 443, 452–53 (S.C. Ct. App. 1831) (citations omitted).

[57] Mayor of New York v. Lord, 17 Wend. 285, 303 (N.Y. Sup. Ct. 1837).

[58] People v. Kerr, 37 Barb. 357, 410 (N.Y. App. Div. 1862) (citations omitted).

[59] Lewis v. Du Pont, 22 A.2d 832, 834–35 (Del. Super. Ct. 1941); see also Bailey v. Phila., Wilmington & Balt. R.R. Co., 4 Del. (4 Harr.) 389, 391 (1846) ("But the owner of the land, if dissatisfied with [the commission's] report, was authorized to sue out a writ of ad quod damnum, to inquire by a jury of twelve men 'what damages will be sustained by such owner . . . .'").

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2. Common Law Jury Right Dates to 13th Century

More frequently, however, courts invoked the writ of ad quod damnum without using the exact terminology. The concept of ad quod damnum had been used throughout English history. *Attorney-General v. De Keyser's Royal Hotel Ltd.*,[60] a 1920 House of Lords opinion, walks through this history in some detail. There, the United Kingdom's highest court had been asked to decide whether the owner of a hotel was due compensation for temporary occupation by the armed forces during the First World War.

Speaking of a 1708 statute,[61] the House of Lords observed the long history of juries assessing compensation in takings: "It is somewhat significant that in the first statute of all dealing with the acquisition of land, we have a reference to the usual methods that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury."[62]

The House of Lords goes on to discuss a 1757 statute[63] passed during the Seven Years' War in which Parliament reaffirmed the role of juries. The statute provides that land taken be vested "in trustees till the price may be paid as fixed by assessment by jury."[64] A 1798 statute[65] passed during war with the revolutionary Government of France similarly reaffirmed that His Majesty may "take the land and get the value assessed by jury."[66] 1803[67] and 1845[68] statutes reaffirmed the jury right as well.

The British Court of Appeal that heard the case below went into greater detail on the 1708–1798 history in particular:

> It appeared [by 1708] to be fully recognized that the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts, to enable particular lands to be taken compulsorily. . . . [T]o enlarge and strengthen the fortifications of Portsmouth, Chatham and Harwich, . . . provision is made for the appointment of Commissioners

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[60] [1920] AC 508 (HL) (appeal taken from Eng.).
[61] Fortifications Act 1708, 7 Ann. c. 26 (Eng.).
[62] *De Keyser's Royal Hotel*, AC at 527 (citation omitted).
[63] Fortifications Act 1757, 31 Geo. 2 c. 39 (Eng.).
[64] *De Keyser's Royal Hotel*, AC at 527.
[65] Defence of the Realm Act 1798, 38 Geo. 3 c. 27 (Eng.).
[66] *De Keyser's Royal Hotel*, AC at 528.
[67] Defence of the Realm Act 1803, 43 Geo. 3 c. 55 (Eng.).
[68] Land Clauses Consolidation Act 1845, 8 & 9 Vict. c. 18, § 68 (Eng.).

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> to survey the lands to be purchased, and in default of agreement with the owners, the true value is to be ascertained by a jury.[69]

The first recorded use of juries to value property in England dates to 1086 when William the Conqueror commissioned what later became known as the Domesday Book.[70] It surveyed the value of lands all across England relying entirely on jury assessments.

The concept was naturally extended to valuation of property in takings. Records from the United Kingdom National Archives show that the King issued the writ of ad quod damnum in 1267 to value land acquired in Gloucester.[71] Pursuant to the writ, a jury of twelve local residents certified the value of the land taken. The records show that the King issued the writ of ad quod damnum again in 1277 to acquire land in Hereford[72] and again in 1308 to acquire land in Winchelsea.[73]

The writ of ad quod damnum applied equally to Parliament as well as the King. One early example of Parliament applying this principle can be found in a "Bill for the Conduyttes at Gloucester" passed in 1541–1542.[74] The Bill authorized the mayor to dig for new springs and build conduits in order to boost the water supply for the "commonwelth utilitie and relief."[75] The Bill provided for "indifferent men inhabiting within the parish where the ground so broken or trenched shall be" to assess the compensation due.[76]

Two years later, in a "Bill concerning the Conduyte in London," Parliament empowered a corporation to enter into lands to lay pipes for the delivery of water from newly discovered springs to London.[77] The Bill provided for a commission appointed by the Lord Chancellor to offer a preliminary compensation offer.[78] If owners of those lands did not accept

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[69] De Keyser's Royal Hotel, Ltd. v. The King [1919] 2 Ch. 197, 222.

[70] See Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579, 582–83 (1993) (discussing origins of the civil jury). See generally 1 William S. Holdsworth, A History of English Law 312–13 (3d ed. 1922) (noting that the Domesday Book "was compiled from the verdicts of jurors").

[71] See Susan Reynolds, Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good 39 (2010) (citing Inquisitions on Land Taken at Gloucester (1267)).

[72] See id. (citing Inquisitions on Land Taken at Hereford (1277)).

[73] See id. (citing Inquisitions on Land Taken at Winchelsea (1308)).

[74] See McNulty, supra note 36, at 643.

[75] Id.

[76] Id.

[77] See id. at 643–44.

[78] See id. at 644.

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the commission's offer, then they could recover damages in an action of trespass in which a jury would be impaneled to assess compensation.[79]

Records indicate that the writ of ad quod damnum applied equally during periods of military conflict. More than a decade later, Elizabeth I relied on the writ of ad quod damnum to acquire lands on the bank of the River Medway in Kent for the construction of an artillery fort designed to protect ships of the Royal Navy during a period of rising tension with Spain.[80] The artillery fort—later known as Upnor Castle—was built over an eight year period from 1559 to 1567.[81] In the absence of an agreement on sales price, the valuation of the acquired lands was assessed by a jury of "indifferent persons" drawn from the local community.[82]

Parliament even took pains to issue the writ of ad quod damnum during periods of crisis. Indeed, after the Great Fire of London in 1666, Parliament applied the writ of ad quod damnum concept in "An Act for rebuilding the City of London."[83] The Act, among other things, provided funding for the city to widen streets.[84] If the owner of lands needed for streets could not reach an agreement with the mayor's office on sales price, the Act called for a jury to assess the land's value.[85]

Parliament relied heavily on the writ of ad quod damnum to procure land for the development of the turnpike road system in the late seventeenth and early eighteenth centuries.[86] A 1662 statute, for example, allowed affected owners to contest the proposed compensation by invoking the writ of ad quod damnum and thereby summoning a jury drawn from the parish or adjoining parishes to determine compensation.[87]

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[79] See id.

[80] See Reynolds, supra note 71, at 43 (citing Accounts for Land Acquired at Upnor (1568)); see also A.D. Saunders, Upnor Castle: Kent 7–8 (4th ed. 1979) ("Relations with Spain were always strained, and for about twenty years there was a period which we should call today 'cold war' before hostilities broke out in earnest.").

[81] See Saunders, supra note 80, at 6.

[82] See Reynolds, supra note 71, at 43 (citing Accounts for Land Acquired at Upnor (1568)).

[83] See An Act for Rebuilding the Citty of London 1666, 18 & 19 Car. 2 c. 8 (Eng.).

[84] See generally T.F. Reddaway, The Rebuilding of London After the Great Fire 72–100, 142–44, 155–64 (1940) (discussing legislative efforts to rebuild London after the Great Fire).

[85] See McNulty, supra note 36, at 644.

[86] See generally William Albert, The Turnpike Road System in England 1663–1840, at 59 (1972) (discussing the origins and implementation of the English turnpike system).

[87] See An Act for Enlarging and Repairing of Common High Wayes 1662, 14 Car. 2 c. 6 (Eng.).

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The turnpike acts were later consolidated into a 1773 statute that governs the public highways in England.[88] It authorizes local justices of the peace to take land needed to widen existing highways or build new ones.[89] In the absence of an agreement on sales price, the justices are required to "impanel a Jury of twelve disinterested Men" who "to the best of their Judgement" will "assess the Damages to be given, and Recompence to be made, to the Owners and others interested . . . in the said Ground."[90]

The Georgia Supreme Court in 1851 cited these English highway statutes in striking down a Georgia statute that denied the right to a jury in takings:

> The British Parliament have frequently recognized this doctrine of the Common Law. For example: in the Highway Acts of 13 George III. and 3 George IV., the surveyor of highways is required to offer the owner of the soil over which a new road is to pass, a reasonable compensation, which, if he refuses to accept, the Justices . . . are required to impannel [sic] a Jury to assess damages . . . .[91]

Notably, the Georgia Supreme Court linked the common law jury right to the Takings Clause of the United States Constitution: It "is true at Common Law, according to the *lex terræ* ["law of the land"] recognized and affirmed by *Magna Charta*, and it is true by the special ordainment of the Constitution of the United States."[92]

The South Carolina Court of Appeals, writing in 1796, also cited these English highway statutes—noting their application to a bridge built over the Thames River in particular:

> A most magnificent bridge had just been built over the river *Thames* . . . . But . . . , it became necessary to pull down a number of buildings which stood in the way. Accordingly, an application was made to parliament, who passed an act authorizing the lord mayor . . . of *London*, to treat with private persons for such houses . . . .

[88] See An Act to Explain, Amend, and Reduce into One Act of Parliament, the Statutes Now in Being, for the Amendment and Preservation of the Publick Highways Within that Part of Great Britain Called England, and for Other Purposes 1773, 13 Geo. 3 c. 78 (Eng.).
[89] Id. § 14–16.
[90] Id. § 16.
[91] Parham v. Justices of the Inferior Court, 9 Ga. 341, 350 (1851).
[92] Id. at 344.

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> And in case the proprietors would not sell, then to summon a jury to assess the value of each house and lot . . . .[93]

Judge Waties, writing separately, quoted Blackstone's *Commentaries* as authority on the "common law of *England*."[94] He then noted that these common law principles were exemplified "in the act of parliament for making a new road from *Black Fryer's Bridge*, across *St. George's Fields*"—if any owners refused the compensation offered, a jury assessed the land's value.[95]

B. Codified in Magna Carta

Although Blackstone's *Commentaries* are widely cited defending the common law writ of ad quod damnum, it was an opinion authored more than a century earlier by then-Chief Justice Edward Coke that cemented the writ's place in the common law. In the *Case of the Isle of Ely*,[96] Lord Coke declared void the provision of the 1531 "Statute of Sewers"[97] that authorized a government commission to assess compensation due when property is taken for the construction of sewers. Lord Coke held that the common law right to a jury could not be negated, even by Parliament.[98]

This case is likely the inspiration for Lord Coke's famous dictum in *Dr. Bonham's Case*[99] issued later that year—cited as the first recorded articulation of a theory of judicial review:[100]

> And it appears in our books, that in many cases, the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, . . . the common law will controul it, and adjudge such Act to be void . . . .[101]

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[93] Lindsay v. Comm'rs, 2 S.C.L. (2 Bay) 38, 55 (S.C. Ct. App. 1796).
[94] Id. at 58 (Waties, J., dissenting).
[95] Id. at 58–59.
[96] 77 Eng. Rep. 1139, 1141 (KB); 10 Co. Rep. 141 a, 142 a.
[97] The Bill of Sewers with a New Proviso 1531, 23 Hen. 8 c. 5, § 3 (Eng.).
[98] *The Case of the Isle of Ely*, 77 Eng. Rep. at 1141.
[99] (1610) 77 Eng. Rep. 646, 652 (KB); 8 Co. Rep. 113 b, 118 a.
[100] See generally Edward S. Corwin, The Establishment of Judicial Review, 9 Mich. L. Rev. 102, 107 (1910) ("Coke's dictum supplies . . . the original basis of the doctrine of judicial review . . . ."); Edward S. Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 365, 370–71 (1929) (endorsing "the ratification which Coke's doctrine received in American constitutional law and theory").
[101] *Dr. Bonham's Case*, 77 Eng. Rep. at 652.

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Lord Coke's ruling declaring void the provision of the 1531 "Statute of Sewers" was a formative moment in English legal history because it held that the common law binds not only the King, but also Parliament. The prior proposition was already established when King John signed the Magna Carta on June 15, 1215. King John had pledged "a group of his subjects that the occupant of the throne of England would thereafter obey 'the law of the land,'" as outlined in the document.[102] Lord Coke's ruling in effect gave the document constitutional proportions by applying its protections against Parliament.

Chapter 29 of the Magna Carta safeguards, among other rights, the right to a jury in takings: "No Freeman shall be . . . disseised of his Freehold . . . but by lawful judgment of his Peers, or by the Law of the Land."[103]

1. Mistranslated Medieval Latin Conjunction

The Magna Carta was written in Medieval Latin. A key nuance in the language of Chapter 29 has been lost in contemporary translations.[104] The "or" in the phrase "by lawful judgment of his Peers, or by the Law of the Land" is a contemporary translation of the Medieval Latin conjunction "vel."[105] "The Latin conjunction can be translated as either 'and' or 'or.'"[106] The distinction depends on context. Scholars widely believe that it meant "and"—not "or"—in this context.[107] Lord Coke came to the same conclusion when interpreting the clause in the seventeenth century.[108]

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[102] John Paul Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 14 (1992) (quoting Hurtado v. California, 110 U.S. 516, 542 (1884)).

[103] Magna Carta art. 29 (1297).

[104] Cf. Samuel E. Thorne et al., The Great Charter: Four Essays on Magna Carta and the History of Our Liberty 111, 132 (1965) ("*Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, . . . nisi per legale judicium parium suorum vel per legem terre*.").

[105] See William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 381 (2d ed. 1914) ("'[O]r' thus occur[s] where 'and' might naturally be expected.").

[106] Id. ("[T]he word '*vel*' introduced an unfortunate element of ambiguity."); Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1682 n.17 (2012); Neil Allies, A History of *Uel*: From Latin to Castilian, 8 Ianua. Revista Philologica Romanica 73, 82 (2008) ("[I]n Classical Latin *uel* occupied a stable position as a disjunctive, often with an inclusive meaning. However, by post-classical Latin, nominally the fourth century, it appears to have taken on an additional meaning as a copulative . . . ."); cf. Keith Sidwell, Reading Medieval Latin 398 (1995) (documenting "vel" as an alternate spelling of "uel").

[107] See McKechnie, supra note 105, at 381–83.

[108] See George E. Butler II, Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury, 1 Notre Dame J.L. Ethics & Pub. Pol'y 595, 642 n.167 (1985).

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Seventeenth-century colonial sources corroborate the "and" translation. Emulating Chapter 29 of the Magna Carta, the 1683 New York Charter of Libertyes and Priviledges provided that "Noe freeman shall . . . be disseized of his ffreehold [sic] . . . But by the Lawfull Judgment of his peers and by the Law of this province."[109] The 1677 Concessions and Agreements of West New Jersey similarly provided that a citizen cannot be deprived of real or personal property "without a due tryal, and judgment passed by twelve good and lawful men of his neighbourhood."[110]

Historical records after the Founding appear to quote to the "and" and "or" translations of Chapter 29 interchangeably. The Georgia Supreme Court, for example, quoted to the "and" translation in an 1851 case:

> Against the contrary the great [Magna] Charta guarded, by declaring that no individual should be deprived of his property, but by the law of the land, and by judgment of his peers. . . . It is not, therefore, necessary to go to the Federal Constitution for it. It came to us with the Common Law . . . .[111]

2. "Law of the Land"

The distinction between the "and" and "or" translations did not have any practical significance, however, since "law of the land" was understood to encompass the right to a jury in takings. As the South Carolina Appellate Court declared in 1831, "The writ of *ad quod damnum* . . . secures to the citizen the right of a trial by jury, whenever his property is to be taken from him. And this is the *lex terræ* ["law of the land"], which is referred to in the constitution" and Chapter 29 of the Magna Carta.[112]

The Magna Carta's "law of the land" language refers to the right to a trial by jury in accordance with common law. As the Supreme Court held in 1850:

> [T]he law of the land . . . does not mean a mere act of the legislature, for such a construction would remove all limitation on legislative

[109] New York Charter of Libertyes and Priviledges (1683), *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 163, 165 (1971).

[110] Concessions and Agreements of West New Jersey (1677), *reprinted in* Schwartz, supra note 109, at 126, 127 ch. 17.

[111] Parham v. Justices of the Inferior Court, 9 Ga. 341, 349 (1851).

[112] Walker v. City Council, 8 S.C. Eq. (1 Bail.) 443, 453 (S.C. Ct. App. 1831).

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> authority, and destroy the restrictive power of the above constitutional provisions. As originally used in Magna Charta, it was understood to . . . meaneth due process of law, and which in effect affirms the right of trial according to the process and proceeding of the common law.[113]

The Supreme Court reaffirmed this holding just a few years later: "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*."[114] The Court cited to Lord Coke's famous treatise, *Institutes of the Lawes of England*,[115] which explains that the term "by the law of the Land" meant "due process of Law," that is, in Lord Coke's words, "by indictment or presentment of good and lawfull men, . . . or by writ originall of the Common law."[116]

Perhaps most telling is a 1794 ruling in which a South Carolina court held that a statute eliminating the right to a jury in takings violates the "law of the land":

> How then can a law be valid, which constrains a citizen to submit . . . his property, to a tribunal, that proceeds to give judgment . . . without the intervention of a jury? [Do] these words . . . "*or by the law of the land*," authorise it? Do they mean *any law* which may be passed, directing a different mode of trial? Such a construction would be incompatible with the declaration of this privilege . . . . For if the law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature. But when we consider the true import of these words, and allow them the construction which all the commentators upon *[M]agna [C]harta* (from whence they are taken) have concurred in giving them, they will then be found to afford a real security to the citizens for the

[113] Webster v. Reid, 52 U.S. (11 How.) 437, 455 (1850) (citations omitted); see also Hurtado v. California, 110 U.S. 516, 535 (1884) (reiterating that this wording is a "practical restraint" on the legislature).

[114] Murray v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

[115] Id.

[116] 2 Sir Edward Coke, Institutes of the Lawes of England 50 (1642); see also Alexander Hamilton, Remarks on an Act for Regulating Elections (Feb. 6, 1787), *in* 4 The Papers of Alexander Hamilton 34, 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962) ("Lord Coke, that great luminary of the law, . . . in Magna Charta, interprets the law of the land to . . . have a precise technical import, [which] . . . can never . . . refer[] to an act of legislature."). See generally A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968) (discussing the influence of the Magna Carta and Lord Coke's treatise on the colonies).

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> preservation of this [jury] right, and to become an effectual bar to the innovations of the legislature.[117]

The "law of the land" language is an example of a separation of powers check on the legislature and executive. Indeed, because takings can only occur with the requisite budgetary outlay, empowering juries to assess compensation checks the takings power in a populist[118] and practical manner. The Magna Carta's language therefore reflects a broader vision of constitutional structure in which the judiciary, and juries in particular, play an important part in condemnations.[119]

The Mississippi Supreme Court noted these separation of powers implications in an 1858 takings case.[120] It held that the legislature's appointment of commissions to assess compensation in takings usurps an exclusively judicial role and violates "the law of the land":

> The legislature may not, therefore, exercise powers which, in their nature, are judicial; or close the courts, or forestall the citizen, in his remedy therein, by due course of law, for injuries to his lands or goods. The right of the legislature or the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the "just compensation" it ought to pay therefor . . . cannot for a moment be admitted or tolerated under our

[117] Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 390–91 (S.C. Com. Pl. 1794); accord Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 606 (1831) ("[T]hat an edict in the form of a legislative enactment, taking the property of A, and giving it to B, might be regarded as the '*law of the land*,' and not forbidden by the constitution . . . [is] a proposition . . . too absurd to find a single advocate. This provision was introduced to secure the citizens against the abuse of power by the government. Of what benefit is it, if it impose no restraint upon legislation? Was there not as just ground to apprehend danger from the legislature as from any other quarter? Legislation is always exercised by the majority. Majorities have nothing to fear; for the power is in their hands. *They* need no written constitution, defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of the minority. They are in danger.").

[118] See Essays by a Farmer No. IV (Mar. 21, 1788), *in* 5 The Complete Anti-Federalist 36, 38 (Herbert J. Storing ed., 1981) (referring to juries as "the democratic branch of the judiciary power" (emphasis omitted)); 1 Alexis De Tocqueville, Democracy in America 293–94 (Vintage ed. 1945) ("The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."); Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789) (on file with the Library of Congress, Manuscript Division, The Thomas Jefferson Papers at the Library of Congress, Series 1) (referring to juries as "trials by the people themselves").

[119] See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 83 (1998) ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.").

[120] Isom v. Miss. Cent. R.R. Co., 36 Miss. 300 (1858).

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> constitution. . . . The right to decide . . . "just compensation . . . " is a judicial, and not a legislative, power; one belonging to courts and juries, and not to law-makers, or legislatures, under our system of government.[121]

C. British Admiralty Courts Spur First Congress to Delineate Jury Rights

The colonial experience with British admiralty courts in the decade prior to the Founding created a deep appreciation for the jury rights safeguarded by Chapter 29 of the Magna Carta, but also an awareness of tactics for government encroachment. Admiralty cases were decided by Crown-appointed judges, in contrast to law cases decided by local juries. Parliament greatly expanded the jurisdiction of admiralty courts in the years prior to the Revolutionary War as hostilities between colonists and colonial administrators mounted.[122]

"John Adams voiced the American reaction: 'But the most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge.'" As "newspaper essayists complained . . . 'If we are Englishmen . . . [i]s not our property . . . to be thrown into a prerogative court? a court of admiralty? and there to be adjudged, forfeited, and condemned without a jury?'"[123] These grievances were aired in a 1774 petition drafted to King George III, in which delegates of the First Continental Congress in Philadelphia expressed outrage at the conflict of

[121] Id. at 314–15 (emphasis omitted).

[122] See Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), *in* Documents Illustrative of the Formation of the Union of the American States 1, 1 (Charles C. Tansill ed., 1927) ("[T]he British Parliament . . . extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county."); George A. Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776, at 176–77 (1923) (noting establishment of new admiralty court in Halifax, Nova Scotia with jurisdiction over all American colonies); John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 179 (1986) (noting admiralty courts required defendants to post a large bond to avoid default judgment and did not allow for recovery of court costs). See generally Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution (1960) (analyzing changes in admiralty courts and their jurisdiction from 1763 to the outbreak of the war).

[123] Philip Hamburger, Is Administrative Law Unlawful? 151 (2014) (quoting To the Printers, Boston Gazette & Country J., July 15, 1765).

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interest in "Judges of admiralty . . . courts . . . receiv[ing] their salaries and fees from the effects condemned by themselves."[124]

Recognition that Chapter 29's broad language—encompassing a number of common law rights—could be circumvented by jurisdiction-stripping or expansion led the drafters of the Bill of Rights in search of stronger provisions to safeguard their deeply cherished jury rights.

1. Virginia Declaration of Rights as a Model

The call for clearly delineated jury rights was led by Antifederalist George Mason. Mason was one of only a few delegates who never signed the Constitution. In fact, he walked out of the Philadelphia Constitutional Convention of 1787 before its adjournment in protest.[125] He listed the reasons for his refusal to sign the Constitution on the back of a committee report. Mason later sent a copy of his objections to George Washington, who had them published in the *Virginia Journal*. Mason's first and principal objection was: "There is no Declaration of Rights . . . ."[126]

George Mason was the principal author of both the Virginia Declaration of Rights and the Virginia Constitution. He insisted on adoption of a federal counterpart to the Virginia Declaration of Rights.[127]

George Mason's prior experience as a Virginia lawyer working on behalf of the revolutionary cause influenced his drafting of the Virginia Declaration of Rights. Indeed, his insistence on constitutional provisions

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[124] Journal of the Proceedings of the Congress, Held at Philadelphia, September 5, 1774, at 58 (London, J. Almon, 1775).

[125] See Robert Allen Rutland, George Mason: Reluctant Statesman 91 (1961); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 Max Farrand, The Records of the Federal Convention of 1787, at 131, 135–36 (1911) ("Mason left Philada. [sic] in an exceeding ill humour indeed. . . . He returned to Virginia with a fixed disposition to prevent the adoption of the plan if possible. He considers the want of a Bill of Rights as a fatal objection.").

[126] George Mason, Objections to the Constitution of Government formed by the Convention (Oct. 7, 1787), *in* The Documentary History of the Ratification of the Constitution Digital Edition (John P. Kaminski et al. eds., 2009).

[127] See id. ("[T]he Declarations of Rights in the separate States are no Security."); Jeff Broadwater, George Mason: Forgotten Founder 202 (2006) ("Mason spoke next. He conceded the difficulty of specifying when juries should be required, but he thought a 'general principle laid down on this and some other points would be sufficient.' And he added, 'He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the state declarations, a bill might be prepared in a few hours.'"); Rutland, supra note 125, at 89, 93 ("[Patrick Henry] and Mason pushed through the General Assembly a bill for a ratifying convention that carried an explicit recommendation for a second federal convention to consider amendments put forward by the states . . . .").

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guarding common law jury rights was driven by outrage over abuses his clients experienced before Crown-appointed admiralty courts.[128]

While Mason drew heavily from the Magna Carta in drafting the Virginia Declaration of Rights, he eschewed Chapter 29's broad language in favor of two more clearly delineated provisions: one guarding common law rights of criminal defendants[129] and the other guarding the right to a jury in private disputes as well as those regarding property.[130]

The latter requires some attention to comprehend. It, in full, reads: "[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[131] Mason intended the "controversies respecting property" provision to guarantee the right to a jury in takings of private property. After all, the opposite—citizens who took government property—would fall under the criminal jury provision, and private property disputes would fall under the "between man and man" jury provision.

This provision guaranteeing the right to a jury in private disputes and takings provided Mason more comfort than the Magna Carta's broadly worded language in Chapter 29. His provision had great popular appeal not only in Virginia but throughout America. Pennsylvania,[132] North Carolina,[133] Vermont,[134] New Hampshire,[135] and Rhode Island[136] quickly adopted Mason's provision in their state constitutions.

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[128] See Letter from George Mason to the Committee of Merchants in London (June 6, 1766), *in* 1 The Papers of George Mason, 1725–1792, at 65, 67 (Robert A. Rutland ed., 1970) (asserting that admiralty courts were responsible for injustices that drove a wedge between England and the colonies).

[129] Va. Const. of 1776 § 8 ("[T]hat no man [can] be deprived of his liberty, except by the law of the land or the judgment of his peers.").

[130] Id. § 11 ("That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.").

[131] Id.

[132] Pa. Const. of 1776, art. XI ("That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.").

[133] N.C. Const. of 1776, art. XIV ("That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.").

[134] Vt. Const. of 1777, art. XIII ("That, in controversies respecting property, and in suits between man and man, the parties have a right to a trial by jury; which ought to be held sacred.").

[135] N.H. Const. of 1784, art. XX ("In all controversies concerning property, . . . the parties have a right to a trial by jury; and this method of procedure shall be held sacred . . . .").

[136] Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations (May 29, 1790), *in* Documents Illustrative of the Formation of the Union of the American States 1052, 1054 (Charles C. Tansill ed., 1927) ("That in controversies respecting property, and in suits between man and man the antient trial by jury,

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Not all Antifederalists, however, shared George Mason's conviction that the right to a jury in private disputes and takings needed to be separately delineated in the Bill of Rights. For example, Thomas Jefferson signaled that his concerns would be assuaged by adopting the Magna Carta's guarantee to "a trial by jury in all cases determinable by the laws of the land."[137]

Mason's prescient call for a federal counterpart to the Virginia Declaration of Rights found widespread popular support in the ensuing ratification process and was honored by the First Congress with the adoption of ten such amendments.[138]

2. Madison Recasts "Controversies Respecting Property" Jury Provision

Fellow Virginian James Madison led the effort to compile a federal bill of rights and looked to the Virginia Declaration of Rights authored by George Mason as a model.[139] In a speech before the First Congress, Madison expressed regret that Congress did not pass a bill of rights as its first order of business, as doing so would have "stifled the voice of complaint, and made friends of many who doubted the merits of the Constitution."[140]

Madison added that the public upheaval that precipitated the need for a federal bill of rights was over the lack of a constitutional provision codifying certain procedural protections currently preserved only by

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as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary, is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolate.").

[137] Letter from Thomas Jefferson to Francis Hopkinson (Mar. 13, 1789), *in* 5 Documentary History of the Constitution of the United States of America, 1786–1870, at 159, 159–60 (1905).

[138] See Wolfram, supra note 30, at 668 ("Historians of the period unanimously agree that the attack on the proposed Constitution . . . based on its omission of a bill of rights struck a very responsive chord in the public." (citing Irving Brant, The Bill of Rights: Its Origin and Meaning 39 (1965); Robert Allen Rutland, The Birth of the Bill of Rights, 1776–1791, at 122–24 (1955); Charles Warren, The Making of the Constitution 509–10 (1937))).

[139] See Richard Labunski, James Madison and the Struggle for the Bill of Rights 199 (2006) ("Not surprisingly, Madison drew heavily on the amendments suggested by his state's ratifying convention and those listed in the Virginia Declaration of Rights.").

[140] 1 Annals of Cong. 427 (1789) (Joseph Gales ed., 1834). But see Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) *in* 5 The Writings of James Madison 269, 271 (Gaillard Hunt ed., 1904) ("I have never thought the [Bill of Rights] omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others." (emphasis omitted)).

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English common law tradition: "I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power . . . ."[141]

A close analysis of Madison's proposed bill of rights suggests that he adapted both the Takings Clause and the Seventh Amendment from the jury provision drafted by George Mason for the Virginia Declaration of Rights. After all, Virginia's ratifying convention had proposed the provision for inclusion in the federal Bill of Rights.[142]

While the current Takings Clause reflects Madison's proposal word for word, both the House and Senate modified the language of Madison's proposed Seventh Amendment.[143] A study of Madison's proposed language, before editing by congressional committees, may, however, shed light on its intended meaning. Madison's proposal read: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[144] Notably absent is the "controversies respecting property" language. By comparison, Mason's provision read: "[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[145]

A number of factors make it difficult to believe that Madison sought to eliminate the right to a jury in takings by omitting the "controversies respecting property" language. Indeed, Madison had a reputation as one of the most vocal defenders of property rights, particularly in the takings context. In fact, he argued in the Federalist Papers that "Government is instituted no less for protection of the property than of the persons of

[141] 1 Annals of Cong. 427, 433 (1789) (Joseph Gales ed., 1834).

[142] Ratification of the Constitution by the Commonwealth of Virginia (June 27, 1788), *in* 2 Documentary History of the Constitution of the United States, 1786–1870, at 377, 379 § 11 (Washington, Department of State 1894) ("Eleventh. That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is one of the greatest Securities to the rights of the people, and ought to remain sacred and inviolable.").

[143] 1 Annals of Cong. 435, 760 (1789) (Joseph Gales ed., 1834) (chronicling how the House Committee simplified Madison's proposal from "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate" to "In suits at common law, the right of trial by jury shall be preserved" and how the Senate added a twenty-dollar floor).

[144] Id. at 435.

[145] Va. Const. of 1776, supra note 129, at § 11, at 3814.

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individuals."[146] He even proposed legislation to guard against state seizure of loyalist property in the aftermath of the Revolutionary War.[147] It is difficult to imagine the same Madison would repudiate a deeply cherished jury right without explanation.

It is also difficult to imagine such an exclusion would have satisfied George Mason. Mason had earlier written that if the Federalists agreed to address his concerns about litigants' procedural rights, "I cou[l]d cheerfully put my Hand & Heart to the new Government."[148] His biographer noted that Mason displayed "much Satisfaction" with Madison's handiwork and what became of the Bill of Rights,[149] an unlikely outcome if Madison simply rejected the right to a jury in takings.

A more plausible account is that Madison improved upon Mason's "controversies respecting property" language by introducing the Takings Clause. After all, Mason had included the "controversies respecting property" language to guard the right to a jury in takings of private property for public use because the opposite—takings of government property for private use—were already covered by the provision for criminal defendants and private property disputes were already covered by the "between man and man" language. The Takings Clause understandably might have offered Madison more comfort than the less clear "controversies respecting property" language. Such an account would also explain why the Takings Clause is the only Bill of Rights provision that was not proposed by any of the state ratifying conventions and why Madison felt no need to explain the clause or its rationale when he presented it to the First Congress.[150]

Examining Madison's language and Mason's language side by side provides much-needed insight into the "without just compensation" language of the Takings Clause. It reveals that the Takings Clause was intended to safeguard a specific jury right: the right to a jury in takings.

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[146] The Federalist No. 54, at 307 (James Madison) (Clinton Rossiter ed., 1999).

[147] See, e.g., Bill Prohibiting Further Confiscation of British Property (Dec. 3, 1784), *in* The Papers of James Madison Digital Edition (J.C.A. Stagg ed., 2010).

[148] Broadwater, supra note 127, at 241; cf. In Convention (Aug. 31, 1787), *in* 2 Max Farrand, The Records of the Federal Convention of 1787, at 475, 479 (1911) (documenting Mason's frustration during an August 31, 1787 debate in the Constitutional Convention and his declaration "that he would sooner chop off his right hand than put it to the Constitution as it now stands").

[149] Broadwater, supra note 127, at 241.

[150] See William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 791 (1995).

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Like the Fifth Amendment right to a criminal grand jury, the Sixth Amendment right to a criminal petit jury, and the Seventh Amendment right to a civil jury, the Takings Clause guards a procedural right for litigants. It dictates how compensation is assessed, but not necessarily the amount of compensation awarded.

A "just compensation" is what a jury determines it to be. Or as one Massachusetts citizen presciently put it shortly before Madison authored the clause: "[T]he mode taken . . . to determine the compensation due, is as just as the nature of Government admits . . . . [W]hatever said Jury may determine to be a reasonable compensation, must be supposed just."[151]

A number of states even added language to clarify this understanding in their state constitutions. For example, the Maryland Constitution of 1851 added an explanatory clause defining "just compensation" as the amount "agreed upon between the parties or awarded by a jury."[152] The Ohio Constitution of 1851 followed Maryland's lead by adding the explicit requirement that "such compensation shall be assessed by a jury."[153] The Iowa Constitution of 1857 similarly added an explanatory clause defining "just compensation" as "damages . . . assessed by a jury."[154]

Many other states saw no need to add such clarifying provisions since their state courts had already clarified that "just compensation" necessitated a jury assessment. By the end of the nineteenth century, courts in California,[155] Delaware,[156] Georgia,[157] Indiana,[158]

[151] Jonathan Parsons, A Consideration of Some Unconstitutional Measures, Adopted and Practiced in this State, In an Address to the Public 17 (Newburyport, John Mycall 1784).
[152] Md. Const. of 1851, art. III, § 46.
[153] Ohio Const. of 1851, art. I, § 19.
[154] Iowa Const. of 1857, art. I, § 18.
[155] See Gilmer v. Lime Point, 18 Cal. 229, 260 (1861).
[156] See cases cited supra note 59.
[157] See Parham v. Justices of Inferior Court, 9 Ga. 341, 346 (1851).
[158] See Lake Erie, Wabash & St. Louis R.R. Co. v. Heath, 9 Ind. 558, 561 (1857).

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Massachusetts,[159] Mississippi,[160] New York,[161] and South Carolina[162] had already clarified the right to a jury in takings.

Some state courts took this right perhaps to an extreme. One such example is a Maryland decision that struck down a state statute that required railroads to cooperate by letting one another cross or connect to their tracks over short distances and pay their standard freight rate. "Just compensation" requires that a jury assess the rate paid if the railroads cannot come to an agreement on price:

> In fact, even a crossing of the defendant's roadways . . . [is] subject to the constitutional mandate that just compensation therefor be first paid . . . . The Legislature . . . cannot in the law itself fix the compensation to be paid. Such compensation in case of disagreement between the parties must . . . be awarded by a jury.[163]

D. Founding Era Precedents Uniformly Uphold Jury Right

In 1795—four years after the Bill of Rights was ratified—the circuit court in *VanHorne's Lessee v. Dorrance*[164] became the first federal court to interpret the Takings Clause's "just compensation" language. There, the circuit court held that "just compensation" requires that a jury assess the compensation due:

> The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to

[159] See Burt v. Merchants' Ins. Co., 106 Mass. 356, 364 (1871) ("[T]he parties . . . could not agree upon the price to be paid . . . which authorizes the court to . . . procure an appraisement by a jury."); accord Harris v. Elliott, 35 U.S. (10 Pet.) 25, 52 (1836) ("The act of the legislature of Massachusetts . . . provides, that if the agent of the United States, and the owners of the land so to be purchased, cannot agree in the sale and purchase thereof, application may be made to . . . summon a jury to value the same.").

[160] See Isom v. Miss. Cent. R.R. Co., 36 Miss. 300, 315 (1858) ("The right to decide . . . the '*just compensation first to be made*,' within the meaning of the prohibition in the constitution . . . [is] one belonging to . . . juries . . . ."); cf. Thompson v. Grand Gulf R.R. & Banking Co., 3 Miss. 240, 246, 251 (1839) (holding "[i]t was competent for the legislature to prescribe the mode of assessing the damages as they did" because the legislative charter required that courts impanel a jury to determine valuation if the parties cannot come to an agreement).

[161] See cases cited supra notes 57–58.

[162] See Walker v. City Council, 8 S.C. Eq. (1 Bail.) 443, 452–53 (S.C. Ct. App. 1831).

[163] Pa. R.R. Co. v. Baltimore & Ohio R.R. Co., 60 Md. 263, 268–69 (1883) (citations omitted).

[164] 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795).

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> legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation . . . .[165]

The court went on to declare a 1729 statute unconstitutional because it allowed a legislature-appointed board to assess compensation in takings:

> By the confirming act, the value of the land taken . . . [is] to be ascertained by the Board of Property. And who are the persons that constitute this board? Men appointed by one of the parties, by the Legislature only. The person, whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away.[166]

The Supreme Court first commented on "just compensation" in an 1810 District of Columbia case. Martha Washington's heirs had obtained an injunction to stop "an inquisition in the nature of a writ [of] ad quod damnum" from condemning their land for construction of a turnpike.[167] The Supreme Court upheld the federal statute authorizing the turnpike, noting it provided for a jury to assess compensation in case of disagreement over the owner's damages.[168]

Similarly, in 1837, Justice McLean stated in *Charles River Bridge v. Warren Bridge*[169] that only a jury can assess "just compensation" in a government taking:

> In granting the charter of the Warren Bridge, the legislature seem to recognise the fact that they were about to appropriate the property of the complainants for public uses, as they provide, that the new company shall pay annually to the college, in behalf of the old one, a hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do; [sic] assess the amount of compensation to which the complainants are entitled.[170]

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[165] Id. at 315.
[166] Id.
[167] Custiss v. Georgetown & Alexandria Tpk. Co., 10 U.S. (6 Cranch) 233, 233 (1810).
[168] See id. at 236.
[169] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).
[170] Id. at 571 (McLean, J., concurring).

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Bank of Hamilton v. Dudley's Lessee,[171] an 1829 case, presented the question under the Seventh Amendment rather than the Takings Clause. It challenged an Ohio statute that directed courts to appoint a commission to assess the value of improvements to land before turning an occupying claimant out of possession. Chief Justice Marshall held that the Seventh Amendment preserves the right to a jury assessment of property value:

> The 7th amendment to the constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law, and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title. The compensation for improvements . . . must be submitted to a jury.[172]

Chief Justice Marshall added that statutes which direct law courts to put property valuation questions before commissions are unconstitutional under the Seventh Amendment: "[L]egislature[s] cannot change radically the mode of proceeding prescribed for the courts . . . or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury."[173]

Eighteenth and early nineteenth century records show that the federal government—both Congress and the executive agencies—uniformly provided for a jury to assess compensation if the parties could not agree. An early example is an attempt to acquire land for a federal lighthouse at Baker Island in Newport, Rhode Island in 1797. A letter preserved in the National Archives from the Treasury's Commissioner of Revenue Tench Coxe reveals that the Treasury relied on "a just valuation of a Jury" if the landowner would not accept "a liberal price":

> It is wished, that you would endeavor to procure the Soil: 1st by treaty with the owner, or 2dly by taking measures to procure the land upon a just valuation of a Jury under the authority of law, in that manner which is understood to be called 'condemning land' in the Eastern states.[174]

[171] 27 U.S. (2 Pet.) 492 (1829).
[172] Id. at 525.
[173] Id. at 526.
[174] Letter from Tench Coxe to William Ellery (Feb. 28, 1797) (microformed on U.S. Nat'l Archives and Records Admin. M63, roll 1 (Microfilm Publ.)).

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E. De Minimis Exception for Unimproved Land Reasonable in Colonial Context

Historical records, however, show that some colonies, particularly in the early years of their existence, carved out a de minimis exception for takings of unimproved land to build roads. Their insistence on impaneling a jury to assess compensation—or even offering compensation at all—waned in such instances on the common assumption that unimproved land had insignificant monetary value.

The practice of distinguishing improved land from unimproved land was likely seen as a monetary floor on the common law jury right. "According to custom, disputes for more than forty shillings fell under the jurisdiction of a common law court and almost always entailed factual determination by a twelve-member jury; smaller disputes typically were under the jurisdiction of a justice of the peace."[175] Some colonies understandably assumed that building a new road over unimproved land damages the citizens by less than forty shillings, if at all.

In fact, because unimproved land was so abundant in early colonial America, many at the time believed that a new public road was worth more to the landowner than unimproved land.[176] In other words, the colony was doing the landowner a favor by building a new road to his property. A leading legal historian notes the colonists' dismissive view of unimproved land proved quite reasonable when "[v]iewed in context":[177]

> [I]t is important to place this custom in perspective. . . . First, colonial roads were rudimentary in nature, little better than dirt paths. Such primitive roads made only a modest intrusion upon a landowner's property. Second, since land was plentiful the colonists believed that unimproved land was of insignificant monetary value. They may well have reasoned that the economic advantages of a highway would more than offset the loss of a small amount of unimproved land by the owner.[178]

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[175] Chapman & McConnell, supra note 106, at 1705–06 (citing Philip Hamburger, Law and Judicial Duty 410 (2008)).

[176] See William B. Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 583 (1972).

[177] James W. Ely, Jr., "That Due Satisfaction May Be Made": The Fifth Amendment and the Origins of the Compensation Principle, 36 Am. J. Legal Hist. 1, 11 (1992).

[178] Id. (citing 4 George Rogers Taylor, The Transportation Revolution 1815–1860, at 15–17 (1951)); see also 1 Philip Nichols, The Law of Eminent Domain 13–14 (1917) ("When the settlement of the American colonies began, the situation in respect to roads was just the reverse

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As a consequence, colonists paid little attention to takings of unimproved land in early colonial America, unlike those of improved land. As one state attorney general put it:

> [I]t would therefore have been little less than downright robbery, to have taken away these [improved] lands and houses from the proprietors, without adequate compensation. But this is very different from waste lands, which have never been occupied or improved . . . . [T]he two cases are by no means parallel with each other.[179]

A particularly illustrative example is Virginia, which did not provide compensation for takings of unimproved lands in its early years, yet provided compensation for takings of raw materials used to build and maintain roads, such as timber and earth fill.[180] The distinction quite rationally follows from the context of early colonial America: "Since timber was often more valuable than vacant land, it is noteworthy that lawmakers safeguarded the owner's prime economic interest . . . ."[181]

Any distinction between takings of developed and undeveloped land disappeared over time as the colonies grew and even unimproved land became valuable. For example, by 1785 opening a new road in Virginia required "a writ of 'ad quod damnum,' thus incorporating the compensation procedure long used in Virginia when land was taken for mills, courthouses, and churches."[182] In other words, even for roads over vacant land, Virginia courts impanelled juries "to view the lands through which the said road is proposed to be conducted, and say to what damage it will be of to the several and respective proprietors and tenants."[183]

While colonies differed in their early years in their treatment of wasteland, eighteenth century records show that the colonies uniformly granted their citizens the right to a jury in takings of land with substantial

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of what it was in England . . . . [U]nimproved land, although held in private ownership, had no substantial value. . . .").

[179] Lindsay v. E. Bay St. Comm'rs, 2 S.C.L. (2 Bay) 38, 55 (S.C. Ct. App. 1796).

[180] See An Act for the More Effectually Keeping the Publick Roads and Bridges in Repair (1762), *reprinted in* 7 William Waller Hening, The Statutes at Large Being a Collection of All the Laws of Virginia 577, 577–80 (photo. reprt. 1969) (Richmond, Franklin Press 1820).

[181] Ely, supra note 177, at 11–12.

[182] John F. Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 Nw. U. L. Rev. 1099, 1138 (2000) (quoting An Act Concerning Public Roads (1785), *reprinted in* 12 William Waller Hening, The Statutes at Large Being a Collection of All the Laws of Virginia 174, 175 (Richmond, George Cochran 1823)).

[183] An Act Concerning Public Roads, supra note 182.

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value. One prominent example is the 1755 New York statute to fortify the town of Schenectady after devastating attacks by French forces and their Indian allies. The "officers . . . and captains who were to organize the work at Schenectady . . . were to 'endeavour in a Friendly and Amicable manner' to purchase the land needed. If the owners would not agree, then twelve good and lawful men were to be sworn in to value it."[184]

Another more frequent example in eighteenth century colonial America was takings of riverfront land—often of substantial value—to build new watermills. In these instances, the colonies uniformly followed the writ of ad quod damnum model codified in the Virginia mill act of 1667 and the Maryland mill act of 1669.[185] While the term "writ of ad quod damnum" fell out of use in the early eighteenth century, the principle that only a jury could assess compensation in such takings rung true across the colonies.

II. CONTEXTUALIZING CURRENT CONFUSION

The historical understanding of "just compensation" as a codification of the common law jury right in takings was forgotten by the late nineteenth century. The conceptual void was filled by a series of Supreme Court decisions that "turned the words of the Takings Clause into a secret code that only a momentary majority of the Court is able to understand."[186] A leading scholar described the resulting case law as "a chaos of confused argument which ought to be set right if one only knew how," adding "[i]t is difficult to imagine a setting more inhospitable to those who would invoke 'settled precedent.'"[187]

A. Unresolved Ambiguity Under Takings Clause Doctrine

The string of muddled case law began in 1883 with two irreconcilable cases decided only a decade apart. In the first, *United States v. Jones*,[188] the Department of Justice challenged the constitutionality of a federal statute granting jurisdiction over federal takings along the Fox River to

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[184] Reynolds, supra note 71, at 80–81 (quoting 3 The Colonial Laws of New York from the Year 1664 to the Revolution 1074 (Albany, Charles Z. Lincoln et al. eds., 1894)).

[185] See John F. Hart, The Maryland Mill Act, 1669–1766: Economic Policy and the Confiscatory Redistribution of Private Property, 39 Am. J. Legal Hist. 1, 2–3 (1995).

[186] Michael A. Heller & James E. Krier, Deterrence and Distribution in the Law of Takings, 112 Harv. L. Rev. 997, 997 (1999).

[187] Bruce A. Ackerman, Private Property and the Constitution 8 (1977).

[188] 109 U.S. 513 (1883).

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Wisconsin state courts. The Justice Department appealed a compensation award set by a Wisconsin jury on the theory that federal juries, not state juries, must assess compensation. The Court disagreed, adding that assessing compensation does not require the intervention of a jury or even a court—any tribunal that Congress designates will suffice:

> [T]here is no reason why the compensation to be made may not be ascertained by any . . . tribunal capable of estimating the value of the property. . . . [I]t may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is . . . opportunity [for] the owners of the property to present evidence as to its value, and to be heard . . . .[189]

Only ten years later, in another unanimous decision, *Monongahela Navigation Company v. United States*,[190] the Court held the opposite. It wrote that assessing compensation under the Takings Clause is the role of the jury, not the legislature, adding that "[i]f anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so"[191]:

> [I]t appears that the legislature has undertaken to do what a jury of the country only could constitutionally do[,] assess the amount of compensation to which the complainants are entitled. . . . The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administrating right and justice, cannot for a moment be admitted or tolerated under our Constitution.[192]

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[189] Id. at 519.

[190] 148 U.S. 312 (1893).

[191] Id. at 328 (emphasis omitted) (quoting Isom v. Miss. Cent. R.R. Co., 36 Miss. 300, 315 (1858)).

[192] Id. at 327–28 (emphasis omitted) (first quoting Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 571 (1837); then quoting *Isom*, 36 Miss. at 315).

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In a 1923[193] decision and again in a 1936[194] decision, the Court reiterated that the legislature may not prescribe how compensation is assessed. But because the Court never explicitly overruled *Jones*, Congress and many state legislatures maintain that such holdings are equivocal. The legal ambiguity creates an opening for federal and state statutes that specify government appointed commissions are to assess compensation in takings.

During the *Kelo v. City of New London*[195] oral arguments in 2005, the Court itself expressed confusion regarding how compensation is assessed under the Takings Clause. In response to repeated questions on the issue of "just compensation," the city's lawyer replied, "[T]he answer to your question is . . . if there is some scholarly articles on that, I'm not aware of it . . . . [Y]ou have to assume in this case that there is going to be just compensation."[196]

Justice Kennedy continued to press on how compensation will be assessed, asking, "[I]f the property owner goes to the jury and receives more than the state offered, does the state also have to pay those attorneys' fees?"[197] Neither counsel nor any of the Justices challenged the assumption that the property owner had the right to a jury.[198]

Justice Breyer expressed the Court's desire to resolve the issue in *Kelo*, asking: "Let's repose the problem . . . . [If] an individual has a house and they want to be really not made a lot worse off . . . . is there no constitutional protection? If this isn't the right case, what is?"[199] The city's lawyer curtly deflected the Court's question: "Well, the right case is in the just compensation concept . . . ."[200] The city in *Kelo* successfully

[193] See United States v. New River Collieries Co., 262 U.S. 341, 343–44 (1923) ("[A]scertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard.").

[194] See Balt. & Ohio R.R. Co. v. United States, 298 U.S. 349, 368 (1936) ("The just compensation clause may not be . . . impaired by any form of legislation. . . . Congress may not directly or through any legislative agency finally determine the amount that is safeguarded . . . by that clause. . . . [T]he owner . . . . is entitled to a judicial determination of the amount.").

[195] 545 U.S. 469 (2005).

[196] Transcript of Oral Argument at 45, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

[197] Id.

[198] But see Cumberland Farms, Inc. v. Town of Groton, 808 A.2d 1107, 1127, 1131 (Conn. 2002) (holding that Connecticut property owners—such as those in *Kelo*—do not have the right to a jury assessment of compensation in takings).

[199] Transcript of Oral Argument, supra note 196, at 50.

[200] Id.

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deflected the "just compensation" issue, but, as a result, the Court declined an opportunity to clarify the confusion.

B. Careless Dicta Muddles Question Under Seventh Amendment Doctrine

A separate string of similarly muddled case law considers the issue as a Seventh Amendment question rather than a Takings Clause question. It similarly began in the late nineteenth century with two irreconcilable cases decided only three years apart.

In the first, *Shoemaker v. United States*,[201] homeowners sought to prevent the government from condemning their land by raising a number of challenges to the constitutionality of the federal statute authorizing takings for a national park in Washington, D.C. The statute provided that in case of disagreement the trial court appoint a three-member commission to assess compensation due to affected homeowners. The Supreme Court upheld the legislation creating the park but the parties did not contest—and the Court did not consider—the Seventh Amendment question. Indeed, in the proceedings below, the lower court noted that the affected homeowners conceded their right to a jury:

> [I]t is conceded that, in the exercise of the right of eminent domain by the United States, the owner of the property is not entitled as a constitutional right to a trial by jury, because . . . ascertaining the value by inquest was due process of law before the constitution was adopted, and it has been recognized as such since.[202]

The homeowners' mistake—wrongly conceding their Seventh Amendment right to a jury—was cited as authority in Supreme Court dicta in *Bauman v. Ross*,[203] an 1897 case, and in turn in *United States v. Reynolds*,[204] a 1970 case. The Court ill-fatedly presumed that the

[201] 147 U.S. 282, 13 S. Ct. 361 (1893).

[202] 13 S. Ct. 361, 382–83 (1893). The Supreme Court Reporter includes Judge Cox's Feb. 23, 1892 "opinion of the supreme court of the District overruling the exceptions to the commissioners' report," which supplies the above quote.

[203] 167 U.S. 548, 593 (1897) (citing, inter alia, *Shoemaker*, 147 U.S. at 300–01; United States v. Jones, 109 U.S. 513, 519 (1883); Custiss v. Georgetown & Alexandria Tpk. Co., 10 U.S. (6 Cranch) 233, 233 (1810)) ("[T]he estimate of the just compensation for property taken for the public use . . . may be entrusted by Congress to commissioners . . . or to an inquest consisting of more or fewer men than an ordinary jury.").

[204] 397 U.S. 14, 18–19 (1970) ("[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings. . . . It is not, therefore, to the Seventh Amendment that we look in this case . . . .").

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homeowners conceded their right to a jury because the historical record indicated English common law did not provide for a jury in 1791.

The homeowners' mistake and the lack of a subsequent fact check speaks to the challenge of accessing the volume and breadth of English and early American primary sources necessary to apply the Seventh Amendment's historical test, especially given the tools available in the late nineteenth century. As one law librarian described it, until the West Publishing Company organized and systematized case reports, "The existing forms of publication [in the nineteenth century] were slow, unorganized, and inaccurate."[205]

The development of legal history as a discipline and the growth of academic libraries are a relatively recent phenomenon. As one scholar reflected, "A generation ago, only a handful of schools even taught [American legal history]—probably two or three law schools at most, in 1950 . . . . The field, practically speaking, did not exist."[206] Even more recent is the digitization of collections of early American historical documents at academic libraries and the National Archives. The digitization of these documents is possible thanks to advances in imaging technology and collaborative efforts to leverage the computing resources of academic libraries.[207]

The difficulty in applying the Seventh Amendment's historical test was compounded by the rarity of federal takings prior to 1875.[208] The federal government had previously leaned on states to procure land for federal projects, leaving only a limited number of Washington, D.C., takings subject to Seventh Amendment protection.[209]

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[205] Robert C. Berring, Full-Text Databases and Legal Research: Backing into the Future, 1 High Tech. L.J. 27, 30 (1986). See generally Thomas J. Young, Jr., A Look at American Law Reporting in the 19th Century, 68 Law Libr. J. 294, 298–300, 304 (1975) (examining the history of the legal reporter in 19th century America leading to the rise of the West Publishing Company, which was successful in part due to its "uniformity" and indexing).

[206] Friedman, supra note 16, at 1.

[207] Cf. Roberta Romano, After the Revolution in Corporate Law, 55 J. Legal Educ. 342, 356 (2005) ("[E]mpirical research has become far more accessible and cheaper to undertake than decades ago . . . . When I started law teaching over twenty years ago, I had to use a mainframe at the university computing center.").

[208] See William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1741 (2013).

[209] See id. at 1765. The Supreme Court has not clarified whether the Fourteenth Amendment incorporates the Seventh Amendment civil jury right against the states. Compare Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment. . . . [W]e express no view as to whether jury trials must be afforded in . . . actions in the state courts."), with McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("Our

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It is perhaps no coincidence that off-handed observations made in dicta—not holdings on questions presented by the parties—led to the spread of this historical inaccuracy. As scholars have documented, "[C]ourts [that] decide only those issues that are briefed and argued . . . in turn will produce better judicial decisions."[210] The incentives of the adversarial system are structured to aid the court by articulating competing visions of how the law is applied to a particular set of facts. But these incentives are not engaged when issues are tangential to the case or controversy before the court. For this reason, the Supreme Court has cautioned "that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression."[211]

For example, in *Reynolds*, the appeal centered on the district court's instructions to the jury charged with assessing compensation for the government's taking of seventy-eight acres of land.[212] Because the trial court impaneled a jury to assess compensation for the taking, the parties never mentioned the Seventh Amendment in briefing[213] or in the proceedings below.[214] Indeed, the Court majority expressly wrote that "[t]here is no claim that the issue is of constitutional dimensions."[215] Even those scholars who prefer government commissions to juries acknowledge that the Court's comments regarding the application of the Seventh Amendment's historical test to takings were made in dicta.[216]

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governing decisions regarding the . . . Seventh Amendment's civil jury requirement long predate the era of selective incorporation."). But cf. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (holding that the Fourteenth Amendment incorporates the Takings Clause against the states). See generally Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 78 (2008) ("[T]he Supreme Court's failure to incorporate the Seventh Amendment, when it has incorporated almost all of the rest of the Bill of Rights, is quite odd and perhaps mistaken." (footnote omitted)).

[210] Amanda Frost, The Limits of Advocacy, 59 Duke L.J. 447, 460 (2009); see also Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 955 (2005) ("Even punctilious judges arguably should not be allowed the final word on the extent of their authority to resolve legal issues.").

[211] Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 287 (1853).

[212] See United States v. Reynolds, 397 U.S. 14, 14–15 (1970).

[213] See, e.g., Brief for the Respondent, United States v. Reynolds, 397 U.S. 14 (1970) (No. 88); Brief for the Petitioner, *Reynolds*, 397 U.S. at 14.

[214] See, e.g., United States v. 811.92 Acres of Land, 404 F.2d 303 (6th Cir. 1968).

[215] *Reynolds*, 397 U.S. at 18.

[216] See, e.g., Paxton Blair, Federal Condemnation Proceedings and the Seventh Amendment, 41 Harv. L. Rev. 29, 49 (1927) ("[I]n every one of the foregoing decisions of the Supreme Court, . . . it was not imperatively necessary in order to decide the case to pass upon the question which is the subject of our discussion. . . . [But] the views so expressed [are entitled]

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In 1896—three years after the homeowners in *Shoemaker* mistakenly conceded their right to a jury—the Supreme Court reversed course. In *Chappell v. United States*,[217] the Court held that because just compensation was historically assessed in courts of law, as opposed to equity or admiralty, the Seventh Amendment jury right applies. The Court began by noting that proceedings to assess compensation due in takings are "in substance and effect . . . action[s] at law" and "[t]he general rule . . . is that the trial of issues of fact in actions at law . . . 'shall be by jury.'"[218] It held that the statute directing federal courts to conform their procedures in takings to the current practices of the states in which they sit cannot abrogate the right to a jury since Congress cannot create "an exception to the general rule of trial by an ordinary jury in a court of record."[219]

The following year, in *Whitehead v. Shattuck*, the Supreme Court reiterated that the law-versus-equity distinction is controlling under the Seventh Amendment.[220] In doing so, it clarified that the Seventh Amendment applies to any action for money damages and any action for possession of property—thereby encompassing all takings no matter how the procedural posture is interpreted:

> It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.[221]

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to a weight above that of the ordinary gratuitous dictum."); Walker D. Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in All Condemnation Proceedings?, 11 Va. L. Rev. 505, 506 (1925) ("[T]here have been repeated observations by the . . . Court . . . even if . . . dicta.").

[217] 160 U.S. 499, 513–14 (1896).

[218] Id. at 513.

[219] Id. at 514.

[220] 138 U.S. 146, 151 (1891) ("The Seventh Amendment of the Constitution of the United States . . . would be defeated if an action at law could be tried by a court of equity. . . . '[W]henever a court of law is competent to take cognizance of a right . . . the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.'" (quoting Hipp ex rel. Cuesta v. Babin, 60 U.S. (19 How.) 271, 278 (1856))); see also Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) ("In a just sense, the [Seventh] [A]mendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.").

[221] *Whitehead*, 138 U.S. at 151.

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Lower courts struggled to make sense of the irreconcilable case law: in one line of cases, the Supreme Court cites to the homeowners' mistaken concession of their right to a jury as historical authority, and in the other line of cases, the Supreme Court holds that the law-versus-equity distinction is controlling.

The U.S. Court of Appeals for the Fourth Circuit, for example, grappled with these two lines of cases in *Beatty v. United States*.[222] The Fourth Circuit began by noting, "The question here depends entirely upon the language of the Constitution," and proceeded to walk through the dissonant case law.[223] The Fourth Circuit, writing unanimously, marveled at the thought that the Constitution guards the right to a jury trial in condemnations of property worth $50 for violation of customs laws and yet does not guard the right to a jury trial in condemnations of homes worth hundreds of thousands of dollars:

> It would seem a startling proposition . . . to say that, although the Constitution of the United States forbids the United States laying a fine of a few dollars on a defendant without a trial by jury, . . . and although the Constitution in a common-law case prevents the recovery . . . by the United States from any citizen of the United States, of even a comparatively small amount of money without the verdict of a jury, yet that, in a proceeding for condemnation for public purposes, property of the value of hundreds of thousands of dollars may be taken without the verdict of a jury.[224]

The Fourth Circuit held that this reading of the Bill of Rights creates a distinction without a difference: "The crime of the owner . . . is his refusal to accept what the government offers to pay, and his insistence upon a higher value, and as it is the case of a suit at common law, he is entitled to have his damages assessed by a jury."[225]

The Fourth Circuit felt comfortable setting aside the Supreme Court's observations in the line of cases citing to the homeowners' mistaken concession of their right to a jury because these remarks were dicta, not holdings:

> There was nothing either asserted or argued in the case that called for a ruling that no jury . . . was requisite. The whole confusion on the

[222] 203 F. 620, 622–23 (4th Cir. 1913).
[223] Id. at 621.
[224] Id.
[225] Id. at 626.

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> subject appears to go back to the statement . . . that the right of eminent domain . . . was enforced without the agency of a jury . . . as . . . exercised by the law of England.[226]

The Fourth Circuit went a step further, however. It asserted that even if these observations could be considered holdings, they are not binding under the principle of stare decisis if shown, upon fuller consideration, to be erroneous.[227] Indeed, citing Blackstone's *Commentaries*, the Fourth Circuit challenged their historical validity: "A good deal of unconsidered language has been used with regard to the method of ascertaining the compensation in such cases prevailing in England and America prior to the adoption of our Constitutions."[228]

The Fourth Circuit compared takings to trespass by the government. The Seventh Amendment guarantees the right to a jury determination of damages in trespass actions, and takings are effectively trespass by the government:

> The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete, and it is for that reason presumably the Supreme Court of the United States . . . has decided that a proceeding by the United States to condemn lands for public purposes is a suit at common law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in the proceeding to have his damages assessed by a jury.[229]

The Supreme Court had an opportunity to address the Seventh Amendment question in 1999, but the Court instead distinguished the case based on its procedural posture. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, it held that the Seventh Amendment guarantees

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[226] Id. at 624.

[227] See id.; accord Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 352–53 (1936) (Brandeis, J., concurring) ("This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous."). See generally Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 1 (2001) ("American courts . . . recognize a rebuttable presumption against overruling their own past decisions.").

[228] *Beatty*, 203 F. at 625.

[229] Id. at 626.

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property owners the right to a jury in Section 1983 actions seeking compensation for takings by state or local governments, but refrained from weighing in on jury rights in ordinary takings actions: "We note the limitations of our Seventh Amendment holding. We do not address the jury's role in an ordinary . . . condemnation suit."[230]

C. Federal Rule of Civil Procedure Lets Commission Substitute for Jury

The Land Acquisition Section of the Department of Justice—the agency responsible for litigating takings cases on behalf of the United States government—saw an opportunity to add clarity to the confusion when Congress commissioned the drafting of the Federal Rules of Civil Procedure in 1934.[231] Absent a rule dictating otherwise, federal district courts followed the practice used by the state in which they sat to assess compensation in takings.[232]

At the time, only 5 of the 48 states did not guarantee the right to a jury in takings—leaving it exclusively to government commissions.[233] While 18 states specified that only a jury could assess compensation, 23 states used a hybrid system in which government commissions made the initial assessment followed by a de novo jury trial if either party was dissatisfied with the commission's award.[234]

The Justice Department's advocacy for a uniform rule ensuring the right to a jury in all federal takings ultimately backfired. The Advisory Committee tasked with drafting the Federal Rules of Civil Procedure sought a political compromise and instead proposed the hybrid system used in several states—assessment by a government commission followed by a de novo jury assessment if either party is dissatisfied with the commission's award.[235] The Department of Justice's goal in pushing for a uniform federal rule was to do away with the hybrid system, not expand it across the entire country.[236] By highlighting the expense

[230] 526 U.S. 687, 720–22 (1999).

[231] See Paul, supra note 27, at 232 ("[A]gitation for a rule on condemnation originated in the Lands Division of the Department of Justice [now known as the Land Acquisition Section], the legal staff of which was conducting most of the condemnation proceedings instituted on behalf of the United States.").

[232] See Juergensmeyer, supra note 20, at 678.

[233] See Fed. R. Civ. P. 71.1 advisory committee's note (1951).

[234] See id. (clarifying the remaining two states "do not permit . . . a categorical classification").

[235] See Juergensmeyer, supra note 20, at 679.

[236] See Paul, supra note 27, at 237 (noting the "persistent efforts of the . . . Department of Justice to obtain jury trials in all cases and to have Rule 71A amended so as to give that right").

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required to conduct two valuation proceedings—one before a government commission and another de novo before a jury—the agency convinced the Advisory Committee to strike its proposed rule from the Federal Rules of Civil Procedure adopted in 1937.[237]

The surge in takings by the United States military at the outset of World War II forced the Advisory Committee to reconsider the issue when it reconvened in 1942 to consider revisions to the nascent Federal Rules of Civil Procedure.[238] The ever-cautious Advisory Committee, once again, ducked the issue of who assesses "just compensation." In a shrewd political maneuver, it "'pass[ed] . . . the buck' to the district court judge,"[239] adding a provision—now codified in Rule 71.1(h)—that grants the trial court discretionary power to deny a jury demand in takings: "If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons."[240] The Advisory Committee itself admitted that "[t]he rule may not be perfect" but noted that "if faults develop in practice they may be promptly cured."[241]

The Advisory Committee's proposed revisions were sent to Congress for review on April 30, 1951—absent a vote to affirmatively override them, the Federal Rules of Civil Procedure as revised by the Advisory Committee would become effective three months later, on August 1, 1951.[242] The Senate acted on the recommendation of its Judiciary

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[237] See Juergensmeyer, supra note 20, at 679 ("[T]he Committee . . . was temporarily persuaded of the need for a uniform rule by Department of Justice officials and included a uniform rule for condemnation actions as Rule 74 of its April 1937 Draft. Proposed Rule 74 adopted the procedure followed in several states by providing for the appointment of a commissioner to determine compensation and for a right in either party to have a trial de novo before a court, either with or without a jury. Criticism from various governmental agencies and an abrupt change of position by the Department of Justice persuaded (or perhaps, permitted) the [Advisory] Committee to propose in its Final Report to the Court on November 1937 that Rule 74 be stricken." (footnotes omitted)); Miller, supra note 27, at 1093 ("I am advised that the Lands Division of the Department of Justice, which handles the bulk of the federal condemnation actions throughout the United States, favors the jury trial and strongly opposes the use of commissioners. It is convinced that a case is delayed instead of expedited by the appointment of commissioners."); see also Fed. R. Civ. P. 71.1 advisory committee's note (1951) (referring to "the wasteful 'double' system prevailing in 23 states where awards by commissions are followed by jury trials").

[238] See Juergensmeyer, supra note 20, at 679.

[239] Id. at 681.

[240] Fed. R. Civ. P. 71.1(h)(2)(A).

[241] Fed. R. Civ. P. 71.1 advisory committee's note (1951).

[242] See H.R. Doc. No. 82-121, at 1, 8 (1951).

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Committee and enacted all of the proposed revisions except for one: the provision empowering trial courts to deny jury demands in takings. In its place, the Senate voted for a provision ensuring the right to a jury in all takings.[243]

The House Judiciary Committee similarly opposed the provision permitting courts to deny jury demands in takings but requested more time to study alternatives. The Senate countered that the House ought to simply reject the provision at issue—no need to delay the rest of the revisions to the Federal Rules of Civil Procedure. But without an affirmative vote to extend time, the proposed rule as drafted by the Advisory Committee went into effect by default on August 1.[244]

The story of how a mistaken conception of the historical record in 1893 found its way into Supreme Court dicta and the Federal Rules of Civil Procedure is at once a comedy and a tragedy—particularly so when it abrogates a deeply cherished civil right.[245]

III. UNDERSTANDING IMPACT ON COMPENSATION AWARDS

One would think decisions taken by a government commission are based on better information than decisions taken by a jury. After all, repeat players have some degree of expertise. Yet, empirical evidence suggests the opposite—government appointed commissions systematically misvalue homes.

The data does not indicate bias or capture. It suggests commissions overvalue homes as often as they undervalue them. What is striking, however, is their error rate—that is, the frequency and extent of their departures from fair market value.

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[243] See Juergensmeyer, supra note 20, at 679–80, 682, 684.

[244] See id. at 682.

[245] See, e.g., The Federalist No. 83, at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The objection to the plan of the [constitutional] convention . . . is . . . the want of a constitutional provision for the trial by jury in civil cases." (emphasis omitted)); see Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1169 (1995) ("No idea was more central to our Bill of Rights . . . than the idea of the jury."); William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830, at 96 (1975) ("For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights . . . ."); see also Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("The trial by jury is justly dear to the American people."); Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 7 The Writings of Thomas Jefferson 404, 408 (Andrew A. Lipscomb ed., Mem'l ed. 1903) ("I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.").

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A. Data Suggests Government Commissions Are Less Accurate than Juries

"[T]he Department of Justice continues, as it has since the inception of the idea, to oppose the commission method of determining . . . just compensation."[246] As one Justice Department official summarized in a letter to a United States District Court Judge, "[T]his Department's experience is that, in general, use of commissioners multiplies problems rather than lessens them."[247]

The sheer volume of the Justice Department's takings caseload gives it a unique vantage point on the jury versus commission distinction. Data collected by the Land Acquisition Section of the Department of Justice indicates that the likelihood of retrial increases from 50% to 66% and the likelihood of appeal increases from 39% to 51% when compensation is assessed by commission as opposed to jury.[248]

Empirically evaluating the accuracy of commissions is challenging because there is no market check. An empirical test requires data on what the property would have sold for in a market transaction. Such data is rarely available: "Indeed, expert panels exist precisely because of the absence of clear empirical guidance."[249]

Modern revealed preference regression techniques offer some hope, but come with another hurdle—they require an abundance of sales and property-level data on nearby homes. A recent *Journal of Legal Studies* article is the first to surmount this hurdle.[250] It calibrates a hedonic regression model using detailed property-level data on about 80,000 nearby real estate sales.

The study leverages the calibrated model to estimate the fair market values of all the residential properties taken by New York City from 1990 to 2002 and then compares them against assessments by city commissions.[251]

These commissions were comprised of three professional appraisers appointed by New York City's Appraisal Committee—usually on the

[246] See Juergensmeyer, supra note 20, at 723.
[247] Id.
[248] Id. at 724 n.163.
[249] Bauke Visser & Otto H. Swank, On Committees of Experts, 122 Q. J. Econ. 337, 340 (2007) (emphasis omitted) (quoting Matthew J. Gabel & Charles R. Shipan, A Social Choice Approach to Expert Consensus Panels, 23 J. Health Econ. 543, 544 (2004)).
[250] See Chang, supra note 19, at 201.
[251] See id. at 214–16.

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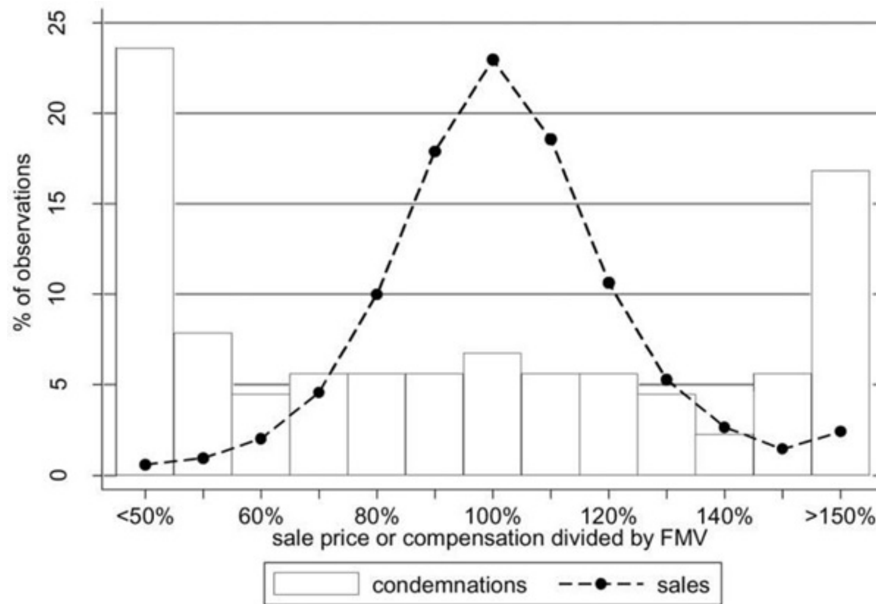
recommendation of the city's lawyer.[252] In other words, the Appraisal Committee maintains a list of preapproved professional appraisers from which the city's lawyer suggests three.

The results are striking. Instead of reflecting a normal distribution centered around fair market value, commission compensation awards reflect a bimodal distribution with extraordinary dispersion.

Figure 1: NYC Home Sales and NYC "Just Compensation" Assessments as a Percentage of Fair Market Value[253]



Source: Yun-chien Chang, An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002, 39 J. Legal Stud. 201 (2010)

The inherent limitations of hedonic regression models cannot account for the remarkable inaccuracy in compensation awards by New York City commissions. Indeed, the model's high R^2 coefficient (0.87) and the normal distribution of residential sales during the period suggest it produces quite accurate estimates of fair market value.[254]

[252] See id. at 213 n.34.
[253] Id. at 228 fig.3.
[254] See id. at 217, 237.

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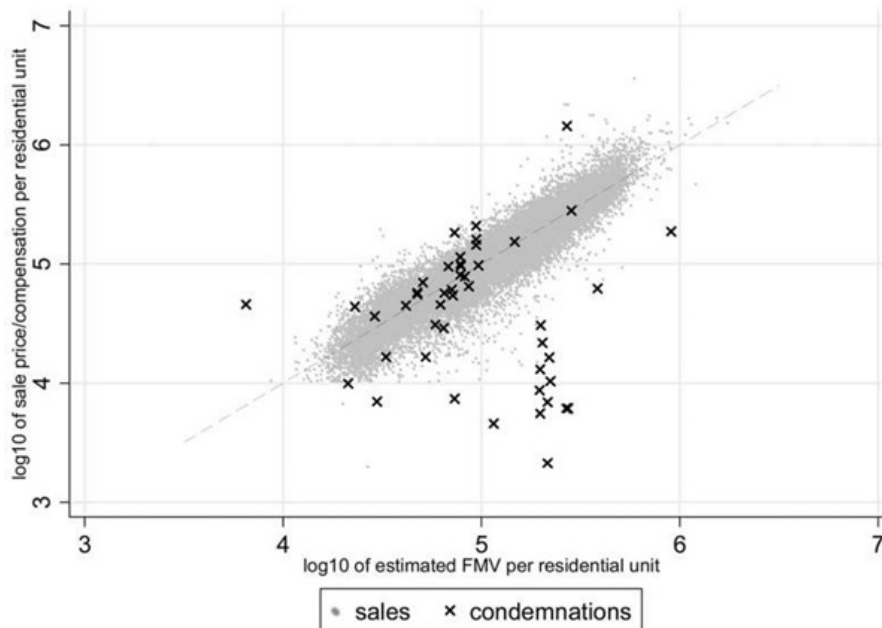
Figure 2 makes this point visually—home sales, depicted as dots, cluster closely around estimates of fair market value, depicted as a dashed line, while commission compensation assessments, depicted as crosses, have an unusually high number of outliers.

Figure 2: Hedonic Regression Model Accurately Explains Variation in NYC Home Sales—but not NYC "Just Compensation" Assessments[255]



Source: Yun-chien Chang, An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002, 39 J. Legal Stud. 201 (2010)

These empirical findings are particularly disheartening in light of Federal Reserve data indicating that the median homeowner has invested more than two and half years of the family's pre-tax income in its home.[256] Even small valuation mistakes—let alone those of the magnitude witnessed in New York City—can make a big difference in a family's financial reality.

[255] Id. at 235 fig.6.
[256] See sources cited supra note 18.

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B. Commissioners' Reputational Concerns Can Explain High Error Rate

If individual experts are more accurate than lay jurors, why are groups of experts less accurate than juries? The answer lies in a subtle difference in incentives: jurors are laymen who are free to voice disagreement without fear of professional repercussions, but the same is not true for government-appointed commissioners. Reputational concerns transform the dynamic of group deliberations—instead of actively debating the merits and coalescing around a mean, rational commissioners withhold disagreeable information and echo the views of their colleagues. This strategic behavior can explain why intelligent and accomplished valuation experts, if placed in groups, systematically misvalue homes.

"Two heads are better than one"[257]—but only if the private information held by each is revealed and aggregated. Group deliberations—a form of information aggregation—ideally yield a more accurate compensation award than any single individual could. But group deliberations can have the opposite effect—serving as an echo chamber instead of a sounding board—if group members do not feel free to voice genuine disagreement.

Disagreement signals that at least one of the group members is wrong and carries with it professional repercussions. As soon as a group member reveals private information that challenges the private information of another group member, both members' perceived competence falls.[258] Reputational concerns therefore "lead people to silence themselves or change their views in order to avoid some penalty—often, merely the disapproval of others. But if those others have special authority or wield power, their disapproval can produce serious personal consequences."[259]

Experimental studies corroborate that group members dislike those who voice dissent and rate the group as having lower morale when it

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[257] See Cass R. Sunstein & Reid Hastie, Making Dumb Groups Smarter, Harv. Bus. Rev., Dec. 2014, at 90, 92 ("As the saying goes, two heads are better than one. If so, then three heads should be better than two, and four better still. With a hundred or a thousand, then, things are bound to go well—hence the supposed wisdom of crowds.").

[258] See Visser & Swank, supra note 249, at 340 ("[A]s soon as members care about their reputation, they want to speak with one voice. Disagreement signals lack of competence as competent members view the consequences of the project in the same way.").

[259] Sunstein & Hastie, supra note 257, at 92; see also Cass R. Sunstein, Group Judgments: Statistical Means, Deliberation, and Information Markets, 80 N.Y.U. L. Rev. 962, 966 (2005) ("As a result of these forces, groups often do not correct but instead amplify individual errors . . . and end up in a more extreme position in line with the predeliberation tendencies of their members." (first citing Roger Brown, Social Psychology: The Second Edition 200–45 (1986); and then citing Cass R. Sunstein, Why Societies Need Dissent 112 (2003))).

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occurs.[260] "This is . . . the typical pattern with deliberating groups, having been found in hundreds of studies involving over a dozen countries, including the United States, France, and Germany."[261]

A reluctance to disagree with professional colleagues is not surprising given the incentives at play. In fact, it is expected. A 2001 experiment tested this intuition directly.[262] If each subject truthfully revealed his private signal, the group would be able to determine the correct answer with a high degree of accuracy. But because the subjects' incentive structure rewarded agreeableness more so than accuracy, the group experienced an astonishingly high error rate.[263] Indeed, participants lied about their private signal more than thirty-five percent of the time, leaving the group not much more accurate than a single individual.[264] Group deliberations, in effect, become an echo chamber that amplifies errors instead of correcting them.

Juries are less susceptible than government commissions to this perverse behavior because of a subtle difference in incentives—jurors' "professional reputations do not depend on how well they are perceived as jurors."[265] Indeed, "[j]urors come, deliberate and go back to their homes."[266] As Justice Douglas put it,

> A jury . . . lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present the next day to be criticized.

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[260] See, e.g., Jasmine S. Rijnbout & Blake M. McKimmie, Deviance in Group Decision Making: Group-member Centrality Alleviates Negative Consequences for the Group, 42 Eur. J. Soc. Psychol. 915, 915 (2012); Charlan Jeanne Nemeth & Margaret Ormiston, Creative Idea Generation: Harmony Versus Stimulation, 37 Eur. J. Soc. Psychol. 524, 524, 526, 532 (2007).

[261] Cass R. Sunstein, Conformity and Dissent 41 (Chi. Pub. L. & Legal Theory, Working Paper No. 34, 2002) (citing Roger Brown, Social Psychology: The Second Edition 204 (1985)).

[262] See Angela A. Hung & Charles R. Plott, Information Cascades: Replication and an Extension to Majority Rule and Conformity-Rewarding Institutions, 91 Am. Econ. Rev. 1508, 1518 (2001).

[263] See id. at 1517–18; cf. Lisa R. Anderson & Charles A. Holt, Information Cascades in the Laboratory, 87 Am. Econ. Rev. 847, 849–53, 860 (1997) (reporting a lower error rate when subjects are incentivized based on accuracy alone).

[264] See Hung & Plott, supra note 262, at 1518 (revealing that participants truthfully revealed their private signal only 64.7% of the time and did not reveal their private signal 35.3% of the time).

[265] Visser & Swank, supra note 249, at 343 (citing Marco Ottaviani & Peter Sørensen, Information Aggregation in Debate: Who Should Speak First?, 81 J. Pub. Econ. 393 (2001)).

[266] Joanne Doroshow, The Case for the Civil Jury: Safeguarding a Pillar of Democracy, at i (1992).

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> It is the one governmental agency that has no ambition. It is as human as the people who make it up.[267]

Social psychologists similarly credit jurors' ability to disagree without fear of professional repercussions as a driving factor of more accurate awards: "While . . . increased pleasantness and minimized disagreeableness may be desirable in many group contexts, juries may be one of the places where disagreement and contentiousness are precisely what we want stimulated. The hotter the deliberative fire, the more severely the evidence is tested."[268]

This concept has been formalized with the help of discrete probability models. This literature "bring[s] the process of collective decision making within the purview of mathematical analysis."[269] It demonstrates a negative correlation between jurors' votes—that is, a willingness to disagree—increases the accuracy of the jury's decisions.[270] The inverse holds as well: a positive correlation between jurors' votes—that is, a reluctance to disagree—reduces the accuracy of its decisions.[271]

The reliance on juries to assess compensation therefore reflects powerful insight into group decision making. With the help of modern economic analysis, we can recover what the Founders implicitly understood.

CONCLUSION

The Seventh Amendment's "historical test represents a rare instance in which the modern Court has come to almost complete agreement on methodology."[272] That methodology is easier said than applied. As Justice Brennan laments, "Requiring judges, with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary and secondary sources . . . has embroiled courts in recondite controversies better left to legal historians."[273]

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[267] William O. Douglas, An Almanac of Liberty 112 (1st ed. 1954).

[268] Michael Saks & Reid Hastie, Social Psychology in Court 81 (1978).

[269] Sven Berg, Condorcet's Jury Theorem, Dependency Among Jurors, 10 Soc. Choice & Welfare 87, 87 (1993).

[270] See id.

[271] See id.

[272] Miller, Text, History, and Tradition, supra note 17, at 887 (citing Bernadette Meyler, Towards a Common Law Originalism, 59 Stan. L. Rev. 551, 596 (2006) (noting agreement on methodology across a wide range of the Court's ideological viewpoints)).

[273] Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 576 (1990) (Brennan, J., concurring in part and concurring in the judgment).

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This Article answers the call for such historical scholarship. In tracing the history of the "just compensation" clause to its conceptual origin, it uncovers a forgotten yet deeply cherished civil right.