

## ABSTRACT B-K 2020

### “all temperate and civilized governments:” A BRIEF HISTORY OF JUST COMPENSATION

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This essay examines the history of the just compensation norm in eminent domain. The paper first discusses the common law and natural law origins of the compensation requirement, and stresses that this principle was widely accepted in America long before it was expressly incorporated in the Bill of Rights and state constitutions. Invoking unwritten fundamental principles, several early state courts insisted that compensation was required when government acquired private property even if no constitutional provision mandated an indemnity. The Fifth Amendment was viewed not as an innovation, but simply as declaratory of a fundamental principle.

Next the paper probes the rationale behind the compensation requirement. Why should the state be expected to pay anything when it acquires private property from an individual? Samuel Pufendorf, a natural law theorist, offered an influential explanation grounded on “natural equity.” He maintained that an individual can only be expected to contribute his or her share to achieve social benefits. Anything beyond this share should be refunded. Courts in the United States have adopted this rationale, declaring that the just compensation requirement prevents the government from singling out a few individuals to contribute disproportionately toward the cost of public projects.

Finally, the essay explores the elusive question of what constitutes just compensation. Before the adoption of the Fifth Amendment lawmakers and commentators spoke in terms of “true

worth,” “due satisfaction,” “full compensation,” and “full indemnification and equivalent.” Did the word “just” add anything? The Bill of Rights and state constitutions do not define “just compensation,” nor specify what form compensation is to take. Early courts struggled with a series of basic issues. Who was to determine the amount of just compensation? By what standard does one assess the amount of compensation? Must compensation be monetary, or can imputed benefits be offset against an award? In addressing these questions, the essay considers the evolution of the just compensation norm during the nineteenth century.