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# Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May

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# Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May

MICHAEL B. RAPPAPORT*

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## I. INTRODUCTION

For the friend of originalism and economic liberties, the Constitution is a mixed bag. Certainly, the constitutional text contains some clauses that expressly protect economic liberties, such as the Contract Clause and the Takings Clause. But the constitutional text does not comprehensively protect economic liberties. The Contract Clause, for example, applies only against the states and protects only against the impairment of existing contracts rather than fully embracing freedom of contract.[1]

Of course, the Constitution was once interpreted to be much more of a charter of economic liberty. The so-called *Lochner* Court, through a variety of doctrines, powerfully protected economic liberty. But many, although not all, of these protections are difficult to derive from the original meaning.

The *Lochner* Court's protections of economic liberties have now been largely eliminated. And most originalists—both on the Court and in the academy—have generally accepted these changes as justified by the original meaning.[2] Yet, these originalists insist on enforcing those economic protections that they believe are in accordance with the Constitution's original meaning. One protection that they have sought to enforce is the Takings Clause.[3]

The Takings Clause protections have been extended not only to physical takings, in which the government physically seizes or possesses private property, but also to regulatory takings, in which the government restrains the property holder from using his property as he desires.[4]

These protections against regulatory takings, however, have been criticized on originalist grounds. Several commentators have attacked judicial originalists like Justices Scalia and Thomas, as well as academic originalists like Richard Epstein, on the ground that they support covering regulatory takings, because the critics argue that the original meaning of the Takings Clause does not extend to such takings.[5]

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1. U.S. CONST. art. I, § 10, cl. 1 (providing that the Contract Clause applies only to the states); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 526 (1987) (noting that the Contract Clause only applies to existing contracts).

2. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 159–60, 351–52 (1990). However, a significant minority of originalists do continue to defend these economic liberties on originalist grounds. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–54 (2004).

3. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 1027 (1992) (majority opinion by Justice Scalia).

4. *Id.*

5. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996) [hereinafter Hart, *Colonial Land Use*

As a friend of both economic liberty and originalism, it saddens me to acknowledge that the critics have, so far, had the better argument. They have strongly argued that the legal regime at the time of the Constitution allowed regulatory takings, that there was little or no criticism of this aspect of the legal regime, and that there was no case law applying state takings clauses to regulatory takings.[6] Thus, I unhappily conclude that on the available evidence, the original meaning of the Fifth Amendment does not cover regulatory takings.

But perhaps the story need not be entirely unhappy. While the federal government is restricted by the Takings Clause of the Fifth Amendment, the states are restricted by the Takings Clause as it is incorporated under the Fourteenth Amendment. Although it is regularly, if not uniformly, assumed that the Fifth Amendment Takings Clause has the same original meaning as the incorporated Fourteenth Amendment Takings Clause, that may not be true. These enactments were passed at different times, under different circumstances, and with different purposes. It turns out that a potentially strong case can be made that the Takings Clause had a different meaning under the Fourteenth Amendment, and in particular, that it restricts at least some regulatory takings, even though the Fifth Amendment Takings Clause may not.

This essay develops the argument that the Takings Clause has a dual original meaning. First, I review the original meaning of the Fifth Amendment Takings Clause, concluding that the weight of the evidence supports restrictions of only physical takings. Along the way, I critically discuss the contrary argument of Richard Epstein in *Takings*[7] as well as the supportive argument by William Treanor, presented at the Conference.[8] Second, I argue that the incorporated Takings Clause may have a broader meaning than the Fifth Amendment Takings Clause. Applying Akhil Amar's view of the Bill of Rights and its incorporation, I sketch the argument that the incorporated Takings Clause applies to nonphysical

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*Law*]; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1099–1100 (2000) [hereinafter Hart, *Land Use Law in the Early Republic*]; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–84 (1995).

6. See *infra* notes 23–25 and accompanying text.

7. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN ix, 230–31 (1985).

8. William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633 (2008).

takings.[9] While I do not seek to prove this argument—doing so would require a significant amount of historical work and an acceptance of Amar's theory—my argument shows that a very plausible case can be made for concluding that the Fourteenth Amendment Takings Clause covers some regulatory takings. Thus, opponents of the regulatory takings doctrine cannot simply dismiss it as inconsistent with the original meaning.

This understanding of the incorporated Takings Clause fits well with the overall structure of the Constitution's protection of economic liberties. Just as the Constitution protects only pockets of economic liberties, it also protects against only some regulatory takings. Federal regulations are left to a republican political process that was designed to provide significant, but not categorical, protections for property rights.

While the Constitution may only protect against state regulatory takings, the contemporary effects of this interpretation may be greater than this half-a-loaf characterization might suggest. The great bulk of the important regulatory takings cases, including *Lucas* and *Tahoe-Sierra Preservation Council*, have involved state action rather than federal action.[10] If the original meaning of the incorporated Takings Clause restricts regulatory takings, that has far-reaching implications for current cases.

## II. TAKINGS: PHYSICAL, REGULATORY, AND CONSEQUENTIAL

The Takings Clause states "nor shall private property be taken for public use, without just compensation."[11] One perennial question under the Clause is what type of government action may constitute a taking. One type of taking is a physical taking. Under this type, the government physically seizes property either by claiming title to the property or permanently occupying a portion of the property. This type of taking has generally been covered by the Takings Clause from the beginning of the Republic, and virtually all commentators believe the Clause applies to such takings.[12]

By contrast, another type of taking is a regulatory taking. With this type, the government does not take either title or possession of the property, but instead regulates the owner's use of the property. The

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9. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 77, 80 (1998).

10. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 309, 311–12 (2002); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–07, 1009 (1992).

11. U.S. CONST. amend. V.

12. Hart, *Land Use Law in the Early Republic*, *supra* note 5, at 1101; Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 5, at 792–803.

most famous recent example of a regulatory taking is the *Lucas* case, in which South Carolina's prohibition on the development of beachfront property caused the property, according to the Supreme Court, to have zero value.[13]

Similar yet distinct from regulatory takings are consequential takings. These takings involve government action that does not actually possess the owner's property, but prevents him from enjoying the use of his property. For example, the government may build a road or a wharf that does not directly touch the owner's property, but restricts access to it. Consequential takings differ from regulatory takings because they do not involve the regulatory power of the government, but instead involve government improvements, such as building roads or improving waterways.[14]

Although consequential takings are distinct from regulatory takings, both are important because the usual arguments for excluding regulatory takings from the Takings Clause also suggest that consequential takings should be excluded. Like regulatory takings, consequential takings do not physically take the title or possession of property, but merely prevent the owner from using or otherwise enjoying the full benefits of his property. Those who restrict the Takings Clause to physical takings claim that early law covered neither regulatory nor consequential takings.[15] Thus, evidence that the Takings Clause covered consequential takings is direct evidence that it was not limited to physical takings. It is also indirect evidence that the Takings Clause would have been understood to cover regulatory takings, because there is no obvious reason why one would restrain consequential takings but not regulatory takings.[16]

Of course, if regulatory and consequential takings are covered by the Takings Clause, that still leaves the bigger question of how much protection property owners should receive from regulatory and consequential government actions. Under current law, the Supreme Court has applied a lenient and vague test for regulatory takings.[17] Fortunately, that

13. *Lucas*, 505 U.S. at 1006–07.

14. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1224–26.

15. Treanor, *supra* note 5, at 796–97.

16. Kobach, *supra* note 14, at 1225, 1226 n.86.

17. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25, 127–28, 135 (1978).

question is largely beyond the scope of this essay, which focuses on *whether* regulatory and consequential takings are covered rather than the *degree* of protection they should receive.

## III. THE ORIGINAL MEANING OF THE FIFTH AMENDMENT TAKINGS CLAUSE

A significant dispute in the scholarly literature exists on whether the original meaning of the Fifth Amendment Takings Clause restricts regulatory takings. Textually, the question of whether regulatory or consequential takings are covered turns largely on the meaning given to two words in the Takings Clause: "property" and "take."

In this Part, I examine in succession the case for and against covering nonphysical takings under the Takings Clause. I argue that the language of the Clause is ambiguous, but that evidence from the legal regime at the time of the Constitution suggests that the Clause only covers physical takings. I then examine and criticize the works of Richard Epstein and William Treanor, two prominent commentators on the Clause who have contrary views of it.

### *A. The Case for Coverage of Regulatory and Consequential Takings*

At first glance, there appears to be a strong case for concluding that the Takings Clause covers regulatory and consequential takings. One can reasonably interpret the key words of the Clause so that they cover such takings. Thus, the term "property" might be understood to mean the various rights to property that an owner possesses, including not merely the right to exclude, but also the right to use and enjoy his property. This interpretation is supported by the discussion of property in Blackstone's *Commentaries*, which was widely read in the early years of the nation.[18] Blackstone writes that the individual right to property "consists in the free use, enjoyment, and disposal of all of his acquisitions, without any control or diminution, save only by the laws of the land."[19] The term "take" might also support nonphysical takings if it is understood in the ordinary senses of either depriving one of something or as simply taking a nonphysical thing from someone.[20] Thus, when the government regulates or takes actions that affect someone's right to use

18. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 456 (2006).

19. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (photo. reprint, Univ. of Chi. Press 1979) (1765).

20. *See* Treanor, *Take-ings*, *supra* note 8.

and enjoy their land without physically seizing their property, it might be deemed to take those property rights.

This interpretation is further supported by the fact that regulatory and consequential takings often appear to require compensation just as much as physical takings do. If a physical seizure of a part or the entirety of one's property for a public purpose is compensable, then it is not clear why a regulation or consequential effect of government action for a public purpose—especially if it imposes significant harm—should not also require compensation.

### *B. The Case for Coverage of Only Physical Takings*

Despite the apparent power of the case for covering regulatory and consequential takings, the available evidence supports the view that the original meaning of the Takings Clause extends only to physical takings. The main problems for the broader interpretation of the Takings Clause derive from the acceptance of regulation by the legal systems at the time of the Constitution.

While the language of the Takings Clause can be read broadly, it can also be read narrowly. First, the term "private property" might refer not to each of the sticks in the bundle, but instead to the overall bundle of sticks, with a focus on the exclusive right of possession. For example, William Treanor defines "property" as "physical control of material possessions."[21] A citizen is deprived of property under this view only when he loses the right to possess his property—that is, when the government takes the title—and the rights normally associated with it—or when the government occupies his property. His property is not taken when the government merely interferes with his use of it.

Second, the term "take" might also have the narrow meaning of physically seizing something.[22] When the government appropriates land for a road, it has physically seized the property. By contrast, a right, such as the right to use property, cannot be physically seized because there is nothing physical to hold. Thus, if "take" had this physical meaning, takings would be restricted to physical takings.

The language of the Clause, then, is ambiguous. It might be understood narrowly to cover only physical takings or more broadly to cover regulatory and consequential takings. It is the historical practices and

21. *Id.* at 633.
22. *Id.* at 633–34.

interpretations, however, that strongly suggest that the Fifth Amendment Takings Clause should be understood narrowly.

First, the legal regime in both the colonies and the independent states prior to the adoption of the Constitution involved a significant degree of property regulation.[23] Many of these regulations would have been ripe for a regulatory takings doctrine. Moreover, it does not appear that these property regulations were significantly criticized or thought undesirable when the Constitution was enacted.[24] This absence of criticism suggests that the Takings Clause was not adopting new principles that were inconsistent with the existing legal regime. Second, the original state takings clauses were not applied to regulatory measures or consequential takings, but only to appropriations of property.[25] These interpretations of the state takings clauses suggest that the Federal Takings Clause was understood as extending only to physical takings, since the state and federal clauses used similar language.

These two pieces of evidence provide strong and mutually reinforcing support for the conclusion that the Takings Clause only applied to physical takings. They suggest that the legal system allowed significant regulation, that this regulation was not thought to be illegitimate, and that the state takings clauses were consistent with the traditional legal system. This provides powerful evidence that the Fifth Amendment Takings Clause did not cover regulatory or consequential takings.

One might question the force of this evidence on the ground that these legal systems and takings clauses existed at the state level, which does not necessarily indicate that the enactors of the Constitution approved of such actions at the federal level.[26] Because the federal government had relatively little power or need to regulate property and was often thought to be more dangerous than the state governments, the enactors might have wanted to impose additional restraints on it. While this is certainly possible, a mere possibility is not strong evidence.[27] If the enactors of the Takings Clause wanted to impose a broader limitation on the federal government, it is unlikely that they would have used the same language

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23. Hart, *Colonial Land Use Law*, *supra* note 5; Hart, *Land Use Law in the Early Republic*, *supra* note 5, at 1107–31.

24. Hart, *Land Use Law in the Early Republic*, *supra* note 5, at 1131.

25. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 5, at 791 n.50.

26. John Hart provides some evidence that Congress did not view the Takings Clause as covering regulatory takings. Hart, *Land Use Law in the Early Republic*, *supra* note 5, at 1139–47.

27. Of course, there are other possibilities as well. For example, the enactors might have thought additional restraints were unnecessary because the federal government did not have enumerated authority to pass many regulations of property.

that imposed a narrower restriction at the state level.[28] Moreover, contemporary accounts do not support this possible inference. St. George Tucker, a leading contemporary commentator who favored strong restrictions on the federal government, suggested that the Clause was intended to prevent military confiscations, not to cover regulatory takings.[29]

*C. Richard Epstein's Defense of Coverage for Regulatory Takings*

My claims about the original meaning of the Fifth Amendment Takings Clause conflict with the work of Richard Epstein, one of the leading commentators on the Clause. Epstein argues that one should rely on the original meaning of the terms and he seeks to find that meaning in the standard writers at the time,[30] such as Blackstone and Locke.[31] While Epstein is aware that contemporary practices do not conform to his very broad understanding of the Takings Clause, he concludes that reliance on a narrow understanding of the Takings Clause is detrimental. Epstein argues that the Framers:

> [M]ay have meant to endorse both the takings clause and wages and price controls without knowing the implicit tension between them. If they cannot have both, then their explicit choice takes precedence over their silent one. Suppose the framers believed both A and X, when A entails not-X. If A is the constitutional text, then X is not allowed.[32]

Unfortunately, I must disagree with this argument—unfortunately, because I regard Richard Epstein's work in *Takings* as some of the very best modern political theory within the Lockean tradition, even placing it above Robert Nozick's *Anarchy, State, and Utopia*.[33] Epstein's use of

28. That the federal government had relatively little power to regulate property does not necessarily suggest the application of broader takings principles against the federal government. This minimal power might also suggest applying narrow principles on the ground that the absence of federal powers makes broader principles less necessary.

29. 1 BLACKSTONE'S COMMENTARIES editor's app. at 305–06 (St. George Tucker ed., Philadelphia, Birch & Small 1803).

30. Epstein is rightly skeptical of the speeches that the drafters made because they were influenced by strategic considerations. Epstein explains that "[w]here the number of parties is large and the divergence of views great, the best evidence of textual intention is the language of the text itself." EPSTEIN, *supra* note 7, at 26–27.

31. Epstein writes that the "founders shared Locke's and Blackstone's affection for private property." *Id.* at 29.

32. *Id.* at 28.

33. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

the very simple principle of forced and compensated exchanges within Lockean theory to justify a whole set of legal practices that would otherwise seem unjustified—practices from statutes of limitations to eminent domain—is quite brilliant. But, as originalist constitutional law, the argument is problematic.

While Epstein and I agree on following the original meaning, we disagree about what that meaning is. I have been arguing that the language of the Takings Clause is ambiguous, but that the physical takings interpretation is strongly supported by contemporary legal practices, the absence of criticism of these practices, and state judicial decisions.

Epstein seeks to avoid this result with two basic arguments. First, Epstein relies on the "internal intellectual integrity of the [Takings Clause]," which he regards as reflecting the Lockean world view.[34] But this reliance on the Lockean views of the Framers cannot bear the weight he places upon it. First, it is too simple to ascribe a single theory to the Framers. The real world at any time is a messier place. While they may have praised Locke, the Framers' generation also lived with various property regulations that were inconsistent with Lockean thought. And there is little evidence that they found those regulations to be problematic and sought to eliminate them. Second, the Framers' generation was also influenced by republican political theories that were less protective of property rights. Akhil Amar and William Treanor present evidence—which I discuss below—that suggests the Framers held more republican political views. One can argue about the relative influence of these different views, but the diversity of political views indicates that one need not follow a strict Lockeanism to give faith to the Framers' actions. Where the ordinary meaning of the words allows both a narrow and broad interpretation, and where the existing legal landscape would be significantly inconsistent with the broad interpretation, there is a strong case for concluding that the narrow meaning was the original meaning unless there is evidence that the enactors sought to change the legal landscape.

Epstein's argument about the inconsistency of the Takings Cause and regulation does not require a different conclusion. If the language were absolutely clear, then we might feel compelled to reject the regulatory practices at the time of the framing. But the language of the Takings Clause is ambiguous, and given that one of the meanings is consistent with these regulatory practices, one would normally follow that meaning.

Interestingly, Epstein's originalist approach in this area is similar in some respects to the type of abstract originalism recently defended by

34. EPSTEIN, *supra* note 7, at 16, 26.

Jack Balkin. Balkin argues that clauses such as the Equal Protection Clause and the Privileges or Immunities Clause have an abstract meaning, such as prohibiting caste legislation.[35] Balkin does not believe the enactors' specific expectations about what constitutes caste legislation are part of the original meaning of these Clauses.[36] Instead, the abstract meanings are to be given content over time as different social movements influence the way each generation reads the Constitution.[37]

There are several possible criticisms of Balkin's approach, but one is that he is too quick to assume that the enactors' expectations about the Clauses they enacted were mistaken.[38] If the enactors believed that laws discriminating against women did not violate the Fourteenth Amendment and were not caste legislation, our first obligation is try to figure out why. It is too politically convenient to assume that they were confused. Rather, the most likely possibility is that they were using a particular understanding of caste legislation. Perhaps, they did not believe discriminations based on significant biological differences such as sex constituted caste legislation. One must conclude that the enactors did not place that meaning into the Constitution before concluding that their expectations were mistaken.

Arguably, Epstein makes a mistake similar to Balkin's. Before concluding that the Framers were confused about the effects of the Takings Clause, one must conclude that they did not have a different understanding of the language they used in the Clause. I am sympathetic to the political principles that motivate Epstein's and Balkin's arguments—I wish the Takings Clause covered regulatory takings and the Fourteenth Amendment protected women—but one needs to distinguish political principles from legal interpretation.

While the evidence does seem to me to weigh against covering regulatory takings under the Fifth Amendment, this conclusion is not certain. One way to argue against it is to show that the regulatory practices that existed at the time of the framing can be explained with a principle that would nonetheless prohibit certain regulatory takings. Eric

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35. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 101, 298–99 (2007), *available at* http://papers.ssrn.com/abstract=925558.

36. *Id.*

37. *Id.*

38. *See* John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007), *available at* http://papers.ssrn.com/abstract=962142.

Claeys's work attempts to show that traditional regulations were often consistent with a background theory that protects property rights from some regulatory takings.[39] If Claeys's efforts could be sustained, then there might be no real conflict between a broader reading of the Takings Clause and these regulatory practices. But on the existing evidence, the case for the narrower interpretation of the Takings Clause seems stronger to me.

### *D. William Treanor's Argument about the Meaning of "Take"*

While Claeys's argument might, with additional evidence, support covering regulatory takings under the Fifth Amendment, William Treanor has written a new article for the conference that would, if his claims are accepted, have the effect of precluding Claeys's efforts. Treanor argues that the meaning of the term "take" at the time of the Constitution referred to "physical acts."[40] While not explicit about it, he seems to suggest that regulatory takings are not covered because government regulations do not physically take property. If a government regulation restricts development, as in the *Lucas* case, it does not physically seize anything from the property owner. Therefore, there would be no taking.[41]

Under this definition, it would not matter whether Claeys was able to explain that most of the framing era regulations complied with a different background theory. Even if they did, the original plain meaning of the Takings Clause would preclude finding that the government had taken property. Moreover, this definition of "take" would appear to deny regulatory takings irrespective of the definition of property. While Treanor himself holds that property means "physical control of material possessions,"[42] it would not matter if property was defined as Blackstone defined it—in terms of usage rights—because regulations do not physically take these usage rights. Thus, Treanor's argument is potentially important.

Treanor's argument, however, is not persuasive. Treanor adopts the strategy of first looking at the modern definition of "taking" and then moving to the definition in 1789.[43] Relying on a modern dictionary, Treanor claims that the modern meaning of the word "take" always has a

39. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1549–66 (2003).

40. Treanor, *Take-ings*, *supra* note 8, at 634.

41. Treanor never defines the original meaning of "take" in his contribution to the Symposium. Instead, he often describes it as being inconsistent with regulatory takings. *Id.* at 634, 635, 637, 639. But, his basic point appears to be that "take" must refer to a physical act by the government. *Id.*

42. *Id.* at 633.

43. *Id.* at 634, 637–38.

physical component.[44] He therefore concludes that if the Takings Clause were written today, its meaning would not cover regulatory takings.[45]

But this argument is mistaken. Although it is not clear whether a takings clause that was interpreted using the modern meaning of its terms would cover regulatory takings, it is clear that the language by itself would not decide the matter. With modern meanings, the language of the Takings Clause is ambiguous. Treanor supports his claim that the language is unambiguous with Webster's Dictionary, which defines "take" with meanings such as "[t]o get into one's possession by force, skill, or artifice" and "[t]o grasp with the hands."[46] But exclusive reliance on dictionaries is a dangerous practice. Dictionaries are certainly a useful starting point for determining word meanings, but all usages will not be reflected in dictionaries. This is especially true of meanings which involve questions of nuance, such as whether a taking needs to be physical.

In fact, Treanor's claims about the modern meaning of "take" are mistaken because "take" can be used without any physical component. For example, imagine that I am speaking with a colleague about an idea I have for an article. Then, six months later, I discover that he has published his own article developing my idea. It would be entirely natural for me to complain, "I can't believe that he took my idea." There is no physical component to this—an idea is nonphysical—but it is clearly acceptable for me to use the word "take."

Treanor also relies on an exchange with his daughter. He says that if he tells his daughter "that she cannot play ball in the apartment," she will "not accuse me of having 'taken' her ball—or, for that matter, of having 'taken' anything at all."[47] Perhaps not, but that hardly shows that all takings involve a physical aspect. I also have talks with my children. Once, my younger son finished his homework and had fifteen minutes left to play until his bedtime. I came into his room and proceeded to discuss our weekend plans. When we were done, it was time for him to go to bed, prompting him to complain: "Daddy, you took all my time." A taking need not involve a physical component.

Another example involving my other child provides further evidence. My wife and I had punished our older son by forbidding him from

44. *Id.* at 633–34.
45. *Id.* at 634.
46. *Id.*
47. *Id.*

playing with his computer game for a week. He kept the computer disk which held the game, but was forbidden to play it. Even though we did not take the disk, he often refers to this punishment as the time when "we took away his computer game." Clearly, he believes that a rule prohibiting him from using the game, but not physically taking it away from him, takes the game from him. Sometimes, we use the term "take" to mean something like deprive.

These examples show that dictionaries are not complete or fully reliable indicators of usage, especially as to secondary questions such as whether "take" requires a physical taking, which is not the question that the dictionary is attempting to address. There is simply no substitute for examining usage in documents and speech to accurately determine meaning.

Treanor's argument becomes even less convincing when he moves from the modern meaning of "take" to its 1789 meaning. Again, his strategy is to examine dictionaries. One dictionary that he considers is Sheridan's Dictionary from 1789, which lists a large number of meanings for "take."[48] While Treanor claims that "none of the definitions provided in these dictionaries is consistent with the idea that regulation of property is a taking," it is not clear why he thinks this is so.[49] The Sheridan Dictionary includes the following definitions of "takings": to seize what is not given, to receive, to receive with good or ill-will, to use, to employ, to receive into the mind, and to copy.[50] But not all of these meanings suggest a physical component. For example, "to receive" and "to use" do not necessarily indicate a physical component. One might use an idea. Although some of these meanings might be explained away as involving different contexts, it would seem that Treanor owes us some discussion of the matter.

Of course, as I suggested above, it is not sufficient to examine dictionaries to get the meanings of terms. One wants to determine how the words are used. Some of the best originalist scholarship examines word usage rather than simply relying on dictionary definitions.[51] To test Treanor's claim, I reviewed the usage of the term "take" in *The Federalist Papers* and uncovered a variety of examples that appear to use the term without a physical component. For example, in *Federalist No. 19*, James Madison, with the assistance of Alexander Hamilton, wrote that the Franks, after "having conquered the Gauls, established the

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48. *Id.* at 638.
49. *Id.* At 637.
50. *Id.* at 638 (quoting THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1789)).
51. *See, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 849–51 (2003).

kingdom which has taken its name from them."[52] Similarly, in *Federalist No. 24*, Hamilton wrote that his own "statement of the matter is taken from the printed collections of state constitutions."[53] In *Federalist No. 42*, Hamilton wrote, "[t]his is not the only case in which the articles of confederation have [attempted] . . . to reconcile a partial sovereignty in the Union, with compleat sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain."[54]

Finally, and perhaps most importantly, in *Federalist No. 54*, Madison wrote "that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants."[55] Significantly, this usage is the one that the broader interpretation of the Takings Clause employs. Hamilton's language makes clear that the language at the time of the Constitution allowed one to talk of taking away property rights. Thus, if "property" meant "property rights," including rights to use property, then the Takings Clause might have employed the term "take" to mean taking those usage rights. Clearly, because rights are not a physical entity, the term "take" did not always have a physical component.

## IV. THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT TAKINGS CLAUSE

Concluding that the original meaning of the Takings Clause of the Fifth Amendment does not cover regulatory takings has normally meant the end of the analysis for commentators who are exploring originalist takings principles. They then assume or assert that the meaning of the Fifth Amendment Takings Clause also applies when the incorporated Takings Clause is applied under the Fourteenth Amendment.[56]

But this claim is not necessarily warranted. The original meaning of the Fifth Amendment Takings Clause may not be the same as the original meaning of the Takings Clause incorporated under the Fourteenth Amendment. Here, I argue that there is a strong case for the possibility that the incorporated Takings Clause has a different meaning than the

52. THE FEDERALIST NO. 19 (James Madison).
53. THE FEDERALIST NO. 24 (Alexander Hamilton).
54. THE FEDERALIST NO. 42 (James Madison).
55. THE FEDERALIST NO. 54 (James Madison).
56. *See* Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 5, at 862.

original Takings Clause—in particular, that the incorporated Clause protects against some nonphysical takings even though the original Clause does not.

### *A. Incorporation and the Divergence of Meaning*

Before even discussing the possibility that the Fourteenth Amendment Takings Clause has a different meaning, it is necessary to address the general question of incorporation to determine whether an incorporated Takings Clause even exists. Although the Supreme Court has incorporated most of the Bill of Rights for some time, and the Takings Clause for at least a century, whether the original meaning of the Fourteenth Amendment allows for incorporation is a matter of significant controversy.[57] There are serious questions about incorporation under the Due Process Clause of the Fourteenth Amendment,[58] but, as I discuss below, a strong originalist case has been made by Akhil Amar for incorporation under the Privileges or Immunities Clause.

If the Bill of Rights has been incorporated, the next question is: what is the content of the rights that are incorporated under the Fourteenth Amendment? While the Supreme Court generally assumes that the rights have the same meaning under the original Bill as under the Fourteenth Amendment, that, of course, does not resolve the original meaning.

One possibility is that the enactors of the Fourteenth Amendment intended the original meaning of the Bill of Rights to be applied under the Fourteenth Amendment. But that is not the only possibility. Another possibility is that the enactors intended a new and different meaning. The rights that were protected under the Bill might have come to be understood as having a different content. One would, of course, need evidence that the new meaning existed and was adopted—evidence of legal understandings and of reasons why the new content might have seemed compelling—but with such evidence, one might conclude that the incorporated Bill differed from the original one.

### *B. Akhil Amar's Theory of Incorporation*

While there are various ways that one might incorporate, the most persuasive and developed case is presented by Akhil Amar in *The Bill of*

57. The incorporation of the Takings Clause is usually thought to have occurred in Chicago. Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236–41 (1897). *See, e.g.*, Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1082 n.24 (1993).

58. Most significantly, the term "due process" is not one that would naturally suggest protection of the substantive as well as the procedural aspects of the Bill of Rights.

*Rights*, which is one of the best books on constitutional law that I have read.[59] Its learning, originality, elegance, and persuasiveness make it a work of excellence. It thus makes sense to use Amar's theory of incorporation to explore the incorporation of the Takings Clause, even if one is, like me, not certain of all of Amar's claims or even of many basic issues concerning the original meaning of the Fourteenth Amendment [60]

Amar's theory sees the original Bill of Rights as having different content and different purposes than our modern view of the Bill. Amar argues that the original Bill of Rights was more about majority rights and federalism than our modern understanding of it as a charter of individual freedoms against the tyranny of the majority.[61] This focus on the majoritarianism and federalism of the Bill of Rights makes sense when one realizes that the original Bill largely reflected the concerns of the Antifederalists, who criticized the new Constitution for being too nationalist and too elitist—for creating too great a risk that the distant national government would use its authority to oppress the people.[62] The Antifederalists believed that the Republic would be safer if the states and ordinary people had more power. Thus, it is no surprise that the Bill of Rights, which was taken from Antifederalist proposals, attempted to protect federalism and majoritarianism.[63]

Two examples illustrate the argument.[64] While today the Establishment Clause is thought of as opposing the establishment of religion, the original Establishment Clause was more of a federalism provision which forbade Congress from either establishing a national religion or disestablishing an established state religion.[65] Amar also argues that the Second Amendment had at its core the right of the people to bear arms

59. AMAR, *supra* note 9.

60. Despite my praise of the book, I do not mean to suggest that I accept everything in it or even that I have concluded that the original meaning of the Fourteenth Amendment incorporates the Bill of Rights. The original meaning of the Fourteenth Amendment is one of the most difficult issues in constitutional law, and I have not reached firm conclusions about many aspects of it. But incorporation is accepted by many scholars and Amar's theory is powerful enough to justify exploring what the meaning of the incorporated Takings Clause would be under his theory.

61. AMAR, *supra* note 9, at xii.

62. *Id.* at 9–11, 126–27.

63. *Id.* at 78.

64. I select these two examples because they are relatively easy to explain and therefore somewhat obvious. The power of Amar's approach, however, is that it persuasively accounts for so many plausible changes in the meaning of the Bill, not just the more obvious ones.

65. AMAR, *supra* note 9, at 32–42.

as part of the militia.[66] Again, this right concentrated on protecting the militias as the safest military organization for a free people, and also as a means of resisting federal usurpations of powers.[67] The power here was focused on the people as a whole rather than as individuals.[68]

While the meaning and character of the original Bill of Rights may have had a majoritarian and federalist orientation, Amar argues that the Bill of Rights incorporated by the Fourteenth Amendment had a very different meaning and character. For Amar, the original meaning of the incorporated Bill of Rights had a more modern focus on protecting individual rights from the majority.[69] This new focus on individual rights, rather than on the rights of states and majorities, made sense for two basic reasons. First, because these rights were to be applied against the states, it was inappropriate to view them in federalism terms or as rights of the states. Second, the individualist orientation of these rights was appropriate because the Fourteenth Amendment was designed to protect freedmen and other minorities, such as southern unionists, who had been and continued to be at risk from hostile southern majorities.[70]

Amar shows that this individualistic interpretation of the Bill of Rights had developed prior to the Civil War. He roots the interpretation in a tradition of thinking about the Bill of Rights, which he calls that of the Barron Contrarians.[71] These contrarians believed that the original Bill of Rights applied against the states, contrary to Chief Justice Marshall's decision in *Barron v. Mayor & City Council of Baltimore*.[72] Many abolitionists adopted this view of the original Bill of Rights, which they used to criticize the oppressive aspects of southern slave society.[73] Amar suggests that many of the leaders of the Thirty-Ninth Congress

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66. *Id.* at 46–49.

67. *Id.* at 46–59.

68. While Amar believes the core of the right involves the right of the people in their militias, he should not be interpreted as claiming that it is somehow exclusively a right of the states to have national guards. Amar notes that the Constitution distinguishes between rights of the people, like that in the Second Amendment, and rights of the states. Moreover, the militia in 1789 was generally understood as referring to all citizens capable of bearing arms. *Id.* at 51. He even acknowledges that the language of the Amendment is broad enough to protect individual rights, but he argues that the focus was on the militia, not on hunting. As Amar states, "to see the [original Second] [A]mendment as primarily concerned with an individual right to hunt or to protect one's home is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge or to have sex." *Id.* at 49.

69. *Id.* at xiv–xv.

70. *Id.* at xiv, 242.

71. *Id.* at 145–56.

72. 32 U.S. (7 Pet.) 243, 247, 250–51 (1833).

73. AMAR, *supra* note 9, at 160–62.

who had written the Fourteenth Amendment, including John Bingham, were followers of this tradition.[74]

Amar argues that these groups placed their individualistic ideas about the Bill of Rights into the Fourteenth Amendment. In particular, they used the Privileges or Immunities Clause to apply the Bill of Rights against the states, but did so in a way that reflected their understanding of the Bill as an instrument that protected individuals from oppressive majorities.[75]

Amar allows us to see how this objective was realized in the constitutional text. He explains that the Privileges or Immunities Clause protects against state abridgment of at least the rights that citizens enjoy as citizens of the United States—rights which include those announced in the Bill of Rights. But he argues that the term "privileges or immunities of citizens" had a subtle but key transformative effect: the term referred to the rights of individual citizens rather than to the rights of states or majorities.[76] Thus, the language of the Privileges or Immunities Clause in essence says that individual rights of United States citizens shall not be abridged by the states. This interpretation takes the individual rights component and understanding of the original Bill of Rights and applies it to the states. One strength of Amar's theory is that it explains in a plausible way how the text of the Privileges or Immunities Clause could have accomplished this result.

Our two aforementioned examples from the original Bill of Rights illustrate how incorporation under the Privileges or Immunities Clause can change the meaning of the Bill. While the Establishment Clause was principally a federalism provision under the original Bill, there is some evidence that it came to have a new meaning over time. For example, some states (and federal territories) adopted establishment clauses in their constitutions and some state judicial decisions suggested that the Federal Establishment Clause applied against their states.[77] Since these clauses and decisions cannot be understood as motivated by federalism,

74. *Id.* at 147.
75. *Id.* at 163–71.
76. *Id.* at 163–71, 221–23.
77. *Id.* at 249–51.

they might be seen as protecting an individual right of people not to be subject to an established church.[78]

Similarly, the Second Amendment, according to Amar, went from being a right that was focused on the ideal of the militia for a free people to the right of individuals to use guns for self defense and hunting. Discussions of the right to bear arms both before the Civil War and before the enactment of the Fourteenth Amendment suggest that people understood the right—through their language and their assertions—differently than the original Founders did.[79] The right was not principally a means of resisting the national government and its army—after all, the Union Army was seen as a force for good by the enactors of the Fourteenth Amendment—but as a right of individuals, especially freedmen and other minorities, who needed it to defend and provide for themselves.[80] As Amar explains, "between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman."[81]

Thus, the incorporated Bill of Rights under the Fourteenth Amendment may have had a different meaning than the original Bill of Rights. If the rights in the original Bill had developed a new meaning in the years leading up to Reconstruction, and if the enactors of the Amendment had used those new meanings, the incorporated Bill would have a different meaning than the original Bill.[82]

### *C. Applying the Theory to the Takings Clause*

Our concern, though, is with the Takings Clause. Interestingly, Amar reads the original Takings Clause as something of an exception to the remainder of the Bill of Rights. While much of the Bill of Rights

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78. Amar is not certain that the Establishment Clause actually applies against the states. Instead, he is also open to the view that the Free Exercise Clause protects against many aspects of state established religions. *Id.* at 245–57.

79. *Id.* at 259–66.

80. *Id.* at 257–67.

81. *Id.* at 266.

82. There is a significant degree of resistance among some scholars to admitting that the incorporated Bill might have a different meaning than the original Bill. Yet, it seems clear that two similarly worded provisions enacted at different times and in different contexts might have different meanings. To take an especially clear case, imagine that the Due Process Clause had been originally enacted not under the Fifth Amendment, but under the Fourteenth Amendment, and that the original meaning of the Fourteenth Amendment was entirely procedural. Now assume that a constitutional amendment was enacted in 1925, at the height of the substantive due process era that applied due process to the federal government, and that part of the reasons given for passing the amendment was that it was necessary to protect certain substantive rights. It seems clear that the 1925 Due Process Clause might have a substantive meaning, even though the original meaning under the Fourteenth Amendment was entirely procedural.

reflected majoritarian values, Amar believes that the Takings Clause did not.[83] Instead, he views it as having been included by James Madison to reflect his individualistic views about property.[84] Support for this view derives in part from the fact that the Takings Clause is the only right in the entire Bill that was not proposed by the states during ratification.[85] Although the Takings Clause does not reflect majoritarianism, Amar argues that the Clause reflects federalism values because it only applies against the federal government.[86]

While Amar may be correct about the original Takings Clause, that certainly does not end the matter. If the original Clause conferred an individual right, then no change in the meaning would have been necessary for the Clause to be understood as a privilege or immunity. One need not transform it from a majority or state right to an individual right. Still, that does not mean that the Clause had the same meaning in 1789 as it did in 1866. There is a strong case that the content of takings principles evolved, and the Fourteenth Amendment enactors adopted the Clause's later meaning because it better served their principles and purposes.

### *1. The Original Takings Clause*

The original Takings Clause may have been an individual rights provision, but it was still part of a Bill that reflected the traditional republican concerns expressed by the Antifederalists.[87] To put the point differently, Madison may have written the first draft of the Clause, but it was amended in Congress and then ratified by the states, that were, by hypothesis, animated by Antifederalist concerns. This Antifederalist republicanism may have influenced the nature of the right.

The individual right to be compensated for having one's property taken may have been defined narrowly or broadly—it might have extended only to physical takings or also to regulatory and consequential

83. AMAR, *supra* note 9, at 77–80.

84. Amar views the inclusion of the Takings Clause as clever bundling, but I find his argument unpersuasive. *Id.* at 78. Even if Madison bundled it with other clauses, either the House or Congress could still have deleted it. A more plausible explanation is that the Takings Clause was accepted, even though it did not have a majoritarian orientation, because it was relatively narrow. It is not necessary for the entire Bill to be majoritarian for Amar's general points to stand.

85. *Id.*

86. *Id.* at 79.

87. See *supra* notes 60–63 and accompanying text.

takings. Under Amar's theory, it would not be surprising that the original Takings Clause would have conferred the narrower right because Amar contends that the concerns which animated the Bill of Rights were not those of individuals, but instead of majorities and states.[88] Thus, although an individual right could slip into the Bill, it makes sense that such a right was narrow.

Treanor's account of the Clause is also helpful. Treanor argues that republicanism was very influential at the time of the Constitution.[89] While his understanding of the forces at work in 1789 differs somewhat from Amar's, Treanor's basic point is compatible with Amar's so far as it extends to the Takings Clause. For Treanor, the Bill of Rights enactors' inclusion of the Takings Clause reflected a specific concern: the enactors generally respected majoritarian values, but they were concerned that the majoritarian process might not operate well in the limited circumstances raised by physical takings of particular property.[90] Thus, they would have had strong reasons to protect only against physical takings and otherwise rely on majority decisionmaking.

Amar's and Treanor's views support a consistent account of a narrow Takings Clause. Under this account, the Takings Clause did not protect against regulatory and consequential takings because the Founders were largely majoritarian and believed that this right ought to be categorically protected only in limited circumstances.

### 2. *The Fourteenth Amendment*

Although this analysis suggests that the Fifth Amendment protects only against physical takings, the story changes when we examine the Fourteenth Amendment. The argument for expanding the Takings Clause to cover nonphysical takings is supported by two mutually reinforcing arguments. First, the structure and purposes of the incorporated Bill of Rights favor an expanded Takings Clause. Second, the legal landscape concerning takings that preceded the Fourteenth Amendment's adoption also supports an expanded Takings Clause.

#### a. *Structure and Purposes*

Amar's analysis of the incorporated Bill of Rights provides various reasons why the Fourteenth Amendment Takings Clause would extend beyond physical takings. First, Amar's argument that the Fourteenth

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88. See *supra* notes 61–68 and accompanying text.

89. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 5, at 819–25.

90. *Id.* at 836–55.

Amendment was intended to protect individual rights against abuses by the majority—rather than to protect majorities and federalism—provides strong general support for an expanded Takings Clause. We have seen how the desire of Antifederalists and republicans to protect majority decisionmaking in 1789 helps explain why the Clause might have been applied only to physical takings.[91] By contrast, the desire of the Fourteenth Amendment enactors to protect individual rights suggests that they would not have been quick to pass a takings clause that would leave the individual rights of former slaves or other vulnerable minorities at risk. While the original Bill of Rights may have reflected republican ideas, the incorporated Bill reflected liberal principles that were congenial to broad rights protections.[92]

Second, these broader protections would have been needed during Reconstruction. State governments controlled by those sympathetic to the former Confederacy had shown themselves willing, through the passage of the Black Codes and other actions, to use government power to harm the freedmen and others opposed to the Confederacy.[93] Applying the Takings Clause to the states would have been necessary to protect these unpopular groups from having their property seized without compensation. But applying the Takings Clause only to physical appropriations might have been inadequate. That would still have allowed state governments to impose uncompensated consequential or regulatory takings on these disfavored groups, either to punish them or to transfer onto them the costs of needed projects.[94]

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91. See *supra* notes 87–90 and accompanying text.
92. See *supra* notes 74–76 and accompanying text.
93. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 42–43 (1988).
94. It might be objected that an equality principle under the Equal Protection Clause or the Privileges or Immunities Clause would prohibit regulations or other government actions designed to harm African Americans, and therefore a broader takings clause would not have been necessary. This objection, however, is mistaken for two reasons. First, even if African Americans were fully protected by Fourteenth Amendment equality principles, it is very possible that other vulnerable groups, such as unionists, would not be. Second, it might often be difficult to prove that a particular regulation or other government action was motivated by the race of the people who were harmed by it. It is also not clear that a regulation or government action that did not expressly discriminate against blacks would have been found to violate the equality principle. One might wonder whether the original meaning of the equality principle forbade only express discrimination or also intentional discrimination not evident on the face of a statute. But even if intentional discrimination that was not evident on the face of a statute was prohibited, it is often not possible to establish discriminatory intentions.

Moreover, this focus on broad property rights as necessary individual rights would not have seemed anomalous to the enactors of the Fourteenth Amendment. While liberals beginning in the twentieth century have downplayed property rights as an element of freedom, that is not true of the movement that led to the Fourteenth Amendment. The enactors of the Fourteenth Amendment accepted the importance of basic common law rights—including the rights of private property—to the freedom of the individual. It was these rights that had been attacked by the Black Codes, and it was these rights that the Civil Rights Act of 1866 and the Fourteenth Amendment were designed to protect.[95]

In fact, the legislative history of the Fourteenth Amendment raises the possibility that the rights protected by the Takings Clause may even have occupied a preferred position in some republican thinking. In its journey through Congress, the Fourteenth Amendment went through various permutations on its way to passage, many of them suggested by John Bingham.[96] When the Joint Committee was considering an amendment that would have prohibited race discrimination as to civil rights, Bingham sought to add to it, "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[97] Clearly, the protection of private property from takings was an essential right for Bingham, one that he thought required singling out. Bingham's proposed addition was blocked 7-5, but subsequently Bingham successfully proposed a provision that protected all privileges and immunities of United States citizens.[98] Although there are various ways to read this legislative history, one plausible view is that it reflected Congress's belief that while the Takings Clause was important, it was better to incorporate all of the Bill of Rights.

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A decision to build a road in a particular place or to pass a certain type of regulation might be made for a variety of reasons. The enactors of the Fourteenth Amendment understood that southern majorities might use indirection to accomplish their goals because the Amendment was passed, in part, to address attempts made through the Black Codes to preserve the servitude of African Americans. *Id.* The enactors may therefore have written the Amendment broadly to counteract such circumventions.

95. *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863–1869, at 61–62 (1990) (noting that the Civil Rights Act protected basic rights under Republican ideology). The Civil Rights Act protected former slaves against discrimination regarding their rights "to make and enforce contracts . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

96. *See* NELSON, *supra* note 93, at 48–58.

97. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 84 (1986).

98. *Id.*

Finally, the application to the states of the Takings Clause, which had originally applied only against the federal government, might have led the enactors to expand the right. The specific concern that seemed to most motivate the passage of the Takings Clause was opposition to the army's impressment of property.[99] This concern, which resonates with the Antifederalist worries about a centralized army, could have been addressed by prohibiting only physical seizures of property. By contrast, the incorporated Takings Clause would apply to the states, which had a long history of land regulation. Since the states could use this governmental authority not only to seize property, but also to impose consequential and regulatory harms, it would be natural to restrict those types of harms when one was applying the Clause to the states.

#### *b. The Legal Landscape of Takings*

Thus, the structure and purpose of the incorporated Bill of Rights provide reasons to believe that the Fourteenth Amendment would have embraced a Takings Clause that extended beyond physical takings. But unless there was also reason to believe that the concept of takings might cover nonphysical harms, these arguments would probably be inadequate. To put the point differently, if takings principles at the state level were uniformly applied only to physical takings, then it would be hard to believe that anyone would have understood the incorporated Takings Clause as applying to nonphysical takings. By contrast, if some states understood takings principles to cover consequential and regulatory takings, then the enactors of the incorporated Takings Clause might have adopted that understanding, especially because it would have furthered the purposes and principles that motivated their passage of the incorporated Bill of Rights.

While the legal regime in place prior to and immediately after the adoption of the original Bill of Rights shows little evidence that nonphysical takings were covered by the Clause, the legal regime in place when the Fourteenth Amendment was enacted differs markedly. Notably, the desire and perceived need to protect against takings had grown tremendously between the enactment of the original Bill and that of the Fourteenth Amendment. While there were only a couple of takings clauses in 1789, the landscape looked quite different in 1866, as

99. *See supra* notes 27–29 and accompanying text.

the principle of requiring compensation for takings had become virtually universal at the state level.[100] Many state constitutions contained takings clauses, including virtually all of the states that joined the union after the founding.[101] In the remaining states, the requirement of paying just compensation was found in judicial decisions that relied on natural law or common law.[102] As Amar writes, "[d]octrinally, virtually all mid-nineteenth-century jurists deemed just compensation a fundamental principle of justice."[103]

Even more importantly, state decisions had recognized that takings could occur not only from physical seizures, but from consequential and regulatory actions as well. While Treanor and others have argued that takings principles only covered physical takings until after the Civil War or until Justice Holmes's decision in *Mahon*, recent scholarship has challenged this view.[104] This new scholarship argues that the law prior to the adoption of the Fourteenth Amendment grew to incorporate an understanding of takings that extended beyond physical seizures of property.[105] This understanding included the protection of property owners' usage rights against a variety of government actions that infringed on those rights.[106] The new scholarship shows that many judges were prepared to strike down government actions and regulations that affected private property rights, even though the government did not physically seize property.

This scholarship explores both consequential and regulatory takings. Under both types of takings, the harms to the property owner do not involve a seizure of his property or even an interference with his exclusive right to possess it. Instead, consequential and regulatory takings involve an interference with various rights of property owners to use their property or not be forced to take costly actions. These cases fall into a variety of categories that might be listed as takings for interferences with the usage rights of riparian owners,[107] interferences with nonriparian

100. AMAR, *supra* note 9, at 268–69; Kobach, *supra* note 14, at 1230, 1233.
101. Kobach, *supra* note 14, at 1230.
102. *Id.* at 1230–31.
103. AMAR, *supra* note 9, at 268–69.
104. *See* Kobach, *supra* note 14, at 1215 nn.25–27 (citing scholars); Treanor, *supra* note 5, at 798–804.
105. Claeys, *supra* note 39, at 1549; Kobach, *supra* note 14, at 1212.
106. *See infra* notes 107–110 and accompanying text.
107. *See* Gardner v. Trs. of Vill. of Newburgh, 2 Johns. Ch. 162, 162 (N.Y. Ch. 1816); People v. Platt, 17 Johns. 195, 195 (N.Y. Sup. Ct. 1819); Crenshaw & Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 264–65, 270, 276 (1828); Cooper v. Williams, 5 Ohio 391, 393 (1832); Sinnickson v. Johnson, 17 N.J.L. 129, 129 (1839); Comm'rs v. Kempshall, 26 Wend. 404, 404 (N.Y. 1841); Walker v. Bd. of Pub. Works, 16 Ohio 540, 540 (1847); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 53, 102–03 (1851).

usage rights,[108] denials of access to land,[109] and harms from physical takings that do not involve a loss of exclusive possession, but instead the incurring of expenditures.[110]

This collection of consequential and regulatory takings cases supports a view of takings that extends beyond physical takings.[111] This view has implications for the meaning of both "property" and "taking."[112] First, these cases show an understanding of "property" that is not limited to exclusive possessory interests. Rather, it includes the protection of a variety of usage interests, such as access to land, the right to use water adjacent to one's property, and usage of one's land. Second, these cases also show an understanding of "taking" that is not limited to a physical taking. Rather, these interferences often involve no touching of the proprietor's property, such as deprivation of access to land or preventing the usage of riparian rights. These cases show that many states did not understand takings to be solely physical takings. Instead, the takings jurisprudence was understood as protecting the right to use property, even if there was no physical interference or seizure.[113]

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108. *See* Patterson v. Boston, 37 Mass. (20 Pick.) 159, 160 (1838); Parker v. Boston & Maine R.R., 57 Mass. (3 Cush.) 107, 108 (1849); Woodruff v. Neal, 28 Conn. 165, 165 (1859).

109. *See* Fletcher v. Auburn & Syracuse R.R. Co., 25 Wend. 462, 462 (N.Y. Sup. Ct. 1841); Transylvania Univ. v. Lexington, 42 Ky. (3 B. Mon.) 25, 27 (1842); *Parker*, 57 Mass. (3 Cush.) at 108.

110. *See* Commonwealth v. Coombs, 2 Mass. (2 Tyng) 489, 489 (1807); Commonwealth v. Justices of Middlesex, 9 Mass. (9 Tyng) 388, 388 (1812); Perley v. Chandler, 6 Mass. (6 Tyng) 454, 454–55 (1810); *In re* Rensselaer & Saratoga R.R. Co., 4 Paige Ch. 553, 553 (N.Y. Ch. 1834); *In re* Mount Washington Road Co., 35 N.H. 134, 134 (1857); Brown v. Worcester, 79 Mass. (13 Gray) 31, 32 (1859); Old Colony & Fall River R.R. Co. v. County of Plymouth, 80 Mass. (14 Gray) 155, 156 (1859).

111. Another line of cases that supported an understanding of takings principles broader than simply the physical taking of physical property was the group of decisions involving government conferred franchises. *See, e.g.*, West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 533–34 (1848); *id.* at 543 (Woodbury, J., concurring); Treanor, *supra* note 5, at 792 n.56 ("[J]udges repeatedly concluded that the revocation of a franchise gave rise to a compensable taking on the theory that the revocation was a seizure of intangible property.").

112. Although most of the cases discussed above apply state law, some of them do rely, at least in part, on federal constitutional law in the form of the Contract Clause. *See, e.g.*, *Platt*, 17 Johns. at 216. This suggests that the trends in law which led to the expansion of takings principles at the state level also worked their way into federal constitutional law.

113. In addition to the state court cases, the United States Supreme Court also followed a broader understanding of takings principles in two cases decided at the time of the enactment of the Fourteenth Amendment. *See* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176–79 (1871); Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 504–

It is true that there were a greater number of consequential takings cases than regulatory takings cases.[114] While this might mean that consequential takings were more accepted, that is not necessarily the case. First, it is quite possible that there were simply more actions taken by the government—such as building roads—than there were regulations that raised takings issues. Government in those days appears to have regulated less than it does today. Moreover, regulatory actions that conformed to certain requirements, such as restraining nuisances or taking actions that enhanced the value of all property rights holders, would not have raised taking issues.

In addition, there are strong reasons for concluding that courts that struck down consequential takings would also have struck down regulatory takings. Because these types of actions are quite similar, it is hard to see why one would draw a distinction between them.[115] In both cases, the government is presumptively taking action to promote the public. It is, of course, true that in the case of regulatory actions that restrained nuisances or other harmful actions, even the strictest regulatory takings doctrine would not find a taking. But, where the regulation did not satisfy these requirements, it is hard to see why such regulatory action would be less likely to be found a taking than would nonregulatory government action that had the same effect. Although the regulation might be deemed to promote the public interest, that would also be the case with the government activity.

Overall, it is not clear how widespread this expanded view of takings was. One way to answer this question is to determine whether the expanded view, concerning both consequential and regulatory matters, was the more common rule. But to make that determination, one would have to look not only at the states where the expanded view prevailed, but also at the remaining states to decide whether they had actually adopted the contrary rule. One would also want to look at the reputations of the judges and persuasiveness of their opinions, because all judges and decisions are not equal. For example, the New York courts, which were quite vigorous protectors of property rights, might be deemed to be more influential.

07 (1870). Although the Supreme Court later narrowed its articulation of takings principles, critics of regulatory takings should not take great comfort in this, because this narrowing coincided with a narrowing of civil rights that has been thought to reflect resistance to the principles established in the Reconstruction Amendments. *See* Kobach, *supra* note 14, at 1279. Thus, rather than seeing these two cases as a temporary blip that did not reflect the original meaning, one might view their narrowing as part of an effort to resist the new charter of liberty established by the Reconstruction Amendments.

114. *Id.* at 1264–65.

115. *Id.* at 1225–26 n.86.

Of course, even if the broader takings rule was not the leading rule—and this would hardly be surprising—that would by no means determine the meaning of the incorporated Takings Clause. The question hinges on the meaning of the Privileges or Immunities Clause at the time of its enactment, and it is quite possible that people would have understood the Clause to adopt the minority state rule, because that rule better served the purposes and principles of both the Clause and the incorporated Bill.

### *D. Possible Objections*

While this case law suggests that the incorporated Takings Clause might have extended to consequential and regulatory takings, one might question whether this conclusion really holds. First, one might wonder whether it is proper to rely so much on state law for the content of the incorporated Takings Clause. After all, why look to state takings clauses and decisions rather than determine the meaning at the federal level? This is an important objection, but nonetheless one for which there are responses. Amar's theory regularly relies on state law because he argues that the state laws influenced the views that led to the Fourteenth Amendment. It is not hard to understand why Amar employs this reasoning. First, state law often showed how the type of rights in the Bill would be applied in a context without federalism considerations. Moreover, much of the state law developed many years after the original Bill when liberal ideas were more influential and therefore represented a model for how a liberal Bill of Rights should apply. In addition, in the nineteenth century, state and federal law were often deemed to be interactive, with judges using state provisions to determine federal meanings, and vice versa, as well as sometimes applying a kind of constitutional common law that reflected both federal and state law.[116] Thus, state law would have a significant impact on takings principles, especially given the absence of cases interpreting the Federal Takings Clause.[117]

Another possible question about these cases involves the sources of law under which they were decided. While some of the cases were decided under state takings clauses, others were decided under different

116. *See, e.g.*, *Pumpelly*, 80 U.S. (13 Wall.) at 176–77 (interpreting Wisconsin takings clause as having the same meaning as the Federal Takings Clause).

117. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 5, at 794 (citing Harry N. Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 329, 376 (Donald Fleming & Bernard Bailyn eds., 1971)).

doctrines, including natural law and the Contract Clause.[118] Given this diversity of sources, one might wonder whether these cases would have been thought of as takings cases that inform the meaning of a takings clause. Although it is possible that these cases might have been deemed irrelevant to takings principles, it seems unlikely. When a court decision stated that government action under certain conditions operated as a taking that required just compensation, that decision likely would have been thought of as informing takings principles even if it was decided under another clause or source of law.[119] Moreover, the state cases often discussed legal principles in a way that seems to transcend particular sources of law. Thus, it seems likely that opinions which discussed takings would have been deemed relevant to takings principles even if decided under provisions other than takings clauses.

### *E. Implications and Conclusion*

If the argument I have been developing is correct, then its implications may be quite significant. While the original meaning of the Fifth Amendment Takings Clause might cover only physical takings, the original meaning of the incorporated Takings Clause would extend beyond physical takings to consequential and regulatory takings. Thus, one could accept the bulk of the current critics' historical and textual argument of regulatory takings and still conclude that they are mistaken as to state takings cases. And, most of the recent takings cases, including the famous ones, are state takings cases.[120]

Although this argument's implications may be significant, we should not ignore the limitations of the argument or the work that remains to be done. First, all I have done in this essay is to identify the path on which someone could proceed and to suggest that it might be a promising path. I have not taken the path myself. One would have to do quite a bit more work to be entirely confident that the best reading of the incorporated Takings Clause under Amar's theory extends to consequential and regulatory takings.

Second, the biggest issue that remains, however, is not *whether* the incorporated Takings Clause extends to nonphysical takings, but the *content* of the limits that the Clause imposes. Although I have happily placed this issue to the side, leaving it to others to explore, that is where the real work remains. Other scholars have made real headway in this

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118. *See supra* notes 100–103 and accompanying text; *see also supra* note 112.

119. *See* People v. Platt, 17 Johns. 195, 216 (N.Y. Sup. Ct. 1819) (deciding case under the Contract Clause on the basis of whether the government action was an exercise of the police power or an impermissible taking).

120. *See supra* notes 9–10 and accompanying text.

area with a focus on the original Takings Clause.[121] I believe that a focus on the Fourteenth Amendment would allow even greater progress.

After doing this hard work, one might end up concluding that the limits which the incorporated Takings Clause places on nonphysical takings are either relatively narrow or relatively broad. Under the narrow view, one might limit the content of the doctrine to the facts and rulings of the existing cases that I have cited. These cases do not appear to extend all that far, especially as to regulatory takings. In that event, many of the famous state regulatory takings cases might not result in takings under the narrow view.[122] Yet, the incorporated Takings Clause would still cover some regulatory takings and one could not simply dismiss all regulatory takings as nonoriginalist.

Alternatively, one might end up concluding that the limits were broader than the facts and rulings of these cases suggest. First, one might view these cases not as exhaustive, but as merely suggestive of the new takings principles that were emerging. These cases might suggest that takings principles would have been extended to additional regulations and that the enactors of the Fourteenth Amendment—with their commitments to the protection of individual rights including property rights—would have understood the principles in this way. This reading would gain support if there were not many cases that approved these types of regulations and if those that did were older and therefore more likely to be deemed bad law.

Second, one might emphasize differences in the takings doctrine of different states. If some states adopted broader nonphysical takings principles than others, one might end up concluding that the enactors of the Fourteenth Amendment adopted the broader doctrine because it best supported their principles and purposes. Again, one would want evidence to support the view that the enactors adopted these broader principles.

However one ends up resolving the precise scope of the incorporated Takings Clause, if one concludes that the Clause protects property rights more broadly than the original Takings Clause, this will be a happy result for the friend of originalism and economic liberties. The stark charge of the critics of regulatory takings—that they are a modern invention inconsistent with the original meaning of the Clause—can then

121. Claeys, *supra* note 39.
122. *See, e.g.*, Kobach, *supra* note 14, at 1291 (discussing differences between the cases and the modern regulatory takings doctrine and noting that *Lucas* would not have been decided the same way under the earlier cases).

be rejected. And if one concludes that the Fourteenth Amendment adopted the broader nonphysical takings principles, the result will be happier still. Even under these optimistic circumstances, the Constitution still will not provide general protection for economic liberties, but the areas of economic liberties which it does protect will be considerably larger.