

SECOND-BEST ORIGINALISM AND REGULATORY TAKINGS

INTRODUCTION

“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹ With this characteristically gnomic claim, Justice Holmes established the Supreme Court’s modern doctrine of regulatory takings. This doctrine has had a far reaching impact on the country’s property owners, city planning boards, and state land use commissions. Important questions hang upon the extent to which government may regulate the use and possession of property. May a state forbid the construction of any habitable buildings on your beachfront lot?² May a county temporarily prohibit the rebuilding of a summer camp that lies in a floodplain?³ May the government demand a public easement to access the ocean in exchange for a permit to demolish your bungalow and replace it with a three bedroom home?⁴ The Court’s answers to these questions directly impact how millions of property owners may use and develop their homes and businesses, and the Court frequently addresses these issues. Including the October 2016 Term, the Supreme Court has heard a regulatory takings case in five of its last seven terms.⁵ Recently, however, the fidelity of the Court’s regulatory takings doctrine to the original meaning of the Constitution has been called into question.

1. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In *Mahon*, the Court found that a state law which prohibited the mining of coal in such a way as to cause subsidence of a structure used for human habitation constituted a taking of a coal company’s rights to mine a coal deposit located beneath the surface of a house. *See id.* at 412–13. The company had specifically bargained for those rights, and the homeowner’s deed expressly reserved the right to remove the coal to the company. *See id.* at 412.

2. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

3. *See* First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 308 (1987).

4. *See* Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 828 (1987).

5. *See* Murr v. Wisconsin, 137 S. Ct. 1933 (2017); *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Ark. Game & Fish Com’n v. United States*, 133 S. Ct. 511 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010).

In last term's *Murr v. Wisconsin*,⁶ a dissenting Justice Thomas called for the Court to reexamine the entire doctrine of regulatory takings to ensure accordance with the original public meaning of the constitutional text.⁷ Justice Thomas noted that the Supreme Court "has never purported to ground [its regulatory takings] precedents in the Constitution as it was originally understood."⁸ He went further to state that "it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."⁹

This Note is an answer to Justice Thomas's call. It concludes that the original public meaning of the Privileges or Immunities Clause did protect against regulatory takings. To reach this conclusion, I apply a novel form of originalism for answering constitutional questions where the text runs out. I analyze the neighboring doctrines of nuisance and eminent domain law as they were at the enactment of the Fourteenth Amendment. The structural interactions between legislatures and courts present in nuisance and eminent domain should apply to the regulatory takings question as well. Whether a nuisance exists, or a taking is for public use, is subject to judicial review under a deferential standard. While the legislature has latitude, the court will strictly enforce the limits on that latitude. In short, regulatory takings are protected against by the original public meaning of the Fourteenth Amendment because what legislatures may not do directly, they may not do indirectly.

The second-best originalism I will apply in this Note creates an objective criterion separate from a judge's policy preferences and respects democratic decisionmaking. It will provide long term benefits by providing guardrails from which constitutional doctrine will not depart, although its normative grounding is not consequentialist. This Note follows Professor Randy Barnett and Evan Bernick in their goal of creating an originalist

6. 137 S. Ct. 1933 (2017).

7. *See id.* at 1957 (Thomas, J., dissenting).

8. *Id.*

9. *Id.* (citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008)).

mode where “original meaning interpretation alone is not enough to resolve a controversy.”¹⁰ It goes further towards constraining the “spirit” prong. This Note takes part in the contemporary project of articulating a sophisticated originalism for hard cases, and applies that theory to the topic of regulatory takings.

* * * * *

Justice Thomas’s call to reexamine the original meaning of regulatory takings is grounded in extensive debate within the legal academy.¹¹ Scholars have argued that regulation did¹² and did not¹³ constitute a taking at the ratification of the Fifth Amendment, that state courts increasingly recognized regulatory takings between the enactment of the Fifth and Fourteenth Amendments,¹⁴ and that the Fourteenth Amendment may protect against regulatory takings.¹⁵ The dispute stems partially from silence on the question of regulatory takings in the drafting and ratification debates concerning the Fifth Amendment. Whether colonial-era restrictions are analogous to contemporary planning boards is also contested. Finally, scholars disagree about the extent to which the colonial experience is relevant to the Fifth Amendment as applied today, given the

10. Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: the Judicial Duty of Good-Faith Constitutional Construction* (2017) at 1, <https://ssrn.com/abstract=2913223> [<https://perma.cc/F34J-EWT6>].

11. See, e.g., Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996) (focusing on pre-Mahon state court regulatory takings jurisprudence); Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015) (defending a standards based approach to regulatory takings based in the shifting understandings of “established property rights” through different moments in time); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing that the original understanding of the Takings Clause did not protect against regulations limiting the use of property); see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (using Founding-era political theory and contemporary law and economics analysis to argue that a wide range of government regulations should be within the ambit of the Takings Clause).

12. See EPSTEIN, *supra* note 11, at ix.

13. See Treanor, *supra* note 11.

14. See Kobach, *supra* note 11.

15. See Rappaport, *supra* note 9.

absence of widespread judicial review and the small role the federal government played in daily life.

The most prominent voice for applying the Fourteenth Amendment approach, and the scholar cited by Justice Thomas, is Professor Michael B. Rappaport. Professor Rappaport has suggested that the relevant original public meaning for evaluating regulatory takings is the meaning in 1868, since local land use restrictions implicate the *incorporated* Takings Clause.¹⁶ The public meaning of “takings” changed from the time the Fifth Amendment was ratified to the Fourteenth Amendment’s drafting. Still, Professor Rappaport concedes that it is unclear how widespread that change was.¹⁷ It is also possible that the original public meaning of the incorporated Takings Clause contained no meaning regarding regulatory takings at all. If that is true, a judge today facing a regulatory takings question could not say he reinforced the decision of the people who ratified the amendment—there was simply no such decision for that question. Given this lack of objective criteria, such a judge risks importing policy preferences into his decision.

The possibility that the original public meaning of the incorporated Takings Clause is agnostic towards regulatory takings may require the interpreter to apply what I will call “one-step originalism” and “second-best originalism.” One-step originalism determines the meaning of a provision in its originating context, which includes the legal background against which the provision was enacted, and then applies that meaning to the issue before the court.¹⁸ When the meaning of the text is underdetermined, but a judge is still committed to enforcing the original meaning of the text, she needs to perform a “second-best” form of originalism.

Originalist legal theorists have given great attention in recent years to how an originalist judge should answer a question where the original public meaning of the text is underdetermined. Professor Barnett describes the determination of original public meaning “interpretation” and the noninterpretative

16. *See id.* at 757.

17. *See id.* at 756.

18. The “thickest” form of one-step originalism can be called “original expected application.” *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 429 n.6 (2007).

activity used when the text runs out “construction.”¹⁹ Not all originalists have accepted the interpretation-construction distinction,²⁰ and this Note does not wade into that debate.²¹ This Note is concerned with how an originalist should act when the text runs out, and one must apply a “second-best” originalism. Originalists have proposed different methods for answering constitutional questions in the “second-best” zone. Early theorists of originalism proposed that the demonstrable public intentions of the constitutional framers should bind judges.²² Professors John O. McGinnis and Michael B. Rappaport advocate “original methods originalism,” by which judges apply “the interpretive methods that the constitutional enactors would have deemed applicable to it.”²³ This Note focuses on Professor Barnett and Bernick’s recent work, where they present an originalist method for underdetermined questions they call “good-faith constitutional construction.”²⁴ Good-faith constitutional construction, Professor Barnett and Bernick claim, requires judges to adhere to the “letter and the spirit” of the constitutional provision.

This Note proposes an additional constraint for Professor Barnett and Bernick’s “spirit” prong, which will greatly decrease judicial discretion and the potential for judicial over-

19. See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 419 (2013) (“When original meaning runs out, constitutional ‘interpretation,’ strictly speaking, is over, and some new *non*interpretive activity must supplement the information revealed by interpretation.”).

20. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13 (2012).

21. I believe the method I present in this Note is pure interpretation. Professor Barnett may consider it construction.

22. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 17 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 695 (1976).

23. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 751 (2009).

24. See Barnett & Bernick, *supra* note 10. I do not find the interpretation-construction distinction convincing or necessary. Compare Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y* 65, 66 (2011) (defining interpretation as “the activity of identifying the semantic meaning of a particular use of language in context” and construction as “the activity of applying that meaning to particular factual circumstances”), with Gary Lawson, *Dead Document Walking*, 92 *B.U. L. REV.* 1225, 1231 (2012) (arguing that the Constitution is a “no-construction zone”). For the purposes of this Note, I will use the terms interchangeably, much to Professor Barnett and Bernick’s chagrin.

reach. When determining a provision's spirit, judges should first look to the original legal and constitutional background, found in neighboring doctrines, to see if a proxy for the spirit emerges. If that proxy sufficiently guides the court to answer the question before the court, the spirit inquiry ends there. In the context of takings, doctrines like the police power, nuisance, and economic regulation are horizontal to each other because they work as an interrelated package. Where nuisance ends, the police power ends, and the eminent domain power begins. This addendum will further constrain the discretion of judges, an essential component of originalist interpretive theories.²⁵

This Note has three parts. In Part I, I contrast one-step originalism with "second-best" originalism and explain which category of constitutional question is appropriate for second-best originalism. That category consists of meanings that were neither contested nor relied upon during the framing of a constitutional provision. In Part II, I present the doctrine and history of regulatory takings. I survey academic research to show that, as a matter of one-step originalism, while the original public meaning of the Takings Clause did not affirmatively protect against regulatory takings, the original public meaning of the clause as incorporated through the Fourteenth Amendment is unclear. Finally, in Part III, I apply second-best originalism to the doctrine of regulatory takings, assuming that one-step originalism will never conclusively determine the meaning of the incorporated Takings Clause. I look to treatises and cases contemporaneous to the ratification of the Fourteenth Amendment to argue that regulatory takings should be understood through the structural understanding of nuisance, the police power, and public use eminent domain law. These doctrines serve as proxies for the "spirit" of the Takings Clause. In doing so, I provide an originalist account of why the Fourteenth Amendment protects against regulatory takings. The account represents an applied example of second-best originalism for answering constitutional questions when the text runs out.

25. See Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (March 24, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2940215> [<https://perma.cc/WR7Y-2BMC>].

I. ONE-STEP ORIGINALISM AND SECOND-BEST ORIGINALISM

Different categories of constitutional questions require different originalist interpretive approaches. Consider three categories of constitutional questions.²⁶ First, some were contested and decided. For instance, if one asks whether the enumerated rights in the Bill of Rights are exhaustive, the original public meaning answers the question.²⁷ Second, the answers to some questions were uncontested but relied upon. These questions require more work on the part of an originalist, but the original public meaning can still answer the question. Relied-upon questions are answered by determining the “applicable background convention[s] against which” a provision was enacted.²⁸ As Judge Easterbrook notes, a statute providing “whoever shall willfully take the life of another shall be punished by death” would plainly include “the police officer who shot and killed a terrorist just about to hurl a bomb into a crowd.”²⁹ Yet the law treats rightly such officers “as heroes, not as murderers.”³⁰ As a constitutional example, the Framers did not contest which of the “bundle of rights” were included in the word “property” in the Fifth Amendment. A congressional statute prohibiting the alienation of an estate would nonetheless fall within the original public meaning of “property” found in the Fifth Amendment.³¹ While questions depending on an assumed

26. A fourth category also exists, but is not relevant to the discussion at hand. This category consists of questions that were contested and explicitly left undecided. The long-term existence of slavery was the most obvious example of this question. See U.S. CONST. art. I, § 9, cl. 1 (prohibiting Congress from abolishing the slave trade before 1808). The original public meaning of the text is explicitly agnostic as to the constitutionality of an 1840 statute outlawing slavery, and therefore cannot answer the question. Whether the statute would run afoul of another provision is a separate inquiry. Very few contemporary constitutional questions fall into this category.

27. See U.S. CONST. amend. IX.

28. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2468 (2002).

29. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).

30. *Id.*

31. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (“The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.” (emphasis added)); cf. *Hodel v. Irving*, 481 U.S. 704 (1987) (unanimously holding that a provision of the Indian Land Consolidation Act of 1983, which provided that small, heavily divided property interests

legal background may be more difficult to answer, the original public meaning can suffice.

For the third category of question—questions that were not contested and not relied upon—no amount of historical research will provide a conclusive answer.³² For instance, the Framers and ratifiers did not vote on whether wiretapping³³ or thermal imaging³⁴ constituted a “search” as meant by the Fourth Amendment. They could not even contemplate such a question. Similarly, changes in Congress’s institutional operation mean that contemporary recess appointments were not contemplated at the Framing.³⁵

One-step originalism handles the first category easily and the second category with more legwork, but when it attempts to answer questions in this third category, it fails to satisfy its own normative justifications. Those commitments are principles of democratic legitimacy and the separation of powers. If the ratifiers did not contemplate the question, the judge is not enforcing their democratic decision. Without a conceptually separate criterion that can be critiqued and refuted, the judge risks importing his policy preferences and stepping outside the role of a judge.

The theory of originalism is justified by normative commitments to democratic legitimacy and the separation of powers. The separation of powers principle is a “thou shalt not” command rooted in the understanding that the democratically elected, politically accountable branches make policy decisions, and the undemocratic judiciary should not.³⁶ The democratic-legitimacy principle is essentially the positive mirror-image of the separation-of-powers principle, commanding that judges

escheat to the property owner’s tribe upon the death of the property owner, was a regulation that went “too far” and effected a taking).

32. Such as whether Congress may pass laws regulating human spaceflight.

33. See *Katz v. United States*, 389 U.S. 347 (1967); *Olmstead v. United States*, 277 U.S. 438 (1927).

34. See *Kyllo v. United States*, 533 U.S. 27 (2001).

35. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

36. Justice Thomas promotes originalism because “by tethering their analysis to the understanding of those who drafted and ratified the text, modern judges are prevented from substituting their own preferences for the Constitution.” Justice Clarence Thomas, 2001 Francis Boyer Lecture AEI Annual Dinner: Be Not Afraid (Feb. 13, 2001), <http://www.aei.org/publication/be-not-afraid/print/> [https://perma.cc/J4FQ-TJER].

should respect the values and policies the people have enacted through the Constitution until the people vote differently.³⁷ These two principles work to avoid “the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law,” which is “that the judges will mistake their own predilections for the law.”³⁸ Originalism aims “to reduce judicial discretion and maintain judicial impartiality” to avoid this danger.³⁹ It does so by relying on the original public meaning of the Constitution, the determination of which is conceptually divorced from a judge’s policy preferences.⁴⁰

For category-three questions, there is a greater risk that judges will substitute their policy preferences for the meaning of the Constitution. Originalism “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself,”⁴¹ but category-three questions cannot resort to that criterion. This is especially important at the Supreme Court, “where many of the usual limitations on judicial discretion, such as authority from a superior court or *stare decisis*, either do not exist, or do not exist with the same strength as with other courts.”⁴² As Professor Barnett and Bernick put it, “by articulating guidelines for how judges are to engage in good-faith construction and thereby enable observers to identify

37. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989) (“A democratic society does not, by and large, need constitutional guarantees to insure that its laws reflect ‘current values.’ Elections takes care of that quite well.”); see also Thomas, *supra* note 36 (“[Originalism] places the authority for creating the legal rules in the hands of the people and their representatives, rather than in the hands of the judiciary. The Constitution means what the delegates of the Philadelphia Convention and of the state-ratifying conventions understood it to mean; not what we judges think it should mean.”).

38. See Scalia, *supra* note 37, at 863. Other theorists reject this premise. For instance, H.L.A. Hart argued that the available legal materials provide legal answers to most legal questions. However, in the “penumbra” of hard cases where the legal materials run out, the judge should exercise his discretion in light of “aims, purposes and policies.” H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614 (1957).

39. Thomas, *supra* note 36.

40. See Scalia, *supra* note 37, at 864 (“Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).

41. *Id.*

42. Thomas, *supra* note 36; cf. *Brown v. Allen*, 334 U.S. 443, 540 (Jackson, J., concurring in the judgment) (“We are not final because we are infallible, but we are infallible only because we are final.”).

abuses of judicial discretion, we can make it both more likely that good-faith construction will take place and bad-faith construction will be detected and censured.”⁴³ Where the original public meaning of the Constitution does not answer the constitutional question, an additional tool is needed.

Articulating a method for category-three questions, where the meaning is underdetermined, has been a concern of Supreme Court justices and academic commentators alike.⁴⁴ Justice Alito, a self-described originalist,⁴⁵ has highlighted the problems for democratic legitimacy and separation of powers that category-three questions present. In the oral arguments for *Brown v. Entertainment Merchants Association*,⁴⁶ which dealt with the sale of violent video games to minors, Justice Scalia told the advocate for the petitioners, “[Y]ou’re asking us to create a — a whole new prohibition which the American people never — never ratified when they ratified the First Amendment.”⁴⁷ Justice Alito found Justice Scalia’s reliance on the democratic legitimacy principle misplaced. Justice Alito responded to Justice Scalia’s question by quipping, “I think what Justice Scalia wants to know is what James Madison thought about video games. (Laughter.) Did he enjoy them?”⁴⁸ Justice Alito did not join Justice Scalia’s majority opinion in *Brown*, noting that he “disagree[d] . . . with the approach taken in the Court’s opinion.”⁴⁹ He stated that in “considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution.”⁵⁰ He invoked the separation of powers principle, warning that “we

43. Barnett & Bernick, *supra* note 10, at 29.

44. *See supra* notes 22–24.

45. *See, e.g.*, Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014), https://spectator.org/58731_sam-alito-civil-man/ [<https://perma.cc/2J27-Y7KX>] (“I start out with originalism,” [Justice Alito] says. “I do think the Constitution means something and that that meaning does not change But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.”).

46. 564 U.S. 786 (2011).

47. Transcript of Oral Argument at 16, *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786 (2011) (No. 08-1448).

48. *Id.* at 17.

49. *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring in the judgment). Justice Alito was joined by Chief Justice Roberts.

50. *Id.* at 806.

should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology."⁵¹ Justice Alito's opinion underscores a blind spot for one-step originalist interpretation: uncontested and unrelayed-upon questions do not satisfy the principles justifying original public meaning interpretation.

Professor Barnett has been the theorist of originalism perhaps most interested in the need for a "theory for how to construe a constitution when its meaning runs out."⁵² Such a theory could be resorted to in category-three questions, where the original public meaning is underdetermined. His response is a judicial duty of good-faith construction, derived from the idea of the judge as a fiduciary of the citizenry.⁵³ Per Professor Barnett and Bernick, when the original public meaning of the text runs out, "judges should turn to the spirit of the relevant text."⁵⁴ Their account of how judges determine the spirit, however, is not entirely satisfactory.⁵⁵

51. *Id.*

52. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 70 (2011). The interpretation-construction distinction itself does not substantially affect the analysis in this Note. Nonetheless, I prefer the interpretation nomenclature.

53. Barnett & Bernick, *supra* note 10, at 13 ("[T]he Constitution was designed to establish a government 'whose conduct would mimic that of the private-law fiduciary.'" (quoting Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 255-62 (2007))).

54. *Id.* at 34.

55. The "Letter and the Spirit" approach has a greater shortcoming beyond the ambit of this Note. What should a judge do when the letter and the spirit cannot be reconciled? For instance, let us assume the original public meaning of the Fourth Amendment did not exclude the exclusionary remedy. Instead, the legal remedy was a common law action for trespass. After incorporation, however, states could redefine the trespass action to extend only to private actors, nullifying the traditional trespass remedy. After incorporation then, it seems plausible that the *letter* of the Fourth Amendment forbade the exclusionary rule, while the *spirit* of the amendment required it (or a similar remedy). If a judge sides with the letter, he violates the spirit, and the theory becomes useless for just the sort of hard questions the theory purports to answer. If a judge sides with the spirit, he violates the letter. Professor Lawrence Lessig has advocated a theory of constitutional interpretation that advocates this approach, which he describes as translating the "framing value" of a provision into the contemporary world. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1228-33 (1993) (applying his theory of interpretation as translation to the incorporation of the exclusionary rule against the states). Most troubling for an originalist, if Professor Barnett and Bernick allow the spirit to predominate over the letter, it means that the Fourth Amendment

Professor Barnett and Bernick's "spirit" inquiry can return a judge to the very pitfalls originalism seeks to avoid. Just as determining "the purpose" of a statute can be quixotic, so too "the spirit" of a constitution that was produced through debate and compromise. Does every provision have a single spirit, or multiple spirits? How do structural arguments inform more specific texts? Without a more objective methodology, a judge risks mistaking her own opinions and preferences for the true "spirit" of the provision.

To cabin the discretion inherent in the spirit determination, I propose that the judge should limit himself to original understanding of areas of law that have "local priority"⁵⁶ to the question at issue when possible. For certain questions of law, where one doctrine ends, another begins. One example is the question in *Jones v. United States*,⁵⁷ in which the Court determined that attaching a monitored GPS device to a car constituted a search within the meaning of the Fourth Amendment. Justice Scalia explained that the text of the Fourth Amendment "reflects its close connection to property" and that Fourth Amendment jurisprudence is "tied to common-law trespass."⁵⁸ Since placing and monitoring the device constituted a "physical trespass" against an "effect," the action constituted a search.⁵⁹ Where a constitutional provision has an analogue, a judge may look to those analogues to answer the question before the court.

To recap, there is a category of constitutional questions that were not decided nor relied upon during the framing of the Constitution. The original public meaning of the Constitution will always be underdetermined with regard to these questions. The justifications for originalism—democratic legitimacy and separation of powers—are not satisfied in the underdetermined category. Professor Barnett and Bernick's "good-faith construction" is an attempt to provide a constrained mode of judging for just this type of hard case. This theory requires that a judge be faithful to the text and the spirit of the constitution

provided different answers to the same constitutional question in 1861 and 1961. For further discussion of Professor Lessig's approach, see *infra* note 170.

56. *Cf.* RONALD DWORKIN, *LAW'S EMPIRE* 250–54 (1986) (presenting the idea of local priority in negligence suits).

57. 132 S. Ct. 945 (2012).

58. *Id.* at 949.

59. *Id.*

where its text “runs out.” I add the caveat that where horizontal analogous legal understandings can answer the question before the court, these doctrines should be relied upon as a proxy for the “spirit” of a provision. This will constrain judges, satisfying the separation of powers principle. That original meaning “touchback” will also function as a set of constitutional guardrails, limiting how far a doctrine can depart from the original public meaning and providing more democratic legitimacy than alternative interpretive theories.

II. REGULATORY TAKINGS: THE DOCTRINE AND THE HISTORY

The Takings Clause of the Fifth Amendment, which was incorporated against the states through the Fourteenth Amendment,⁶⁰ commands “nor shall private property be taken for public use, without just compensation.”⁶¹ It was not until the 1922 decision in *Pennsylvania Coal, Co. v. Mahon*⁶² that the Supreme Court acknowledged that, in addition to government taking title to physical property, takings occur when government regulations on use go “too far.”⁶³ In *Mahon*, the state legislature barred mining companies from using their support rights to extract coal when such extraction would cause subsidence of surface structures.⁶⁴ The Court’s framework for determining when a regulation has gone “too far” has traditionally been the fact-intensive balancing test established in *Penn Central Transportation Co. v. City of New York*.⁶⁵ Under that framework, the Court balances the economic impact of the regulation, the reasonable investment-backed expectations of the

60. *See Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (applying the Takings Clause of the Fifth Amendment against the State of Illinois through the Due Process Clause of the Fourteenth Amendment). Interestingly, the first time the Supreme Court faced an argument that a state government had violated a provision of the Bill of Rights was a Takings Clause claim against the state of Maryland. *See Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833) (“[T]he provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states.”).

61. U.S. CONST. amend. V.

62. 260 U.S. 393 (1922).

63. *Id.* at 415.

64. *See id.* at 393–94 n.1.

65. 438 U.S. 104 (1978).

property owner, and the character of the government action to determine if the property owner is entitled to compensation.⁶⁶

The Court has also protected property owners against regulatory “unconstitutional conditions.”⁶⁷ For instance, if creating a public easement through homeowners’ property constitutes a taking, conditioning the family’s building permit on their agreeing to create the easement does too.⁶⁸ Under this doctrine, if the government conditions a property owner’s permit, the condition must substantially further the governmental purposes that justify denying the purpose.⁶⁹ If the connection between the condition and the governmental purposes is too attenuated, the government must provide just compensation.⁷⁰ *Dolan v. City of Tigard*⁷¹ added an additional requirement to the *Nollan v. California Coastal Commission*⁷² “nexus test,” requiring that a city’s permit condition bear a “rough proportionality” to the nature and extent of the proposed development’s impact.⁷³

In *Lucas v. South Carolina Coastal Council*,⁷⁴ the Court held that *any* regulation which deprived a property owner of all economic use of his or her land required just compensation.⁷⁵ *Lucas* sparked the recent trend of the Court carving out certain governmental actions that categorically qualify as regulatory

66. *Id.* at 124–25.

67. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987). While this doctrine is distinct from the question of *when* a regulation commits a taking, it is crucial to understand how cities and states may go about regulating property.

68. See *id.* at 831.

69. *Id.* at 834. More specifically, the doctrine is only implicated when the condition, if done directly by the government, would have been deemed a taking.

70. Both *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), and *Nollan* were 5-4 cases with Justice White casting the deciding vote. In both cases, Justices Brennan, Blackmun, Stevens, and Marshall sided with the government, while Chief Justice Rehnquist, and Justices Powell, O’Connor, and Scalia sided with the property owner.

71. 512 U.S. 374 (1994).

72. 483 U.S. 825 (1987).

73. *Dolan*, 512 U.S. at 391.

74. 505 U.S. 1003, 1030 (1992).

75. See *id.* at 1030. Justice Souter filed a separate statement to case, noting that he would “dismiss the writ of certiorari as having been granted improvidently.” *Id.* at 1076 (statement of Souter, J.). He found the assumption that the regulation actually deprived the owner of the land’s entire economic value implausible, and thus found that the Court was precluded from answering the questions presented. *Id.* For further discussion of the unusual factual posture of the case, see *infra* note 163.

takings regardless of the governmental interests.⁷⁶ Justice Scalia, writing for the Court, described two situations in which a government regulation qualifies *per se* as a taking requiring compensation, “no matter how weighty the public purpose behind it.”⁷⁷ The first category exists when a regulation compels a property owner to suffer a physical invasion of his or her property.⁷⁸ *Lucas* established the second category, which exists where a regulation “denies all economically beneficial or productive use of land.”⁷⁹

Justice Scalia’s opinion for the Court relied on the original meaning of the Takings Clause.⁸⁰ Justice Scalia acknowledged that “early constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”⁸¹ Nonetheless, his opinion relied on the “historical compact recorded in the Takings Clause,” under which a government may only elimi-

76. The fact-intensive balancing approach did not disappear from regulatory takings doctrine, but in certain instances it has been displaced. Justice O’Connor’s plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), applied the *Penn Central* test directly to the area of economic regulatory takings. *Id.* at 522–23. And the unconstitutional conditions doctrine, through both Justice Scalia’s “essential nexus” test in *Nollan* and Chief Justice Rehnquist’s “rough proportionality” test in *Dolan* are both ad hoc, factual inquiries.

77. *Lucas*, 505 U.S. at 1015.

78. A physical invasion taking is sometimes called a “*Loretto* taking” after *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court held that a New York law requiring apartment building owners allow cable television infrastructure in their facilities constituted a taking, even though the facilities occupied approximately one and a half cubic feet of property. *See id.* at 438 n.16. Justice Blackmun dissented, joined by Justices Brennan and White, sharply criticizing the Court’s application of a *per se* rule. In an opinion presaging his dissent in *Lucas*, he began, “If the Court’s decisions construing the Takings Clause state anything clearly, it is that ‘[t]here is no set formula to determine where regulation ends and taking begins.’” *Id.* at 442 (Blackmun, J., dissenting) (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). Justice Blackmun cited *Mahon* and *Penn Central*, and would have followed *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), to find that no taking occurred. He argued that the application of the majority’s categorical rule represented “an archaic judicial response to a modern social problem,” and that “technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts.” *Loretto*, 458 U.S. at 455–56 (Blackmun, J., dissenting) (citation omitted).

79. *Lucas*, 505 U.S. at 1015 (citations omitted).

80. Recently, Chief Justice Roberts’s opinion in *Horne v. Dep’t of Agriculture*, 135 S. Ct. 2419 (2015), relied on “the principles of Magna Carta” the colonists brought with them to the New World to justify “protection against uncompensated takings of personal property.” *Id.* at 2426.

81. *Lucas*, 505 U.S. at 1028 n.15. No specific theorists or works are cited.

nate all economically valuable use through the police power, and not the eminent domain power.⁸² He dismissed evidence that colonists were not protected against regulatory takings as “entirely irrelevant” because they occurred prior to incorporation of the Takings and Just Compensation Clauses.⁸³ Finally, Justice Scalia relied on the drafting history of the Takings Clause. Unlike the draft originally proposed by James Madison, the adopted text of the clause is ambiguous as to whether it is limited to physical takings. Justice Scalia interpreted the clause to include protection against regulatory takings.⁸⁴

Justice Blackmun, in dissent, presented an originalist argument that regulatory takings were not part of the original understanding of the Takings Clause. He claimed that the colonists were tolerant of government takings for public use without compensation,⁸⁵ and that the Founders intended the Takings Clause to protect only against direct appropriations, not regulatory takings.⁸⁶ Justice Scalia’s majority opinion addressed the originalist argument in a single sentence and accompanying footnote,⁸⁷ while Justice Blackmun devoted roughly five full pages to the historical question.⁸⁸ Neither Justice, however, presented a satisfying originalist argument for their position.

82. *See id.* at 1028–29.

83. *See id.* at 1028 n.15.

84. *See id.* (“No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation” (quoting Speech Proposing Bill of Rights (June 8, 1789), in 12 J. MADISON, THE PAPERS OF JAMES MADISON 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979))).

85. *See id.* at 1056 (Blackmun, J., dissenting) (“The colonists . . . inherited . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation extends to the public benefit . . . for this is for the public, and every one hath benefit by it.” (quoting F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 80–81 (1973) (internal quotation marks omitted))).

86. *See id.* at 1056 n.23 (Blackmun, J., dissenting) (citing William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985)).

87. *See id.* at 1028 and n.15 (majority opinion) (“In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”).

88. *See id.* at 1055–60 (Blackmun, J., dissenting).

The Justices' originalist back and forth over the takings clause sparked an increase in scholarly attention to the historical meaning of the clause. Commentators found both Justice Scalia's and Justice Blackmun's accounts lacking.⁸⁹ Justice Scalia's account is both mistaken and incomplete. He claimed that "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'"⁹⁰ But in 1888, the leading treatise on eminent domain acknowledged that regulations, in addition to direct appropriations, could require just compensation.⁹¹ That treatise stated that the legislature may impose restraints "upon the use and enjoyment of property within the reason and principle" of its duty to protect for the general welfare.⁹² Such infringements of the rights of use and enjoyment left a property owner without remedy. It was "a *regulation*, and not a *taking*, an exercise of *police* power, and not of *eminent domain*."⁹³ On the other hand:

[T]he moment the legislature passe[d] beyond mere regulation and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.⁹⁴

Justice Holmes cited that treatise in a 1902 opinion he wrote as Chief Justice of the Massachusetts Supreme Judicial Court, nineteen years before he authored the Court's opinion in *Ma-*

89. See, e.g., Kobach, *supra* note 11, at 1221 ("Like Justice Blackmun, Justice Scalia neglected to conduct a more searching inquiry into the genesis of regulatory takings.").

90. *Lucas*, 505 U.S. at 1014 (majority opinion) (alteration in original) (citations omitted) (first quoting *The Legal Tender Cases*, 79 U.S. (12 Wall) 457 (1870); and then quoting *Transp. Co. v. City of Chicago*, 99 U.S. 635 (1878)).

91. See JOHN LEWIS, EMINENT DOMAIN § 6, at 14–15 (2d ed. 1888).

92. *Id.* at 14.

93. *Id.* (footnote omitted).

94. *Id.* at 15 (first citing *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1873); and then citing *Commonwealth v. Bacon*, 76 Ky. 210 (13 Bush) (1877)) (additional citations omitted).

*hon.*⁹⁵ Simply put, it is not true that *Mahon* marked the turning point in the judicial approach to regulatory takings.⁹⁶

Justice Blackmun's analysis was also unsatisfying. While colonial practice may be more indicative of original public meaning than Justice Scalia acknowledged, he was correct that it does not conclusively establish the meaning of the Takings Clause. In particular, the original public meaning at the time of the Fourteenth Amendment—not the Fifth Amendment—should be the focus, since the case at issue involved the actions of the state of South Carolina.

Two commentators in particular have presented impressive one-step originalist approaches to the regulatory takings question.⁹⁷ Professor John F. Hart argues that colonial America did not protect property owners from regulatory takings, and therefore the original meaning of the Fifth Amendment did not protect against regulatory takings.⁹⁸ Professor Rappaport presents a more provisional claim: while the Fifth Amendment does not provide such protection, the original meaning of the Fourteenth Amendment may.⁹⁹ Professor Hart's and Professor Rappaport's arguments do not settle the issue. Accordingly, I offer a second-best originalist alternative to understanding regulatory takings in Part III.

Professor Hart argues that the original public meaning of the Takings Clause at the time of the founding did not include regulatory takings. The constitutional text does not explicitly address regulation of property, and Professor Hart claims that there is no evidence that the Founders intended the text to include regulations.¹⁰⁰ Therefore, the Court's doctrine of regula-

95. *Sawyer v. Commonwealth*, 182 Mass. 245, 247 (1902).

96. For the major work discussing pre-*Mahon* regulatory takings thought, see Kobach, *supra* note 11.

97. For instance, see the informative roundtable discussion at the 2016 Federalist Society National Lawyers Convention, Property Rights and Environmental Law: Justice Scalia's Property Rights Jurisprudence (Nov. 19, 2016), <https://youtu.be/ybSJI9bbnCs> [<https://perma.cc/6AUN-JH3P>]. Professors John Echeverria and Ilya Somin's ideas are particularly illuminating.

98. See John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996).

99. See Rappaport, *supra* note 9, at 732.

100. See Hart, *supra* note 98, at 1253. It is worth noting that Professor Hart is concerned with the intentions of the framers, not the original public meaning of the Constitution. This focus on original intent distinguishes the "Old Originalism"

tory takings is based in the constitutional text only if “land use regulation was confined to the prevention of nuisance when the Takings Clause was adopted.”¹⁰¹ Colonial regulation of land use was pervasive, and occurred in cases of nuisance as well as noninjurious uses. Since localities regulating land for noninjurious uses is not a recent development, it does not make sense to extend the Takings Clause to regulatory takings.¹⁰²

Professor Hart presents a bevy of colonial land use regulations to demonstrate that colonial governments regulated private property without compensation or complaint. Massachusetts, New Netherlands, New York, and Delaware, for instance, all had colonial laws which required a property owner to improve and build upon his land, under penalty of forfeiting title.¹⁰³ Multiple colonies enacted laws requiring property owners to erect sufficient fencing around their land under penalty of a fine.¹⁰⁴ Some colonies required that mines not worked within a year of their discovery be appointed to other individuals who would work them productively.¹⁰⁵ Many colonies enacted a productivity regime under which a person could condemn land suitable for a mill or ironworks site; the landowner would lose his title to that condemned land unless he built a

from the “New Originalism” focused on original public meaning. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

101. Hart, *supra* note 98, at 1253. Professor Hart misses another possibility: that the Framers assumed that regulations would never arise to the level of deprivation that would require just compensation for the sake of justice.

102. See *id.* at 1258.

103. See *id.* at 1260–61. Massachusetts, for instance, had a 1634 ordinance which provided that “if any man that hath any greate quan[tity] of land graunted him, & doeth not builde upon it or im[prove] within three yeares, it shalbe [free for the Court to disp[ose] of it to whome they please.” *Id.* at 1260 (alterations in original) (quoting Ordinance of Apr. 1, 1634, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 114 (Nathaniel B. Shurtleff ed., Boston, Press of William White 1853)). These regulations were independent from the grant of land the property owner received from a town or chartered company.

104. See *id.* at 1264 (footnote omitted). Professor Hart notes that the stated rationale for this law was not nuisance, but rather “the prosperity of the community.” *Id.* (quoting Ordinance of Feb. 23, 1656, LAWS AND ORDINANCES OF NEW NETHERLAND, 1636–1674, at 218, 218 (E.B. O’Callaghan trans., Albany, N.Y., Weed, Parsons & Co. 1868)).

105. See *id.* at 1265 (citing Act of Mar. 2, 1640, 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 37, 37 (photo. reprint 1968) (David Pulsifer ed., Boston, Press of William White 1861)).

mill or ironworks on the land within a specified time.¹⁰⁶ Statutes required landowners to build dams at their own expense to alleviate flooding of neighboring meadows,¹⁰⁷ restricted the ability of landowners to exclude hunters and fishermen,¹⁰⁸ limited how far from a town meetinghouse a person could erect a dwelling,¹⁰⁹ and permitted cities to regulate the aesthetics of buildings.¹¹⁰ Such regulations deprived property owners of various sticks in the bundle of rights, for non-injurious uses, without providing just compensation. While some of Professor Hart's examples (such as the upstream-dam requirement) seem to border on the nuisance understanding Justice Scalia presented in *Lucas*, other laws, such as New York's aesthetic restrictions, are examples of colonial-era regulations enacted without reference to the private law of nuisance.¹¹¹

Professor Hart's argument, while helpful for its historical research, does not conclusively answer the question whether the original public meaning of the Takings Clause excluded regulatory takings. First, simply because an affirmative individual right (to receive just compensation for deprivations of use or enjoyment) did not exist does not mean that the original public meaning denied that right. The issue may not have been contested or considered. Second, it is possible that the scarce frequency of such regulations meant they were not a serious mat-

106. *See id.* at 1267 (citing Act of May 8, 1669, 2 ARCHIVES OF MARYLAND 211, 211–12 (William H. Browne ed., Baltimore, Md. Hist. Soc'y 1884)).

107. *See id.* at 1268 (citing Act of Feb. 10, 1710[–11], 5 LAWS OF THE ROYAL COLONY OF NEW JERSEY 353, 353 (Bernard Bush ed., 1986)).

108. *See id.* at 1272 (citing Act of Nov. 15, 1636, 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 6, 16 (photo. reprt. 1968) (David Pulsifer ed., Boston, Press of William White, 1861)).

109. *See id.* at 1273 (citing Act of Sept. 2, 1635, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 156, 157 (Nathaniel B. Shurtleff ed., Boston, Press of William White 1853)).

110. *See id.* at 1276 ("The New York Assembly later authorized the city of New York to make 'rules and orders for the better regulation[,] uniformity[,] and gracefulness of such new buildings as shall be Erected for habitations.'" (alteration in original) (emphasis omitted) (quoting Act of Oct. 1, 1691, ch. 18, 1 THE COLONIAL LAWS OF NEW YORK 269, 269 (Albany, N.Y., James B. Lyon 1896)).

111. It is also worth noting, as Justice Scalia did in *Lucas v. S.C. Coastal Council*, that at the enactment of the Bill of Rights, states also directly appropriated physical property without compensation. 505 U.S. at 1028 n.15. This is not surprising: only one of the original thirteen colonies had a "just compensation" clause in its state constitution. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 79 (1998).

ter of concern to the public or the legal community. A minor inconvenience may have not been worth fighting; perhaps the colonists had a right, but choose not to exercise the right. Third, judicial review was still evolving during the colonial era. Perhaps the colonists (rightfully) believed that their rights were being violated, but had no judicial remedy against this violation. Fourth, the Takings Clause was incorporated against the states through the Fourteenth Amendment. If one believes that the “Privileges or Immunities” provision of the Fourteenth Amendment was the vehicle by which the Bill of Rights was incorporated, the relevant public meaning of the Takings Clause would not be its meaning in 1791, but in 1868. Those objections notwithstanding, Professor Hart convincingly establishes that at the ratification of the Fifth Amendment, the original public meaning did not affirmatively protect against regulatory takings.

Professor Rappaport pursues the “Privileges or Immunities” objection to “identify the path”¹¹² for originalists to determine whether the original public meaning of the incorporated Takings Clause protects against regulatory takings. Professor Rappaport, for the most part, accepts that contemporary evidence of the Founding establishes that the Fifth Amendment was limited to physical takings.¹¹³ Nonetheless, he argues that the Takings Clause incorporated through the Fourteenth Amendment may differ, such that regulatory takings could be protected against in the original meaning of that amendment.¹¹⁴ This approach applies Professor Akhil Amar’s interpretation of the Bill

112. See Rappaport, *supra* note 9, at 758. Professor Rappaport notes that he has not done sufficient research to determine whether this argument is the best understanding of the incorporated Takings Clause; he merely “identif[ies] the path.” *Id.*

113. See *id.* at 733.

114. See *id.* at 731. Interestingly, Rappaport rejects Professor Richard Epstein’s originalist argument that the Takings Clause *did* protect against regulatory takings as a Balkin-esque “Living Constitutionalism.” See *id.* at 737–40 (first citing EPSTEIN, *supra* note 11, at ix, 230–31; and then citing Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 101, 298–99 (2007)). Rappaport argues that “[i]t is too politically convenient to assume [the Founders] were confused” in their categories, and claims that the Framers made a conscious choice in tolerating regulatory takings without compensation and enacting a constitution that did not protect against them. *Id.* at 739.

of Rights and Fourteenth Amendment¹¹⁵ to the Takings Clause. According to Professor Amar, the Bill of Rights was concerned with limiting federal power *vis-à-vis* the states while the Fourteenth Amendment was concerned with protecting individuals from the states.¹¹⁶ It was “only after the Fourteenth Amendment [that] Madison’s vision of strong national protection of minorities against majoritarian oppression [became] the dominant strand of American constitutionalism.”¹¹⁷ Accordingly, while in “1789, Madison cleverly packaged the [just compensation] clause and thus slipped it past a Congress that was considerably less libertarian than he; . . . in 1866 the dominant mood of Congress had become far more sensitive to individual rights.”¹¹⁸

If one believes the Bill of Rights was incorporated through the Privileges or Immunities Clause, then the relevant original public meaning of the term “takings” is the meaning in 1866. The enactors of the Fourteenth Amendment were concerned with broadly protecting individual property rights from oppressive action by states (which had a long tradition of property regulation).¹¹⁹ The intent and purpose of the Fourteenth Amendment was likely to provide more expansive protections to property owners.¹²⁰ State constitutions and courts in the mid-

115. See AMAR, *supra* note 111. Amar approaches the incorporation of rights through the Fourteenth Amendment’s Privileges or Immunities Clause.

116. See Rappaport, *supra* note 9, at 745 (citing AMAR, *supra* note 111, at 78).

117. AMAR, *supra* note 111, at 79 n.*. For instance, Professor Amar notes, only one of the original thirteen colonies (Massachusetts) had a just-compensation clause in its state constitution in 1789. *Id.* at 79.

118. *Id.* at 268.

119. See Rappaport, *supra* note 9, at 750–53 (discussing the Fourteenth Amendment’s structure, purpose, and legislative history).

120. See *id.* at 753–57. Professor Rappaport quotes Professor Amar for the proposition that “[d]octrinally, virtually all mid-nineteenth-century jurists deemed just compensation a fundamental principle of justice.” *Id.* at 754 (quoting AMAR, *supra* note 111 at 268–69); see, e.g., *Bradshaw v. Rogers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822) (finding that the just compensation clause was “declaratory of a great and fundamental principle of government; and any law violating that principle must be a nullity, as it is against natural right and justice”). For a list and discussion of this case and others, see AMAR, *supra* note 111, at 149–50 (collecting cases). See also 1 ISAAC F. REDFIELD, A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS § 63, at 231 (3d ed. 1869) (“The duty to make compensation for property, taken for public use, is regarded, by the most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as lying at the basis of all wise and just government, independent of all written constitutions or positive law.” (footnote omitted)).

nineteenth century were more concerned generally with just compensation for takings than were founding era constitutions and courts. For instance, many state courts imposed a just compensation requirement on state governments even in the absence of explicit statutory or constitutional language to that effect.¹²¹ Some state courts protected against regulatory and consequential takings.¹²² Professor Rappaport documents various instances of state courts compensating regulatory and consequential takings, such as interferences with the usage rights of riparian property owners,¹²³ denials of access to land,¹²⁴ and required expenditures by property owners.¹²⁵ Since the purposes and structure of the Fourteenth Amendment differed from the Bill of Rights, and the legal landscape at the time of the Fourteenth Amendment's enactment included the idea of regulatory takings in some states, Professor Rappaport concludes that an originalist case for regulatory takings protections may exist under the Fourteenth Amendment.

His argument is only a proposed framework for further investigation, however, since "it is not clear how widespread this expanded view of takings was."¹²⁶ One would need to establish whether the state rule protecting against regulatory takings was the more common rule and whether states where the rule was not in effect explicitly rejected it.¹²⁷ Further, one must determine whether those ratifying the Fourteenth Amendment understood the incorporated Takings Clause to adopt the mi-

121. See, e.g., *Crenshaw v. Slate River Co.*, 27 Va. 245, 264–65 (1828) (requiring just compensation in absence of explicit constitutional language because the principle of "fair compensation" is "laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country"); *Gardner v. Tr. of Newburgh*, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816) (requiring just compensation of a statute in the absence of statutory or constitutional language because "a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property").

122. Professor Rappaport distinguishes regulatory takings, where the government does not take title or possess the land, but regulates the use of it, from consequential takings, which he defines as "takings [that] involve government action that does not actually possess the owner's property, but prevents him from enjoying the use of his property." *Supra* note 9, at 733.

123. *Id.* at 754 (citing *Gardner*, 2 Johns. Ch. at 162).

124. *Id.* at 755 (citing *Fletcher v. Auburn & Syracuse R.R. Co.*, 25 Wend. 462, 462 (N.Y. Sup. Ct. 1841)).

125. *Id.* (citing *Commonwealth v. Coombs*, 2 Mass. (2 Tyng) 489, 489 (1807)).

126. *Id.* at 756.

127. See *id.* at 756–57.

nority rule, the majority rule, or did not consider the question at all.¹²⁸

While Professor Hart's argument is the more exhaustively researched, Professor Rappaport's reliance on the Fourteenth Amendment's ratification is more persuasive.¹²⁹ Both Hart and Rappaport's approaches satisfy the "separation of powers" principle by limiting judicial policy preferences. Both objectively ground the judge's interpretation in a particular time and place. But only Professor Rappaport's approach satisfies the "democratic legitimacy" principle of originalism. First, it is unclear that regulatory takings were contested or relied upon at the ratification of the Fifth Amendment. Second, understanding incorporation through the Privileges or Immunities Clause is a more satisfying approach to discerning the original public meaning of the Takings Clause. The Fourteenth Amendment should be enforced as the ratifiers of the Fourteenth Amendment understood it. This is all the more true for the incorporated Takings Clause, since contemporary takings cases almost always involve state government action being challenged.

128. *See id.* at 757.

129. I have not, and could not have, included all originalist approaches to regulatory takings. I consider others less persuasive than Professor Hart's and Professor Rappaport's.

Professor Richard Epstein presents a one-step originalist approach to the Takings Clause. His argument in a nutshell runs: since the Founders were Lockean, and Locke would protect against regulatory takings, the original meaning of the Takings Clause protects against regulatory takings. *See* EPSTEIN, *supra* note 11, at ix, 230–31. It is unobjectionable to analyze the Founders' thought through a Lockean lens, but the analysis should not end there. While Locke was an important influence on the Founders' political philosophy, *see, e.g.,* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525 (2007), he was not the only influence, and the Fifth Amendment did not enact his *Second Treatise*.

William Treanor puts forth a dictionary based understanding of the Clause. *See* William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633 (2008). Dean Treanor analyzes twenty-first century dictionaries and then eighteenth century dictionaries to argue that "take" involves a physical object. But Professor Rappaport's counterexamples, including that I can "take your time," *see supra* note 105, at 741, or that *The Federalist* papers refer to "rights which have been taken away," *see supra* note 105, at 743 (quoting THE FEDERALIST No. 54, at 266 (James Madison) (Terence Ball ed., 2003)), reveal the shortcomings of the dictionary approach. Professor Epstein's and Dean Treanor's approaches lack nuance and smack of the primary danger originalism was meant to avoid: "[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law." Scalia, *supra* note 37, at 863.

Neither side has conclusively settled the originalist regulatory takings debate. Justice Scalia claimed in his scholarly writings that “for the vast majority of questions the [correct historical] answer is clear.”¹³⁰ Unfortunately, regulatory takings may be one of the outliers. It is plausible that a Fourteenth Amendment approach to the original public meaning could conclusively establish whether or not the Takings Clause protected against regulatory takings. But it is also possible that the issue was not contested and not relied upon at the framing of that amendment. If that were the case, whence an originalist? In the next section, I will apply a second-best originalism to the doctrine of regulatory takings, based on, but adding to Professor Barnett and Bernick’s “good faith” approach.

III. SECOND-BEST ORIGINALISM AND REGULATORY TAKINGS

Let us assume that an Amarian approach does not provide a satisfying one-step originalist answer to the issues before the Court in regulatory takings cases. When a state forbids building a permanent habitable structure on beachfront property,¹³¹ prohibits construction on a campground after its buildings were destroyed in a flood,¹³² or conditions approval of a hardware store building permit on the dedication of a greenway space for the public,¹³³ how are we to understand the original public meaning of “nor shall private property be taken for public use, without just compensation?” Following Professor Barnett and Bernick, the justification must accord with the text and spirit of the Takings Clause. Per my addendum, it would be better to use the legal background as a proxy for the “spirit” of the provision. Looking to the background of nuisance and eminent domain law against which the Takings Clause was passed, one can see a complex structural back and forth between the legislative and judicial branches. While the legisla-

130. Scalia, *supra* note 37, at 863 (using the death penalty as not cruel and unusual as an example). Given the general consensus that the Founding-era colonies did not protect against regulatory takings, this is likely not the kind of “refined question[] of original intent” with “precise content” that historians struggle to answer. *See id.* The question as applied to the Fourteenth Amendment is murkier.

131. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

132. *See First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 308 (1987).

133. *See Dolan v. City of Tigard*, 512 U.S. 374, 412 (1994).

ture had broad discretion in determining the necessity of a taking, its decision could not be arbitrary, and the courts vigorously enforced the procedures for takings.

Eminent domain treatises contemporaneous to the enactment of the Fourteenth Amendment provide a helpful framework for regulatory takings questions. Every property owner was bound by the duty "to use and enjoy his own [property] as not to interfere with the general welfare of the community in which he lives."¹³⁴ Where a government limited use and enjoyment of property by enforcing this duty through the police power, the property owner was without remedy.¹³⁵ Accordingly, a judge faced with a regulatory takings question should begin by determining if the property owner is committing a nuisance or injurious use. If she is, the police power can be applied to restrain the noxious or injurious use without compensation.¹³⁶ These regulations on use can pertain to seemingly innocent activity, such as a property owner denied the ability to remove gravel from his own land because it endangered the public safety of a harbor.¹³⁷ Nonetheless, whether "certain property, or the use of it, constitutes a nuisance, *cannot arbitrarily be determined by the legislative branch* of the government, unless the property in fact has that character."¹³⁸ Second, the judge must determine whether the government action is for the public use.¹³⁹ If the judge determines the action is for the public use, whether the taking is "necessary" is a strictly political determi-

134. LEWIS, *supra* note 91, § 6, at 14 (footnote omitted); *see also* HENRY E. MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN § 7, at 7 (1879) ("The owner of property may be restrained from a noxious use of his property, and such a restraint is not a taking of the property.").

135. *See* LEWIS, *supra* note 91, § 6, at 14.

136. *See* LEWIS, *supra* note 91, § 6, at 14 (noting that every property owner is "bound so to use and enjoy his own [property] so as not to interfere with the general welfare of the community in which he lives" and that the enforcement of that duty pertains to "the police power of the State"); MILLS, *supra* note 134, § 7, at 7.

137. MILLS, *supra* note 134, § 7, at 8 (citing *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846)).

138. *Id.* § 6, at 6 (emphasis added).

139. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 528 (1868); MILLS, *supra* note 134, § 10, at 12 ("The attempt of the legislature to determine the public character of the use does not settle that it has the right to do so, but the existence of the public use in any class of cases is a question to be determined by the courts." (footnote omitted)).

nation with no judicial input.¹⁴⁰ Third, the judge should determine if the rights at issue are the type for which the State is “not so much the owner as the governing and supervisory trustee.”¹⁴¹ These “rights of a public nature” include public rights such as the right to use navigable waters and the right to fish in public waters.¹⁴² They are an exception to the general rule that when the state appropriates or controls individual property for the public benefit compensation is required.¹⁴³

This framework can serve as the proxy “spirit” of the Takings Clause, with which a judge’s decision must accord. This proxy framework recognizes that the “spirit” of the incorporated Takings Clause was not a single statement, but a combination of designs and a compromise of principles. The legal background against which the Fourteenth Amendment was passed structured the relations between the legislative and judicial branches. Whether a nuisance existed¹⁴⁴ or whether the state action was for “public use” was subject to judicial determination, albeit under a deferential standard.¹⁴⁵ Whether the use was “necessary” for the public benefit was strictly determined by the legislature, as was the extent that was necessary to control or appropriate.¹⁴⁶ Yet once that necessity was specified, courts would vigorously ensure that the government action did not exceed its asserted necessity.¹⁴⁷ Similarly, once the state promulgated its procedures, the courts enforced “strict compliance with all the provisions of the law which are made for [the property owner’s] protection and benefit.”¹⁴⁸ The “spirit” may be better described in structural and procedural terms than substantive ones: the legislature has latitude, but the court enforces limits.

The structural interactions that serve as the proxy “spirit” of the Takings Clause can be described more plainly: the government may not take shortcuts. As Sir Edward Coke quipped,

140. See COOLEY, *supra* note 139, at 538.

141. *Id.* at 523.

142. *Id.* at 524.

143. See *id.*

144. See MILLS, *supra* note 134, § 6, at 6.

145. See *id.* § 10, at 12.

146. See *id.* § 11 at 13; COOLEY at 538.

147. See COOLEY at 540.

148. *Id.* at 528.

“when something is prohibited, everything that leads to the same result is prohibited.”¹⁴⁹ This is often expressed in the maxim, “what may not be done directly may not be done indirectly.” This principle was broadly accepted as a principle of common and constitutional law and was ubiquitous at the ratification of the Fourteenth Amendment. Blackstone relied on the principle in his *Commentaries*.¹⁵⁰ State court advocates¹⁵¹ and judges¹⁵² relied on this principle in almost every state at the time of the ratification of the Fourteenth Amendment. The United States Supreme Court relied on the maxim, as did the advocate before the Court, in a case decided on December 1, 1866.¹⁵³ When that decision was handed down, six states had ratified the Fourteenth Amendment. Twenty-eight states would ratify the amendment before Congress passed a resolution declaring it to be part of the Constitution on July 21, 1868.¹⁵⁴

Analyzing *Mahon*, so far as the majority and dissent disagreed about whether or not the subsidence constituted a nuisance or an endangerment of the public safety, both were true

149. 3 EDWARD COKE, THE INSTITUTES OF THE LAWE OF ENGLAND 158 (1642) (“[Q]uando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.”).

150. See 4 BLACKSTONE, *supra* note 31, at *221 (quoting Coke).

151. See, e.g., *Ex parte Greene*, 29 Ala. 52, 54 (Ala. 1856) (Attorney General of Alabama arguing that sovereign immunity immunizes officers acting in official capacity from suit because to hold otherwise “would be to allow that to be done indirectly which cannot be done directly”).

152. See, e.g., *Vinnedge v. Shaffer*, 35 Ind. 341, 343 (Ind. 1871) (holding that statute which prohibited married women from alienating real property included mortgages because “what cannot be done directly cannot be done indirectly”); *Packard v. City of Lewiston*, 55 Me. 456, 459 (Me. 1867) (invalidating portion of state statute at conflict with national statute because it was “clearly an attempt to do indirectly what cannot be done directly”); *Washington v. State*, 13 Ark. 752, 753 (Ark. 1853) (invalidating portion of statute prohibiting persons from setting up billiards tables without paying for a license since “there is no power to do that indirectly which cannot be done directly”).

153. See *Cummings v. Mo.*, 71 U.S. 277 (1866) (invalidating state and federal law requiring individuals in certain professions to swear an oath that they never gave aid to the rebellion as an ex post facto law and bill of attainder). The petitioner’s advocate relied upon Coke’s *Institutes*. See *id.* at 288 (quoting COKE, *supra* note 149). The Court agreed. *Id.* at 325 (“The legal result must be the same, for what cannot be done directly cannot be done indirectly.”).

154. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 108-17, at 31 (Johnny H. Killian et al. eds., Supp. 2004).

to the proxy “spirit” of the Takings Clause. If it were a nuisance, the public use analysis would be superfluous, since as Justice Holmes noted, “The protection of private property in the Fifth Amendment presupposes that it is wanted for public use.”¹⁵⁵ Had Justice Brandeis limited his disagreement to the nuisance issue, his opinion would have accorded with the Takings Clause’s letter and spirit. Unfortunately, he went further, asserting that “a restriction imposed through exercise of the police power [is not] inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense.”¹⁵⁶ This conflation of the police power and eminent domain power is against the “spirit” of the Takings Clause. It is telling that his assertion of this principle relied only on two twentieth-century cases.¹⁵⁷ The meaning of the takings power in 1866 strictly distinguished the police power—directed at injurious use and done without compensation—from the public use eminent domain power, strictly requiring compensation. To ignore that distinction is to deviate from the “spirit” of the Takings Clause.

In *Nollan*, the majority stayed true to the proxy “spirit” of the public use-injurious use distinction, while Justice Brennan’s dissent strayed far afield. The regulatory conditions doctrine relied on the fact that “[h]ad California simply required the Nollans to make an easement across their beachfront . . . rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.”¹⁵⁸ Justice Brennan’s dissent seemed to invoke the spirit of the clause, stating that the state’s “action implicate[d] none of the concerns underlying the Takings Clause.”¹⁵⁹ Yet when he analyzed these underlying concerns, he shifted to “concerns that underlie our takings *jurisprudence*” and focused solely on

155. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Holmes anticipated the all-encompassing statist approach taken by Justice Brennan in *Nollan*, warning that “When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.” *Id.*

156. *Id.* at 418 (Brandeis, J., dissenting).

157. *See id.* (first citing *Laurel Hill Cemetery v. City of San Francisco*, 216 U.S. 358 (1910); and then citing *Mo. Pac. Ry. Co. v. City of Omaha*, 235 U.S. 121 (1914)).

158. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

159. *Id.* at 842 (Brennan, J., dissenting).

twentieth-century cases.¹⁶⁰ Justice Brennan did not dispute that the easement was for public use. Under his analysis, if a state disregarded property rights so frequently that any property owner had a real fear of a public easement being laid through their land, no taking would occur if the government *did* create a public easement through their land.¹⁶¹ This departure neglects the nuisance-public use distinction. Justice Brennan alluded to, but did not rely on, a theory that would have accorded with the clause's spirit. That plausible theory would be that the California Constitution created a right of a public nature to ocean access.¹⁶² A reliance on oceanfront access as a right of a public nature would accord with the spirit of the Takings Clause. An analysis that allows a state to swallow all reasonable expectations to property would not.

The unusual factual background¹⁶³ of *Lucas* made a good faith analysis tougher to perform, and neither majority nor dissent hewed to the proxy "spirit." Justice Scalia's reliance on the

160. *See id.* at 853 (emphasis added) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

161. *See id.* at 853–61 (discussing the Nollans' reasonable investment backed expectations).

162. *See id.* at 855 (quoting CAL. CONST. art. X, § 4). Justice Brennan analyzed the state provision in the context of the reasonable investment backed expectations of the property owners.

163. The South Carolina Court of Common Pleas found that the "beachfront lots [had] been rendered valueless" by the State's regulation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020 (1992). Justice Kennedy found this to be a "curious finding." *Id.* at 1034 (Kennedy, J., concurring) ("I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction." (citations omitted)). Justice Blackmun thought that "[t]his finding [was] almost certainly erroneous." *Id.* at 1044 (Blackmun, J., dissenting) ("Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house." (citations omitted)). Justice Stevens stated that Lucas's land was "far from 'valueless.'" *Id.* at 1065 n.3 (Stevens, J., dissenting) ("Lucas may put his land to 'other uses'—fishing or camping, for example—or may sell his land to his neighbors as a buffer."). Justice Souter expressed the strongest disapproval about the finding of valuelessness. He neither concurred nor dissented from the Court's judgment, but wrote separately because "[a]fter briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests." *Id.* at 1076 (Souter, J., filing separate statement). Accordingly, he would have dismissed the writ of certiorari "as having been granted improvidently." *Id.*

public use-nuisance distinction¹⁶⁴ was true to the spirit of the takings clause. Yet his analysis strayed from the spirit by failing to recognize the broad discretion governments had to declare nuisances beyond instances of private nuisance.¹⁶⁵ For the reasons expressed in Part II, Justice Blackmun's opinion does not address the meaning of the incorporated Takings Clause. Insofar as one accepts the factual finding that the property was indeed worthless, it seems the approach truest to the spirit is that of Justice Scalia quoting Justice Brennan: "[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."¹⁶⁶ A better approach would recognize the legislature's broad power to determine nuisance, while limiting the Court's role to determining whether the legislature acted arbitrarily.

Second-best originalist approaches do not achieve the democratic legitimacy of one-step originalism, but they come close. When performing "good faith" constitutional interpretation, a judge engages in historical investigation to determine if the original public meaning of the Takings Clause protected against regulatory takings. The judge does his best to enforce what the ratifiers voted on. Finding that the question was neither contested nor relied upon, he does his best to look to determine the "spirit" of the Takings Clause, using a proxy method designed to separate the inquiry from the judge's policy preferences. This helps avoid the "arbitrary discretion in the

164. *See id.* at 1029–30.

165. The legislature's nuisance declaration cannot be arbitrary. Thus, a burial ground cannot be declared a nuisance if the legislature still permits certain persons to be buried there, since such a law "plainly indicates that the burying-ground is not such a nuisance as requires abating." *MILLS*, *supra* note 134, § 6, at 6 (citing *Austin v. Murray*, 33 Mass. (16 Pick.) 121 (1834)). Yet a state can prohibit uses that would not state a claim for a private nuisance. For instance, a state can prohibit hauling gravel from a property owner's lot because such use would "endanger the safety of a harbor." *Id.* § 7, at 8 (citing *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846)). Justice Kennedy recognized that the majority opinion deviated from the proxy "spirit" by denying the legislature deference in the injurious use or nuisance determination. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.").

166. *Lucas*, 505 U.S. at 1017 (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

courts' [that] can cast a pall of illegitimacy on the institution of which judges are a part."¹⁶⁷

The second-best originalist theory I have outlined in this Note increases judicial constraint. Professor Barnett and Bernick correctly note that "[n]o theory of constitutional interpretation or construction can ensure that judges will not betray the people's trust if they are determined to do so."¹⁶⁸ But a second-best originalist approach that constrains its "spirit" determination is the best alternative for those judges who wish to uphold the people's trust. The historical criterion of original public meaning creates an interpretive principle separate from the policy preferences of the judge. Basing the "spirit" in neighboring doctrines also separates the spirit inquiry from the policy preferences of the judge.

This approach is not without its flaws. The theory requires additional analytic grounding. First, the theory needs an account of how to determine if a neighboring doctrine exists. Second, it must answer how to determine whether neighboring doctrines actually speak to the constitutional question before the court. Finally, like any originalist theory of interpretation, it requires an account of the extent to which *stare decisis* should tie a judge's hands.¹⁶⁹

Second-best originalism does not eliminate the "discretion zone." But it does reduce it. Where judges engage in "good faith" analysis, they battle over shared disputes—in *Mahon*, whether mining the coal pillars constituted a nuisance, or in *Nollan*, whether oceanfront access was a "right of a public nature" traditionally exempted from the Takings Clause. Reducing the range of contested issues narrows the discretion zone, and reasoned debate leading to a correct historical understanding should too.

One could argue that by looking to something besides the original public meaning, it is not really originalism at all. In-

167. Barnett & Bernick, *supra* note 10, at 12 (quoting THE FEDERALIST, *supra* note 129, NO. 78, at 383 (Alexander Hamilton)).

168. *Id.* at 29.

169. The work of Judge Amy Coney Barrett is especially insightful on this point. See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017) (concluding that a survey of Justice Scalia's opinions "suggests new lines of inquiry for originalists grappling with the role of *stare decisis* in constitutional adjudication").

stead, it is really a smuggled form of living constitutionalism in the vein of Professor Jack Balkin's "Living Originalism" or Professor Lawrence Lessig's "Interpretation as Translation." Second-best originalism differs, however, by hoping the original public meaning investigation ends the process. Only where that does not resolve the question is second-best originalism necessary. More importantly, Professor Balkin's and Professor Lessig's theories allow changes in public values or changes in the legal landscape to justify changing the constitutional meaning.¹⁷⁰ Second-best originalism, by contrast, is "dead" in that the meaning would not change no matter how circumstances changed.¹⁷¹

Finally, one might ask why a new theory is needed anyway. Justice Alito presented persuasive and justifiable opinions in *Brown* and *Jones* even after disclaiming the use of an originalist approach. Here, the answer relates to long-term judicial practice. Many contemporary constitutional doctrines that are currently unhinged from the original meaning of the Constitution would have been avoided under second-best originalism. The ouroboros of the "reasonable expectation of privacy" test from *Katz v. United States*,¹⁷² the omnipresent commerce clause jurisprudence,¹⁷³ and the economic development "public use" doctrine of *Kelo v. City of New London*¹⁷⁴ would all have reached a more faithful outcome had the Court looked to the original public meaning of the text and the original spirit of the provision at issue. Theories of interpretation relying only on prece-

170. For instance, under Professor Lessig's theory, the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), successfully translates the values of the Founding era into the changed context of today. At the time of the Founding, there was no professional police bureaucracy, so private citizens would carry out warrants. Since under the English common law defendants were forbidden from testifying at trial, interrogation played little role in the criminal justice process. Because the locus of investigation shifted from the judge's courtroom of the eighteenth century to the police officer's interrogation room of the twentieth century, the privilege against self-incrimination needed to shift with it. Accordingly, Professor Lessig argues, *Miranda* is necessary to translate the founding value into the modern context. See Lessig, *supra* note 55, 1189–1210. For further discussion of Lessig's approach, see *supra* note 55.

171. I recognize the policy benefits of both approaches, and find many of Professor Lessig's examples seductive. Still, the rule that "two wrongs don't make a right" cautions me away from consequentialist justifications in legal theory.

172. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

173. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

174. 545 U.S. 469 (2005).

dent or pragmatic outcomes snowball bit by bit until the doctrine becomes incompatible with the original meaning. It is thus not surprising that the cases checking these deviations often deploy some form of originalism.¹⁷⁵ While second-best originalism does not provide the strong democratic legitimacy of one-step originalism, it provides a weaker form through setting long-term guardrails on where a doctrine can go.

Second-best originalism forces judges to embrace reasoning grounded in the original public meaning of the constitutional provision, including its broader constitutional and common law background. The background of eminent domain and nuisance law against which the Takings Clause was passed permits legislative discretion, but within rigorously enforced boundaries. The Court's holdings in *Mahon* and *Nollan* can be justified against this original background. The taking at issue in *Lucas* could have been, although not with the reasoning provided. Arguments rejecting regulatory takings too often combine the police power and eminent domain powers into a Frankenstein's monster unmoored from the original background of the Fourteenth Amendment.

IV. CONCLUSION

Justice Thomas's *Murr* dissent is sure to reinvigorate the scholarly debate over the Supreme Court's regulatory takings jurisprudence.¹⁷⁶ This Note is the first post-*Murr* attempt to give that jurisprudence a "fresh look."¹⁷⁷ Yet regulatory takings

175. See, e.g., *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (citing *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB)) (using a form of second-best originalism similar to that advocated in this Note to find that a physical trespass plus monitoring of the device constituted a search under the Fourth Amendment); *NFIB v. Sebelius*, 567 U.S. 519, 554 (2012) (Roberts, C.J.) (citing *THE FEDERALIST*, *supra* note 129, NO. 45 (James Madison)) (using an intentionalist form of second-best originalism to find that the text and spirit of the Commerce Clause permit Congress to regulate, but not compel, commerce since the government's argument was "not the country the Framers of our Constitution envisioned"); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (using a loose form of second-best originalism to find that the text and spirit of the Constitution created "a structure in which '[a] dependence on the people' would be the 'primary controul on the government,'" such that two steps of agency for-cause protection violated the Constitution's separation of powers (quoting *THE FEDERALIST*, *supra* note 129, NO. 51, at 252 (James Madison))).

176. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

177. See *id.*

represent a hard case for originalists. There is no regulatory takings protection under the original public meaning of the Fifth Amendment, while the text of the Fourteenth Amendment's Privileges or Immunities Clause is underdetermined with regard to the constitutional question. Accordingly, an originalist must apply an interpretive theory for when the text runs out, an activity I call "second-best originalism." One recent theory of second-best originalism, the "Letter and the Spirit" approach advocated by Professor Barnett and Bernick,¹⁷⁸ presents a promising methodology. Unfortunately, the "spirit" determination Professor Barnett and Bernick put forth can end up being a judge's freewheeling guess. This Note presents an addendum to Professor Barnett and Bernick's approach that will increase judicial constraint within the "spirit" prong. An originalist judge should look to the doctrines in horizontal proximity to the constitutional question. For takings law, that means looking to the doctrines of nuisance and eminent domain.

Treatises and cases contemporaneous with the enactment of the Fourteenth Amendment reveal a structural relationship between the legislative and judicial branches that can serve as a proxy for the "spirit" of the incorporated Takings Clause. A property owner can be deprived, without compensation, of use that constitutes a nuisance or injurious use. Activities that are innocent in one context may be injurious in another, but a court will review the injurious determination to ensure the property in fact has that character. Second, the court must determine whether the government action is for the public use. Finally, the legislature has the authority to appropriate, restrain, or control "rights of a public nature" without compensation. These rights include public rights such as the right to use navigable waters or the right to fish in public waters.

This framework may result in less constitutional protection for property rights and a revision of the Supreme Court's regulatory takings doctrine. For those interested in implementing the Constitution as it was originally understood, those consequences are beside the point. What matters is that this approach to regulatory takings is "grounded in the original public meaning of . . . the Privileges or Immunities Clause of the

178. See Barnett & Bernick, *supra* note 10.

Fourteenth Amendment.”¹⁷⁹ If the Court desires to bring its doctrine into accord with that meaning, its regulatory takings precedents would be a good place to start.

John Greil

179. *Murr*, 137 S. Ct. at 1957 (Thomas, J., dissenting).