

William & Mary Environmental Law and Policy Review

Volume 44 (2019-2020)
Issue 3 Symposium Issue: *Climate Change: It
Takes Everyone*

Article 6

March 2020

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Repository Citation

Andrew Parslow, *A Defense of the Regulatory Takings Doctrine: A Historical Analysis of this Conflict Between Property Rights and Public Good and a Prediction for its Future*, 44 Wm. & Mary Envtl. L. & Pol'y Rev. 799 (2020), <https://scholarship.law.wm.edu/wmelpr/vol44/iss3/6>

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A DEFENSE OF THE REGULATORY TAKINGS DOCTRINE: A HISTORICAL ANALYSIS OF THIS CONFLICT BETWEEN PROPERTY RIGHTS AND PUBLIC GOOD AND A PREDICTION FOR ITS FUTURE

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INTRODUCTION

Since man first left the state of nature and formed property rights, there have been issues when states desire to use the property of another for what they consider to be the greater good. In their wisdom, the Founding Fathers of the United States built on centuries of historical principles ranging from the Romans to the English and enshrined in the Fifth Amendment the common law notion that “private property [shall not] be taken for public use, without just compensation.”¹ The rise of environmentalism has brought a new frontier to the ancient struggle between the rights of individuals and the rights of the government over private property as new types of regulation unforeseen by the Founders raise questions, such as what constitutes a taking and for what actions must the government provide compensation.

On the forefront of these arguments regarding the scope of the Fifth Amendment is the regulatory takings doctrine. The first major case to draw attention to the view that severe regulation can amount to a taking was *Pennsylvania Coal Co. v. Mahon*.² In *Pennsylvania Coal*, the Court found that a state act that banned the mining of anthracite coal, if doing so would destabilize human habitation, could not retroactively deny a party’s contracted mining rights to a plot of land.³ More importantly, it introduced the view that the Fifth Amendment’s protection against uncompensated takings applies to a decrease in value from regulation.⁴

* JD Candidate, William & Mary Law School, 2020. Florida State University, 2017. I would like to thank Justice Arthur Kelsey for the invaluable lessons he taught me about the use of historical analysis in legal writing. I would also like to thank the staff of the *William & Mary Environmental Law and Policy Review* for all their hard work.

¹ U.S. CONST. amend. V, § 5.

² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

³ *Id.* at 415–16.

⁴ *Id.* at 415.

This is an issue of grave importance for environmental regulation, for if the government is required to compensate every landowner whose property loses value from a regulation, then they will quickly become prohibitively expensive or, at the very least, highly unpopular due to their cost. Much ink has been spilled on this issue; however, the vast majority of environmental law literature opposes it.⁵ There is a wide spectrum of opposition, ranging from other nations' standards to application difficulties.⁶ Of particular note is the argument that the Founding Fathers never intended for the takings doctrine to apply to a decrease in value due to regulation.⁷ If this statement were true, then the argument for a constitutional requirement to compensate regulatory takings is greatly weakened.

Due to the fact that courts have been upholding regulatory takings claims, the balancing of a constitutional right (security in one's property), and the serious potential ramifications for environmental law, it would be a shame for the issue to only be explored from one angle. In this Note, I will argue in favor of the regulatory takings doctrine, particularly that, while environmental regulation was not foreseen by the Framers, had they known, they would have intended for the Fifth Amendment to cover regulatory takings. This analysis will be done through the lens of Blackstone's *Commentaries on the Laws of England*.⁸ Introduction, Section 2 of the *Commentaries* addresses the ideal manner in which to interpret the meaning of a law or doctrine.⁹ Since the influence of Blackstone on the drafters of both the Constitution and the Bill of Rights cannot be disputed, this should provide an accurate reflection of how it was expected to be interpreted. This argument will be further augmented by background historical sources and events that clearly had an influence on the drafting of the Fifth Amendment and can shine a better light onto its intent.

As explained by Blackstone, there are five tiers which should be used to interpret the "will of the legislator" when an amendment was drafted.¹⁰ First, through the plain meaning of the wording of the statute.¹¹

⁵ See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 90 (1995); Nestor Davidson, *The Problem of Equality in Takings*, 102 *NW. U. L. REV.* 1, 54 (2008); Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 *STAN. ENVTL. L.J.* 247, 247 (2015).

⁶ See sources cited *supra* note 5.

⁷ Schwartz, *supra* note 5, at 247.

⁸ See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (4th ed. 2014).

⁹ *Id.* at 59.

¹⁰ *Id.* at 59–61.

¹¹ *Id.* at 59.

Second, through context by analyzing other parts of the document as well as similar documents by the same drafters.¹² Third, the meaning of the words in regard to the purpose of the amendment.¹³ Fourth, considering hypothetical situations that will result from its application.¹⁴ Finally, by simply trying to understand the reasoning behind the law.¹⁵

Part I will address the historical background of eminent domain, starting with its inherent roots in the establishment of property rights in English common law under Henry II, to the place it held in the minds of the men responsible for the drafting of the American Takings Clause.¹⁶ Part II will be composed of a five-tier analysis of the doctrine in the manner prescribed by Blackstone.¹⁷ Part III will address how best to interpret the results of the analysis in Part II and to consider it for future environmental regulation.

I. THE ORIGIN OF THE TAKINGS CLAUSE

A. *Property Rights and Early English Common Law*

In order to fully understand the reasoning behind the Fifth Amendment's guarantee of just compensation for loss of land, one has to look all the way back to the birth of Anglo-American jurisprudence. When William the Conqueror was laying the groundwork for his eventual successor, Henry II, to create the common law, one of his earliest acts after unifying England was to survey the land to determine who owned what.¹⁸ When Henry II took the throne, England had fallen into disarray.¹⁹ In order to restore order and placate the English, Henry II created the common law, basing it off the framework that was present on the island from local customs with some alterations.²⁰ His legal advancement that is most relevant to this Note was the creation of juries to replace trial by combat or trial by ordeal for land disputes.²¹ Through implementing trial by law

¹² *Id.* at 60.

¹³ *Id.*

¹⁴ BLACKSTONE, *supra* note 8, at 60.

¹⁵ *Id.* at 61.

¹⁶ WINSTON CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN 162 (Dodd, Mead & Company, Inc., 1956).

¹⁷ BLACKSTONE, *supra* note 8, at 59.

¹⁸ *Domesday Book*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Domesday-Book> [<https://perma.cc/L7VU-L69A>] (last visited Apr. 2, 2020).

¹⁹ CHURCHILL, *supra* note 16, at 199.

²⁰ *Id.* at 199–200, 215.

²¹ *Id.* at 217–20.

and other measures to smoothen the manner in which disputes are settled, Henry II created the first property laws in Anglo-American jurisprudence.²² So ingrained was the notion of property rights, especially for land, that the earliest notions which resembled rights in Anglo-American law were to land.²³

The formal notion of rights, strong enough to bind the sovereign, enter our jurisprudence under Henry II's son, King John I, with the Magna Carta.²⁴ There are two things about this eight-centuries-old document that are of great importance to our interpretation of the Fifth Amendment.²⁵ First, of the sixty-three provisions in the Magna Carta, almost half address land rights or other rights that also involve land.²⁶ Second, Article 19 of the Magna Carta states, "No constable or his bailiff is to take [] chattels from anyone [] unless the constable or his bailiff immediately offers money in payment of obtains a respite by the wish of the seller."²⁷ Article 19 still allows for the sovereign's right to eminent domain; however, it explicitly calls for payment if the state takes an individual's property.²⁸ This eight-hundred-year-old legal document is the progenitor of our Takings Clause and reflects the critical association between land and the rights of individuals in early legal minds.²⁹

B. *Enlightenment Influences on the Framers*

While medieval English law was clearly an influence on the Framers, they also faced more modern influences from the Enlightenment that was sweeping the Western World.³⁰ This movement resurrected ancient Greco-Roman notions and concerns of reason and happiness, which had an influence on the great legal and philosophical minds of the time.³¹ There

²² *Id.*

²³ *See id.* at 216–17.

²⁴ *Magna Carta*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Magna-Carta> [<https://perma.cc/8G8S-4VZ5>] (last visited Apr. 2, 2020).

²⁵ *Id.*

²⁶ Magna Carta, 16 Jon. I, chs. 2, 3, 4, 5, 8, 9, 10, 13, 14, 16, 18, 23, 31, 32, 34, 37, 43, 46, 47, 52, 53, 56 (1215).

²⁷ Magna Carta, 10 Hen. III, ch. 19 (1225). This quote is from a later version of the Magna Carta issued by Henry III; however, its Article 19 better summarizes the ideas present in the original's Articles 28, 30, and 31.

²⁸ *Id.*

²⁹ ENCYCLOPEDIA BRITANNICA, *supra* note 24.

³⁰ *Enlightenment*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Enlightenment-European-history> [<https://perma.cc/R22Y-LW4C>] (last visited Apr. 2, 2020).

³¹ *Id.*

were two enlightenment thinkers in particular who were of great influence to the drafters of the Constitution: John Locke and Sir William Blackstone.³²

Locke claimed that all property rights are derived from a man's ownership of his own body.³³ In his philosophy, man has absolute ownership of his mind and body.³⁴ If he uses what he owns to improve the unchanged state of nature, it becomes his by virtue of him improving it.³⁵ He then expresses his own view on the social contract in which governments are willingly formed solely for the purpose of protecting the lives and property of the individuals who formed it.³⁶

Blackstone's views on land ownership and the common law were very clear, "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property."³⁷ In his view, the ever impalpable common law had a clear-cut rule that no matter the cause, land cannot be taken by the government without just compensation.³⁸ In many ways, the Enlightenment served to calcify the medieval notion in the common law of rights to one's property, making it more tangible and useful for the Founders of the United States.

II. BLACKSTONE'S FIVE-TIERED APPROACH TO ANALYSIS

A. *Usual and Most Known Significance of the Words*

The first step Blackstone offers to divine the "will of the legislator" is to look at the plain meaning of the text itself.³⁹ The text of the Takings Clause states, "[(1)] private property [shall not] [(2)] be taken [(3)] for public use, [(4)] without just compensation."⁴⁰ For the sake of brevity and simplicity, this Note will cede elements 3 and 4. Numerous cases and papers have dealt with the issue of what constitutes "public use" and under

³² While the Enlightenment had numerous great minds who had an influence on the Founders, many of whom who were lawyers, the scope of this Note requires the analysis be limited to these two outstanding influences.

³³ George H. Smith, *John Locke: The Justification of Private Property*, LIBERTARIANISM .ORG (Oct. 19, 2015), <https://www.libertarianism.org/columns/john-locke-justification-private-property> [<https://perma.cc/A9MD-4SFG>].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ BLACKSTONE, *supra* note 8, at 135.

³⁸ *Id.* at 134–35.

³⁹ *Id.* at 59.

⁴⁰ U.S. CONST. amend. V, § 5.

what criteria one must use to determine “just compensation.”⁴¹ For the sake of argument, this Note will assume that environmental regulation is a public use and a valid reason to take property. It will also adopt the assumption that if a regulation is found to be a taking, the compensation will be just. The far more interesting and relevant points to address here are “private property” and “[shall not] be taken.”⁴²

Purely based on word use, what constitutes private property? Merriam-Webster defines private as “intended for or restricted to the use of a particular person, group, or class.”⁴³ It also defines property as “something owned or possessed specifically: a piece of real estate.”⁴⁴ It is safe to assume that any commonly used dictionary would yield similar results. In this case, the common English meaning would be a thing, particularly land, that certain people can restrict others from using. This seems to perfectly align with the well-known legal metaphor of the bundle of rights.⁴⁵ When one adds private to property, the common language use suggests a meaning in concurrence with the legal understanding of the right to restrict other’s uses of the property as the true right to private property, not just control of the mere physical plot of land.

The same logic can be applied to “be taken.”⁴⁶ Merriam-Webster defines “take” as, “to get into one’s hands or into one’s possession, power, or control.”⁴⁷ The common meaning of “take” would suggest that something can be taken both physically, “one’s possession” and figuratively, “[within] one’s . . . power, or control.”⁴⁸

If someone were to combine the plain meaning of the various elements of the Takings Clause discussed above, they would get: the Federal Government⁴⁹ shall not remove an individual’s ability to determine

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Private*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/private> [https://perma.cc/M6QE-YCH5] (last visited Apr. 2, 2020).

⁴⁴ *Property*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/property> [https://perma.cc/WV33-FUDW] (last visited Apr. 2, 2020).

⁴⁵ Carlos Kelly, *What’s a Bundle of Sticks and Why Should You Care?*, LEGAL SCOOP ON SOUTHWEST FLA. REAL ESTATE (June 9, 2016), <https://www.legalscoopswflre.com/eminent-domain/whats-a-bundle-of-sticks-and-why-should-you-care/> [https://perma.cc/DK3N-VYDX].

⁴⁶ U.S. CONST. amend. V, § 5.

⁴⁷ *Take*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/take> [https://perma.cc/P4SF-XXGN] (last visited Apr. 2, 2020).

⁴⁸ *Id.*

⁴⁹ Since the Fifth Amendment was written solely to limit the federal government, it is referred to in my plain meaning interpretation of the Takings Clause; however, in application, it would still apply equally to the states under the due process clause of the Fourteenth Amendment.

the uses of their land either through physically possessing the land or by claiming that ability for themselves. This plain language reading supports the notion that by restricting an individual's ability to use the land as they see fit, a part of their ability to determine its use, then they are taking private property. This view concurs with the notion of regulatory takings.

B. Meaning of the Words from Context

If the first approach does not adequately explain the “will of the legislator” in a particular document, then Blackstone proscribes examining their meaning through the context of the document itself as well as similar works by the same legislature.⁵⁰ Since the Constitution was drafted by what Jefferson referred to as “an assembly of demigods,” all of whom had a wide range of impressive credentials, educations, and opinions, it would be rather difficult to discern the meaning of this bundle of compromises by looking at the drafters' independent writings.⁵¹ This shortens the scope of analysis to the Preamble to the Constitution, the various articles found within the document, and the other amendments that make up the Bill of Rights.⁵²

The Preamble is a logical starting point since the role of a preamble is to state the purpose of a document. The Constitution's Preamble reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁵³

The relevant principles for the Takings Clause would be “establish Justice,” “promote the general Welfare,” and “secure the Blessings of Liberty.”⁵⁴ These goals fall on both sides of the debate. On the one hand, “Justice” and “Liberty” would tend to support a strong view of property rights, while “general Welfare” would favor allowing the government to override these

⁵⁰ BLACKSTONE, *supra* note 8, at 60.

⁵¹ *An Assembly of Demigods*, NAT'L CTR. FOR CONST. STUD., <https://nccs.net/blogs/articles/an-assembly-of-demigods> [<https://perma.cc/YF9L-V2RS>] (last visited Apr. 2, 2020).

⁵² While it is true that the Bill of Rights was not written with the rest of the Constitution, these documents share an author, and the amendments were intended to be used in tandem with the Constitution.

⁵³ U.S. CONST. pmb1.

⁵⁴ *See id.*

rights when necessary for the good of society.⁵⁵ While what exactly Justice is has been argued for several millennia, common elements in the Western Philosophical tradition tend to be strict adherence to the law and the protection of the rights of citizens.⁵⁶ Liberty is an equally nebulous term, which seems to have lost a distinctive meaning over the years.⁵⁷ It is rooted from Latin “Liber,” which translates to free, which means that in the very least liberty can be understood to mean freedom from some degree of restraint on an individual’s actions.⁵⁸ The phrase “general Welfare” was lifted directly from the Articles of Confederation, and James Madison claimed that it was to serve a limited purpose and expressly warned of its overuse.⁵⁹ In some cases, the courts have taken Madison’s view such as *United State v. Butler*, which shot down an agricultural spending program as beyond the boundaries set forth in the Constitution.⁶⁰ For the most part, the predominant view has been Alexander Hamilton’s, that as long as the use is directed towards a vague common good, then it is allowable.⁶¹

General Welfare, as it is commonly used, is strongly in favor of uncompensated government regulations, since as stipulated earlier such regulation serves to benefit the general public. Liberty, on the other hand, would support regulatory takings as it would imply protection from overly intrusive government action, the generally accepted reason for the revolution that led to the writing of the document in the first place.⁶² Justice, if interpreted as protecting individual rights, would likely be on the side

⁵⁵ *See id.*

⁵⁶ Edward Younkins, *Justice in a Free Society*, LIBERTY FREE PRESS (Mar. 15, 2000), <http://www.quebecoislibre.org/younkins27.htm> [<https://perma.cc/D9BA-8A73>]. While there are numerous, fascinating non-Western interpretations of justice, for the sake of an analysis of the intent of this Western document written by men with limited awareness to these other views, all that is necessary is the Western interpretation.

⁵⁷ Carl Eric Scott, *The Five Conceptions of American Liberty*, NAT’L AFF. (Summer 2014), <https://www.nationalaffairs.com/publications/detail/the-five-conceptions-of-american-liberty> [<https://perma.cc/HWY3-ZUBL>].

⁵⁸ *Liberty*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/liberty> [<https://perma.cc/Z4PT-L8DB>] (last visited Apr. 2, 2020).

⁵⁹ *See* Mike Maharrey, *James Madison Refutes Expansive Reading of the General Welfare Clause*, TENTHAMEND. CTR. (July 18, 2018), <https://tenthamentcenter.com/2018/07/18/james-madison-refutes-expansive-reading-of-the-general-welfare-clause/> [<https://perma.cc/HCD7-PP8R>].

⁶⁰ *See* *United States v. Butler*, 297 U.S. 53, 68 (1936).

⁶¹ *General Welfare*, FREE DICTIONARY BY FARLEX, <https://legal-dictionary.thefreedictionary.com/General+Welfare> [<https://perma.cc/DK3H-AU7V>] (last visited Apr. 2, 2020).

⁶² *American Revolution*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/American-Revolution> [<https://perma.cc/5NXG-C39N>] (last visited Apr. 2, 2020).

of regulatory takings.⁶³ This is especially true given that at the time of the writing of the Constitution, private property was held to be one of the highest of individual rights and as Blackstone put it “sacred and inviolable.”⁶⁴ If the more modern use of rights is taken, this point loses much of its strength, as in the modern age we have a very wide variety of rights of which property is but one of many.⁶⁵

The articles of the Constitution itself can also be examined to give insight into the meaning of the Takings Clause and how far it should be extended. Property is only directly addressed twice within the body of the document in Article III, Section 3 and Article IV, Section 3.⁶⁶ Article III, Section 3 limits the power of the government to prevent the heirs to someone convicted of treason to inherit their property.⁶⁷ Article IV, Section 3 is of little relevance as it involves property belonging to the United States, not individual citizens.⁶⁸ Article I, Section 8 further addresses the power to act on behalf of the general welfare; however, it is primarily dealing with Congress’s power to spend, not exercise eminent domain or regulate.⁶⁹

The other Amendments to the Constitution contained in the Bill of Rights hold greater probative value than the articles in the text itself. While none of them address land in particular or personal property, they all follow a common trend.⁷⁰ They are all negative rights rather than positive ones.⁷¹ Negative rights say what a government can not do, while positive rights say what it must do.⁷² Since positive rights did not develop until after World War II, the Founding Fathers would have understood rights only to be protections against what the government can do.⁷³ Most actions taken in the name of environmental protection which would cause an issue with the regulatory takings doctrine would fall under positive rights.⁷⁴

⁶³ U.S. CONST. pmbl.

⁶⁴ BLACKSTONE, *supra* note 8, at 140.

⁶⁵ *See, e.g.*, G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948). Of its thirty articles, only article 17 protects property. It also extends protection only so far as guaranteeing a right to own property and not have it “arbitrarily” taken.

⁶⁶ *See* U.S. CONST. art. III, § 3; *see also* U.S. CONST. art. IV, § 3.

⁶⁷ U.S. CONST. art. III, § 3.

⁶⁸ U.S. CONST. art. IV, § 3.

⁶⁹ U.S. CONST. art. I, § 8.

⁷⁰ *See* U.S. CONST. amends. I–X.

⁷¹ *See id.*

⁷² *Negative vs. Positive Rights*, GLOBALIZATION 101, <http://www.globalization101.org/negative-vs-positive-rights/> [https://perma.cc/652G-49HN] (last visited Apr. 2, 2020).

⁷³ *Three Generations of Human Rights*, GLOBALIZATION 101, <http://www.globalization101.org/three-generations-of-rights/> [https://perma.cc/9LK9-K3UT] (last visited Apr. 2, 2020).

⁷⁴ *Id.*

Since, the Bill of Rights seems to be a highly negative document, whose primary purpose is to limit government action, it clearly reflects a preference for inaction over action in order to protect individual rights.⁷⁵ This emphasis on inaction out of fear of harming rights would support the view that the Founders would disfavor regulatory actions that threaten an individual's right to their private property.⁷⁶

Like the first tier, the second supports the notion of regulatory takings. The Preamble highlights three purposes for the document: justice, the general welfare, and liberty.⁷⁷ With this meaning, the drafters most likely understood justice and liberty would require compensation for regulation, while general welfare, if taken liberally, would not.⁷⁸ While an analysis of the body of the Constitution, unfortunately, provides little light on the issue, an analysis of the other Amendments in the Bill of Rights further supports regulatory takings. The Bill of Rights follows a theme of limiting the actions of the federal government to protect cherished negative rights.⁷⁹ This strong emphasis on negative rights and limited government would imply that all ten, including the fifth, should be applied in the manner that provides the most protection to these rights at the expense of government power.

C. *Understanding of the Words with Regard to Their Purpose*

The next tier of analysis prescribed by Blackstone is to discern the general purpose of the clause and examine its words in the light most aligned with that purpose.⁸⁰ Discerning the purpose of the Takings Clause involves much of the analysis previously discussed in Section B as well as a cursory glance at the time in which this document was drafted. Once the purpose of the clause is discerned, its text and application should be read in the manner most consistent with this purpose.⁸¹

As shown in the previous subsection, the original purpose of the Constitution and its first ten Amendments is to further justice, the general welfare, and liberty primarily through the use of negative rights.⁸² This view is further strengthened through a basic understanding of the events that led up to its drafting.

⁷⁵ See U.S. CONST. amends. I–X.

⁷⁶ *Id.*

⁷⁷ U.S. CONST. pmbl.

⁷⁸ *Id.*

⁷⁹ U.S. CONST. amends. I–X.

⁸⁰ BLACKSTONE, *supra* note 8, at 60.

⁸¹ *Id.*

⁸² U.S. CONST. pmbl.

Prior to the drafting of the Constitution, the infant United States had won its independence from the British Empire.⁸³ Like any conflict, the Revolution was the result of a myriad of factors; however, it is generally accepted that the primary cause was opposition to increased British control of the American Colonies after their halcyon days when the British let the colonies largely operate independently.⁸⁴ This increased control was particularly heinous because it denied the colonists the rights they had as Englishmen under the common law.⁸⁵ Since the Constitution was birthed from a conflict that was a reaction to violations of the colonists' common law rights, it can safely be assumed that it should not also oppose those same rights.⁸⁶ This history would suggest that an interpretation of the Constitution under the third tier of analysis would require a view of the words in a meaning that is consistent with common law rights prior to the document's drafting.

The Takings Clause states, "private property [shall not] be taken for public use, without just compensation."⁸⁷ The negative law preference interpretation would suggest a reading of this clause would have to favor the negative right of property over the more positive right of a clean environment.⁸⁸ This interpretation would require the government to compensate for loss of value.

The historical view that the Constitution would have to uphold the rights established under the common law is a little more complex. The problem with this approach is that the English common law did not include eminent domain because it was not needed.⁸⁹ The reasons for this being that after William the Conqueror seized control of the island, the Crown owned all the land in England.⁹⁰ Perhaps because the king owned all land, the common law allowed for different people to own various interests in the same piece of land, the bundle of rights view.⁹¹ Despite the

⁸³ ENCYCLOPEDIA BRITANNICA, *supra* note 62.

⁸⁴ *Id.*

⁸⁵ See *Rights of Englishmen in British America*, LIBR. CONGRESS, <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/rights-of-englishmen-in-british-america.html> [<https://perma.cc/A843-VR8U>] (last visited Apr. 2, 2020).

⁸⁶ Richard Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882).

⁸⁷ U.S. CONST. amend. V, § 5. As before, for the sake of brevity only parts 1 and 2 will be focused on.

⁸⁸ GLOBALIZATION 101, *supra* note 72.

⁸⁹ William D. McNulty, *The Power of "Compulsory Purchase" Under the Law of England*, 21 YALE L.J. 639, 640 (1912).

⁹⁰ *Id.*

⁹¹ Kelly, *supra* note 45. This view is a common metaphor that has become a term of art

king having an ownership interest, over time the common law grew to hold a deep respect for “the sacred and inviolable rights of private property.”⁹²

If the clause is interpreted with the purpose of protecting the rights the former colonists had as Englishmen, then the deference for private property, especially land, would entail a broad interpretation over what constitutes property and what constitutes taking. Since the English common law favored strong protections on real property when everyone only had partial interest to their land, then only losing a partial interest in land should still be interpreted as a taking.⁹³ This broad definition of taking coupled with the respect the early English had for land rights would certainly support the view that the Founders would have required reparations for a regulatory taking.

D. Will the Application of an Interpretation Result in an Absurd Hypothetical?

The next tier in the analysis is whether or not the consequences of applying the rule would be absurd.⁹⁴ Blackstone explains this means of interpretation through an analogy to an old law from Bologna.⁹⁵ This law prohibited drawing another’s blood in the street.⁹⁶ This tier of analysis would rule that a doctor could still perform an emergency operation on someone in the street even if it meant drawing his blood since it is highly unlikely that the lawmakers intended to punish a doctor for saving someone’s life under a law clearly intended to prevent harm to people’s safety.⁹⁷

This standard becomes less useful when the application of the statutes is not as obviously absurd as Blackstone’s example.⁹⁸ During the eighteenth century, environmentalism as we know it did not exist.⁹⁹ While humans had already caused drastic climate shifts during the Roman Warm Period and the Medieval Warm Period, mankind had yet to understand

within the legal profession. This source in particular was selected for its good job in explaining the phrase.

⁹² BLACKSTONE, *supra* note 8, at 135.

⁹³ See McNulty, *supra* note 89, at 649.

⁹⁴ BLACKSTONE, *supra* note 8, at 60.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.*

⁹⁹ ERIN L. GORDON, THE AM. CTR., HISTORY OF THE MODERN ENVIRONMENTAL MOVEMENT IN AMERICA (June 2012), https://photos.state.gov/libraries/mumbai/498320/fernandesma/June_2012_001.pdf [<https://perma.cc/7YJB-8S6G>].

its effect on the environment.¹⁰⁰ As previously discussed, the Founders were influenced by a legal tradition with a strong emphasis on property rights, so there is a chance that they would find not requiring compensation for serious regulation which devalues property to be absurd. How they would react to modern environmental issues is extremely difficult to predict since they had no exposure to modern regulations or environmental issues.¹⁰¹ These factors make tier four unfortunately not particularly useful in this analysis.

E. The Spirit of the Law

The final tier of analysis is assessing the spirit of the law, which Blackstone describes as the “most universal and effectual way of discovering the true meaning of a law[.]”¹⁰² Under this approach, similar to tiers two and three, one must discern why a particular statute is in place and apply the statute in the manner that best supports the intent or spirit behind the statute.¹⁰³ It is for this interpretation of the law that Blackstone claims legal equity exists.¹⁰⁴ He goes on to explain that this tier is to be used on a case by case basis when there is some wiggle room in the law for the judge’s discretion.¹⁰⁵ While this tier has the most potential leeway in its interpretation, Blackstone does warn that overuse of this mode of interpretation will “destroy all law, and leave the decision of every question entirely in the breast of the judge.”¹⁰⁶

As discussed in Section B, the text of the constitution suggests that the spirit of the Fifth Amendment would further justice, the general welfare, and liberty with a preference for negative rights.¹⁰⁷ Section C showed a strong desire to protect common law rights and land rights through the historical background of the Amendment’s drafting. Both of these sections supported the notion that the government must compensate for devalued land; however, tier five’s view of the spirit of preserving land rights may allow for more malleable conclusions when the rights of other landowners are threatened.

¹⁰⁰ James Taylor, *Global Cooling, Not Global Warming, Doomed the Ancients*, FORBES (May 29, 2014), <https://www.forbes.com/sites/jamestaylor/2014/05/29/global-cooling-not-global-warming-doomed-the-ancients/#3069e4187869> [https://perma.cc/K7MT-E27X].

¹⁰¹ GORDON, *supra* note 99.

¹⁰² BLACKSTONE, *supra* note 8, at 16.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See generally* U.S. CONST. pmb1.

This can be illustrated with the tort of public nuisance, which comes from the English common law.¹⁰⁸ A public nuisance arises when an individual uses their property in a way that is detrimental to the public.¹⁰⁹ The poster child for public nuisance is environmental pollution such as “harm to a natural resource [] aris[ing] from contamination of waterways.”¹¹⁰ Tortfeasors who commit public nuisances often face the equitable remedy of an injunction forcing them to cease their detrimental activity.¹¹¹ Public nuisances and injunctions are not deemed unconstitutional despite imposing a limitation on an individual’s use of property.¹¹² This serves the spirit of the law under Section B because it protects the rights of individuals, including to their real property, even if it is from other individuals’ use of their property. It also serves the spirit as discussed in Section C, since this was a pre-existing remedy under English common law.¹¹³

The same special situation is true of the common law tort of trespass.¹¹⁴ If anyone invades another’s property, then they are liable for damages regardless of intent.¹¹⁵ This includes an individual’s air rights and can be used to punish a tortfeasor who uses his land to produce pollution that enters another’s land.¹¹⁶

The existence of torts such as public nuisance and trespass, which can allow for the granting of injunctions, suggests that the law does not see regulation of one’s use of their land to protect another’s rights to be a taking.¹¹⁷ This would suggest that the intent of the Fifth Amendment was not to be so draconian as to make any necessary regulation of land impossible. It would instead support the conclusion that such regulation is admissible if it is for the sake of protecting the material rights of others and their land.

¹⁰⁸ Brad Reid, *A Brief Introduction to the Law of Nuisance*, HUFFINGTON POST (Sept. 6, 2016), https://www.huffingtonpost.com/brad-reid/a-brief-introduction-to-t_b_11876710.html [<https://perma.cc/S3UQ-K43W>].

¹⁰⁹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 (AM. LAW INST., Tentative Draft No. 2, 2018).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Reid, *supra* note 108.

¹¹⁴ See *Trespass*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/trespass-law> [<https://perma.cc/ZK43-KSB3>] (last visited Apr. 2, 2020).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *Remedies in Tort Law*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/remedies-in-tort-law.html> [<https://perma.cc/69VG-SR2J>] (last updated June 24, 2018).

III. HOW ENVIRONMENTAL REGULATION SHOULD GO FORWARD WITH THE TAKINGS CLAUSE

A. *Cautious Regulating*

Blackstone's interpretation of the Takings Clause and the history leading up to its drafting support the notion that if the government severely restricts the use of someone's property, then it has performed a taking. This does not, however, spell the end of environmental regulation as we know it. Not all regulations on property have been found to be takings, such as the court's finding in *Penn Central Transportation Co. v. New York City*.¹¹⁸ In *Penn Central*, the Supreme Court ruled that imposing landmark laws to preserve the edifice of Penn Central Station did not amount to a taking despite limiting the use of the property.¹¹⁹ In doing so, the Court imposed a three-part test to determine takings.¹²⁰ First, how severe was the economic impact on the regulated property?¹²¹ Second, did the regulation interfere with investment backed expectations?¹²² Finally, did the regulation further a legitimate government interest?¹²³ The *Penn Central* test would still allow for government regulation as long as the government is more conscientious of when its action would constitute a taking.¹²⁴ This is arguably the most desirable outcome since it would both allow for necessary regulation and require that regulators carefully consider their impact on private property rights.

B. *Make a Greater Use of Torts*

As discussed in the fifth tier of the Blackstone analysis of the Fifth Amendment, trespass and public nuisances do not interfere with the Takings Clause.¹²⁵ Both existed since before the Constitution and were never deemed contrary to it.¹²⁶ Prior to modern environmental regulation, if

¹¹⁸ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 124.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ The *Penn Central* test has already rightly faced some criticism; however, future decisions are likely to maintain some form of test for the same purpose. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

¹²⁵ See Reid, *supra* note 108; ENCYCLOPEDIA BRITANNICA, *supra* note 114.

¹²⁶ George F. Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220, 221

your neighbor's activities were harming your resources, you filed for an injunction under nuisance law.¹²⁷ While a complete abandonment of government environmental regulation would not be desirable, more actions to empower and encourage communities to oppose polluting tortfeasors may be a desirable reaction to regulatory takings.

This approach works in cases where people are directly affected; however, it does encounter issues in regard to standing. Environmental issues that affect animals but not humans would be unable to be addressed through torts, since as expressed in *Naruto v. Slater*, animals cannot have standing to sue.¹²⁸ This means that for some issues, environmental regulation would still be necessary for wildlife preservation.¹²⁹

C. *Ignore the Intent of the Founders*

Another approach that can be taken is to simply ignore the intent of the Founders in determining the constitutionality of the regulatory takings doctrine. There is a myriad of ways in which the Constitution can be interpreted including textualism, original meaning, judicial precedent, pragmatism, moral reasoning, national identity, structuralism, and historical practices.¹³⁰ Former Judge Richard Posner even went as far as to say, "I see absolutely no value to a judge of spending decades, years, months, weeks, day, hours, minutes, or seconds studying the Constitution . . . Eighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21st century."¹³¹

The intent of the Founding Fathers is of paramount importance for an interpretation under original meaning and a broad use of historical practices.¹³² Textualism and structuralism would also be in favor of

(1917); *The Historical Meaning of Nuisance*, LAWS, <https://tort.laws.com/nuisance/history-meaning> [<https://perma.cc/W5WL-BPTU>] (last updated Dec. 22, 2019).

¹²⁷ Roger Meiners & Bruce Yandle, *The Common Law: How It Protects the Environment*, PROP. & ENV'T RES. CTR. (May 1, 1998), <https://www.perc.org/1998/05/01/the-common-law-how-it-protects-the-environment/> [<https://perma.cc/ET39-NJCJ>].

¹²⁸ *Naruto v. Slater*, 888 F.3d 418, 420, 426 (2018). This case explicitly dealt with standing to sue on copyright grounds, but similar results have been found by courts in other areas of law.

¹²⁹ *See id.*

¹³⁰ BRANDON J. MURRILL, CONG. RESEARCH SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION (Mar. 15, 2018), <https://fas.org/sgp/crs/misc/R45129.pdf> [<https://perma.cc/AR36-HF76>].

¹³¹ Jessica Chasmar, *Judge Richard Posner: 'No value' in studying the U.S. Constitution*, WASH. TIMES (June 27, 2016), <https://www.washingtontimes.com/news/2016/jun/27/richard-posner-no-value-in-studying-us-constitution/> [<https://perma.cc/TW2X-QKS2>].

¹³² *See* MURRILL, *supra* note 130, at 7, 22.

regulatory takings under tier one and tier two of the analysis in Part II.¹³³ This still leaves the pragmatism, moral reasoning, and national identity arguments, as well as a more narrow view of historical practice and judicial precedent.¹³⁴ The world has changed a lot since the time of the drafting of the Constitution. Perhaps like in *Atkins v. Virginia*, there is an “evolving standard of decency” for property rights when weighed against environmental concerns.¹³⁵

Ultimately, this may be the most dangerous approach to the issue of regulatory takings. While there are various means of interpretation, blatantly ignoring a strong position in one, even if for a good reason, may lead to less consistent federal laws and reduce the legitimacy of the court over time. As the great Julius Caesar once said, “All precedents productive of evil effects have had their origin from what was good.”¹³⁶

CONCLUSION

The notion of property rights has been around since Henry II began Anglo-American jurisprudence with reference to the *Domesday Book*.¹³⁷ With the signing of the Magna Carta in 1215 by King John I, these rights were deemed so important as to be beyond even the power of the king to violate.¹³⁸ These limitations on the sovereign included the article, “No constable or his bailiff is to take . . . chattels from anyone . . . unless the constable or his bailiff immediately offers money in payment of obtains a respite by the wish of the seller.”¹³⁹ Five-hundred-seventy-six years later James Madison would recodify this rule into the Takings Clause of the Fifth Amendment, which reads, “private property [shall not] be taken for public use, without just compensation.”¹⁴⁰

The goal of this Note is to analyze how this ancient rule fits into our modern world and the need for regulating land use for the sake of the environment. Using Blackstone’s system of analysis to try to surmise the will of the Founders reflects a strong support of land rights and opposition to their uncompensated regulation.¹⁴¹ Tier one supports regulatory

¹³³ See *id.* at 5–7, 18–22.

¹³⁴ See *id.* at 10–18, 22–24.

¹³⁵ *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

¹³⁶ GAIUS SALLUSTIUS CRISPUS, CONSPIRACY OF CATILINE § 51 (John Watson trans., Harper & Brothers, 1867).

¹³⁷ CHURCHILL, *supra* note 16, at 162.

¹³⁸ ENCYCLOPEDIA BRITANNICA, *supra* note 24.

¹³⁹ Magna Carta, 10 Hen. III, ch. 19 (1225).

¹⁴⁰ U.S. CONST. amend. V, § 5.

¹⁴¹ See BLACKSTONE, *supra* note 8, at 16–18.

takings as it deduced that the plain meaning of the Takings Clause extending to both physical confiscation and a reduction in the power of the landowner to determine the use of their land.¹⁴² Tier two more tentatively supports it, since liberty, the classical view of justice, and a preference for negative rights would favor limiting government action.¹⁴³ General welfare and a more modern interpretation of justice would weigh against regulatory takings.¹⁴⁴ Tier three reflects a desire to oppose strong government and uphold traditional common law rights and would thus support regulatory takings.¹⁴⁵ Tier four is of little use in the interpretation at hand and can be dismissed as it is impossible to know whether modern takings would be seen as an absurd use of the clause.¹⁴⁶ Tier five is the most permissive and reflects numerous equitable exceptions in the Takings Clause; however, Blackstone warns of its overuse.¹⁴⁷

It seems clear with three in favor, one abstaining, and one that depends upon the particular case, that the Fifth Amendment would require compensation for regulation which seriously devalues one's property.¹⁴⁸ Environmental law can be more cautious going forward, act more through proxies in tort suits, or try to argue alternative interpretations of the rule; but, ultimately if an individual's property is adversely affected enough, they would have to be paid. This may be a potential roadblock for environmental regulation in the future, but it is a necessary part of the precocious balancing act between individual liberties and the good of society.

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See* BLACKSTONE, *supra* note 8, at 16–18.

¹⁴⁸ *See id.*