"No Taking Without a Touching?" Questions from an Armchair Originalist

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One of the most delightful things about this law review Symposium is that, unlike many other law review symposiums, we have been asked a question that is very hard to answer: What did the constitutional provisions protecting economic rights, including the Fifth Amendment's Takings Clause—the subject of this essay—originally mean? I am particularly honored to be a part of the discussion because another delightful thing about this Symposium is that the authors sharing this

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issue—present company excepted—happen to be the very individuals who have thought most seriously about and produced the best scholarship examining that very question. And, while I do profess to be an originalist, my originalism is of the armchair, rather than academic, variety. Very little of my scholarship focuses on the Takings Clause at all, and that which does is admittedly both history free and full of the soft law and economics utilitarian analysis that Dean Treanor has correctly observed dominates academic discussions of takings problems.[1]

It is thus as an armchair originalist that I pose three questions about the use of history to support the dominant academic view that the compensation requirement of the Fifth Amendment's Takings Clause, as originally understood, extended only to physical appropriations or invasions of private property by the government. This position, which I will refer to as the "standard account" or "standard historical account," certainly has attracted forceful dissents in the academy, most notably by the authors featured in this Symposium issue. The view that Takings Clause protection against so-called regulatory takings is ahistorical, however, is commonly accepted enough to earn the endorsement of even Justice Scalia, who is both an originalist and a supporter of regulatory takings protection.[2]

My first question about the standard historical account concerns the frequent reliance on the prevalence of colonial and founding era land use regulations to support the inference that the Takings Clause could not have been intended to reach regulatory takings. In light of evidence suggesting that the founding generation *knew* about pervasive land use regulation, the argument goes, then surely the men who proposed, adopted, and ratified the Fifth Amendment also knew how to mandate compensation for regulatory takings.[3] The inference, while logical enough, suffers from two related difficulties. First, when ratified, the Fifth Amendment only

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1. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 104–05 (2006); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936–37 (2003). *See also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 811 (1995) (characterizing dominant analysis in Takings literature). This characterization of my own work is not intended to denigrate the excellent law and economics commentary, of both the soft and hard varieties, on the Takings Clause.

2. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.").

3. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252, 1283 (1996) [hereinafter Hart, *Colonial Land Use Law*]; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1101 (2000) [hereinafter Hart, *Land Use Law in the Early Republic*].

reached federal action, and the federal government lacked authority, in most cases, to enact the kinds of police power regulations that tend to raise regulatory takings questions.[4] In other words, the enumerated powers provided far more comprehensive protection against regulatory takings than the Takings Clause. Second, legal historians have tended to conflate local land use regulations with those enacted by state—or colonial—governments.[5] Yet, the import of *local* regulations is significantly complicated by the fact that the distinction between "public" corporations—municipalities—and "private" ones—General Motors, was not completely developed until at least the early decades of the nineteenth century, and for some purposes, not until later.[6] Therefore, land use regulations imposed by cities like New York and Boston, especially during the colonial era, might not be perfectly analogous to modern land use restrictions.

My second two questions about the historical record supporting the standard account concern the interpretive weight attributed to *state* court decisions either interpreting a state constitutional compensation requirement, or in the absence of such a provision, discerning whether government action nonetheless necessitates compensation. Early state decisions certainly provide important insights into the original meaning of the Takings Clause. Particularly to the extent that they were asked to resolve questions analogous to today's regulatory takings problems, state court decisions can shed light on what the operative terms of the Takings Clause objectively meant at the time of the founding. For example, would a member of the founding generation have understood the word *take* to sometimes cover confiscatory regulations? Would he have understood *property* in a limited "thing-like" sense or a more modern relational one?[7]

My first question about the use of state cases to understand what the Federal Takings Clause means is temporal; the second is substantive. Historians of the Takings Clause frequently draw upon cases decided

4. *See* Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Takings Clause only applies to takings by the federal government).

5. *See* Hart, *Colonial Land Use Law*, *supra* note 3, at 1273–79 (discussing state and local regulation); Hart, *Land Use Law in the Early Republic*, *supra* note 3, at 1107–13 (same). *See also generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1, 3, 6, 10, 16 (1996) (same).

6. *See infra* notes 42–54 and accompanying text.

7. *See, e.g.*, Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1188–91 (1999) (discussing competing conceptions of property).

well into the nineteenth century to support various, and competing, conclusions about the original reach of the compensation requirement.[8] Yet, it is unclear to me what weight should be given to the reasoning of judges separated from the founding by more than a generation or so. As many scholars, including, again, other contributors to this Symposium, have observed, the thinking about economic and property rights underwent a profound ideological shift during the late eighteenth and early twentieth centuries.[9] While I am ill-equipped to resolve the academic debate over the extent to which this shift had taken hold by the time of the Fifth Amendment's ratification, the shift itself complicates the already problematic reliance on nineteenth century cases to elucidate the meaning of a late eighteenth century legal provision.[10]

A final difficulty with the use of state cases is that they are relevant to original meaning analysis only to the extent that nineteenth century state courts were asking the same questions as modern courts faced with regulatory takings claims. But, as Eric Claeys's work suggests, it is not entirely clear whether they were asking the same questions.[11] If nineteenth century courts were asked to resolve *different* questions than twentieth and twenty-first century ones, then the evidentiary weight of their decisions is significantly undermined.

I. THE TAKINGS CLAUSE AND THE PROBLEM OF HISTORY

About the only thing conclusively established regarding the history of the Takings Clause is that the history of the Takings Clause plays little or no role in the Supreme Court's regulatory takings jurisprudence.[12] The cases are peppered with apparently ahistorical gems, from Justice Holmes's admonition in *Pennsylvania Coal* that a regulation that "goes

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8. *See infra* notes 61–65 and accompanying text.

9. *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 29–34, 54–58, 101–02 (2d ed. 1998) (discussing the evolution of thought about economic life during the nineteenth century); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) (same); Treanor, *supra* note 1, at 819–27 (same).

10. *See, e.g.*, Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 593–94 (1995) (arguing that the founding generation strongly endorsed private property rights); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 561–63 (1995) (challenging Epstein's characterization).

11. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1562–63 (2003) (challenging the dominant interpretation of nineteenth century takings cases).

12. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985) ("Historical arguments have played virtually no role in the actual interpretation of the clause.").

too far" effects a taking,[13] to Chief Justice Rehnquist's articulation of a Goldilocks rule for regulatory exactions in *Dolan*: "We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed."[14] In fact, many scholars have argued that the most prominent exception to the Court's practice of disregarding history when resolving regulatory takings claims—Justice Scalia's invocation of "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"[15]—was ill-conceived.[16]

Why the Court's regulatory takings jurisprudence has remained ahistorical is, in one sense, a puzzle. After all, regulatory takings doctrine arguably underwent its most significant evolution during the decades when we all became originalists. The Justices in the majority of the decisions reflecting that evolution were, without question, the Court's most consistent originalists.[17] One way to resolve this puzzle of non-originalism among originalists would be to assume that proponents of strong regulatory takings protection are favoring results-driven, rather than principle-driven, outcomes. For example, Justice Scalia's admonition in *Lucas* that "[t]he practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, . . . were out of accord with *any* plausible interpretation of those provisions,"[18] is, as William Treanor observed, arguably "at odds with his announced commitment to a doctrine of originalism and his explanation of what originalism means."[19]

Another explanation for the Court's ahistorical approach to the Takings Clause—and perhaps for the regulatory takings "muddle"

13. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
14. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
15. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).
16. Lynn E. Blais, *Takings, Statutes and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1996); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 79 (1995); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 837 (2006); Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 759–61 (2006).
17. Jeffrey Rosen, *Originalist Sin*, THE NEW REPUBLIC, May 5, 1997, at 26 ("We are all originalists now."). *See also* Palazzolo v. Rhode Island, 533 U.S. 606 (2001); *Dolan*, 512 U.S. at 374; *Lucas*, 505 U.S. at 1003; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
18. *Lucas*, 505 U.S. at 1028 n.15.
19. Treanor, *supra* note 1, at 808.

generally[20]—is the fact that the Takings Clause is itself a historical puzzle. Not only is the Takings Clause the *only* provision of the Bill of Rights that was not requested by a state ratifying convention, but there was also apparently not one word of discussion about it at the time it was proposed and ratified—not in Congress, either before or after its proposal, or in the states, either before or after its ratification.[21]

Moreover, unlike many other provisions of the Constitution, the Takings Clause had no colonial or British antecedents: No colonial charter mandated compensation, even for physical appropriations, in all cases.[22] Only two Colonies provided any per se protection against seizures, and only one of these protections—Massachusetts's compensation requirement for seizures of personal property—was fully implemented.[23] The first state to adopt a takings clause, post Revolution, was Vermont in 1777; many states did not adopt takings clauses until well into the nineteenth century.[24] While colonial—and later state—governments routinely compensated owners when their property was seized, compensation was a matter of legislative grace, rather than fundamental entitlement.[25] Some scholars, notably William Treanor and Morton Horwitz, have argued that founding-era governments routinely refused to compensate owners when property was seized for roads.[26] This reading of the historical evidence has been challenged, especially by James Ely, who argues that cases of noncompensation, far from being routine, were the rare exception to an expectation that any seizure required compensation.[27]

The Takings Clause, however, represented a profound departure from voluntary remuneration practices, whatever their extent, by mandating just compensation for all takings by the federal government. This reality—that the Takings Clause was itself ahistorical—poses a particular

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20. *See generally* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562–63, 594–96 (1984) (characterizing takings doctrine as a "muddle").

21. *See, e.g.*, Treanor, *supra* note 1, at 791.

22. *Id.* at 785.

23. *Id.* at 785–86 & nn.12 & 14 (citing Mass. Body of Liberties § 8 (1641) and Fundamental Constitutions of Carolina art. 44 (1669)) ("Perhaps because the attempts to put the Fundamental Constitutions of Carolina into operation were unsuccessful, . . . leading accounts have considered the Massachusetts [provision] . . . the only colonial precursor of the Takings Clause.").

24. HORWITZ, *supra* note 9, at 63–64, 66; Treanor, *supra* note 1, at 789–91.

25. *See, e.g.*, HORWITZ, *supra* note 9, at 65–66; Treanor, *supra* note 1, at 785, 788–89.

26. HORWITZ, *supra* note 9, at 63–65; Treanor, *supra* note 1, at 787–88.

27. *See* James W. Ely, Jr., *"That Due Satisfaction May be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 4–14 (1992).

problem for originalists: In contrast to, for example, the Fourth Amendment's reasonableness requirement, it is impossible to draw upon pre-founding era interpretations of similar rights because there were none.[28] One side effect of the Takings Clause's ahistorical status has been the dominance of "original intent" scholarship seeking to recover the subjective meaning of the Clause's terms to the elite group of men who proposed and ratified it.[29] The writings of James Madison, who proposed the provision—apparently out of the blue—play a significant role in these academic exercises, for obvious reasons,[30] as does the intellectual and ideological backdrop against which the Clause was proposed and ratified.[31]

II. THE TAKINGS CLAUSE AND ORIGINALISM: THREE HISTORICAL PUZZLES

As an armchair adherent to the now dominant "original meaning" originalism, the questions posed by this essay shy away from these original intent debates. This essay focuses instead on the historical evidence used to support the conclusion that the terms of the Takings Clause *objectively* excluded regulatory takings, rather than on the evidence hinting at the ratifiers' and Framers' subjective understanding of the provision. This historical evidence falls into two general categories: inquiries into the regulatory practices during the colonial and founding eras, and cases interpreting state takings clause analogs.

A. Colonial and Founding Era Land Use Regulations

In *Euclid v. Ambler Realty*, the seminal case upholding comprehensive zoning, Justice Sutherland explained:

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28. *See, e.g.*, TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 38–41 (1969) (using British practices and history to elucidate the meaning of the Fourth Amendment); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 764 (1994) (same). *See also* Treanor, *supra* note 1, at 785–87 (observing that colonial charters lacked compensation guarantees).

29. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–91 (2004); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 n.51 (2002).

30. *See* Treanor, *supra* note 1, at 791 (arguing that, absent a ratification record, "Madison's statements thus provide unusually significant evidence about what the clause was originally understood to mean.").

31. *See, e.g.*, ELY, *supra* note 9, at 29–34, 54–58 (discussing the intellectual history of the Takings Clause); EPSTEIN, *supra* note 12, at 19–31 (same).

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.[32]

It is now well accepted that Sutherland's tale was mythological. Notably, scholars such as John Hart have established that land use regulations were a pervasive fact of life during the colonial and founding eras.[33] For example, fire codes prohibited the erection of wooden buildings and permitted local authorities to demolish sound houses to prevent further conflagration; affirmative use requirements mandated that owners improve both agricultural and urban property; poor laws empowered local authorities to take over the property of dissolute residents in order to generate support for family members; local, colonial, and state codes regulated the location and even appearance of buildings; and the rights of land speculators were dramatically curtailed.[34] Compensation for the economic losses sustained as a result of these regulations was rare. On the other hand, owners were usually, but not always, compensated when their property was seized for public use.[35]

Some scholars, including John Hart, have used the fact that the Takings Clause was proposed and ratified against this backdrop of pervasive land use regulation to argue that the Clause could not have been intended to mandate compensation for regulatory takings.[36] Hart argues:

> If anyone had felt that contemporary manifestations of the power to regulate land use unreasonably threatened landowners' autonomy, then the period surrounding the ratification of the Constitution would have been a good time to speak up and propose constitutionalizing land use law. . . . Instead, Congress adopted a compensation provision in 1789 covering only "property . . . taken for public use." . . . If the first Congress had wanted to shift the boundary line between public power and private prerogative, so that regulation as well as appropriation of land were subject to review under the new Takings Clause, that would have been a great novelty. We should not read such a novelty into a text without some clear evidence showing that contemporaries understood it that way.[37]

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32. 272 U.S. 365, 386–87 (1926).
33. Hart, *Colonial Land Use Law*, *supra* note 3, at 1259–81; Hart, *Land Use Law in the Early Republic*, *supra* note 3, at 1007–1131.
34. *See* NOVAK, *supra* note 5, at 68; Hart, *Colonial Land Use Law*, *supra* note 3, at 1259, 1277, 1280; Hart, *Land Use Law in the Early Republic*, *supra* note 3, at 1109–14, 1123.
35. Hart, *Land Use Law in the Early Republic*, *supra* note 3, at 1134.
36. *See id.* at 1133–35; Treanor, *supra* note 1, at 787–91.
37. Hart, *Land Use Law in the Early Republic*, *supra* note 3, at 1133–35 (footnotes omitted).

Even after accepting the record of land use regulations amassed by Hart and others, I am not sure that it supports the inference suggested by Hart. I agree that neither the Congress that adopted the Takings Clause, nor the states that ratified it, intended to disrupt local and state regulatory practices. But, of course, these men did not intend, with the Fifth Amendment, to disrupt state and local compensation practices *at all*. At the time that it was ratified, the Fifth Amendment did not apply to the states any more so than did the Establishment Clause.[38] Just as the first Congress did not understand the First Amendment's Establishment Clause to require states to disestablish their official churches, it also did not understand the Takings Clause to mandate compensation, even for physical takings, in the states. And, just as several states continued to maintain established churches in the decades following the First Amendment's ratification, a number of states also did not adopt a takings clause until well into the nineteenth century.[39]

Moreover, it is reasonable to assume that the members of the first Congress and of the ratification conventions believed that the enumerated powers would dramatically limit opportunities for federal regulation of private property. Indeed, the Constitution does explicitly address the federal power to regulate property, but in Article IV, not in the Takings Clause. Article IV, Section 3, provides, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[40] If, at the time of the founding, the accepted view was that federal regulatory powers were extremely circumscribed, silence on the matter of regulation might not necessarily indicate a blanket approval of confiscatory regulations. To be sure, on a few occasions, the federal government did exercise its enumerated powers to regulate territorial affairs in ways that limited private property owners' rights—for example, by imposing forfeiture penalties for nonresidence.[41] Congress also declined to

38. *See* Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 250–51 (1833).

39. *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 20–24 (1987) (noting that many states, especially in New England, maintained established churches after the ratification of the First Amendment; Massachusetts became the last to disestablish its church in 1833). For the state takings clauses, I actually had a research librarian look up when they were adopted: Connecticut (1818); Maine (1819); Florida (1838); Rhode Island (1842); New Jersey (1844); New York (1846).

40. U.S. CONST. art. IV, § 3.

41. Hart, *Land Use Law in the Early Republic*, *supra* note 3, at 1139–42.

exercise its power to review territorial land use regulations, including a number of affirmative use requirements as well as provisions authorizing a majority of landowners to compel nonconsenting owners to participate in cooperative arrangements.[42] In my view, these regulations, as opposed to the regulatory practices of state and local governments, go much further toward supporting the idea that the Takings Clause did not reach regulatory takings.

I offer one final question about the use of colonial and founding era regulatory practices to support the proposition that the Takings Clause only reached physical takings, although it is so tentative as to be better described as a musing. Scholars examining the historical land use regulatory practices during the colonial era and the early nineteenth century frequently treat regulations enacted by towns and cities as interchangeable with colonial or state regulations. Yet, I wonder whether characterizing *local* rules regulating property, especially during the colonial period, as analogous to modern "land use regulations" might be making a category error.

A city's legal status can only be fully understood against the backdrop of the historical evolution of the modern American corporation. Prior to the early nineteenth century, American law made no distinction between public and private corporations. A corporation was a corporation—a legally distinct entity empowered by a legislative charter to carry out defined purposes, which we today would consider both public and private.[43] The hybrid legal status of corporations, which had ancient roots, is relatively easy to understand in the new world context because many colonial cities—consider William Penn's Philadelphia—were closely analogous to today's "planned unit developments." Then, as in some cases today, the "developer"—in the colonial context, often a chartered corporation—retained some regulatory rights as landowner.[44]

During the early years of the nineteenth century, American legal thinking underwent a remarkable transformation—namely, the conceptual separation of the private and public generally, and of private and public corporations in particular.[45] Business corporations became independent

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42. *Id.* at 1144–45.

43. *See, e.g.*, HORWITZ, *supra* note 9, at 111–22; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 105, 1101–02 (1980).

44. *See* Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 228 (1985) (reviewing HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW (1983)).

45. *See, e.g.*, HORWITZ, *supra* note 9, at 112–14 (discussing development of the distinction between public and private); Frug, *supra* note 43, at 1100–04 (discussing separation of public and municipal corporations); Williams, *supra* note 44, at 232–35

rights holders, constitutionally protected from unreasonable state interference.[46] Moreover, the gradual erosion of the ultra vires doctrine and the passage of general incorporation laws guaranteed the proliferation of private corporations with broad authority to engage in a wide range of activities.[47] In contrast, municipal corporations came to be viewed as subordinate to, and carrying out the purposes of, the states.[48] By the late nineteenth century, private corporations were well on their way toward autonomy,[49] while municipal corporations had become local governments subject to state domination.[50]

To the extent that local regulatory practices are relevant to original intent analysis—and, for the reasons discussed above, I am skeptical that they are—I wonder if we need to better understand whether an informed citizen would have categorized a local land use regulation as a public or private act, or some hybrid. By the time of *Dartmouth College*, the conceptual severance of public and private was developed well enough to be accorded constitutional significance by the Supreme Court.[51] Certainly by that time, state courts had begun to recognize the regulatory actions of local governments as public exercises of the police power.[52] On the other hand, Hedrik Hartog's excellent case study of New York suggests that as late as 1850, most New Yorkers viewed the city, in some sense, as both public and private.[53] Moreover, there clearly were *regional*

(discussing the role of municipal corporations in the development of the distinction between public and private).

46. *See, e.g.*, HORWITZ, *supra* note 9, at 111–14.

47. *See* HORWITZ, *supra* note 9, at 77–78; Frug, *supra* note 43, at 1101 (describing the "Jacksonian effort to pass general incorporation laws, thus allowing the 'privilege' of incorporation to be exercised by all.").

48. *See, e.g.*, Frug, *supra* note 43, at 1100–04.

49. *Cf.* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1485 (1988) (describing "[t]he Middle Period [of corporate development]—the 1850s to the 1880s," when "[t]he states enacted 'general corporation laws' to assure equal access to the corporate form . . . ."); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 208 (noting that "[t]he pervasive adoption of general incorporation statutes by many states during the latter half of the 19th century did not signal abdication of the regulatory notion of corporate law.").

50. Frug, *supra* note 43, at 1108 (describing how local autonomy gave way to state control in the late nineteenth century).

51. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 617 (1819).

52. *See, e.g.*, Stetson v. Kempton, 13 Mass. (13 Tyng) 272, 272, 278 (1816); Eustis v. Parker, 1 N.H. 273, 275 (1818).

53. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730–1870, at 4–5, 240–41, 256–60 (1983).

differences in popular perceptions of local actions.[54] It strikes me that these perceptions might be relevant to the categorization of both local regulations and perhaps also of colonial laws empowering local governments to regulate property—which we today would call enabling acts.[55]

B. State Cases and the Federal Takings Clause

My final two questions both concern the use of nineteenth century state cases to discern the original meaning of the terms of the Fifth Amendment's Takings Clause. In the Takings Clause context, there are virtually no federal decisions interpreting the Fifth Amendment's compensation requirement until the late nineteenth century, perhaps in large part because the federal government relied upon states to condemn property for it.[56] This has led a number of scholars to mine volumes of early state court reports in an effort to uncover whether state courts ever held that state constitutional provisions akin to the Takings Clause required compensation for regulatory takings.[57]

In a footnote in *Lucas v. S.C. Coastal Council*, Justice Scalia hinted that these cases were "entirely irrelevant"[58] to modern takings analysis because they were decided prior to the incorporation of the Takings Clause in 1897.[59] While, for the reasons discussed above, I wonder if early state and local *regulatory practices* are probative of the original meaning of the Takings Clause, it strikes me that early *decisions* interpreting state law takings analogues are probative. At least to the extent that these decisions resolved questions akin to the modern regulatory takings dilemma—that is, whether regulations diminishing property value ran afoul of constitutional protections that mirror the Takings Clause—they can help us understand what the terms of the Takings Clause meant at the time it was enacted. As my colleague A.J.

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54. *See, e.g.*, Williams, *supra* note 44, at 231–38 (contrasting New York and New England traditions).

55. Hart, *Colonial Land Use Law*, *supra* note 3, at 1274–84 (discussing colonial era laws empowering or mandating local land use regulations).

56. Treanor, *supra* note 1, at 794.

57. *See, e.g.*, *id.* at 792–94; *see also, e.g.*, Claeys, *supra* note 11, at 1553–54; Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 228–40 (1999); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1285–87.

58. 505 U.S. at 1028, n.15 ("Justice Blackmun expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the 'understanding' of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses . . . were out of accord with *any* plausible interpretation of those provisions.").

59. *See* Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 236–38 (1897).

Bellia has noted, during the early years of the Republic, state court decisions often provide the *best* evidence about the meaning of a federal provision because, especially during those first decades, state courts did the overwhelming majority of all judicial work, including the work of interpreting the Constitution and federal statutes.[60] There are, however, two difficulties with using this state court evidence: identifying the temporal range of decisions relevant to original meaning analysis and making sure that the state courts were in fact responding to questions akin to modern regulatory takings claims.

1. Early Cases, Not Late Ones?

My first question about state court evidence is certainly not unique to the takings context: In relying on early decisional law to discern the original meaning of a constitutional provision, it is, of course, important to cabin the universe of relevant cases to those most likely to reflect founding era understanding of relevant legal terms. As Justice Thomas observed in *Kelo v. New London*, the probative value of state court decisions diminishes dramatically as time passes.[61] Since judicial interpretations of constitutional provisions may evolve over time, the farther away from the founding, the greater the risk that a decision reflects a modern, rather than a founding era, understanding.[62]

The difficulty is that there are relatively few cases interpreting *state* takings clauses in the years following the ratification of the Fifth Amendment.[63] This is not surprising in light of the fact that only eight states—fewer than half of the total number admitted—adopted takings clauses before 1815, roughly a generation after the founding.[64] The

60. Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1504–07 (2006).

61. Kelo v. City of New London, 545 U.S. 469, 513–14 (2005) (Thomas, J., dissenting) (noting that mid-nineteenth century cases are not "deeply probative" of the Fifth Amendment's original meaning).

62. *See id.* at 514.

63. *See, e.g.*, FRED BOSSELMAN ET AL., THE TAKINGS ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENT AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 106–07 (1973); Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 75–76 (1986).

64. VT. CONST. of 1777, ch. I, art. II; MASS. CONST. of 1780, pt. I, art. X; PA. CONST. of 1790, art. IX, § 10; KY. CONST. art. 12, § 12 (1792); DEL. CONST. of 1792, art. I, § 8; ILL. CONST.; TENN. CONST. art. XI, § 21 (1796); OHIO CONST. art. VIII, § 4 (1802).

relative paucity of early decisional law has led some scholars to extend the universe of cases relevant to original meaning analysis well into the nineteenth century.[65] This strikes me as problematic, especially in light of the dramatic shifts in both the reality of, and philosophical or ideological thinking about, economic life during the nineteenth century—changes which may make the risk of interpretive drift particularly sharp in the Takings Clause context.

2. The Same Questions, Not Different Ones?

Several scholars have challenged the standard characterization of early state decisions as limiting compensation to physical takings.[66] Having not exhaustively reviewed the case law, I leave the battle over the weight of the judicial record to those who have. But, I would like to close by raising a different question about the characterization of early state cases. It strikes me that the decisions which are most probative of whether the Fifth Amendment's Takings Clause, as originally understood, was meant to mandate compensation for regulatory takings are those that (1) interpreted state constitutional provisions substantially similar to the Federal Takings Clause—that is, by prohibiting "takings" without "just compensation"—and (2) resolved questions akin to the modern regulatory takings claim—that is, by addressing if or when a regulation that "goes too far" becomes a taking. If a state takings provision departed dramatically from the text of the Takings Clause or the courts were resolving different questions, then the case law's probative value diminishes dramatically.

The principle danger of relying on early state cases is not a problem of constitutional text—most state takings clauses closely paralleled their federal counterpart—but rather the risk of anachronism: We might read decisions to be responding to the questions we expect in the regulatory takings context when in fact the courts were asking and answering quite different ones. For example, Eric Claeys has argued that nineteenth century courts "did not organize takings cases under the same categories that we apply now," but rather divided the regulatory world between valid "regulations" and invalid or compensatory "invasions" of property rights.[67] And, more recently, Bradley Karkkainen has argued that modern courts and scholars have misread two seminal *federal* decisions, *Chicago B. & Q.*[68] and *Pennsylvania Coal Co. v. Mahon*,[69] as takings cases—

65. *See, e.g.*, Claeys, *supra* note 11, at 1549 (studying nineteenth century regulatory takings cases); Kobach, *supra* note 57, at 1223–59 (studying antebellum regulatory takings cases).

66. *See* Gold, *supra* note 57, at 228–40; Kobach, *supra* note 57, at 1223–59.

67. Claeys, *supra* note 11, at 1553.

68. 166 U.S. 226 (1897).

the cases that incorporated the Takings Clause and invented regulatory takings, respectively—when, in fact, both were due process decisions.[70]

Leaving these thought provoking arguments to one side, it is clear that some of the cases used to support the standard account did not directly ask whether a textual takings provision required compensation for the economic effects of regulation. Some of the earliest decisions resolving questions of compensation relied not on a textual takings provision, but on natural rights principles.[71] Many commonly cited cases that did interpret a takings clause are better characterized as consequential rather than regulatory takings decisions—that is, they concern the compensation for damage resulting as a consequence of a physical taking,[72] which continues to be a contested issue today.[73] Other commonly cited cases did not discuss the issue of compensation, but rather involved disputes about the scope of governmental power to regulate *at all*. Some of these cases were closely akin to modern substantive due process challenges—they involved assertions that a regulation exceeded the police power[74]—

69. 260 U.S. 393 (1922).

70. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 843–52, 862–67 (2006) (arguing that both decisions were due process decisions). Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

71. *See, e.g.*, Proprietors of Piscataqua Bridge v. N.H. Bridge, 7 N.H. 35, 66 (1834) (stating that as a matter of right and as one of the first principles of justice, due compensation must be provided if one's property is taken without consent); Sinnickson v. Johnson, 17 N.J.L. 129, 151 (1839) (noting that it was settled principle of law to provide just compensation for taking of private property for public use); Gardner v. Trs. of Vill. of Newburgh, 2 Johns. Ch. 162, 165–66 (N.Y. 1816) (explaining that the trustees of the village were planning to divert the stream on plaintiff's land, but plaintiff has a legal right to the use of the water); Kobach, *supra* note 57, at 1229–32 (discussing decisions which assert that natural law principles required compensation for takings).

72. *See* Commonwealth v. Coombs, 2 Mass. (2 Tyng) 489, 490 (1807) (barring construction of a road where compensation procedures are not followed); *Sinnickson*, 17 N.J.L. at 151 (deciding that even though the statute did not provide for damages caused by the erection of a dam, there is no bar for seeking such damages); *Gardner*, 2 Johns. Ch. at 162 (compensating for consequential damages when trustees attempted to divert stream on plaintiff's land); Cooper v. Williams, 5 Ohio 391, 392–93 (1832) (determining whether to assess damages for water diverted from the river to feed into the canal for the public welfare); Kobach, *supra* note 57, at 1223–28 (distinguishing consequential and regulatory takings).

73. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 558–62 (2001) (discussing concept of "derivative takings"); 4A JULIUS L. SACKMAN, NICHOLS ON THE LAW OF EMINENT DOMAIN § 14.01 [2–3] (3d ed. 1992) (discussing consequential damages).

74. *See, e.g.*, Baker v. Boston, 29 Mass. (12 Pick.) 184, 194 (1831) (arguing that police regulations to prevent public harm "are not void, although they may in some

while others were reminiscent of enabling act questions—they involved challenges to a local government's action as ultra vires.[75]

Finally, a related problem that we also cannot know due to the limited judicial record is how state courts would have interpreted the *Federal* Takings Clause. In the statutory construction context, for example, both A.J. Bellia and John Manning have argued that, in the early nineteenth century, state courts routinely used an "equity of the statute" approach to interpret state laws, but they employed a different, textualist approach to interpret federal laws.[76] Perhaps state court interpretations of state compensation guarantees also might have departed in unexpected ways from state court interpretations of the federal compensation guarantee. State constitutions, after all, are very different documents than the Federal Constitution. As local government law students learn on the first day of class, states have plenary power, the federal government—at least theoretically—does not. Perhaps a nineteenth century state court would have, if presented with the opportunity, interpreted a compensation requirement applied against a backdrop of limited, enumerated powers more broadly—or, for that matter, more narrowly—than a similar provision applied against a backdrop of plenary police powers.

III. CONCLUSION

Ultimately, I do not know whether the terms of the Takings Clause, as originally understood, could have required compensation for a confiscatory regulation—for example, a regulation that "denies all economically beneficial or productive use of land."[77] I leave that puzzle to the historians, along with a few others, which I hope will shed light on the sparse historical record surrounding the ratification of the Takings Clause.

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measure interfere with private rights without providing for compensation."); Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 58–59 (1846) (reasoning that a property owner could be prevented from moving stones on his private beach without compensation to prevent erosion, because such interference is not so severe as to warrant a taking worthy of compensation); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851) (upholding a statute banning construction of wharfs beyond a certain point in the Boston Harbor).

75. *See, e.g.*, Mayor of N.Y. v. Ordrenan, 12 Johns. 121 (N.Y. Sup. Ct. 1815) (allowing regulation of the storage of gunpowder); Tanner v. Vill. of Albion, 5 Hill 121 (N.Y. Sup. Ct. 1843) (approving regulation of the operation of a bowling alley).

76. *See* Bellia, *supra* note 60, at 1506–07; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86 n.336 (2001).

77. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).