

2018

Challenge Accepted: A Reconsideration of Regulatory Takings Jurisprudence Under the Privileges or Immunities Clause of the Fourteenth Amendment

Joe Brammer

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Joe Brammer, *Challenge Accepted: A Reconsideration of Regulatory Takings Jurisprudence Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 86 U. Cin. L. Rev. 1299 (2018)

Available at: <https://scholarship.law.uc.edu/uclr/vol86/iss4/5>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ken.hirsh@uc.edu.

CHALLENGE ACCEPTED: A RECONSIDERATION OF REGULATORY TAKINGS JURISPRUDENCE UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

*Joe Brammer**

I. INTRODUCTION

It is no bold assertion to suggest that the Supreme Court has established a tradition of asking the wrong question when ascertaining which unenumerated rights the Constitution protects.¹ In doing so, the Court necessarily constrains itself to fashioning a square-peg solution for the round-hole issue confronting it.² This square-peg typically takes the form of a contrived test, purportedly articulate and dynamic, but usually smacking of “ad-hockery.”³ Often, the Court arrives at the right answer despite asking the wrong question and further delays a necessary and long-overdue restructuring of the framework with which it enumerates “fundamental” rights. Its failure to undertake this effort threatens to accelerate the pace with which state and federal governments erode the individual liberty interests that the Constitution, properly interpreted, protects.

This Article briefly explores the Supreme Court’s June 2017 decision in *Murr v. Wisconsin*. The *Murr* court asked the wrong question and expanded, rather than discarded, the Takings Clause analysis used to determine whether so-called “regulatory takings” are unconstitutional. More importantly, this Article accepts the challenge Justice Thomas presents in his *Murr* dissent: to “reconsider” the Court’s regulatory takings precedent.⁴ Part II examines the both the history preceding the drafting of the Privileges or Immunities Clause of the Fourteenth Amendment and the Clause’s subsequent application in constitutional jurisprudence. Part III summarizes the evolution of American

* Associate Member, 2016-2017 *University of Cincinnati Law Review*. Thanks are owed to Professor Christopher Bryant, whose enthusiasm for constitutional interpretation was the inspiration for this comment, and to my wife, Kelly, without whose support I could not have accomplished this undertaking.

1. See generally Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017) (determining the appropriate inquires required of an originalist interpretation of the Constitution’s text).

2. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 834 (2003) (describing the Court’s application of substantive due process analyses to issues presenting different legal claims).

3. Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53 (2017).

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

conceptions of property rights and the development of regulatory takings precedent, beginning with the Court's decision in *Pennsylvania Coal Co. v. Mahon* and culminating in *Murr v. Wisconsin*. Part IV asks the correct question—whether the right to dispose of individual property is a privilege of citizenship protected under the Fourteenth Amendment's Privileges or Immunities Clause. The question itself is narrow, its implications far-reaching.

II. THOMAS, *MCDONALD*, AND THE SLAUGHTER OF PRIVILEGES OR IMMUNITIES

To understand why the *Murr* majority answered the wrong question, we must first accept Justice Thomas' invitation to consider whether the proper inquiry lies in the Privileges or Immunities Clause of the Fourteenth Amendment. In *Murr*, the majority found that a Wisconsin statute prohibiting a property owner from selling a portion of his land did not violate the Fifth Amendment's Takings Clause.⁵ Their analysis applied the regulatory takings doctrine, which the Court had developed over the previous century in cases where no physical appropriation of property occurred.⁶ Chief Justice Roberts authored the main dissent and criticized the majority's "malleable definition of 'private property'" that allowed courts to consider factors beyond state defined property boundaries in their analyses.⁷ Justice Thomas wrote separately and agreed that the dissent properly applied the regulatory takings precedent to the facts of the case.⁸ However, he questioned whether the doctrine itself was constitutional and suggested that the Privileges or Immunities Clause of the Fourteenth Amendment may provide a better answer to the regulatory takings question.⁹

If Justice Thomas is correct and the Clause is the proper lens through which to examine the issue, it is because the Clause protects a substantive right to dispose of property, guaranteed to every American citizen, that no State may abridge. Justice Thomas provided the framework for this inquiry in his concurring opinion in *McDonald v. City of Chicago*, described in the section below. After examining his framework, this part of the Article summarizes American conceptions of individual property rights at the time of the Fourteenth Amendment's ratification. It then proceeds with an analysis of historical understandings of the privileges and immunities of American

5. *Id.* at 1950.

6. *Id.*

7. *Id.*

8. *Id.* at 1957 (Thomas, J., dissenting).

9. *Id.*

citizenship.

A. Justice Thomas, McDonald, and the Meaning of “Privileges or Immunities”

In *McDonald v. City of Chicago*, Justice Thomas took issue with Court for arriving at the right answer—that Chicago’s ordinance effectively banning handgun ownership violated the Fourteenth Amendment—by asking the wrong question.¹⁰ While he agreed that the Fourteenth Amendment did make the Second Amendment applicable to the States, he persuasively argued that it was the Privileges or Immunities Clause of the Fourteenth Amendment, not its Due Process Clause, that supported the Court’s holding.¹¹ His objection to the substantive due process doctrine that the plurality employed echoed his dissent in *Murr*—that the Court would be better served to ground its protection of substantive liberty interests in a clause that speaks to substance, not process.¹²

Unlike in *Murr*, Justice Thomas’s concurrence in *McDonald* included a thorough examination of the Fourteenth Amendment’s history. This examination supported his assertion that the Privileges or Immunities Clause of the Amendment prohibited States from abridging the fundamental rights enumerated in the Second Amendment.¹³ His opinion initially contextualized the Fourteenth Amendment’s adoption among the numerous legislative efforts to remedy the injustices of slavery. Specifically, the Amendment’s first sentence, granting citizenship to former slaves “unambiguously overruled” the *Dred Scott* decision.¹⁴ Next, Justice Thomas examined the Privileges or Immunities Clause and found that its purpose, facially at least, was to grant those slaves now enjoying citizenship a body of associated rights encompassed within their new status.¹⁵ It was the Court’s narrow

10. *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring).

11. *Id.* Section One of the Fourteenth Amendment has three distinct clauses. Its first clause grants citizenship to “[a]ll persons born or naturalized in the United States.” This was a direct repudiation of the infamous *Dred Scott* decision that denied black Americans citizenship, both in their own state and the United States. *Id.* at 808. Second, is the Privileges or Immunities Clause which prohibits state abridgement of certain individual rights. Disagreement over exactly which rights this clause refers to has generated a quagmire of jurisprudence that Justice Thomas’ *McDonald* dissent sought to resolve. Third, is the Due Process Clause. Its text makes the Fifth Amendment’s prohibitions against unjust deprivations of “life, liberty, and property” directly applicable to the states while additionally forbidding states from denying their citizens “the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

12. *McDonald*, 561 U.S. at 806 (Thomas, J., concurring).

13. *Id.*

14. *Id.* at 807.

15. *Id.* at 808.

definition of this body articulated in the *Slaughter-House Cases*, described in more detail below, that rendered the Privileges or Immunities Clauses meaningless in modern constitutional jurisprudence, giving rise to the substantive due process doctrine.¹⁶

To establish why the *Slaughter-House Cases* were wrong, Justice Thomas explained why that Court's interpretation of the Constitution's text was incorrect. Presuming that its drafters intended the Clause to have meaning and effect, Justice Thomas then embarked on a journey to "discern what 'ordinary citizens'" in 1868 would have understood the Privileges or Immunities Clause to mean.¹⁷ Citing contemporary precedent, he characterized "privileges" and "immunities" as synonymous with "rights," "liberties," and "freedoms" incident to American citizenship during Reconstruction.¹⁸ Having so defined these terms, he then asserted that the purpose of the government, both state and federal, was to protect these rights.¹⁹ Justice Thomas relied upon contemporary sources and found that Justice Bushrod Washington's opinion in *Corfield v. Coryell* (described in further detail below) best described which enumerated rights were privileges and immunities of American citizenship.²⁰

To support his argument, Justice Thomas recounted Sen. Jacob Howard's speech before the Senate introducing the most recent draft of the Amendment. Sen. Howard clarified that the Amendment's purpose was to prohibit the States from "abridging the privileges and immunities of the United States."²¹ As to what rights these "privileges and immunities" encompassed, Sen. Howard cited *Corfield v. Coryell* as the authoritative description.²² Relevant to the focus of this Article, Justice Thomas also compared contemporary Reconstruction-era characterizations of the substantive rights contained in the Privileges or Immunities Clause with those described in the Civil Rights Act of 1866, which guaranteed that "citizens, of every race and color" enjoyed a right to "the security of person and property," again finding that Reconstruction definitions of "privileges" mirrored the *Corfield* definition.²³

16. *Id.* at 808-810.

17. *Id.* at 813 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect")).

18. *McDonald*, 561 U.S. at 813-814 (Thomas, J., concurring) (citing several nineteenth century cases defining the terms consistent with the Blackstonian interpretation that informed antebellum Constitutional jurisprudence).

19. *Id.* at 815.

20. *Id.* at 820.

21. *Id.* at 831-832.

22. *Id.* (citing 39th CONG. GLOBE, 39th Cong., 2765 (1866)).

23. *Id.* at 833, quoting §1, 14 Stat. 27.

After devoting more than half of his opinion discerning the meaning of the text of the Privileges or Immunities Clause, Justice Thomas identified and answered two crucial questions. First, did the “ratifying public” understand the right to keep and bear arms described in the Second Amendment to be a privilege of American citizenship that the Fourteenth Amendment protected?²⁴ Unequivocally, he argued, they did.²⁵ Having answered this threshold question, he then determined whether the Fourteenth Amendment prohibited Chicago from abridging this right or did it merely require that the city impose any restrictions upon its exercise in a non-discriminatory manner.²⁶ His answer to this question was similarly confident—“[t]he Clause is thus best understood to impose a limitation on state power to infringe upon pre-existing substantive rights.”²⁷

For Justice Thomas, the Court delivered the correct answer to the wrong question.²⁸ The continued adherence of the plurality to the substantive due process doctrine perpetuated a century-old methodology that was “devoid of a guiding principle.”²⁹ The ordinance was unconstitutional because it abridged a privilege of American citizenship “include[d] in the minimum baseline of federal rights” that the Privileges or Immunities Clause protected.³⁰ Whatever protections the Due Process Clause of that same Amendment guaranteed had nothing to do with the issue presented.³¹ Commentators critical of the substantive

24. *McDonald*, 561 U.S. at 837-838 (Thomas, J., concurring). The emphasis Justice Thomas places on discerning what the “ratifying public” understood the text to mean reflects the division among adherents of originalist constitutional interpretation. A minority of originalist scholars and judges favor “intentional meaning originalism” and believe the proper inquiry concerns what the drafters of the Constitution’s text intended that text to mean. After enduring widespread and valid criticism, originalists have largely embraced “public-meaning originalism” which focuses instead on the “more-readily accessible original conventional meaning of the text . . . , rather than individual or group intent.” See Strang, Lee J., *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1194 (2017) (examining the evolution of originalist approaches to constitutional interpretation).

25. *McDonald*, 561 U.S. at 837 (Thomas, J., concurring).

26. *Id.* at 838.

27. *Id.* at 839. Justice Thomas found support for his “natural textual reading” from a proposed revision that President Johnson submitted to Congress after some Southern states refused to ratify the Fourteenth Amendment. The revision eliminated the Privileges or Immunities Clause, removing the language “[n]o State shall” and “abridge,” and replaced it with language guaranteeing that the “Citizens of each State shall be entitled to all the privileges and immunities of the several States.” This revision was an attempt to replicate the language of Article IV, Section 2 of the Constitution. This proposed change, according to Justice Thomas, demonstrated that the “ratifying public” understood the Privileges or Immunities Clause of the Amendment to be a prohibition against the infringement of fundamental liberty interests rather than an anti-discrimination provision ensuring only that States equally apply any law infringing upon these interests. *Id.* at 839-840.

28. *Id.* at 805.

29. *Id.* at 812.

30. *Id.* at 858.

31. *Id.* at 805.

due process doctrine regarded Justice Thomas's dissent as rallying cry, providing a remedy to the damage they believed the doctrine inflicts upon the body of constitutional jurisprudence.³²

B. Historical Interpretations of the Privileges of Citizenship

For Justice Thomas, and many others who believe the Privileges or Immunities Clause to be the true source of protection for substantive rights, Justice Washington's *Corfield* opinion has been the most cogent articulation of the rights embodied in the "privileges and immunities" of citizenship.³³ In *Corfield*, a citizen of Pennsylvania challenged the constitutionality of New Jersey's law preventing non-citizens from raking oysters in New Jersey's oyster beds.³⁴ After dismissing the plaintiff's claim that New Jersey violated Article I, §8 (the Commerce Clause), Justice Washington then considered whether the law violated Article IV, §2 (the Privileges and Immunities Clause).³⁵ He framed the issue as such:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . . .³⁶

The key distinction was whether the right to take New Jersey oysters was fundamental, belonging to the "citizens of all free governments," or whether it was a "public benefit[] [that] a State might choose to make

32. See A. Christopher Bryant, *What McDonald Means for Unenumerated Rights*, 45 GA. L. REV. 1073, 1074 (2011) (chastising Justice Scalia for his "modesty" in adhering to the substantive due process doctrine which the Justice himself believed had no basis in the Constitution's text).

33. *McDonald*, 561 U.S. at 820 (Thomas, J., concurring).

34. James L. Huffman, *Speaking of Inconvenient Truths – A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 83 (2007).

35. *Id.*

36. *Corfield v. Coryell*, 6 F. Cas. 546, 551-552 (E.D. Pa. 1823).

available to its citizens.”³⁷ Although it was too late for the oysters, Justice Washington upheld the law as a legitimate exercise of the State’s power.³⁸

Corfield’s description of the privileges and immunities of citizenship has proven influential in the renewed scholarly debate concerning the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.³⁹ However, the Supreme Court’s decision in *The Slaughter-House Cases* is an insurmountable obstacle facing anyone desiring to reframe the discussion of substantive rights in this context.⁴⁰ Justice Washington’s *Corfield* opinion shaped both the drafters of the Fourteenth Amendment and their contemporaries’ understanding of privileges and immunities.⁴¹ The *Corfield* opinion specifically identified property ownership as one of the privileges of citizenship that the Constitution protected.⁴² Had Justice Washington not felt it too tedious to enumerate the right to “exercise [one’s] trade,” the *Slaughter-House Cases* may never have happened.⁴³ Fewer than five years after the ratification of the Fourteenth Amendment, the majority in *The Slaughter-House Cases*, citing Justice Washington as authority, determined that the rights described both in Article IV, §2 and the Privileges or Immunities Clause of the Fourteenth Amendment comprised a narrow body of rights, “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”⁴⁴

The *Slaughter-House* decision upheld Louisiana’s grant of a monopoly to its butchers against a challenge by a new company claiming that the law violated the Privileges or Immunities Clause because it denied them the right to “exercise their trade.”⁴⁵ Under *The*

37. *McDonald*, 561 U.S. at 820 (Thomas, J., concurring).

38. *Corfield*, 6 F. Cas. at 552.

39. See Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 333 (2011).

40. *Slaughter-House Cases*, 83 U.S. 36 (1873).

41. *McDonald*, 561 U.S. at 832-834 (describing Sen. Jacob Howard’s reliance on the *Corfield* opinion in his speech introducing a third draft of the Fourteenth Amendment before the Senate. Newspapers across the country reprinted Sen. Howard’s speech, touching off widespread national debate. Reaction among the citizenry and the subsequent congressional debates concerning the Amendment included descriptions of “Privileges and Immunities” that echoed Sen. Howard and those described in *Corfield*.) *But see*, Lash, *supra* note 39, at 334 (arguing against the conventional wisdom of current scholars that Justice Washington’s opinion informed John Bingham’s draft of the Fourteenth Amendment).

42. *Corfield*, 6 F. Cas. at 552.

43. *Slaughter - House Cases*, 83 U.S. at 60 (refuting the plaintiffs’ claim that the statute unconstitutionally denied them the privilege to “exercise their trade”).

44. *McDonald*, 561 U.S. at 851 (Thomas, J., concurring) (quoting *Slaughter—House Cases*, 83 U.S. at 79).

45. *Id.* (quoting *Slaughter- House Cases*, 83 U.S. at 60).

Slaughter-House Cases, the privileges or immunities of federal citizenship guarantees the right to visit Washington D.C. and “transact any business he may have with it, . . .” enjoy protection on the high seas, petition for habeas corpus, and become a citizen of any other state.⁴⁶ For the *Slaughter-House* majority, Justice Thomas’ construction would allow the Supreme Court to act as a “perpetual censor” upon the States and upset the balance of a federalism to a degree that neither the drafters of the Amendment nor the States ratifying it intended.⁴⁷

The effect of the *Slaughter-House Cases* was to create a distinct body of state and federal privileges and immunities that were “mutually exclusive.”⁴⁸ This dichotomy proved disastrous for victims of the Colfax massacre who lost their lives the day before the Supreme Court issued its decision in the *Slaughter-House Cases*.⁴⁹ The leader of a white mob in Louisiana attacked a group of mostly black citizens, eventually parading his prisoners through the streets and summarily executing them.⁵⁰ Louisiana only convicted three of the ninety-seven indicted participants, not for murder, but for violating the Enforcement Act of 1870.⁵¹ This prohibited anyone from conspiring to prevent another from enjoying any “right or privilege granted or secured to him by the constitution or laws of the United States.”⁵² One of the privileges that the defendants conspired to deny to their victims was the right to bear arms, which the Second Amendment ostensibly secured.⁵³

The Supreme Court, in *United States v. Cruikshank*, held otherwise and declared that the Constitution did not grant the right to bear arms.⁵⁴ Rather, the Second Amendment only guaranteed that Congress, and Congress alone, would not abridge that which predated the Constitution’s ratification.⁵⁵ Ultimately, the Court reversed all of the convictions and held that the protections of the Fourteenth Amendment were not at issue because they spoke only to state actions, not those of private individuals.⁵⁶ It was the *Cruikshank* decision specifically that precluded the *McDonald* plaintiffs’ claim that the Chicago ordinance

46. *Slaughter-House Cases*, 83 U.S. at 79.

47. *Id.* at 78.

48. *McDonald*, 561 U.S. at 852 (Thomas. J., concurring).

49. Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1071 (2009).

50. *McDonald*, 561 U.S. at 808 (Thomas. J., concurring).

51. *United States v. Cruikshank*, 92 U.S. 542, 548 (1876).

52. *Id.*

53. *McDonald*, 561 U.S. at 809 (Thomas. J., concurring).

54. 92 U.S. at 553 (1875).

55. *Id.*

56. Huhn, *supra* note 49, at 1074.

violated the Privileges or Immunities Clause.⁵⁷ The plurality in *McDonald* found it unnecessary to reconsider its interpretation of the Clauses' meaning under the *Slaughter-House* and *Cruikshank* precedent because the Due Process Clause analysis was sufficient for striking down the ordinance.⁵⁸

III. PROPERTY RIGHTS IN AMERICA AND THE DEVELOPMENT OF THE REGULATORY TAKINGS DOCTRINE

A. Origins

It is prudent to review conceptions of property rights that informed the drafters of both the Fifth and Fourteenth Amendments as well as those of public whose understanding is so critical to our analysis.⁵⁹ Whether the right of a citizen to dispose of his private property is a privilege of citizenship enjoying the Fourteenth Amendment's protection depends entirely upon the substance of the right itself. Colonial notions of private property rights trace their origins to ancient conceptions predating Magna Carta. However, it was that document which prominently codified those ancient conceptions and provided a foundation for future generations of Englishmen to advance their individual liberty interests.⁶⁰ Indeed, the Fifth Amendment's text is a direct descendant of Magna Carta's guarantee that "no man's lands or goods shall be seised into the king's hands."⁶¹

Magna Carta was influential on later English legal theory which, in turn, influenced the Constitution's framers. In particular, William Blackstone's *Commentaries on the Laws of England*, published in 1765, left a lasting impact upon the framers and their notions of individual liberty.⁶² In his *Commentaries*, Blackstone begins his discussion of private property rights by observing that "inherent in every Englishman, is that [right] 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."⁶³ Blackstone, in concert with Magna

57. *McDonald*, 561 U.S. at 758.

58. *Id.*

59. *McDonald*, 561 U.S. at 837 (Thomas, J., concurring). The axis around which Justice Thomas' analysis, and proponents of public-meaning originalism generally, revolves is the public understanding of the Fourteenth Amendment's text at the time of its ratification.

60. *Simard v. White*, 383 Md. 257, 269 (2004).

61. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 12 (University of Adelaide, ebook 2009).

62. Mark Spatz, *Shame's Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 835 (2002).

63. BLACKSTONE, *supra* note 61 at 12.

Carta, places property rights among those that exist independent of political authority.⁶⁴ Throughout his commentary, he emphasizes the fundamental nature of an individual's interest in private property.⁶⁵ He specifically addresses the subject of government seizures of private property:

Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.⁶⁶

The Constitution's protections relating to private property rights reflect the salient principles of Blackstone's treatise.⁶⁷

Equally influential during the framers' era were the writings of John Locke whose *Second Treatise on Government* similarly grounded its treatment of property rights in principles of natural law.⁶⁸ Locke proclaimed that "[t]he great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."⁶⁹ The profound impact of Locke's philosophy is evident throughout the history of the Constitution's drafting, particularly through the writings of James Madison, Father of the Constitution.⁷⁰ Madison observed that "being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."⁷¹ The Takings Clause itself is directly attributable

64. *Id.*

65. *Id.*

66. *Id.*

67. *United States v. Jenkins*, 490 F.2d 868, 872 (2d Cir. 1973).

68. *Cannon v. Delaware ex rel. Sec'y of the DOT*, 807 A.2d 556, 566 (Del. 2002).

69. *Kirby v. N.C. DOT*, 368 N.C. 847, 853 (2016) (quoting John Locke, *Two Treatises of Government* 295 (London, Whitmore & Fenn et al. 1821)).

70. Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 37 (2016).

71. *Id.* n.202.

to Madison's fervent devotion to the protection of property rights.⁷² The Clause is unique in that its protections were the only ones the states did not propose which the Bill of Rights included.⁷³

B. Finding Unenumerated Rights in the Constitution's Text

Although we cannot reasonably doubt that the framers and their contemporaries understood fundamental rights to include the right to own and dispose of property, we similarly cannot avoid the inconvenient truth that neither the Fifth nor the Fourteenth Amendment directly addresses the issue. Where the text is lacking, disagreement inevitably ensues when asserting that a proper interpretation of the Constitution yields the desired protection or prohibition. Perhaps this tension is most evident when examining the body of substantive due process jurisprudence that has developed since the seminal *Lochner v. New York* decision more than one century ago.⁷⁴ Where the Court has looked exclusively to a clause that "speaks only to 'process'" when deciding what rights are fundamental, there are those who suggest that the right answer may be more easily found by asking the correct question.⁷⁵ That vocal minority instead believes the proper inquiry when extracting unenumerated rights from the Constitution's text is whether or not the right is a privilege or immunity of citizenship.⁷⁶

With many parallels but less visibility exists a similar discourse concerning the application of the Fifth Amendment's Takings Clause to regulatory takings of private property.⁷⁷ If "substantive due process" is an egregious misnomer,⁷⁸ "regulatory taking" may similarly evoke negative reactions when it encounters a textual interpretation. As both proponents and critics have observed, the Supreme Court has derived its regulatory takings precedent from a clause understood to apply only to

72. AKHIL R. AMAR, *THE BILL OF RIGHTS 77-78* (1998).

73. *Id.*

74. *See McDonald*, 561 U.S. at 811 (Thomas, J., concurring) (summarizing the Court's inconsistent standards used to determine which rights are "fundamental" subsequent to the *Lochner* decision).

75. *Id.* at 806. (Thomas, J., concurring) (criticizing the substantive due process paradigm as the proper framework for determining which rights are "fundamental").

76. *Id.*

77. *See generally* 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) (describing the debate between those finding protection from regulatory takings in the Fifth Amendment and those who believe that the Privilege or Immunities Clause of the Fourteenth Amendment protects citizens from such takings).

78. *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, A., concurring) (agreeing that the government's retroactive application of a statute's prohibitions was "related to a legitimate legislative purpose" but disagreeing that substantive due process was a legitimate doctrine to apply to the analysis).

physical appropriations of property for the first one hundred and fifty years of the republic's history.⁷⁹

C. Getting to Murr

On its face, the Fifth Amendment's Takings Clause—“[N]or shall [any person's] private property be taken for public use, without just compensation”—is silent as to what constitutes a taking.⁸⁰ To understand *Murr's* definition of taking, it is necessary to examine the precedent upon which it relied. Modern regulatory takings jurisprudence originated with the Supreme Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*.⁸¹ In *Mahon*, the Pennsylvania Coal Company challenged a statute which deprived them of the right to mine under a homeowner's property despite the existence of that homeowner's deed which explicitly granted mineral rights to the company.⁸² The company argued that because the deed was executed prior to the statute's enactment, the government denied them “previously existing rights of property and contract.”⁸³

In finding for the company, Justice Holmes equated the impact of the statute with a physical taking of the land for public use.⁸⁴ He based his holding on the “general rule” that “when regulation goes too far it will be recognized as a taking.”⁸⁵ Curiously, there was no accompanying citation to support this “general rule” nor was there any explication of how far was “too far.” Justice Holmes later regretted the language, if not the substance, of his opinion and feared that the decision lacked the clarity necessary for future courts to apply a consistent standard.⁸⁶ The century subsequent to the *Mahon* decision has proven his fears well-founded.⁸⁷

In *Penn Central Transportation Co. v. City of New York*, the Court had to determine whether New York City's Landmark Law that prevented the owners of Grand Central Station from improving their property was a regulatory taking.⁸⁸ The city denied two separate applications of the owners to construct an office tower on top of the

79. See generally *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

80. U.S. CONST. amend. V, § 1.

81. 260 U.S. 393 (1922).

82. *Id.* at 412.

83. *Id.* at 413.

84. *Id.* at 415.

85. *Id.*

86. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985).

87. *Id.* at 64.

88. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978).

station.⁸⁹ The city had previously designated the station as a landmark, which the owners protested, and determined that the proposed improvements would render the landmark a mere “curiosity.”⁹⁰ The owners argued that the Landmark Law deprived them of the use of their “air rights” and therefore constituted a taking under the Fifth and Fourteenth Amendments.⁹¹ The majority disagreed with the owners and held that because the legislation did not deprive the owners of all of their right to use of the property and because there was no impact upon the present operations of the property, no taking had occurred.⁹² Without explicit reference or repudiation of Justice Holmes’ “too far” standard, the *Penn Central* court created a new test.⁹³ Their test focused on whether a regulation “impair[ed] the present use” of the property.⁹⁴ The majority clarified that regulations excluding owners from some, but not all, of the use and enjoyment of their property did not reach too far so long as they did not materially impact the present use and enjoyment of the property.⁹⁵

Commentators have criticized the *Penn Central* decision because of the confusion that the majority’s test created.⁹⁶ Foreshadowing the dissent’s position in *Murr*, many believed that the *Penn Central* test lent itself to inconsistent application because it created “vexing subsidiary questions.”⁹⁷ Others, however, have favorably viewed the malleability of the standard that *Penn Central* created, which later decisions have adapted to suit their own purposes.⁹⁸ One commentator has gone so far as to laud the approach of *Penn Central* and its progeny *because* it allows courts to “alter property rights to some extent without any payment to affected owners.”⁹⁹

The Court again confronted the issue of whether a regulation that

89. *Id.* at 117. The first application proposed a fifty-five-story structure which was reduced to fifty-three stories with the second application. *Id.*

90. *Id.* at 118.

91. *Id.* at 130.

92. *Id.* at 138.

93. Brady, *supra* note 3, at 54 (describing the influence of the decision’s three-part test upon subsequent regulatory takings analysis).

94. *Penn Cent. Transp. Co.*, 438 U.S. at 135.

95. EPSTEIN, *supra* note 86, at 64.

96. Brady, *supra* note 3, at 54.

97. The *Penn Central* test considers “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.’ In addition, the ‘character of the governmental action’ – for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’ – may be relevant in discerning whether a taking has occurred.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005).

98. See generally John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737 (2017).

99. *Id.* at 757.

reduces the economic benefit of a property constitutes a taking in *Lucas v. S.C. Coastal Council*. In *Lucas*, South Carolina enacted an environmental statute which prohibited an owner of beachfront property from developing it for commercial purposes even though he purchased the property prior to the enactment of the statute.¹⁰⁰ The property was therefore worthless to the owner and he sued for compensation.¹⁰¹ The South Carolina Supreme Court upheld the regulation as a legitimate exercise of the state's police power which therefore barred any claims for compensation.¹⁰² The Court remanded the case to the South Carolina courts with the instruction that it must determine whether the proposed use constituted a public nuisance.¹⁰³ Any finding otherwise required the state to compensate the owner for the loss of all economic value in his property.¹⁰⁴ Consistent with the *Penn Central* decision, the Court in *Lucas v. S.C. Coastal Council* entrenched the proposition that a regulation amounts to a taking only when it "denies all economically beneficial or productive use of land" to the owner.¹⁰⁵ Whereas the Supreme Court upheld the regulation in *Penn Central* because it deprived the owner of only some of the property's value, it found that the South Carolina statute constituted a taking absent any showing of nuisance because of the total deprivation of value.

Highlighting the difficulty finding a coherent doctrine in the Court's Takings Clause jurisprudence, Justice Blackmun characterized the majority's holding as a departure from established precedent.¹⁰⁶ Dissenting from the majority, he chastised the court for "launching a missile to kill a mouse."¹⁰⁷ His opinion characterized the majority's rule as "wholly arbitrary" because "a landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."¹⁰⁸ The *Murr* majority seized upon Justice Blackmun's observation to support their holding.¹⁰⁹

Justice Blackmun's criticism notwithstanding, the *Lucas* test remains persuasive. The property owner in *Palazzolo v. Rhode Island* relied on the *Lucas* test and sued Rhode Island for compensation because a beachfront protection statute prevented him from developing his

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

101. *Id.* at 1009.

102. *Id.*

103. *Id.* at 1031.

104. *Id.*

105. *Id.* at 1015.

106. *Id.* at 1036 (Blackmun, J., dissenting).

107. *Id.*

108. *Id.* at 1064.

109. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017).

property thereby depriving him of all of its value.¹¹⁰ Distinct from the owner in *Lucas*, Mr. Palazzolo acquired his property after the regulation was enacted.¹¹¹ The Supreme Court disagreed with the Rhode Island Supreme Court and determined that barring claims where regulation predated acquisition “put an expiration date on the Takings Clause.”¹¹² The *Murr* court later walked back this holding and incorporated this factor into the test it developed.¹¹³ Ultimately, the *Palazzolo* decision solidified the pre-*Murr* approach to Takings Clause claims when it explicitly advocated for a dual analysis under the *Lucas* and *Penn Central* tests.¹¹⁴ The Court affirmed the Rhode Island Supreme Court’s ruling that the owner failed to establish a claim under the *Lucas* test but remanded the case, instructing the lower court to examine the claim under *Penn Central*.¹¹⁵

D. *Murr v. Wisconsin*

The issue in *Murr* was deceptively straightforward. Did individual owners of private real estate have a right to dispose of (sell) it?¹¹⁶ Wisconsin believed, and the Supreme Court agreed, that the answer was no.¹¹⁷ In arriving at this conclusion, the Court approached this issue by considering whether the regulation prohibiting the sale of the owner’s property violated the Fifth Amendment’s Takings Clause.¹¹⁸ The owners acquired two adjacent parcels of land from their parents.¹¹⁹ Their parents previously owned one parcel in their name (Lot E) and the other in their business’ name (Lot F).¹²⁰ Prior to the transfer, Wisconsin enacted an environmental protection statute requiring the county in which the parcels were located to prohibit the sale or development of separate lots that contained less than one acre of land suitable for development.¹²¹ A grandfather clause in this legislation excluded “substandard” lots that were adjacent and owned separately.¹²² The subject parcels, each less

110. *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001).

111. *Id.*

112. *Id.* at 627.

113. *Murr*, 137 S. Ct. at 1945.

114. *Palazzolo*, 533 U.S. at 632.

115. *Id.*

116. *Murr*, 137 S. Ct. at 1939.

117. *Id.* at 1950.

118. *Id.* at 1942.

119. *Id.* at 1940.

120. *Id.*

121. *Id.* The statute was enacted to discourage development along the St. Croix River. The Wild and Scenic Rivers Act required Wisconsin and Minnesota to develop plans that protected and preserved the ecosystem.

122. *Murr*, 137 S. Ct. at 1940.

than one acre, therefore remained separate until deeded to the present owners.¹²³ Upon the transfer, unbeknownst to the owners, the statute combined the lots into a single parcel which still contained less than one acre of developable land.¹²⁴

Ten years after acquiring what was now a single parcel, the owners intended to sell what was formerly Lot E to fund improvements on Lot F.¹²⁵ After the local government denied their requests for variances permitting the sale, the owners sued in Wisconsin alleging that the ordinance deprived them of “all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.”¹²⁶ The state court granted a summary judgment motion for the state and dismissed the suit, holding that the owners had many alternatives to selling the property that afforded them the ability to use and enjoy the property.¹²⁷ The Supreme Court granted certiorari to determine whether the ordinance constituted a regulatory taking violating the Fifth Amendment’s Takings Clause.¹²⁸

The majority’s analysis expounded upon established precedent and promulgated a new three-factor test for determining whether a regulation amounted to a taking within the meaning of the Takings Clause.¹²⁹ After applying its test to the facts at issue, the majority found that the state courts were correct in treating the property as a single parcel.¹³⁰ Because this treatment was correct and because the property did not lose “all economic value” as a result of a “reasonable” regulation, the majority agreed that no taking had occurred and affirmed the dismissal.¹³¹ Justices Roberts, Thomas, and Alito dissented arguing, among other things, that the majority’s test required future courts to make a judgment call when defining “property” thus permitting the government to “to warp the private rights that the Takings Clause is supposed to secure.”¹³²

123. *Id.* at 1941.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1942.

129. Brady, *supra* note 3, at 57. The test examined: 1. the state’s treatment of the property including its effect on “use and disposition;” 2. the physical characteristics of the property; and 3. the impact of the ordinance upon the property’s value and whether it was beneficial to treat the parcels as a single property.

130. *Murr*, 137 S. Ct. at 1949.

131. *Id.*

132. *Id.* at 1957 (Roberts, C.J., dissenting). The main dissent also took issue with the majority’s “blending” of factors relevant to a Takings Clause analysis with those specific to the separate question of how property is defined. something has been “taken” and the amount of “just compensation” into the separate constitutional question of what counts as “property.” Further, the dissenters criticized the

Justice Thomas authored a separate dissent, which is the basis of this Article. He agreed that the main dissent was correct in its application of existing precedent concerning regulatory takings.¹³³ He suggested, however, that the precedent had no basis in the text of the Constitution.¹³⁴ Recalling his concurrence in *McDonald v. City of Chicago*, though performing none of the accompanying analysis, Justice Thomas challenged the court of “reconsider” whether takings jurisprudence should be grounded in the Fifth Amendment or the Fourteenth Amendment’s Privileges or Immunities Clause.¹³⁵

IV. A BETTER PATH FORWARD

Before reconsidering regulatory takings jurisprudence, we must justify why such an undertaking is necessary. Principally, it is because regulatory takings jurisprudence grounds its substantive analysis in a provision that “speaks only to ‘process.’”¹³⁶ Then, to accept Justice Thomas’ challenge requires an examination of whether the “ratifying public” in 1868 understood the right to dispose of property to be a privilege of American citizenship. Contemporary conceptions of property rights in Reconstruction-era America are instructive when deciding whether the right to dispose of property is synonymous with the right to own property. We must also confront the dilemma that Justice Thomas faced in his *McDonald* opinion—even if the right to dispose of property is a privilege of American citizenship, must Wisconsin refrain from abridging that right in any respect or must it simply ensure that any abridgement is imposed equally upon all American citizens? Having addressed all these concerns, this Article poses the correct question—did the ordinance at issue in *Murr* violate the Fourteenth Amendment? Finally, this section contemplates the implications of an affirmative answer to this question.

A. Asking the Wrong Question

When the *Slaughter-House* cases foreclosed finding protection for fundamental rights in the Privileges or Immunities Clause, those seeking to safeguard these freedoms began to force the square peg of substantive due process into a hole which the drafters of the Amendment never

majority for including an analysis of existing regulations which had the effect of allowing a regulation “to limit the constitutional claim at two stages.” See Brady, *supra* note 3, at 58.

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

134. *Id.*

135. *Id.*

136. *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring).

intended it to fill.¹³⁷ Although the bodies of substantive due process and regulatory takings jurisprudence have different roots, their critical inquiry is the same—does a clause of the Constitution addressing procedural rights protect substantive rights?¹³⁸ All of the criticisms levied against the Court’s substantive due process precedent apply equally well to its regulatory takings decisions. Both doctrines are “devoid of a guiding principle”¹³⁹ and “rel[y] more on *ipse dixit* assertions than reasoned analysis.”¹⁴⁰

As Justice Thomas observed in both his *McDonald* and *Murr* opinions, the similarities between the Court’s substantive due process and Regulatory Takings doctrines is a function of neither having any basis in the Constitution’s text.¹⁴¹ For proponents of originalism and economic liberty, this reality has proven deeply troublesome. However, the facts of *Murr* illustrate perfectly why the exhaustive attempts of justices and academics to use the square peg fail. The oxymoronic character of substantive due process¹⁴² is also present in a doctrine that presents the question as such—whether a statute that forces an owner to keep his property is really a statute that takes it from him. Just as “process” does not mean “substance,” “take” does not mean “keep.”

There is no shortage of judges and scholars continuing to assert that “take,” in the Fifth Amendment, means something besides the government’s physical appropriation of private property. To do so requires an alteration of the definition of “property” as it is used in the Fifth Amendment, from strictly physical property, to the body of rights associated with that property, such as the right to use, enjoy, and exclude others from it.¹⁴³ Richard Epstein, undoubtedly a staunch originalist and defender of individual and economic liberty,¹⁴⁴ authored perhaps the most persuasive case for regulatory takings constituting a violation of the Fifth Amendment’s Takings Clause.¹⁴⁵ His principle

137. Rubin, *supra* note 2, at 834.

138. See generally *Lochner v. New York*, 198 U.S. 45 (1905) (giving rise to substantive due process); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

139. *McDonald*, 561 U.S. at 812 (Thomas, J., concurring).

140. Nicole S. Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2017 CATO SUP. CT. REV. 131, 149 (2017).

141. See *McDonald* 561 U.S. at 806 (Thomas, J., concurring); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

142. *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J. dissenting) (describing “substantive due process” as an “oxymoron”).

143. Rappaport, *supra* note 77, at 734.

144. Michael Rappaport, *Richard Epstein on “Constitutionalism, Originalism, and Libertarianism,”* ORIGINALISM BLOG (Feb. 21, 2013) (describing Epstein’s approach as originalism informed by background principals of classical liberalism).

145. Rappaport, *supra* note 77, at 730. (Locke’s definition of property: “This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without

argument is that the Framers' appreciation of the "Lockean world view" presents definitive evidence that the ambiguity of the Takings Clause derives from the Framers' intent to prohibit more than physical appropriations of property.¹⁴⁶ However, as Michael Rappaport reluctantly observed, Epstein's reliance on the Framers' views "cannot bear the weight he places upon it."¹⁴⁷

What Epstein does not rely heavily enough upon is the evidence of regulatory practices in place at the time the Framers drafted the Fifth Amendment.¹⁴⁸ Predating the Constitution was a regulatory system applicable to private property that the *Murr* court would have recognized.¹⁴⁹ While Epstein's reading is plausible, the more appropriate reading, advanced here, is that which is consistent with the regulatory practices that the "ratifying public" employed.¹⁵⁰ Locke's influence upon the Framers is undeniable, however, the question posed would be whether that "Lockean world view" was so pervasive amongst the "ratifying public" that the meaning of "property" as they understood it, would be consistent with Locke's more expansive definition.

We need not answer that question, however. Even conceding that there remains a plausible basis for arguing that the ordinances at issue in *Murr* and *Lucas* fell within the Fifth Amendment's prohibitions, it strains credulity to assert that an ordinance, which required the owner of his property to retain title to that property, might run afoul of the Takings Clause as both the Framers and the "ratifying public" would have understood it. Thus, the imperative nature of Justice Thomas' challenge.

B. How the "Ratifying Public" Understood Property Rights

As instructive as Justice Thomas' *McDonald* opinion is for the *Murr* inquiry, the question in *Murr* exceeds the scope of that presented in *McDonald*. Justice Thomas specifically declined to address whether the Privileges or Immunities Clause extended protection to unenumerated rights.¹⁵¹ Whereas the Second Amendment explicitly guarantees the

reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.")

146. *Id.* at 738.

147. *Id.*

148. *Id.*

149. See generally John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (examining numerous colonial property regulation regimes in place at the time of the Constitution's drafting).

150. Rappaport, *supra* note 77, at 739.

151. *McDonald v. City of Chicago*, 561 U.S. 742, 854 (2010) (Thomas, J., concurring).

right “to keep and bear arms,” the Constitution makes no such guarantee for the right to own property. In fact, the only references to individual property rights are the Due Process Clauses of the Fifth and Fourteenth Amendments. However, “[t]he mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application.”¹⁵² The evidence is overwhelming that both the framers of the Constitution and the Fourteenth Amendment, as well as the ratifying public during both periods, understood property ownership to be a fundamental component of individual liberty. James Madison went so far as to advocate that the protection of property rights was the ultimate purpose of government itself.¹⁵³ The very fact that the Due Process Clauses prohibit government appropriation of property without compensation is direct evidence that a right to own property existed when the respective drafters wrote the Amendments. Such protections were unnecessary if citizens had no exclusive claim to their property.

C. *The Correct Question*

If the right to own property is a privilege of citizenship, then the Fourteenth Amendment prohibits Wisconsin from abridging it. When we pose the correct question, there is a simple and straightforward path to the answer. Attempting to characterize a regulation as a physical act, which is what regulatory takings advocates do, is wholly unnecessary. Wisconsin did not evict the Murrs. Wisconsin did not send police to seize their land or the structures upon it. Wisconsin did not attempt to convert any of the land for public use. What Wisconsin did do was abridge the Murrs’ substantive right to enjoy and dispose of their property as they pleased. This abridgment is exactly what the drafters of the Fourteenth Amendment intended to prohibit.

Southern states’ abridgment of property rights was a central focus of both the Civil Rights Act of 1866 and the Fourteenth Amendment itself. The Joint Committee on Reconstruction investigated the conduct of these states and discovered the state governments’ systematic and widespread abuse of black citizens’ basic freedoms. An Army general testified during the Committee’s hearings that Virginia was “extremely reluctant to grant to the negro his civil rights - those privileges that pertain to freedom, the protection of life, liberty, and property before the law. . . .”¹⁵⁴ Similarly, Mississippi’s Black Codes, enacted in 1866,

152. *Id.*

153. Larkin, *supra* note 70, at 37 n.202.

154. Paul Finkleman, *The Making of a Legal Historian: Reassessing the Work of William E. Nelson: Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89

granted black citizens the right to own property but prohibited them from “rent[ing] or leas[ing] any lands or tenements” without permission from city or municipal government.¹⁵⁵ Congress passed the Civil Rights Act of 1866 in response to these conditions and included a provision guaranteeing all persons “the right purchase, lease, sell, hold, and convey real and personal property. . .”¹⁵⁶

Congress recognized that later legislatures might revise the Act or that the Supreme Court may invalidate it altogether and constitutionalized it with the passage of the Fourteenth Amendment.¹⁵⁷ To borrow from Justice Thomas’ *McDonald* opinion, the record is clear that both the drafters of the Fourteenth Amendment and the “ratifying public” understood personal property rights as “essential to the preservation of liberty” and that this body of rights included the right to dispose of personal property.¹⁵⁸ This being true, the holdings of the *Slaughter-House Cases* and *Cruikshank* with respect to the Privileges or Immunities Clause are erroneous. The *McDonald* majority agreed with this sentiment before inexplicably concluding that there was “no need to reconsider” either case’s holding.¹⁵⁹ For Justices Alito and Scalia at least, the ends of *McDonald* justified the means. Their “misgivings” about the foundations of the doctrine underlying their holding were not enough to encourage their acceptance of Justice Thomas’ challenge even though they acknowledged that previous repudiations of an alternative, possibly superior, doctrine were incorrect. The *McDonald* court did not agree with Chicago’s ordinance and found that they could mash the square peg of substantive due process hard enough to make their holding fit the round hole of the question presented.

Unfortunately for Justice Alito and the Murrs, this approach only prevails when there is a majority of justices willing to mash the square peg. In *Murr*, the dissenters tried to apply the regulatory takings doctrine that suffers from the same defects as substantive due process. Regulatory takings questions—whether using the “too far” standard of *Mahon*, the present value test of *Penn Central*, or *Murr*’s three-factor framework—do not yield consistent or correct answers. That is because

CHI.-KENT L. REV. 1019, 1050 (2014).

155. *Mississippi Black Code*, AN EX-SLAVE REMEMBERS, <http://chm.gmu.edu/courses/122/recon/code.html> (last visited May 11, 2018).

156. 14 Stat. 27, 39 Cong. Ch. 31 (1866).

157. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

158. *McDonald v. City of Chicago*, 561 U.S. 742, 858 (2010) (Thomas, J., concurring) (“In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the war over slavery.”).

159. *Id.* at 758 (majority opinion).

a regulation that does not take one citizen's property and convey it to another citizen or the public at large is not a taking. It is something else. If the statute seized title to the Murr's land into the state's hands or transferred it to the Audubon Society, a takings inquiry would be appropriate. What Wisconsin was actually concerned about and what the statute at issue guarded against was the destruction of riverside ecosystems.

The Wisconsin statute achieved its ends because it deprived the Murrs of the ability to dispose of the property. That is the opposite of a taking. It is, however, a violation of the Murrs' privileges as citizens of the United States. Wisconsin constrained the Murrs' property rights it combined the two parcels into a single parcel and prohibited the sale of any fraction of that single parcel. This action is exactly what the framers of the Constitution feared: that governments would erode essential freedoms through legislation which changed the character of those rights. In the context of personal property, this erosion leads to the gradual accretion of all property into the government's hands.

Of course, there are many legal scholars, political actors, and ordinary citizens that believe government ownership of property is a desirable end—extreme examples being the communist governments of the Soviet Union, China, and Cuba that effectively prohibited any form of private property ownership.¹⁶⁰ There are also more familiar advocates of such approaches. New York mayor Bill De Blasio recently remarked that “people all over [New York City], of every background, would like to have the city government be able to determine which building goes where, how high it will be, who gets to live in it, what the rent will be.”¹⁶¹ He further lamented that the only thing standing in the way of this dream was “hundreds of years of history that have elevated property rights and wealth” such that the government may not simply order citizens to dispose of it as the government pleases.¹⁶² Fortunately for advocates of individual liberty, there is more than history standing in Mayor De Blasio's way. There is the text of the Constitution prohibiting such deprivations of freedom.

Environmental concerns motivate other proponents of government intervention into the sphere of private property ownership as was the

160. See generally Jon Mills and Daniel R. Koslosky, *Whither Communism: A Comparative Perspective on Constitutionalism in a Postsocialist Cuba*, 40 GEO. WASH. INT'L L. REV. 1219, 1228 (comparing the history of property rights in pre-communist Cuba as well as during Castro's rule); Michael A. Heller, *The Tragedy of the Anticommons: Property In the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Theresa H. Wang, *Trading the People's Homes for the People's Olympics: The Property Regime in China*, 15 PAC. RIM L. & POL'Y J. 599 (2006).

161. David Boaz, *Bill De Blasio Is America's Marxist Mayor*, USA TODAY (September 13, 2016).

162. *Id.*

case in *Murr*. Professor John G. Sprankling recently published an article celebrating the erosion of the “historic foundation of American property law.”¹⁶³ For Sprankling, humanity’s impact on the planet’s environment requires a “retool[ing]” of property rights that does not violate the Takings Clause.¹⁶⁴ His solution is to redefine property rights in a way that sidesteps the Takings Clause’s prohibitions. Some new definitions advanced are “involuntary equitable sharing” (granting new easements when environmental impacts make it appropriate), “fiscal-non-compensation necessity” (compensation only required when it is fiscally convenient), or “floating fee” estates (forcing a resident to move to a government approved location).¹⁶⁵ If Sprankling’s dream becomes a reality, the government will be able to “evade takings liability by enacting legislation that weakens property rights.”¹⁶⁶

Sprankling views the Court’s regulatory takings precedent, including its *Murr* decision, as a beacon of hope that signals a new era where property rights are “more flexible and less categorical.”¹⁶⁷ This era is upon us because of the development of the regulatory takings doctrine which threatens to destroy private property rights entirely. There is a way to reverse the effects of this erosion. We must ask the correct question when confronted with a regulation that impacts private property. Is the right of private property ownership a privilege of American citizenship? The answer is, undoubtedly, yes. Therefore, the Privilege or Immunities Clause prohibits any state from abridging that right in the absolute terms that Sprankling abhors. This inquiry nullifies any attempts to run end-around the Takings Clause with creative legislation that achieves the government’s desired ends, noble though they may be.

V. CONCLUSION

It is unfortunate that the facts giving rise to the *Murr* decision are so trivial. Whether an obscure statute in Wisconsin prohibits a family from selling only a part of their small plot of land is a question seemingly of little consequence to Americans generally. And if the correct question truly was whether this statute required Wisconsin to compensate the Murr family for its effect, then we might more easily dismiss its significance. But the question the Court asked in *Murr* was not the correct one. What *Murr* truly stands for is a continuation of the Supreme

163. Sprankling, *supra* note 98, at 738.

164. *Id.*

165. *Id.* at 759-767.

166. *Id.* at 769.

167. *Id.* at 772.

Court's failure to identify the most insidious intrusions upon the foundations of American citizenship. Until the Court asks the correct question, it will never fulfill its duty as a bulwark against legislative and executive abuse.

Justice Thomas' cursory challenge to the Court's analytical framework in his *Murr* dissent belies the significance of the issue truly at hand. If the Constitution protects any fundamental liberties at all, then it must protect the right of a citizen to own property. And if the Constitution prohibits the states from infringing upon those fundamental liberties, then it must be because the Privileges or Immunities Clause provides substantive protection to those liberty interests. There is a path forward that avoids the pitfalls of regulatory takings analyses. Restoring meaning to the Privileges or Immunities Clause, which the *Slaughter-House Cases* destroyed, is that path.