Partial Textualism

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*1 PARTIAL TEXTUALISM

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*2 What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite.
—New York Police Commissioner Michael Murphy [FN1]

I. Introduction

Justice Scalia appropriated this “colorful” metaphor [FN2] when describing the City of St. Paul's ordinance, which, according to Justice Scalia and the majority, only restrained some fighting words. [FN3] Justice Scalia used the Queensbury metaphor to demonstrate that, in a free speech debate, each side should play by the same rules and that content-based and viewpoint-based discrimination can aid one side or the other in the debate creating an unfair advantage. [FN4] Justice Scalia and the New York Police Commissioner each used the boxing metaphor to reach a visceral feeling [FN5] that fights should be fair, an idea that resonates within constitutional analysis. [FN6]
the Supreme Court imposes a “jurisprudence of *3 tolerance,” it “simply insist[s] that the players not hit below the belt and turn a fair fight into a brawl.” [FN7] The Queensbury rules for a justice applying plain meaning textualism limit the meaning of the Constitution to that which is obvious and simple, while a justice relying on personal predilections avoids plain meaning textualism and hits below the belt. [FN8] And, perhaps, plain meaning textualism could be the constitutional equivalent of the Queensbury rules if adherents interpreted only what we all can see and applied this method consistently to the entire Constitution. This Article seeks to demonstrate that plain meaning textualists do not apply plain meaning textualism to the entire Constitution. Instead, plain meaning textualists indulge their personal predilections and apply the doctrine of “partial textualism,” which selectively applies plain meaning textualism to only part of, rather than the entire, Constitution. Partial textualism destroys any possible fairness value to plain meaning textualism. Indeed, such an approach is entirely inconsistent with the goals of plain language textualism. Returning to the Queensbury metaphor, the plain language textualist demands following the Queensbury rules and then hits below the belt when helpful. For someone who wants to win, this is a great way to ensure success.

Through examining the Takings Clause, this Article demonstrates that a plain meaning textualist will commonly apply plain meaning textualism to a part of the Constitution that protects *4 individuals, but apply, or at least rely on, accepted constitutional interpretations that reject plain meaning textualism to expand government power. The Article begins in Part II by describing what methods of interpretation exist and attempts to use the narrow approach of plain meaning textualism to prove that personal predilections form the foundation of any interpretational model. [FN9] Part III explores the problems that plain meaning textualists face when interpreting the Due Process Clause and how these specific problems cause courts and commentators to resort to partial textualism. Part IV explains how courts and commentators apply partial textualism to sanction laws and expand government power in ways that would likely be invalidated by a plain meaning approach to the entire Constitution. The Article concludes that plain meaning textualism, as it is used today, is used only as a method of achieving a specific, desired result and is not a neutral or fair method at all. Those who assert plain meaning to individual rights, such as the right to property protected by the Takings Clause, require others to fight by Queensbury textualist rules, while those same purported textualists ignore plain meaning when its application limits government power and “butt, gouge and bite.”[FN10] Indeed, the plain meaning textualist is actually a partial textualist, one who applies textualism to only part of the Constitution.

*5 II. (One) Holy Grail of Constitutional Interpretations: Elimination of Personal Interpretations [FN11]

Leslie Gielow Jacobs believes that “legitimacy in constitutional interpretation requires transcendence of personal preference.” [FN12] Other scholars express concern, in particular, with injecting “personal values” into constitutional interpretations. [FN13] Rather *6 than attempt to describe every method or theory of constitutional interpretation to prove this point, this Article reviews the very narrow and circumscribed method of plain meaning or plain language textualism [FN14] and applies
it to the Takings Clause of the Constitution in order to demonstrate that even the most narrow method of constitutional interpretation requires resort to personal predilections. [FN15] This Article suggests that when theorists claim that an interpretive model eliminates personal predilections, they often, if not necessarily, fail to demand that such a model applies to each and every word of the Constitution. Instead, they selectively apply the model to particular provisions while ignoring the effect of applying the model to all other provisions. Such an approach is well nigh inevitable and certainly falls into the category of personal predilections. No one can choose an interpretational methodology that eliminates personal predilective choices. [FN16]

How do we interpret the Constitution? Let us count the ways [FN17] using, instead of our fingers, all the snowflakes in a blizzard—ok, only half the snowflakes. [FN18] This hyperbole asserts the obvious: the Constitution has been interpreted by so many methods that the effort to count those methods would be as unlikely to succeed as counting the snowflakes in a blizzard. [FN19] While it cannot be proven beyond any doubt, it is unlikely that any person has attempted to actually review and categorize every method [FN20] of constitutional interpretation. Some scholars discuss “all methods” of interpretation [FN21] while others organize the methods [FN22] into categories, some of which overlap, with designations such as textualism, [FN23] originalism, [FN24] interpretivism, [FN25] non-interpretivism, [FN26] intentionalism, [FN27] and formalism. [FN28] Some describe the categories, [FN29] while a number of others have critiqued them. [FN30] Scholars continually review these categories, and some scholars, after discussion or critique, add new ones. [FN31] Scholars have discussed the benefits [FN32] while others have demonstrated the flaws of each methodological category. [FN33]

*10 Occasionally, these commentators find justices who use [FN34] or reject [FN35] one or more constitutional interpretive approaches. [FN36] They will praise a justice on the Supreme Court for his or her approach to interpretation or seek to “offer a ‘better’ methodology.” [FN37] Other times, a justice of the Supreme Court claims, implicitly or explicitly, adherence to a particular methodology. [FN38] Such adherence or claim will occasionally bring cries of hypocrisy [FN39] or intellectual dishonesty [FN40] from critics that point out where an adherent to a model of constitutional interpretation fails to follow the dictates of such model. [FN41] Commonly, these critiques seek to prove the superiority of a particular method of constitutional interpretation. [FN42] Throughout this process of positing constitutional interpretive models, or noting the failures of these models and their proponents, *12 an explicit (or even implicit) assumption often exists that constitutional interpretation must be, should be, or is, more than the personal interpretation of the justice or commentator. Constitutional interpretation is or at least should be rational [FN43] or structural and should be more than a matter of imposing personal predilections. [FN44] Justice Stephen Breyer said it thus: The more literal judges may hope to find, in language, history, tradition, and precedent, objective interpretive standards; they may seek to avoid an interpretive subjectivity that could confuse a judge's personal idea of what is good for that which the Constitution demands; and they may believe that these “original” sources more readily will yield rules that can guide other institutions, including lower courts. [FN45]

*A 13 A. Unavoidability of a Personal Constitutional Interpretation
This Article explores the true nature of constitutional interpretation, not what it should be or could be, but what it is. In order to find this true nature, this Article began as a review of every article published that concerns or discusses “constitutional theory” or “constitutional interpretation.” The author then narrowed the review to every article available via computer research that concerns or discusses “constitutional theory” or “constitutional interpretation.” Upon further reflection, the author further narrowed the review to every article that contains the term “constitutional theory” or “constitutional interpretation” in the title, the assumption being that if an article does not have “constitutional theory” or “constitutional interpretation” in the title, then the author of the article without the aforementioned terms in the title did not originally intend for casual readers of law review articles to recognize the article as one which concerns “constitutional theory” or “constitutional interpretation.”

Because each of these tasks appeared beyond human, or at least beyond the author’s capability, the author narrowed the scope of review to the very narrow constitutional theory or interpretive model referred to as plain language or plain meaning textualism. This method’s primary purpose is to eliminate personal predilections from constitutional interpretation. The Article further narrows the scope of the review to make the assumption that all could agree on the meanings of each of the words and phrases in the Constitution. The Article then applies this very narrow and restricted interpretive model to the Takings Clause as an attempt to demonstrate the unavoidability of personal predilections in constitutional interpretation.

In particular, this Article concerns itself with Regulatory Takings. Oversimplified, a Regulatory Takings claim urges that “property” is “taken” when a regulation “goes too far,” and because the “property” has been “taken,” the government must pay “just compensation” for the “taking.” Put another way, a regulation “takes” property when it regulates, or over-regulates, the use of property so that the property no longer has any value. John D. Echeverria, among others, has urged that the Takings Clause does not support a claim for Regulatory Takings. John F. Hart explained that when interpreted using the original meaning, the Takings Clause does not support the existence of a regulatory taking claim. Hart and Andrew S. Gold urge that virtually no regulation can “take” property under the plain language of the Takings Clause. Conversely, most, or perhaps all, commentators and Justices of the Supreme Court agree that when the government takes possession or asserts title, the Takings Clause requires that the government pay compensation.

This Article does not seek to demonstrate the “correct” or even the “best” meaning of the Takings Clause. Instead, the Article assumes for the purposes of discussion that the Takings Clause has one plain meaning: the Takings Clause means that the government does not take property unless the government takes title to, or possession of, land. Using that assumption, this Article uses “plain meaning” interpretations of the Takings Clause to prove that personal predilections drive constitutional interpretations. This Article demonstrates that applying plain language textualism to a Takings Clause claim, particularly a Regulatory Takings Claim, eliminates Regulatory Takings from the protections of the Takings Clause but does not
eliminate personal predilections in interpreting the Constitution as it applies to statutes that regulate the use of property. Put in other terms, rejection of a Regulatory Takings Claim based on the plain meaning of the Takings Clause can be accomplished only by ignoring the plain language of other words of the Constitution, or by completely changing the accepted meaning of other constitutional clauses. In the end, the personal predilections of the interpreter dictate which meanings of the words of the Constitution should be plain and which should be interpreted using other interpretive models. Applying plain language textualism to the Takings Clause requires that the interpreter choose which words of the Constitution are relevant to the claim. Personal choice often overcomes the purported benefits of using plain language textualism.

B. Realism: The Meaning of the Constitution has Changed Over Time

The first step in this process requires an understanding of the problem and sources or areas of agreement. This Article begins with the assumption that all who interpret the Constitution and who write about such interpretation agree that specific words (about 7300), [FN71] in a specific order make up the Constitution. It begins, “We the People of the United States . . . .” [FN72] These words *20 have not changed in more than 200 years. [FN73] Indeed, none of the words of the entire Constitution have changed. [FN74] Words, in the form of amendments, have been added, but the original words have not changed. Once amendments have been added, those words have also remained the same (the Twenty-first Amendment, however, repealed the Eighteenth). [FN75] Despite the immutability of the Constitution's words, the Constitution's meaning [FN76] has changed. [FN77] *21 A constitution, the meaning of which changes, conflicts with the ideals many would seek to impose on the Constitution, in particular, the ideal of a “dead,” as opposed to a “living,” Constitution. [FN78] For example, Justice Scalia, among others, wants his Constitution good and dead. [FN79] And so, it is. The Constitution of the United States is undeniably dead. In a biological sense, the Constitution housed in the National Archives contains no living matter other than perhaps some microbes, and those microbes do not change the dark marks we agree to be the words of the Constitution. Those dark marks may fade over time, but they do not change in a way that humans can detect with their senses. As described herein, the Constitution is immutable, as opposed to un-amendable. Each one of the millions of copies of the Constitution begins with the phrase, “We the People of the United States . . . .” And yet over the centuries, despite the immutability of the Constitution's*22 scrawled, black marks, [FN80] the Supreme Court has given different meanings to those unchanged, unchanging words. [FN81] Once upon a time, the Equal Protection Clause permitted “separate but equal.” [FN82] Now, that same unchanged clause written by those same drafters with their same unstated, but perhaps declared “original intent,” prohibits “separate but equal.” [FN83] Also in the past, the phrase “commerce among the several states” applied to, perhaps obviously, only “commerce among the several states.” Whereas today, “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states.” [FN84] Over time, the meaning of the Constitution, as declared by the Supreme Court and applied to actual people whose lives, property, and livelihood can be protected or lost based on such declared meanings, changes. [FN85]
This idea of changing meaning does not refer to application of old meanings to new circumstances or even, perhaps, new knowledge of society or science. Application of an old meaning to a new technology does not indicate a new meaning. For example, when a buyer purchased a native plant from a nursery 200 years ago, the transaction began and ended with the transfer of, perhaps, silver from the buyer to the seller and transfer of the plant from the seller to the buyer. That transaction was clearly commerce. It was not, however, commerce among the several states. If the buyer today used a debit card instead of silver or silver certificates, the character of the transaction has arguably changed. No longer is the transaction limited to one location. The debit card uses interstate means of communication via wires or airwaves to instantly move money from one or more bank accounts to and through one or more other bank accounts through one or more states. Records in banks in other cities, states, and even countries will be modified in an instant. Two hundred years ago, such movement of money would have required days or weeks, not milliseconds. The movement would have required perhaps dozens of people instead of some uncountable number of electrons. If the Supreme Court were to find such a transaction to be “commerce among the several states,” the Court would not really be finding a new meaning to the phrase “commerce among the several states.” Application of old meanings and law to new facts, as exemplified by the discussion of the purchase of the plant, does not indicate a change in meaning or interpretation—only a change in circumstance.

Occasionally constitutional change occurs when science, including social science, creates new insights. Constitutional change may occur when new science requires a new gloss on an old analysis. Change can occur that is arguably not a true change in interpretation or meaning, but rather a change in the scientific basis of an analysis. One example where a change in the understanding of social science might be the cause in changing constitutional meaning occurred when the Supreme Court overruled Plessy v. Ferguson in Brown v. Board of Education. In Plessy, the Court rejected the constitutional argument that “separate but equal” caused what might be called “psychological harm.” But in Brown, the Court reversed Plessy, at least in part, because the Court agreed that segregated schools caused what might loosely be called psychological harm. Similarly, the Court at one time held that no harm occurred when bakers worked excessive hours. Later, the Court overruled that finding and held that the state could regulate the working hours of workers in a flour mill due to the harm caused by working too many hours. [FN95]

These two examples of “changes” in constitutional interpretation could arguably be based on an actual change in the understanding of human behavior and the effects of psychological harm. These types of changes seem acceptable, or even inevitable. They suggest the possibility that constitutional interpretation consists of little more than invocation of personal predilection, particularly where constitutional interpretation is based at least in part on social science. Indeed, the “Lochner era injected into legal debates social science issues concerning the comparative strengths of regulated and unregulated labor markets.” The Lochner era ended, at least in part, because the Court decided that it could not determine the validity or proper application of social science when judging a government's decision with regard to economic regulation. [FN98] The Court would not interfere in legislative decision-making when
such decision-making was based on “modern social science.” [FN99] In other words, even when a court restricts itself to application of social science, it may venture into the world of personal predilections. [FN100]

*27 Other changes in constitutional interpretation cannot even be bounded by social science. These changes can only be explained by a change in time or Supreme Court membership. One bold example included the Supreme Court's double reversal in its Tenth Amendment jurisprudence. [FN101] This example can be honestly explained by the change in Supreme Court membership. Then-Justice Rehnquist proved this point in his dissenting opinion when he forecast the overruling of the second reversal in the Tenth Amendment double reversal. [FN102] The words of the Constitution do not change. [FN103] Over time, however, different justices read the Constitution and interpret its words differently than those who preceded them. [FN104]

*28 C. Fantasy: Textualism Eliminates a Changing Constitution

Many believe that this process must stop. [FN105] Many believe that these changes suggest that constitutional interpretation has become or has always been a matter of imposing personal predilections, [FN106] or at a minimum suggests the risk of imposing such personal predilections. [FN107] Undeniably, many believe that constitutional*29 interpretation must not include the personal predilections of the justices. [FN108] In order to eliminate these personal predilections, justices and commentators call for application of what are often termed “neutral principles” when interpreting the Constitution. [FN109] Some commentators have suggested that neutral principles include “original understanding, constitutional text or structure, or some other source of constitutional meaning,”[FN110] while others have suggested “separation of powers and federalism.” [FN111] Some of these neutral principles are assertedly derived from the plain meaning of a text. [FN112] The intended purpose of using neutral principles and methods*30 is “to maximize the legitimacy of judicial decision-making.” [FN113]

Textualism, on the surface, appears to be an excellent bulkhead against the rising tide of personalized interpretations. Indeed, “conservatives [FN114] argue that the only nonpolitical, neutral check on the judicial power, other than majoritarianism, is the text and Framers’ intent.” [FN115] Oversimplified, textualism purports to demand that the constitutional text says what it means and means what it says, and what it means does not change over time. [FN116] Perhaps the narrowest version of textualism would be plain language or plain meaning textualism. [FN117] In other articles, this author has suggested that determining the “plain” meaning of a particular word or phrase is fraught with the use of personal predilections. [FN118] For the purposes*31 of further discussion, however, this Article assumes that each and every word and phrase of the Constitution has (or could have) a declared plain meaning. [FN119] Even with that assumption, this Article seeks to demonstrate that constitutional interpretation requires the Supreme Court to indulge its personal predilections. In order to show the influence of personal predilections, this Article will review the Takings Clause in light of a purported plain meaning.

III. Partial Textualism
This Article operates under a simple premise: “plain” means, well, “plain.” Where a person asserts that one part of a document should be interpreted using a plain-meaning approach, then the entire document needs to be interpreted with that same approach. Likewise, a plain language advocate for one provision of the Constitution should not complain when other interpreters apply plain meaning textualism to other parts of the Constitution. However, this is not the case. Purported plain meaning textualists often resort to other methods of interpretation to reach a final result, regardless of whether that result is consistent with a plain meaning construction of each clause or phrase of the Constitution.

Plain language textualism aims to take personal choice out of constitutional interpretation. Under this theory, plain language textualism suggests one or a very limited meaning to constitutional clauses. By choosing plain language textualism as an interpretational method, the interpreter has in some ways chosen a result. This choice of result becomes far more apparent when the interpreter chooses plain language for one provision and not another relevant provision. This Article demonstrates examples where choosing plain language for two relevant constitutional clauses creates one result, while choosing plain language for only one of the two creates another result. One of two possible conclusions follow: the interpreter intentionally chooses a result because the interpreter intentionally chose methods knowing which result would follow, or the interpreter has randomly, arbitrarily, or blindly chosen different interpretational methods having no idea what they mean or how they operate. The first choice suggests intentionally hiding personal predilections behind purportedly neutral rules. The other suggests incompetence. Through analysis of the specific problems that arise when applying plain language textualism to interpret the Due Process Clause and the Takings Clause, one can truly observe interpreters' slip from plain language textualism to partial textualism, an approach driven by personal predilections and inconsistent with the claimed goals of plain language textualism.

A. Plain Language of the 14th Amendment Due Process Clause

The assertion of a plain meaning to the Takings Clause creates a constitutional conundrum particularly for the clause as applied to the States, because, in plain language, the Takings Clause plainly does not apply to the states. [FN120] In Barron v. Baltimore, [FN121] the Supreme Court held that the first eight amendments to the Constitution apply only to the federal government. [FN122] Recently, Professor Akhil Reed Amar described Barron as a canonical opinion that honored “the orthodox public understanding of those who drafted and ratified the Bill of Rights” and that the Bill of Rights did not “bind[] state governments.” [FN123] Consistent with plain language textualism, including that which plainly is not in the text, “Chief Justice Marshall assured the readers of Barron v. Baltimore that if the drafters of the Bill of Rights had intended to apply those rights to the states, the drafters would have done so in ‘plain and intelligible language.’” [FN124] Consequently, the Bill of Rights, in general, and the Takings Clause in particular, do not apply to the states and do not restrict state power. [FN125] In other words, the Bill of Rights did not automatically apply to the states. [FN126]
At this point, plain language textualists and, indeed, any constitutional interpreter must determine how to apply the Takings Clause to the states. More particularly, the plain meaning textualist must find something in the text that applies the Takings Clause to the states in order to avoid interpretational hypocrisy. To date, the Supreme Court has applied Takings Clause concepts against state action through two different methodologies, neither of which relies on the plain language of anything. Instead, each method relies on one or another interpretation of the Due Process Clause. One approach suggests that the Takings Clause, or its principles, apply to the states only through Lochner-esque substantive due process. Under this approach, the Fourteenth Amendment Due Process Clause would contain a “substantive component that *34 authorized close judicial scrutiny of both the form of legislation enacted pursuant to local police powers and its operative effects.” [FN127] Under a more modern substantive due process takings claim, a reviewing court would “concentrate[] on whether the government's aims are 'clearly arbitrary and unreasonable, having no substantive relation to the public health, safety, morals, or general welfare.'” [FN129] Indiana Supreme Court Chief Justice Randall T. Shepard has “advocate[ed] the use of the Due Process Clause rather than the Takings Clause as a means of challenging government regulation [of property]” [FN130] and has “assert[ed] that substantive due process, rather than the Takings Clause, provides a better tool for assessing the validity of land use regulation.” [FN131] Whatever the value that may exist in using a substantive due process approach to incorporate the principles of the Takings Clause, such approval violates the principles of plain language textualism. Justice Scalia in “reject[ing] the notion of ‘substantive due process,’ [has] argu[ed] that the Constitution's plain language of *35 ‘process,’ by definition, precludes internal substance.” [FN133] Indeed, textualists take the position that the Due Process Clause's plain language “preclude[s] a doctrine of substantive due process.” [FN134] Professors Steven G. Calabresi and Gary Lawson have recently observed that substantive due process exists in more than a century of precedents, which “have mangled the plain meaning of the Due Process Clause.”[FN135] So whatever may be said for the value of substantive due process, “a committed textualist” would declare the doctrine “oxymoron[ic].”[FN136]

“The fundamental obstacle to incorporation of the Bill of Rights under the Due Process Clause is textual.” [FN137] Incorporation of the Bill of Rights through the Due Process Clause has been described as “textually untenable.” [FN138] Professor Strauss takes a softer approach describing the incorporation doctrine as having “textual difficulties.” [FN139] Indeed, no one really suggests that the text of the Due Process Clause requires incorporation of the Bill of Rights. The Clause does not mention rights, the Bill of Rights, or incorporation.*36 As noted earlier, it simply repeats another clause of the Constitution, the Due Process Clause of the Fifth Amendment. Despite the fact that the Fourteenth Amendment Due Process Clause refers only to Due Process of Law, Justice Black urged “total incorporation” of the Bill of Rights.[FN140] Justice Black asserted that textualism supported his theory [FN141] because “for Black[,] textualism required total incorporation as the only plausible way to tie the vague Due Process Clause to constitutional text.” [FN142] Professor Stephen Gardbaum explained Justice Black's approach, as follows:
The appeal of total incorporation was the appeal of textualism generally: by tying the meaning of the vague text of the Due Process Clause to the text of the first eight amendments, it would do away with the type of reasonableness and fundamental fairness tests that enabled the Court to usurp the policy making function of state legislatures. [FN143]

To restate this in plain language textualist terms, the plain language of the Bill of Rights applies to the states through the Due Process Clause because, although the plain language of Due Process of the Fourteenth Amendment [FN144] refers solely and plainly to procedure, that clause should be declared vague. Once declared vague, in order to avoid application of reasonableness tests by courts, the clause should be interpreted to totally incorporate the plain language of each of the Bill of Rights. In short, the plain language textualist must declare the Due Process Clause's plain language vague in order to give that language a new meaning that permits total incorporation of the Bill of Rights. It is no wonder Professor John Robinson describes Black's total “incorporationist alternative to substantive due process adjudication as” fatally incoherent.” [FN145] Neither textualism, generally, nor plain language textualism, specifically, can justify application of the Bill of Rights to the states.

Perhaps as overkill, perhaps in fear that the logic of this Article fails, consider one last rephrase of plain meaning incorporation of the Bill of Rights. Under this plain meaning approach, the Fourteenth Amendment Due Process Clause plainly means and requires incorporation of the entire Bill of Rights and at the same time plainly means the plain meaning of those now incorporated rights. At the same time, the Fifth Amendment Due Process Clause does not have the plain textual meaning of total incorporation. The plain meaning of the Fifth Amendment Due Process Clause, instead, restricts the Clause’s meaning to procedure. The Due Process Clause, then, plainly means either (1) “incorporate the Bill of Rights,” when the clause appears in the Fourteenth Amendment or (2) “fair procedures,” when the clause appears in the Fifth Amendment. To suggest such radically different meanings to the same words certainly suggests some difficulties with plain meaning textualism and suggests a problem with claiming that the Fourteenth Amendment plainly incorporates the Bill of Rights.

Of course, the plain language textualist asserting the plain meaning of the Takings Clause need not rely on substantive Due Process or the total incorporation of the Bill of Rights. Instead, the plain language textualist can use selective incorporation to apply the Takings Clause to the states. [FN146] Under this “alternative constitutional mechanism the Court ha[s] applied virtually all of the Bill of Rights to the States.” [FN147] In deciding whether to incorporate *38 or assimilate [FN148] a right with the Fourteenth Amendment Due Process Clause, the Supreme Court has used a variety of tests or criteria [FN149] including the idea or ideal of “fundamental fairness.”[FN150] For example, Justice Douglas “described the fundamental fairness approach as reflecting a ‘view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of the same guarantee as applied to the Federal Government.’” [FN151] Other permutations suggest that “the Supreme Court needed to invoke notions of fundamental fairness implicit in the guarantee of due process in order to apply the provisions of Bill of Rights to the states.” [FN152] Justice Frankfurter “‘insist[ed] on fundamental fairness as the touchstone of the Fourteenth Amendment’ and incorporation of rights against the states.” [FN153] “[F]undamental
fairness”’ is one of “[t]hree theories [that] have been advanced to justify the application of the Bill *39 of Rights against the states.”[FN154] “Under the selective incorporation doctrine, the Supreme Court has held that the guarantee of fundamental fairness implicit in the fourteenth amendment due process clause [sic] requires incorporation of most of the Bill of Rights to the States.” [FN155] Finally, “[f]undamentality” still is the touchstone under selective incorporation for determining whether a given Bill of Rights guarantee applies to the states, and surely there is good sense in concluding that “what is important enough to have been included within the Bill of Rights has good claim to being an element of ‘fundamental fairness.’” [FN156] The Supreme Court has also asked whether a right is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” [FN157] Justice Cardozo, writing for the Supreme Court, appears to have first used this phrasing in Snyder v. Massachusetts. [FN158] This phrasing harkens to fifty years earlier when the first Justice Harlan noted “that there are principles of liberty and justice lying at the foundation of our civil and political institutions.”*40 [FN159] The majority in Hurtado v. California recognized the same indicating that “the inherent and reserved powers of the state [must be] exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” [FN160] Thirty-five years before Hurtado, the Supreme Court of New York made an equivalent statement that a legislative body may not “exercise a power incompatible with the nature and objects of all governments [or] destructive to the great end and aim for which government is instituted [or] subversive of the fundamental principles upon which all free governments are organized.” [FN161] Whatever the history and pedigree and meaning of Justice Cardozo’s phrase, “only those provisions [of the Bill of Rights] ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’ were incorporated” against state action. [FN162] Under this standard, the Supreme Court determines whether to incorporate (1) “nontextual liberty interest[s],” [FN163] (2) rights, [FN164] or (3) “personal immunities.” [FN165] Perhaps *41 more often the Supreme Court looks to both these rooted principles of justice as well as “ordered liberty.” [FN166] As explained by Professor Philip C. Kissam, The standard for incorporating rights in the Bill of Rights into the Fourteenth Amendment has been stated variously as whether the right is “of the very essence of a scheme of ordered liberty,” reflects “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or in the case of criminal procedure rights, is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” [FN167] The Court uses other substantially similar tests to determine whether to incorporate a right. [FN168] However stated and whatever test the Court chooses, the plain language textualist faces an irreconcilable conundrum. Plain language textualism cannot justify incorporation in general, nor can such textualism explain the standards*42 for selective incorporation. Finally, plain language textualism cannot possibly explain how the Due Process Clause, which looks to “tradition,” “conscience,” “ordered liberty,” and “justice,” could be used to interpret the Takings Clause as an incorporated right. Put another way, a plain language textualist seeking to apply the plain language of the Takings Clause must assert something like, “the American scheme of justice” and “ordered liberty” require not
only incorporation of the Takings Clause, but also incorporation of the plain meaning of that clause. These contortions of logic demonstrate the impossible maze a plain language textualist faces when asserting that the “plain meaning” of the Fourteenth Amendment’s Due Process Clause incorporates the Takings Clause. At least one commentator has expressly noted this incongruity as follows: “If plain meaning were the test, we could no longer rely on a host of textually suspect but absolutely pivotal legal constructs, such as the ‘incorporation doctrine,’ which makes the Bill of Rights binding on the states as well as the federal government.” [FN169] The plain meaning of those clauses simply cannot be relied upon to reach the conclusion that any part or parts of the Constitution can be read to require the Takings Clause’s plain language to restrict state power.

From the preceding discussion, one narrow conclusion follows: plain language textualism cannot be used to justify applying the Takings Clause in general, or the plain meaning of the Takings Clause in particular, to the states. This narrow conclusion does not in and of itself point to any specific weakness in using plain language textualism when applying the Takings Clause to the national government. The discussion leads to a broader conclusion that a plain meaning textualist relies on that interpretational methodology less than all the time. Just like the plain language textualist ignores or chooses not to use plain language textualist canons of construction,[FN170] the plain language textualist uses partial textualism to pick and choose which constitutional words, phrases, and clauses merit a plain language interpretation.

*43 B. Another Textualist Due Process Problem

As noted, [FN171] commentators often assert that regulatory takings claims contradict the plain meaning of the Takings Clause. [FN172] As stated by Dean William Michael Treanor, “The text of the Takings Clause limit[s] it simply to physical seizures by the government . . . .” [FN173] While some commentators use plain meaning simply to discredit the concept of regulatory takings, [FN174] others use plain meaning or other textual arguments to demonstrate why regulatory jurisprudence improperly commingles the Takings Clause and the Due Process Clause. [FN175] These commentators do not necessarily*44 seek to eliminate all claims that the government validates the Constitution when it regulates property. [FN176]
Professor Ronald J. Krotoszynski, Jr., urges moving toward a “principled limitation” on the scope of the Takings Clause [FN177] by limiting takings claims to those circumstances where a court finds “expropriatory intent.” [FN178] Krotoszynski’s approach would then force non-expropriatory intent, regulatory takings claims into equal protection or substantive due process claims, which would require a finding that the legislation be arbitrary or capricious before it would be declared invalid.[FN179] Professor Steven J. Eagle suggests “meaningful substantive due process review.” [FN180] Mark Tanick suggests different standards of scrutiny depending on the property interest involved. [FN181]
Separating the Takings and Due Process Clauses and relying on the substantive component of due process rejects plain language textualism. Professor Ronald Krotoszynski unintentionally *45 explained the interpretational disconnect that occurs
when a plain language textualist uses the Due Process Clause to support a regulatory takings doctrine:

the Takings Clause, on its face, does not purport to place any substantive limits on government action, but instead conditions such action on the payment of “just compensation.” Due process of law, on the other hand, limits not only the procedures by which government acts, but the very ability of government to certain ends.[FN182] Professor Krotoszynski in no way purports to demand a “textualist” meaning to the Takings Clause. His discussion points to the flaws of textualism. Neither the Due Process Clause nor the Takings Clause, “on [their] face purport to place any substantive limits on government action,”[FN183] and, yet, Professor Krotoszynski continues to support a “substantive component” of Due Process Clause while rejecting it for the Takings Clause. For Professor Krotoszynski, this approach is consistent with his goal of principled adjudication.

This cannot be said for the plain language textualist. Neither the Takings Clause nor the Due Process Clause contains a substantive component. [FN184] More importantly, a plain language approach to the Due Process Clause might create an unexpected result for those seeking to limit Takings Clause protection for property owners. The plain language analysis of the Due Process Clause begins simply enough. “[T]he phrase, ‘due process,’ after all, is indicative of procedural matters.”[FN185] As Justice John Paul Stevens stated in a law review article more than two decades ago, “the plain language of the due process clause seems to speak only *46 of procedure.”[FN186] Put more affirmatively, “the plain meaning of the due process clause [provides] that life, liberty, and property can be taken so long as it is done with procedural correctness.”[FN187]

C. Textual Failures of the Textualist Version of the Due Process Clause

Reconsider at this time the generally accepted textualist dismissal of substantive due process. Due process textualists, like Justice Antonin Scalia and Professor John Hart Ely, argue that the plain language of the Due Process Clauses precludes substantive due process. [FN188] One textualist version of the Due Process Clause asserts that a legislative body categorically abrogates an interest in life, liberty, or property so long as it does so pursuant to a validly enacted statute because such enactment would provide all the process that is due. [FN189] Michael W. McConnell expands this slightly, suggesting that due process of law “mean[s] properly enacted statutes (or common law) administered according to proper procedures.”[FN190] According to McConnell, part of this analysis includes the straightforward conclusion that “[d]ue process means *47 ‘process.’”[FN191] Or, as John Harrison simply restated, “Process means procedure.”[FN192]

This textual approach to the Due Process Clause proceeds simply and clearly enough. The other words, closely scrutinized, create textual conundrums. The first such word, “due,” could mean “fair,” as in fair procedure. [FN193] Alternatively, “due” could mean “what is owed.”[FN194] The words “due” and “process” precede “of law,” which could mean statutory, common, or—dare it be suggested—natural law, or any combination of the three. More important, the question raised is whether “due process of law” can be equated in any textual sense to validly or properly enacted statute.
If “due process” means “fair procedure,” then due process of law could mean (1) fair procedure in a statute or (2) fair procedure of law, including statutes, common law, and natural law. These meanings, indeed any meaning, of “fair procedure of law” make no syntactical sense. For example, suppose a statute requires or contains an unfair process. Then, due process of law would be the fair process of enacting a statute that includes or requires unfair process. On the other hand, if “due process of law” means the fair process required by natural or common law, the modifier “fair” seems to have no purpose. If natural common law requires inherently unfair process, then due process of law means fair process of an inherently unfair process. If natural or common law requires inherently and definitionally fair process, then “due process of law” means “fair process of fair process.”

*48 The alternate meaning of “due,” “what is owed,” creates its own problems. Under that meaning, the Due Process Clause would refer to the process of law which is due and owing. If “law” means “statute,” then “due process of law” means the process due and owing under the statute. This approach suggests that the statute creates the process due and owing and that a statute could create any process by which life, liberty, and property can be deprived. The Supreme Court has clearly rejected the idea that life, liberty, and property may be deprived pursuant to any statutorily created process. Indeed, many of the so-called procedural due process claims concern whether statutorily created processes are valid. [FN195] Alternatively, “due process of law” means the process due and owing under “law” as in a higher or natural law, law unmentioned in the Constitution and supreme to the legislative power, specifically mentioned in Article I of the Constitution. One final approach to the Due Process Clause defines due process as fair process and completely ignores the words “of law.” Not only does this approach of cutting words out of the Constitution seem antithetical to textualism, it, too, relies on “law” outside the Constitution. The textualist restricts this extra-textual “law” to that which limits the Constitution to procedures consistent with an unwritten law of fair procedures. By doing so, the textualist completely rewrites the Due Process Clause and avoids the idea that due process of law means law that is consistent with a natural or higher law. Under this approach, the textualist's Due Process Clause contains no recognition of a higher law of “substance” but recognizes a higher law of process. However the textualist chooses to fit “fair procedures” into the Due Process Clause, the textualist encounters textual difficulties. Notwithstanding these difficulties, the textualist concludes that the Due Process Clause permits the government to take property so long as it proceeds with “procedural correctness.” [FN196]

At first glance, this approach seems to support the claim that a regulatory taking claim should be denied under the Due Process Clause as well as the Takings Clause. Further inspection of the plain language belies that conclusion. For this discussion, the reader can assume that “due process” refers to procedures or *49 “process.” Within one year of Marbury v. Madison, [FN197] however, the Ohio Court of Common Pleas noted that the “[Ohio] Supreme Court has held that [due process] means a right of trial in the ordinary course of law.” [FN198] During the next six decades, a number of courts in the United States agreed:

The expressions, ‘the law of the land,’ ‘due process of law,’ and ‘due course of law,’ as found respectively in the English charters and the various State constitutions in the United States, are substantially identical, and have always been held to mean a judicial
proceeding regularly conducted in a court of justice, as contra-distinguished from statutory enactment. [FN199]

Nearly a century ago, Professor Edward S. Corwin discussed these pre-Civil War decisions. [FN200] He noted that Justice Porter*50 in an 1841 New York case expressed no doubt as to the meaning of the phrase “due process of law.” [FN201] For Justice Porter, “due process of law” meant “nothing less than a proceeding or suit instituted and conducted according to prescribed forms and solemnities for ascertaining guilt or determining the title of property.” [FN202] As recently as 2007, Professor Caleb Nelson followed this idea, concluding that early- to mid-Nineteenth century courts and commentators agreed that “American constitutions were widely understood to require an opportunity for ‘judicial’ proceedings when the government proposed to act upon core private rights.” [FN203] He based his conclusions, at least in part, on cases holding that due process of law required a “judicial trial.” [FN204] While these cases and commentators do not necessarily reference a plain meaning, they do reference the text as having a fairly indisputable meaning. While these cases and commentators fail to prove that due process of law “plainly” means a judicial proceeding, they do offer a reasonable argument that the text of the Due Process of Law Clause requires a judicial proceeding. Assuming that this admittedly debatable, but not easily dismissed, proposition is accepted, then a legislature cannot constitutionally deprive anyone of property. Some courts and judges then reasoned that if due process deprivations of life, liberty, and property could occur only after appropriate judicial proceedings, then legislative bodies could not destroy liberty or property via legislative directive. [FN205] As explained by one Nineteenth Century judge,

When the constitution [sic], which was created to define the powers of government, and not leave us to any tender mercies of parliamentary omnipotence, undertakes to protect private property, it can not be competent for the legislature, by giving its *51 own definitions, and calling that due process of law which condemns without a hearing, and robs without redress, to evade the rules made for its guidance. [FN206]

It has also been said that

[1]he words “due process of law,” cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to the property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. [FN207]

One federal judge, albeit in dissent, explained, “The words ‘by the law of the land’ do not, therefore, mean merely an act of the legislature, for that construction would render the restriction absolutely nugatory.” [FN208] Finally, the Alabama Supreme Court quoted an 1833 decision of the Supreme Court of North Carolina, explaining that due process of law “do[es] not mean merely an act of the general assembly.” [FN209]

This Article does not seek to prove that “due process” refers solely to judicial—and not legislative—process any more than it seeks to prove that the plain meaning textualist incorrectly interprets the Takings Clause. It suffices to say that some view the plain meaning of due process to refer to judicial process. [FN210] This *52Article uses the assumption that the plain meaning of the Due Process Clause refers to judicial
proceedings to again demonstrate that those who purport to rely on plain language actually rely on partial textualism.

Assuming that due process means only judicial process, then the regulatory taking of property claim resurrects. Reviewing the plain language, a state may not deprive a person of property without judicial process. Legislation that deprives a person of property by operation of law would not comply with the required judicial process. For example, Dean Treanor has used a bouncy ball metaphor. [FN211] To rewrite the metaphor, a child, Savannah, owns a bouncy ball. First, the legislature declares that Spencer now has legal title and all the interest in the ball. Under a plain reading of the deprivation clause, the legislature has deprived Savannah of her property, even if it has not taken it for the government's use. Inasmuch as the deprivation occurred without judicial process (although it may be enforced by judicial process), the legislation violated the Due Process Clause.

Instead, imagine that Spencer owns land, but Savannah has purchased air rights to build a fifty-story tower over Spencer's house. [FN212] At the time of purchase, Savannah could legally build such a tower. Savannah had a property interest in construction of the tower. When the legislature enacts a statute making such construction illegal, it may not have “taken” Savannah's property for itself, but it “plainly” has deprived her of that property and “plainly” has done so without judicial procedure.

Of course, this approach implicitly assumes that the right to build a tower over Spencer's house is property. For the moment, assume that such a right is not property protected by the Due Process Clause. Then it must also be true that the right to build the tower is not property for Takings Clause purposes either. This leads to the conclusion that the government could build a tower over Spencer's house without violating the Takings or Deprivation Clauses because no one was deprived of property, and those clauses apply only to circumstances involving property.

*53 Air rights, however, are, or at least can be, “standard property rights which can be developed, mortgaged, leased, or sold.” [FN213] To the extent that these air rights have become vested, procedural due process protects the owner. [FN214] Put another way, “[r]evocation of vested development rights can give rise to liability for violation of procedural due process.” [FN215] The property aspect of air rights has been recognized in cases where “the government [has taken] all the air rights over a certain parcel of land by eminent domain.” [FN216] In 1899, the State of Massachusetts recognized, and the Supreme Judicial Court of Massachusetts reaffirmed, that property existed in the right to construct buildings in excess of ninety feet in height and that a regulation prohibiting construction in excess of that height took property for which compensation was due. [FN217] This Article does not seek to prove the existence of property in air rights in any particular case. This Article merely asserts that (1) air rights can be property; (2) when legislation destroys those air rights, the owner has been deprived of property; and (3) that a deprivation has occurred without judicial process, as required by the Due Process Clause's plain language. This approach does not make unconstitutional all legislation that affects property. It simply requires that the court consider (1) whether property rights existed and (2) whether legislation deprived an individual of those property rights.

Applying “plain” language to the Takings Clause, one textualist upholds a statute that eliminates the right to build a tower because the government did not take possession or
title to that right. Another textualist applying “plain” language would hold that the legislation violates the Due Process Clause if the right to build the tower was “property” because the owner of that property would have been deprived in violation of the Due Process Clause. Whether the textualist approach to the plain language of the Due Process Clause would necessarily invalidate the restriction on building towers does not really matter. What matters is the approach. A government relying on the plain language of the Takings Clause should be subject to a plain language interpretation of the Due Process Clause.

IV. Textualism, But not for the Government

The following sections of the Article seek to demonstrate that commentators and the justices of the Court who demand a textualist approach rarely expand their application beyond the few words of the clause they seek to interpret. Plain meaning textualists, purportedly relying on text, limit the meaning of the Takings Clause to require an actual taking of title or possession of property to support a claim. This permits the interpreter to protect government regulation by effectively inserting a plain meaning Takings Clause into the Constitution, a constitution that the Supreme Court has interpreted for the past two centuries without using such an approach. Using this partial textualism approach permits the interpreter to uphold laws that might be invalidated if the interpreter applied plain meaning textualism to the entire Constitution. Many use this approach to uphold or to justify the validity of land use or environmental laws. [FN218]

A. Partial Textualism: Occasionally Looking for Plain Meaning of the Text

Consider constitutional exercises of federal power and the Takings Clause using the Controlled Substances Act, which prohibits the manufacture, distribution, or possession of marijuana. [FN219] Suppose that the first case to consider the Controlled Substances Act involved a “manufacturer” of marijuana who was forced to close down the manufacturing facility. The manufacturer, who presumably acted lawfully prior to the enactment of the Controlled Substances Act, would claim that the United States had “taken” the facility. The plain language textualist would easily dismiss the Takings Clause because the United States neither took possession nor title of the facility. But suppose the manufacturer had on premises millions of dollars worth of previously lawful marijuana that the United States confiscated and destroyed. The plain language textualist can no longer protect the government's action through a plain meaning interpretation of the Takings Clause because the government clearly seized the property. The plain meaning of the Takings Clause would require the government to compensate the owner for the value of the property. Indeed, the result would be the same for a person who imported lawfully purchased marijuana. The owner of the property would arrive in the port with “property,” and the government would seize and destroy the property, and maybe the boat, too.

On the other hand, the manufacture and possession of the marijuana will not suffice to state a takings claim against the United States based on the marijuana's seizure. As explained recently by the Federal Circuit, “Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings
Clause.” [FN220] So, a plain language interpretation prevents a *56 Takings Clause claim based on destruction of the property interest in the marijuana factory, but the plain language is ignored when the factory owner claims that he is entitled to just compensation when the government seizes the actual bales of marijuana.

B. Partial Textualism: As in Using Textualism for Only Part of the Constitution

Similarly, when the marijuana manufacturer argues that Congress does not have power under the Commerce Clause to enact a statute regulating production and possession of marijuana, the Court will ignore the plain language of the Commerce Clause and uphold the validity of Congress's statute. [FN221] As Éric Claeys states, and as Justice Thomas concluded in his concurring opinion in United States v. Lopez, [FN222] in “[a]pplying plain-meaning and structural interpretation principles, if ‘commerce’ encompassed activities like ‘manufacture’ and ‘agriculture,’ the Commerce Clause would be unintelligible, because it is impossible to conduct ‘manufacture’ between states.” [FN223]

With regard to the federal regulation of commercial activities, that regulation is not a taking under a plain meaning of the Takings Clause but is a valid congressional statute despite the fact that Congress has no power to enact it under the plain language of the Commerce Clause. For the textualist interpreting the Takings Clause, these are easy cases. The government has not taken property in either instance because the government has taken neither possession nor title. To the textualist, the case is over.

The self-righteousness of this approach is palpable: “take” means “to take.” Because the government did not actually take title, nothing was taken in violation of the Takings Clause. The hypocrisy, however, is latent. The textualist looks at the language of the Takings Clause and says, “Plainly, I win,” or perhaps, “Plainly, the government wins.” The textualist does not acknowledge, at least in a textualist sense, that the rest of the Constitution even exists. The textualist does not look at the plain language of Article I, specifically, the Commerce Clause.

Regarding the suggested statutes, they are legitimate only if the textualist wears constitutional blinders. The textualist justifies this by implicitly, or perhaps explicitly, demanding that the only issue is the Takings Clause. The textualist will likely argue that it is not her responsibility that the rest of the Constitution has been misconstrued—that is not the issue before the court. She will focus on whether Congress has the power to enact the statutes; the question is simply whether there has been a taking. Placed into the context of the proposed statutes, the argument would be: (1) Congress has the power to regulate commerce; (2) this power has been non-textually enlarged to encompass a variety of powers, including the power to regulate; (a) the growing of tomatoes at home, at least, where such growing, in the aggregate, has been shown, after appropriate hearings, to substantially affect interstate commerce; (b) the meditation on trees because when people meditate on trees they do not go gambling, which causes the economy to fail; and (3) whether Congress's exercise of its non-textually enlarged power violates a textually-bound right, as set forth in the quite simple Takings Clause. Remember: “take” means “to take.” According to the textualist, the arbitrator of that dispute should be limited by the text when considering a citizen's property rights but should not be limited by the text when considering the power of the government.
To return to the hypothetical congressional act affecting property, this textual balance may not result in the Supreme Court finding a violation of the Takings Clause, but it might result in the Court declaring the statute outside the scope of congressional authority. For the landowner, the difference is irrelevant. The result would be that the Court would have prevented the government from using its power to negatively impact the landowner. To the landowner, her property was not taken.

Congress may or may not have the power under the Commerce Clause to regulate the growth and sale of marijuana; however, that is of no concern to this Article. The expansion of Congress’s commerce power demonstrates that plain language textualism, as applied solely to the Takings Clause, creates an Orwellian scenario: Congress and citizens are equally bound to the text. But, Congress is less bound. Regarding a Takings Clause claim based on a congressional statute, textualism must either be applied to *58 both or to neither. The alternative is that the textualist must use personal predilections to decide that plain language textualism applies to one part of the Constitution and not to another part, the latter part being directly relevant to answering the question of whether Congress validly exercised its authority. Put another way, failure to use plain language textualism for the entire Constitution is inconsistent with the theory that plain language textualism is the best method of interpreting the Constitution. Using plain language textualism for the entire Constitution might result in a Court invalidating the statute, even if it did not find the Congressional regulation a “taking.”

C. Partial Textualism: Sovereign Immunity and the Takings Clause

Sovereign immunity, a non-textualist prestidigitation, also demonstrates the Orwellian nature to limit the Takings Clause to its plain meaning of taking title or possession. It may be that the sovereign immunity “rabbit” is in the Constitution’s “hat,” but the rabbit is certainly not in “plain” view until constitutional magicians pull it out of the hat. It may be that such a magic trick is demanded for proper constitutional interpretation, but it certainly is not demanded, or even remotely suggested, by the plain language of the Constitution. As will be demonstrated, sovereign immunity creates an even more unbalanced Constitution than interpreting the Commerce Clause to include powers well outside the words of the actual Constitution.

For discussion purposes, assume that Congress has enacted the Panther Protection Act, a statute prohibiting the fencing of property in the rare Panther range of Florida because the panthers are caught within the fenced properties and soon die. [FN224] Landowner, whose property is within the range, removes her fence under threat of imprisonment. Panthers cross her property and eat her chickens. She seeks to have the federal courts protect her property. Assuming she files a takings claim, the plain language adherent *59 would argue that the Panther Protection Act gives title to the government. Therefore, under a plain language interpretation there is no taking. As noted before, plain language adherents argue that nothing about the phrase “taking property” indicates “harm to property.” Thus, Landowner is out of luck.

Suppose Landowner, relying on plain language, albeit plainly missing language, files a different claim based on “harm to property” rather than “taking property.” In particular, Landowner claims trespass against the state of Florida for requiring her to allow the panthers to cross her land, and that the government in fact released the panthers. Perhaps
she claims damages against the United States for her dead chickens. The particular causes of action are not relevant. What is relevant is that without a single citation to any particular word in the constitution, the claim will be dismissed based on sovereign immunity. [FN225]

No matter the cause of action—nuisance, trespass, or other tort—sovereign immunity shields the government from liability. The landowner has no opportunity to state a claim for relief for trespass and no opportunity to litigate questions of duty or breach. The extra-textual concept of sovereign immunity bars the courthouse door to non-takings claims, but plain meaning textualism bars the door to a takings claim. As with the Commerce Clause, sovereign immunity protects the exercise of federal power by rejecting tort claims against the United States government.

Returning to Landowner's Panther Protection Act complaint against the United States, the partial textualist again has the United States prevail against its citizens, always, not just some of the time. It is this government-always-wins approach to harm of property that makes partial plain language textualism so wrong. It is beyond cavil that harm-to-property takings claims are based on injury to property and not the taking of possession or title. Partial textualism prohibits harm-to-property claims under the “plain language” of the Takings Clause, and then prohibits all other harm-to-property claims based on the very extra-constitutional doctrine of sovereign immunity. Such an unbalanced approach to constitutional interpretation should not be supported. A court should not permit the government to look beyond the plain language of the *60 Constitution for protection from citizens' claims while rejecting those same claims because they are not within the “plain language” of the Takings Clause.

Regarding state environmental laws, the imbalance of state sovereign immunity creates slightly different tensions. The Eleventh Amendment, enacted in response to Chisholm v. Georgia, [FN226] states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.” [FN227]

The actual text of the amendment does no more than strip jurisdiction from the federal courts for any case with state-private citizen diversity, arguably withdrawing from federal courts these cases even where a federal question is raised. Justice Souter, dissenting in Seminole Tribe of Florida v. Florida, persuasively argued that the Eleventh Amendment was even narrower, reaching “only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses.” [FN228] In other words, Justice Souter would have the Court take jurisdiction notwithstanding the citizen-state diversity of the parties if any other jurisdictional bases, such as federal question diversity, existed. The Court has gone in precisely the opposite direction, using this completely non-textual doctrine to exempt states from damages claims in federal and state court or in a federal administrative agency. This exception applies even when a private citizen sues a state for violating a federal statute and the statute or legislative history indicates Congress's unmistakable intent to subject the states to private suit. [FN229]

Again the question is not whether the Court's Eleventh Amendment/State Sovereignty jurisprudence appears to be correctly*61 reasoned. The question should be one of interpretational consistency: whether the Court should rely on plain language to limit Takings Clause claims to those instances when the government actually takes title or
possession while simultaneously ignoring plain language by allowing sovereign immunity to prevent all suits based on damage to property. Going from the opposite direction, if extra-textual sources and analysis can be used to protect states from less-than-takings property damage, then extra-textual sources and analysis should be used to determine whether the questionable state activity “takes” property, regardless of whether the state actually takes title or possession of property.

D. Partial Textualism: The Preamble and the Takings Clause

Plain language textualism runs into a similar conflict with regard to the Preamble of the Constitution. Obviously, the Takings Clause is within the Constitution. And while there is no definition section within the Constitution, there is a very clear opening statement, which one could characterize as a statement of purpose. Regardless of characterization, the Preamble states that the “People ordain[ed] and establish[ed]” the Constitution “in Order to establish Justice and secure the Blessings of Liberty.”[FN230] A plain language textualist cannot explain why the Preamble should be ignored. Assuming for a moment that a plain language interpretation of the Takings Clause destroyed the “Blessings of Liberty,” the question is whether that interpretation can possibly be correct. At a minimum, it should require the plain language advocate to demonstrate that no other interpretation is even conceivably possible. Indeed, the plain language of the Constitution might seem to demand that there be an understanding of the “Blessings of Liberty” before any other provision of the Constitution related to “Liberty” be interpreted. In particular, plain language interpretation of the Takings Clause requires a study as to whether the “Blessings of Liberty” place a gloss on either “taken,” “property,” or the entire clause. A plain language interpretation of the Takings Clause makes no sense if it is contrary to the express purposes of the Preamble, especially if plain language is the only method of interpretation. Indeed, the plain language of the Preamble indicates that the Takings Clause, like all constitutional provisions, is there to *62 secure the blessings of liberty. Perhaps the Preamble means nothing, but such an interpretation cannot be based on any sense of plain language.

E. Plain Language Textualism: False Promise or Intentional Deceit?

“[Justice] ‘Scalia believes in rules.’” [FN231] Perhaps Justice Scalia does. [FN232] Certainly, Justice Scalia pledges fealty to rules. [FN233] No person, however, can “penetrat[e] into the hearts of men.” [FN234] Justice Scalia's words, expressed in his opinions and to others, claim a belief in rules. He can preach the need for rules, but we cannot know if he truly believes in them. Certainly, others have attacked his fidelity to rules, [FN235] perhaps suggesting that for Justice Scalia rules are tools of convenience, to be used only when a result suits him and tossed aside when an inconsistent result is preferable. Similarly, a plain meaning textualist, implicitly or explicitly, commits himself to what has been described by Justice Scalia as the most important interpretive rule: “the Plain Meaning Rule.” [FN236] As noted earlier, plain meaning textualists assert that the rule of law requires following rules such as plain meaning textualism in order to keep justices from “roam[ing]” free in a jurisprudential world of “unguided speculation.” [FN237] This
Article, however, demonstrates that within constitutional interpretation plain meaning textualism is the demon feared by the plain meaning textualist and not the god to deliver constitutional analysis from that demon of judicial discretion.

Within constitutional interpretation, as it exists today, plain meaning textualism is used only as a method of achieving a specific result and not as a method of applying a neutral rule. As noted, a court that uses plain meaning textualism to limit the meaning of the Takings Clause does so in the context of a federal statute, which Congress would have no power to adopt pursuant to the actual text of the Commerce Clause. The plain meaning textualist knows that partial textualism means picking a favored result. A justice or a court that applies plain meaning to only one provision of the Constitution violates plain meaning textualism's core value of eliminating personal predilections from constitutional interpretation. Partial textualism demonstrates no fidelity to rules, but to jurisprudential hypocrisy.

V. Conclusion

Text matters. Professor Polly Price bluntly demands that constitutional analysis “begin with the text.” [FN238] Professor Akil Amar argues that text is no more than “a proper starting point for proper constitutional analysis.” [FN239] “[O]ther proper constitutional arguments” occasionally overcome “plain-meaning textual arguments.”[FN240] This Article in no way asserts the irrelevance of text. Instead, it asserts that the “rule” of using plain meaning is, at this time, a ruse. It suggests that a rule does not count as a rule if it is not applied in the same way every time. While this Article cannot demonstrate the failure of all “rules” of interpretation, the suggestion is made here that if a very simple rule, the plain meaning rule, is a tool of predilection, then certainly other “rules” with more flexibility will suffer the same fate.

Constitutional interpretation requires reasoning and open discussion of premises. It should resort to, inter alia, rules, history, original meaning and intent, and the spirit of the Constitution. An interpretation is accepted and lasts because it is well reasoned not because it is commanded by a rule or a court falsely pledging fealty to rules.

[FNa1]. Professor of Law, Florida Coastal School of Law. I would like to thank Brenna, Spencer, and Savannah, knowing that words can never thank them enough.


[FN3]. See, e.g., Steven H. Shiffrin, Racist Speech, Outsider Jurisprudence, and the
Meaning of America, 80 CORNELL L. REV. 43, 49-50 (1994) (noting that Justice Scalia relied on the Queensbury analogy when he and the majority “no doubt” correctly found content discrimination and subject matter discrimination as well as point-of-view discrimination).


[FN5]. See Berman, et al., supra note 2, at 1158 (suggesting that “Justice Scalia's colorful image” implicates “norms of competitive fairness”).

[FN6]. See, e.g., Jamin B. Raskin, Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform, 1996 ANN. SURV. AM. L. 393, 407 (1996). Raskin discusses two different versions of a “fair fight” in campaigns. Id. One version is the Supreme Court’s in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); and Buckley v. Valeo, 424 U.S. 1 (1976), wherein each side in an election has a “fair” opportunity to get their message across. See id. at 400. Raskin argues that these “fair fights” often end in “one-sided massacres.” Id. at 407. In other words, fairness in constitutional adjudication matters, or may matter, even if not everyone agrees to what is fair.

[FN7]. See, e.g., William N. Eskridge, Jr., Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics, 88 MINN. L. REV. 1021, 1025 (2004) (suggesting that in deciding Lawrence v. Texas, 123 S. Ct. 2472 (2003), the Court “simply insist[ed] that the players [in this case the members of society debating the societal rights of lesbians, gays, bisexuals and transgenders] not hit below the belt and turn a fair fight into a brawl”).

[FN8]. See, e.g., Note, Textualism as Fair Notice, 123 HARV. L. REV. 542, 557 (2009) (“By seeking to discern the most reasonable, plain meaning textualism by its very definition seeks to satisfy fair notice,” i.e., one version of fairness.).

[FN9]. Infra Part II. This conclusion grates against those who claim that personal predilections must be eliminated from constitutional interpretation. See, e.g., Caprice L. Roberts, In Search of Judicial Activism: Dangers in Quantifying the Qualitative, 74 TENN. L REV. 567, 618 (2007) (“Chief Justice Roberts also framed his ideal role as not an individual man with personal predilections, but rather a neutral arbiter when the robe is slipped on.”); see also Emery G. Lee, III, Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases, 33 U. TOL. L. REV. 581, 586 (2002) (“As Professor Frickey observed, ‘judicial review is tolerable only to the extent that the Supreme Court operates as a disinterested decisionmaker, insulated as far as humanly possible from the personal predilections of the justices.’”).

[FN10]. Sutherland, supra note 1, at 24 n.9.

[FN11]. Richard Shragger recently described “limiting judicial judgment” as “the holy


[FN13]. See, e.g., Michael B. Brennan, Book Review, 79 MARQ. L. REV. 329, 336-37 (1995) (reviewing RICHARD A. POSNER, OVERCOMING LAW (1995)) (“[Professor Robert] Bork’s articulation and defense of originalism elimin[ates] the vagaries and political illegitimacies of judges applying their personal values to interpret the Constitution.”); see also John O. McGinnis, The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein, 71 TEX. L. REV. 633, 650 n.73 (1993) (“When interpreting the U.S. Constitution, Bork advocates the application of a set constitutional theory that can transcend the times so that Supreme Court Justices do not apply their own personal values.”); Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 MICH. L REV. 245, 336 & n.390 (1997). Numerous articles express concern with judges using personal predilections or showing the concern others have for using personal predilections. See, e.g., David Chang, Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?, 91 COLUM. L. REV. 790, 791 n.6 (1991) (“Judicial conservatives believe that constitutional interpretation should not be based only on a judge's personal values.”); Bruce Fein, OnReading the Constitution, 90 MICH. L REV. 1225, 1226 (1992) (“But is there no superior alternative to Tribe and Dorf's reliance on the personal moral convictions or other idiosyncrasies of judges? This review will attempt to develop an approach to constitutional interpretation that focuses on the language and purpose of constitutional provisions instead of the personal values of judges.”); J.D. Hyman, Constitutional Jurisprudence and the Teaching of Constitutional Law, 28 STAN. L. REV. 1271, 1277 (1976); Christopher Wolfe, The Result-Oriented Adjudicator's Guide to Constitutional Law, 70 TEX. L. REV. 1325, 1339 (1992) (“Wellington rejects the across-the-board judicial restraint advocated by Felix Frankfurter and James Bradley Thayer. Thayer's case is strong only when it rests on the incorrect premises that judicial review is a deviant institution and that the only resources for interpreting the Constitution can be the personal values of the interpreter.”) (footnote omitted)).

[FN14]. In two recent articles, the author creates a definition of these terms. See Stephen M. Durden, Animal Farm Jurisprudence: Hiding Personal Predilections Behind the ‘Plain Language’ of the Takings Clause, 25 PACE ENVTL. L. REV. 355, 357 (2008) [hereinafter Durden, Animal Farm Jurisprudence]; Stephen M. Durden, Plain Language Textualism: Some Personal Predilections are More Equal than Others, 26
QUINNIPIAC L. REV. 337, 341 (2008) [hereinafter Durden, Plain Language Textualism]. In general, “plain language textualism” describes an interpretation of the Constitution where the interpreter declares the meaning of a term or phrase to be “plain.” The interpreter gives no other explanation as to how the interpreter determined the meaning.

[FN15]. This Article takes exception, in part, to the assertions by Professors Bayefsky and Fitzpatrick that “[a]ll theorists of constitutional interpretation seek to prove that their postulated interpretive framework is most true to the constitutional enterprise and is bounded and determinate enough not to leave the judges free to impose their personal values.” Anne Bayefsky & Joan Fitzpatrick, International Human Rights Law in United States Courts: A Comparative Perspective, 14 MICH. J. INT’L L. 1, 86 (1992). This Article seeks to demonstrate constitutional interpretation is always personal. Id. That does not necessarily mean that it is not “bounded and determinate” even though such interpretation may on its face seem to be nothing more than an imposition of personal values. Id. Professor Michael Anthony Lawrence recently declared as “an [un]acceptable option for thoughtful constitutionalists favoring any interpretive method,” the process of “accept [ing] only those provisions squaring with their own personal ideologies, while ignoring others.” Michael Anthony Lawrence, Second Amendment Incorporation Though the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 MO. L. REV. 1, 41 (2007) (footnote omitted).

[FN16]. Lawrence, supra note 15, at 41.


[FN20]. See, e.g., Lackland H. Bloom, Jr., Interpretive Issues in Seminole and Alden, 55 SMU L. REV. 377, 377 (2002) (“Every significant method of constitutional interpretation (including textualism, original understanding, structure, precedent, doctrine, practice, and rhetoric) is employed by both the majorities and the dissents.”).


[FN25]. E.g., Michael C. Dorf, The Coherentism of Democracy and Distrust, 114 YALE L.J. 1237, 1238 (2005) (“[T]hose whom Ely called ‘interpretivists' have invoked the same set of arguments as a basis for concluding that the Constitution's open-ended provisions should be given neither substantive nor procedural content apart from what is narrowly entailed by the original understanding of its framers and ratifiers.”); see also Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781 (1983).


[FN28]. See, e.g., Caleb A. Jaffe, Obligations Impaired: Justice Jonathan Jasper Wright and the Failure of Reconstruction in South Carolina, 8 MICH. J. RACE & L. 471, 489 (2003). Professor Jaffe describes one version of formalism when discussing Chief Justice Taney's opinion in Dred Scott v. Sandford, 60 U.S. 393 (1856): Chief Justice Roger Taney adopted one of the classic methods of legal formalism—originalist interpretation of the Constitution—and declared that “[t]he duty of the court is, to interpret [the Constitution] with the best lights we can obtain on the subject according to its true intent and meaning when it was adopted.” Id. (quoting Dred Scott, 60 U.S. at 405). Other forms of formalism have been suggested as well. See, e.g., Matthew J. Festa, Applying a Usable Past: The Use of History in Law, 38 SETON HALL L. REV. 479, 536 (2008) (“In one of the leading articles from the height of the controversy over originalism, H. Jefferson Powell attempts to prescribe ‘Rules for Originalists.’ Of course Powell, who made one of the first and most famous critiques of originalism as a normative enterprise, offered this purported ‘rulebook’ tongue-in-cheek.”); David M. Golove, Against Free-Form Formalism, 73 N.Y.U. L.


[FN30]. See, e.g., Festa, supra note 28, at 536; see also Barnett, supra note 28; Cornell, supra note 28; Gangi, supra note 28, at 273-84; Goldstein, supra note 28; Lermack, supra note 28.


[FN32]. See, e.g., Christian M. Halliburton, Letting Katz Out of the Bag: Cognitive Freedom and Fourth Amendment Fidelity, 59 HASTINGS L.J. 309, 360 (2007)(“[Intratextualism] has many of the ‘conservatizing’ benefits of a textualist approach, by beginning with the constitutional language, yet improves on that conventional method by leaving the language in (rather than divorcing it from) its scriptural context.”).

[FN33]. See, e.g., Nathan Gibbs, Getting Constitutional Theory Into Proportion: A Matter of Interpretation? 27 OXFORD J. L. STUD. 175, 184 (2007) ( “[Professor] Beatty argues that interpretivism fails to provide a convincing method of constitutional review because it allows judges too much discretion to let their own moral and political preferences determine the weight and relevance of the various historical, precedential and textual considerations involved in deciding cases in this way.”); see also Michael W. McConnell, Active Liberty: A Progressive Alternative to Textualism and Originalism?, 119 HARV. L. REV. 2387, 2415 (2006) (noting that “Justice Breyer devotes the last full chapter of his book to explaining why the textualist-originalist approach is
‘unsatisfactory[,]’ wherein Justice Breyer lodges five major criticisms of textualism and originalism’); William Michael Treanor, The War Powers Outside the Courts, 81 IND. L.J. 1333, 1336 (2006) (Professor Treanor ‘sketch[es] out why normal methodologies of constitutional interpretation fail to give us concrete answers to [his] two questions of what constitutes congressional authorization and when authorization is unnecessary.”).

[FN34]. See generally Jack Wade Nowlin, Constitutional Violations by the United States Supreme Court: Analytical Foundations, 2005 U. ILL. L. REV. 1123 (2005)(discussing inherent constitutional limits on the interpretive methods courts of last resort can choose to use when interpreting the Constitution); see also Bloom, Jr., supra note 20, at 377.


[FN36]. Jonathan R. Siegel, Judicial Interpretation in the Cost-Benefit Crucible, 92 MINN. L. REV. 387, 387 (2007) (“Countless judges and scholars have attempted to prove that particular interpretive methods are constitutionally required or constitutionally illegitimate . . . .”).

[FN37]. Brannon P. Denning & Glenn H. Reynolds, Constitutional “Incidents”: Interpretation in Real Time, 70 TENN. L. REV. 281, 283 (2003) (“[M]uch constitutional scholarship tends either to wrestle with the ‘counter-majoritarian difficulty’ posed by judicial review or to critique the interpretive choices made by Supreme Court Justices (and, to a much lesser extent, lower court judges) and offer a ‘better’ methodology.” (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16 (1962))).


[FN39]. Ticien Marie Sassoubre, The Value of Irony: Legal Orthodoxy and Henry James's Washington Square, 95 CALIF. L. REV. 1027, 1077 n.352 (2007) (“Justice Harlan's dissent in the Civil Rights Cases (1883) indicts the majority for hypocrisy in its ‘too narrow and artificial’ construction of the Thirteenth and Fourteenth amendments [sic]. Harlan details the ways the majority has ‘departed from the familiar’ mode of constitutional interpretation in its categorical and ahistorical abstractions.” (quoting The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting))); see also Dawn Johnsen, Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century, 1 HARV. L. & POLY REV. 239, 242 (2007) (“Progressives should continue to spotlight the Right's hypocrisy and insidious rhetoric designed to mislead and obfuscate while resisting temptations to commit similar sins in their own messages.”).

[FN40]. Adam B. Wolf, Fundamentally Flawed: Tradition and Fundamental Rights, 57 U. MIAMI L. REV. 101, 104-105 (2002); see also Robert Schehr, Shedding The Burden


[FN42]. Of course, the Constitution itself says nothing about what makes a better interpretation. Instead, those claiming a better interpretational model must base that claim on a result that the claimant insists is better. For example, the Constitution does not mention constraining courts as one of its values any more than it mentions constraining the President or Congress. Articles I, II, and III use very similar language in granting legislative, executive, and judicial power. Justice Scalia, however, urges implicitly or explicitly that the best methodology for interpreting the Constitution is the one that provides the most constraint on judges. See Wesley MacNeil Oliver, Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century, 81 TUL. L. REV. 777, 782 n.26 (2007) (“Even originalism's most famous defender recognizes there is substantial uncertainty in reconstructing the past. Justice Scalia merely argues that originalism does a better job of constraining judges than other methods of interpreting the Constitution.” (citing Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 862-65 (1989))); see also Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225, 1301 n.342 (1999) (“Still, one could defend rigorous textualism as the best method for interpreting the Constitution because it works better than any other method to constrain judges to accept the outcomes of democratic processes unless some objective criteria—for the rigorous textualist, the text's meanings—are satisfied.”).


[FN46]. Francis J. Mootz, III, now a distinguished scholar and professor, as an associate, in his first law review article, also asserted that constitutional scholarship had denigrated because of “the inability of legal scholars to come to grips with the true nature of interpretation.” The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur, 68 B.U. L. REV. 523, 555 (1988).

[FN47]. See, e.g., Erwin Chemerinsky, A Grand Theory of Constitutional Law?, 100 MICH. L. REV. 1249, 1253 (2002) (reviewing Professor Rubenfeld's theory of constitutional interpretation) (“In interpreting the Constitution, courts should follow the ‘paradigm case method.’”). In answering the question “What is Constitutional Meaning?” Professor Lipkin urges, “Interpreting the Constitution, whether in the courts or in the majoritarian branches, should be conducted according to the best methods of political interpretation.” Robert Justin Lipkin, The New Majoritarianism, 69 U. CIN. L. REV. 107, 147 (2000) (footnote omitted). As stated by Professor Siegel, “Countless judges and scholars have attempted to prove that particular interpretive methods are constitutionally required or constitutionally illegitimate.” Siegel, supra note 36, at 387& n.2.

[FN48]. Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 STAN. L. REV. 989, 1035 (2006) (“In determining what type of power is being exercised and what checks the Constitution requires [in criminal law cases where separation of powers may be an issue], the Court could continue to use conventional methods of interpretation, which would allow the Court to consider text, history, precedent, and evolved practices.”).


[FN50]. Actually, scholars have identified more than one version of plain language or plain meaning textualism, including “soft plain language textualism [m].” Madeline June Kass, A Least Bad Approach for Interpreting ESA Stealth Provisions, 32 WM. & MARY ENVTL. L. & POL’Y REV. 427, 435 (2008).


[FN54]. The author doubts such agreement exists. Indeed, if such agreement existed, the study of constitutional law would be pedestrian, rote memorization of words. As stated by commentator Matthew S. Nosanchuk, “The Constitution is not a seamless document containing words whose meaning and scope were agreed upon in advance.” Matthew S. Nosanchuk, The Embarrassing Interpretation of the Second Amendment, 29 N. KY. L. REV. 705, 731 (2002); see also CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 71 (Harcourt, Brace & World 1964) (“The Constitution was a spider's web of words about whose meaning no two men, not even Hamilton and the faithful Rufus King, had agreed exactly.”).

[FN55]. U.S. CONST. amend. V.

[FN56]. The idea of the unavoidability of relying on personal predilections is not new. See, e.g., Leonard Sosnov, Criminal Procedure Rights Under the Pennsylvania Constitution: Examining the Present and Exploring the Future, 3 WIDENER J. PUB. L. 217, 233 n.61 (1993) (“[I]t is unavoidable that personal ideologies will play an important role in interpreting a generally worded constitution such as the Pennsylvania and United States Constitutions.”). Indeed, this conclusion probably falls into the legal realists' camp. See, e.g., J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 TEX. L. REV. 1443, 1460 n.57 (2003) (“While legal interpretation was traditionally conceived as a mechanical, rule-bound exercise requiring judges to suppress their personal preferences, this view long ago gave way to legal realism, which argues that judges inevitably (even unconsciously) advance their preferences in the process of interpretation.”); Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 432 (2005) (“A competing school, that of the ‘realists' or the ‘attitudinalists,’ argues that judicial interpretation mainly reflects the personal values of judges.”); Daniel J. Solove, The Darkest Domain: Deference, Judicial Review, and The Bill of Rights, 84 IOWA L. REV. 941, 952 (1999) (“[T]he legal realists did much to dissolve the tidy boundaries between law and politics, emphasizing the influence of personal ideology in interpretation.”). So, while “legal realists” have been accused “of encouraging Supreme Court justices to impose their personal views upon the country,” 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE (4th ed. 2008), this paper merely joins the chorus which suggests inevitability of personal choice.


See, e.g., Robert G. Dreher, Lingle's Legacy: Untangling Substantive Due Process From Takings Doctrine, 30 HARV. ENVTL. L. REV. 371, 377 (2006) (“Inspired by Justice Holmes's maxim that property regulation that 'goes too far' constitutes a taking, regulatory takings doctrine focuses on whether state action that is legitimate may nonetheless impose unfair economic burdens on particular property owners, warranting payment of just compensation.”); James J. Kelly, Jr., “We Shall Not Be Moved”: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, 80 ST. JOHN'S L. REV. 923, 942 (2006) (“If an uncompensated regulatory taking goes ‘too far,’ then the government must pay compensation.”).

See, e.g., Garrett Power, Palazzolo v. Rhode Island: Regulatory Takings, Investment-Backed Expectations, and Slander of Title, 34 URB. L权利. 313, 328 (2002)(discussing creating a tort that permits the new owner of over-regulated property to
file suit upon purchase).

[FN61]. See, e.g., James H. Davenport & Craig Bell, Governmental Interference with the Use of Water: When Do Unconstitutional “Takings” Occur?, 9 U. DENV. WATER L. REV. 1, 11 (2005) (describing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), as holding that “when the economic impact of a governmental regulatory action was so severe as to render property without any value, a per se taking had occurred”).


[FN63]. See, e.g., John F. Hart, Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause, 63 MD. L. REV. 287, 312 n.166 (2004) (“Because the literal meaning of the Takings Clause comports with the original understanding of that clause, the entire doctrine of regulatory takings is anachronistic.”); Andrew W. Schwartz, Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings, 22 UCLA J. ENVTL. L. & POL’Y 1, 39 (2004) (“Although inconsistent with the original understanding of the Takings Clause, the law has devolved to the point where property owners may now seek compensation for regulatory takings.”).


[FN67]. Professor (as of this publication, Dean) Chemerinsky describes what judges do
as the following: “Ultimately, the role of the Justice is to decide what he or she believes is the best meaning of the Constitution and then write an opinion justifying that view.” Erwin Chemerinsky, Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters, 54 OKLA. L. REV. 1, 13 (2001).


[FN69]. See Echeverria, supra note 62, at n.31 (“[The] plain language [of the Takings Clause] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.” (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321-22 (2002))); Tunick, supra note 68, at 885, 886 (“[T]he plain meaning of [the Takings Clause] requires only that government must not ‘take’—grasp, seize, lay hold of—property without paying compensation, not that its regulations must be fair or promote a sufficiently justified purpose.”).


[FN72]. U.S. CONST. pmbl.


In this case, “Constitution's meaning” refers to the meaning expounded by a majority of justices at any particular moment in time.

Alain A. Levasseur, Legitimacy of Judges, 50 AM. J. COMP. L. 43, 71 (2002) (“Whereas the [Constitution's] words have remained stagnant and frozen” its meaning or interpretation “has not been immutably frozen in the words chosen by the drafters.”). Nearly a century ago, W.F. Dodd wrote about the meaning of words changing while the words have remained the same. W.F. Dodd, Implied Powers and Implied Limitations in Constitutional Law, 29 YALE L.J. 137, 143 n.18 (1919)(“Punishments which may have been regarded as proper in 1787 would probably now be held to be ‘cruel and unusual,’ not because of any change in the words of the Constitution, but because of a changed attitude of the community and of the courts. A change has thus apparently come in the meaning of the words themselves.”).


Bradley P. Jacob, Will the Real Constitutional Originalist Please Stand Up?, 40 CREIGHTON L. REV. 595, 596 (2007) (“At the bottom line, however, there is one fundamental question that divides constitutional interpreters: Does the Constitution have a fixed meaning that can only be changed by its specified amendment process, or can the Supreme Court change the document's meaning at any time?” (footnote omitted)); see also Justice Antonin Scalia, Foreword, 31 HARV. J. L. & PUB. POL'Y 871, 871 (2008) (“The interpretive philosophy of the ‘living Constitution’—a document whose meaning changes to suit the times, as the Supreme Court sees the times—continues to predominate in the courts, and in the law schools.” (footnote omitted)).

Plessy v. Ferguson, 163 U.S. 537 (1896); see also Ex parte Plessy, 11 So. 948 (La. 1893) (coming to the same conclusion four years earlier at the state level). But see, Clark v. Bd. of Dirs., 24 Iowa 266 (1868) (“The board of directors may exercise a uniform discretion equally operative upon all, as to the residence, or qualifications, or freedom from contagious disease, or the like, of children, to entitle them to admission to each particular school; but the board cannot, in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like.”).


Durden, Plain Language Textualism, supra note 14, at 345 (quoting United States v. Darby, 312 U.S. 100, 118 (1941)).

Perhaps the most crass statement to that effect is that “[t]he Constitution is now
so alive that its meaning changes with each new appointment to the federal bench.”
Richard G. Wilkins & John Nielsen, The Question Raised By Lawrence: Marriage, the

[FN86]. To some extent this was the argument made by the plurality in Planned
Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992), when it
urged that it was not overruling Roe v. Wade, 410 U.S. 113 (1973). Roe arguably created
a trimester review as a surrogate for more precise standards based on viability. Id. at
163. Between Roe and Casey, fetuses arguably became viable outside the womb at an
earlier stage necessitating not a change in standards, but an application of the same
viability standard to new understanding of science.

[FN87]. See Tracey Maclin, Katz, Kyllo, and Technology: Virtual Fourth Amendment
Protection In The Twenty-First Century, 72 MISS. L.J. 51, 51 (2002) (“Advances in
science and technology recurrently exert pressure on the scope and meaning of the Fourth
Amendment, but the privacy and security protected by the Fourth Amendment should not
depend on innovations in technology.” (footnote omitted)).

[FN88]. See, e.g., Honorable Stephen Reinhardt, U.S. Court of Appeals, 9th Circuit,
Panelist, Transcript: Environmental Law: Property Rights in the United States, 32 WM.
& MARY ENVTL. L. & POL’Y REV. 877, 887 (2008) (“I had thought that the
Constitution was a series of general principles that we were supposed to interpret over the
years as we learn more and more about society and we learn more and more about human
nature, that they were wise enough to give us this set of principles so that we could, with
knowledge and the developments of life and science, the difference between the country
as it was in the 1789 and the country as it is today, that we have more knowledge, more
experience, and that we could take those principles and apply them to today's
problems.”).

[FN89]. See, e.g., Anthony Varoudakis, Book Review, 4 J. HIGH TECH. L. 1 (2004-
2005) (reviewing DAVID FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME
COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW
(2004)) (“David Faigman has masterfully put together a story of how science has
contributed to the evolution of the Constitution throughout the history of its existence and
interpretation.”).

[FN90]. See Dean M. Hashimoto, Science as Mythology in Constitutional Law, 76 OR.
L. REV. 111 (1997), for a fascinating discussion of the use of science in constitutional
adjudication, including a discussion of the distinction between using science for its
“facts” and using science as the foundation for rhetoric.

of “separate but equal” has no place in the field of public education); see, e.g., David L.
Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law As
Science and Policy, 38 EMORY L.J. 1005, 1041 n.131 (1989) (“But much of the
rationale for the original ’separate but equal’ doctrine rested upon the ’social science
data’ of the nineteenth century, so it is at least natural to refute that rationale with the social science data of the present day.” (quoting PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 29-30 (1972)); Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 DUKE L.J. 624, 627 (1985) (“[T]he law of race relations [at the time of Plessy v. Ferguson] was a product of the period's social science, just as the law of race relations developed by the Warren Court during the Brown era was a product of the social science of that period.”); Michael Stokes Paulsen, Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?, 86 N.C. L. REV. 1165, 1194 (2008) (“But to the extent the Brown opinion is vulnerable to criticism, it is because of its seeming reliance on ‘changed facts' in the form of recent, trendy, contingent social science—psychological or social studies—instead of announcing a categorical, principled rejected [sic] of Plessy as wrong when decided and continuously wrong for fifty-eight years.”).

[FN92]. See Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (rejecting plaintiff's argument that the issue of separate facilities “stamps the colored race with a badge of inferiority”). But see Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. REV. 1393, 1481 n.411 (2005) (“The heart of the harm in Plessy was an injury to reputation, not to psyche, but the emphasis on the personality in the postwar period made lawyers read psychological harm back into Plessy itself. For my purposes, whether the harm was one of reputation or psychology, it was not material, nor did the NAACP lawyers see it as such.” (citing DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996 120 (1997))).

[FN93]. Brown, 347 U.S. at 494-95; see, e.g., William E. Nelson, History and Neutrality in Constitutional Adjudication, 72 VA. L. REV. 1237, 1289 (1986) (“In Brown,Chief Justice Warren relied on social science evidence not only to make his controversial argument that school segregation did in fact harm black children but also to observe that, because conditions had changed since the time of the Plessy decision, it could no longer bind the Court.” (footnote omitted)).


[FN95]. Bunting v. Oregon, 243 U.S. 426, 438 (1917); see, e.g., David P. Currie, The Constitution in the Supreme Court: 1910-1921, 1985 DUKE L.J. 1111, 1130 (1985) (“[T]he Court in Bunting v. Oregon buried Lochner without even citing it, upholding a conviction for employing a worker in a flour mill more than ten hours in a day without paying overtime. Justice McKenna, who had been with the Court in Lochner, made no effort to show that a miller's work was more dangerous than a baker's, or indeed that it was dangerous at all. He found the law a reasonable health measure because the state legislature and courts had found it so, because their judgment was shared by many foreign countries, and because the record did not prove the contrary.” (footnotes omitted)); Barry Cushman, Regime Theory and Unenumerated Rights: A Cautionary Note, 9 U. PA. J. CONST. L. 263, 267 (2006).
[FN96]. See Hashimoto, supra note 90, at 150. Hashimoto suggests that even “hard” science is used more like mythology than fact. Id. In other words, if “hard” science is subject to manipulation in constitutional adjudication, then surely social sciences are also subject to similar manipulation. See id.


[FN99]. See id.

[FN100]. See, e.g., Robert P. George, Propter Honoris Respectum: One Hundred Years of Legal Philosophy, 74 NOTRE DAME L. REV. 1533, 1540-41 (1999) ( “Although appeals to the alleged findings of social science became an increasingly common feature of judicial opinions as the twentieth century wore on, realists who became judges rarely cited their own subjective views or prejudices or psychological predilections as grounds for their decisions. Rather, they cited legal rules as the ultimate reasons for their decisions and claimed, at least, to lay aside their own preferences in fidelity to the law.”).

In a 1968 decision, Maryland v Wirtz, the Court held that Congress could regulate the wages and hours of state and local government employees on the same basis that it regulated their private-sector counterparts. Less than a decade later, by a vote of 5-4, the Court reversed itself. In National League of Cities v Usery, it ruled that the Tenth Amendment forbids Congress “to directly displace the States' freedom to structure integral operations in areas of traditional government functions.” But the National League of Cities test proved difficult if not impossible to administer, and ten years later the Court reversed itself again. In Garcia v San Antonio Metropolitan Transit Authority, the Court overruled National League of Cities and announced that the principal if not exclusive protections of state and local governmental integrity must come from the political process.
Id. (footnotes omitted).

[FN102]. Id. at 478. Professor Fallon suggests that had a triple reversal been accomplished, especially if by a precarious 5-4 majority—[it] would risk making the Court look foolishly inconsistent. It also would invite derisive speculations about the Court's proneness to flip-flop with turns of the political tide and raise questions about the justices' capacity to function as relatively apolitical umpires of federal-state relations.
Id.
[FN103]. See Dodd, supra note 77, at 143-44 n.18.


[FN106]. See, e.g., Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 COLUM. L. REV. 1515, 1572 (1986). Clinton suggests that, since at least 1799, “constitutional interpretation [has been] informed by the political predilections of the current members of the Court.” Id.

[FN107]. Berger, supra note 104, at 637-38. Professor Berger argues against this changing meaning by discussing the thinking and language of Chief Justice Earl Warren: His thinking was colored by yet another high-handed notion that the meaning of constitutional terms changes with the times. “The Bill of Rights needed revision with time. ‘We will pass on,’ Warren said, a ‘document [that] will not have exactly the same meaning it had when we received it from our fathers.’” Thereby he laid claim to the prerogative of Humpty-Dumpty: “When I use a word, it means just what I choose it to mean.” A judge who pours his own meaning into constitutional terms lays claim to power to amend the Constitution, as Chief Justice Taney perceived: “If in this court we are at liberty to give old words new meanings, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States.” In this he echoed Madison and Jefferson. And it remained the view of the Reconstruction Congress. In 1872 a unanimous Senate Judiciary Committee Report, signed by Senators who had voted for the fourteenth amendment [sic], stated, “A construction which should give the phrase a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution . . .” Id. (footnotes omitted).

[FN108]. Justice Scalia could be described as the public face to the call to eliminate
personal predilections. See, e.g., Colby, supra note 44, at 531 n.10 (“[T]he main danger in judicial interpretation of the Constitution [is] that the judges will mistake their own predilections for the law.” (quoting Justice Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 863 (1989))).

[FN109]. Ronald H. Silverman, Weak Law Teaching, Adam Smith and a New Model of Merit Pay, 9 CORNELL J.L. & PUB. POL’Y 267, 292 n.115 (2000) ( “Proponents of the ‘Neutral Principles’ school attempted to construct a theory of constitutional adjudication that ‘would establish constraints on the freedom of a judge to decide difficult legal problems based on the judge's particular policy predilections’ . . . .’ (citations omitted (quoting GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END 37 (1995))). But see David R. Keyser, State Constitutions and Theories of Judicial Review: Some Variations on a Theme, 63 TEX. L. REV. 1051, 1075 (1985) (“Our search for neutral or dispositive ‘principles of restraint’ on our power of judicial review is much ado about nothing. As the various opinions in this case amply demonstrate, each set of neutral principles asserted is contradictory, offers little help in deciding close cases, and relies ultimately on a judge's personal predilections about what sorts of constitutional arguments matter most.”).


[FN113]. Id. at 27.

[FN114]. One commentator, when cataloguing “votes” on the Supreme Court, suggested “‘conservative’ indicates a ‘vote for the government against an individual, a vote against a claim of constitutional or statutory rights, a vote against the exercise of federal jurisdiction, or a vote favoring state (as opposed to federal) authority on federalism questions.’” Jenni Khuu Katzer, A Tale of Two Liberals: Departure at Supreme Court Review of Punitive Damages, 29 WHITTIER L. REV. 625, 651 (2008)(quoting Richard G. Wilkins, Scott Worthington, Jacob Reynolds, & John J. Nielsen, Supreme Court Voting Behavior 2004 Term, 32 HASTINGS CONST. L.Q. 909, 913 (2005)).


[FN116]. See, e.g., Michael Stokes Paulsen, How To Interpret the Constitution (And How Not To), 115 YALE L.J. 2037, 2056 (2006) (“The straightforward internal textual argument for original-meaning textualism is that the Constitution is a written document;
that it specifies ‘this Constitution’ as the thing that is to be considered supreme law; that the default rule for textual interpretation was, at the time of the Constitution's adoption, the natural and original linguistic meaning of the words of the text; and that any argument for anachronistic interpretations of the text—that is, for substituting a personally idiosyncratic, nonstandard, or time-changed meaning in preference to the one that would have been understood at the time, and in the context, in which the text was adopted—ends up substituting some other words for the words chosen in ‘this Constitution.’

[FN117]. See, e.g., James P. Nehf, Textualism in the Lower Courts: Lessons From Judges Interpreting Consumer Legislation, 26 RUTGERS L.J. 1, 54 (1994) (“The plain meaning approach is textualism in its purest form and would appear to be the most restrictive of judicial discretion.”).

[FN118]. See supra note 14.


[FN120]. This argument does not impact textualism as applied to the federal government. Other textualist consistency concerns regarding the federal government will be discussed later.


[FN125]. Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases, 109 YALE. L. J. 643, 715 (2000) (“None of the rights enumerated in the first eight amendments was [sic], when adopted in 1789, intended by the Founders to restrict the actions of state governments.”).
[FN126]. Id.


[FN141]. See, e.g., Gardbaum, supra note 140, at 548-49 (1997); Wilson R. Huhn, Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus, 79 IND. L. J. 801, 856 n.355 (2004) (“In interpreting the Due Process Clause, Justice Black favored a purely textual approach referred to as ‘total incorporation . . . .’”).

[FN142]. Gardbaum, supra note 140, at 549.

[FN143]. Id.

[FN144]. See discussion supra Part II.C.


[FN146]. See Paul E. McGreal, Ambitious Playground, 68 FORDHAM L. REV. 1107, 1195 n.395 (2000) (describing selective incorporation and total incorporation as the two main theories of application of the Bill of Rights to the states and noting Professor Akhil
Reed Amar’s third approach to incorporation).

[FN147]. Lawrence, supra note 15, at 50-51; see also Ronald J. Krotoszynski, Jr., Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights, 48 WM. & MARY L. REV. 923, 936 (2006) (“Most, but not all, provisions of the Bill of Rights have been incorporated against the states through a process of ‘selective incorporation.’”); Howard J. Vogel, The “Ordered Liberty” of Substantive Due Process and the Failure of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court, 20 ALB. L. REV. 1473, 1477 (2007).

[FN148]. Cf. Lawrence H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Portend the Future or—Reveal the Structure of the Present?, 113 HARV. L. REV. 110, 183 n.328 (1999) (suggesting “the privileges or immunities of United States citizenship presupposes the right to individual self-government, as embodied in, but not exhausted by, some (but not all) parts of the Bill of Rights”). Tribe’s idea for the Privileges or Immunities Clause does not copy incorporation through the Due Process Clause but suggests another way in which individuals may be protected from government power. Id.


[FN151]. Id. at 295 (quoting Gideon v. Wainright, 372 U.S. 335, 346-47 (1963) (Douglas, J., concurring)).


[FN159]. Hurtado v. California, 110 U.S. 516, 546 (1884) (Harlan, J., dissenting).

[FN160]. Id. at 535 (majority opinion).

[FN161]. White v. White, 4 How. Pr. 102 (1849).


[FN165]. Jack Greenberg & Anthony R. Shalit, New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights, 63 COLUM. L. REV. 1384, 1384 (1963); see also Gary V. Dubin, Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, 18 STAN. L. REV. 322, 373 (1966). This iteration of the principle may have been first suggested by Justice Frankfurter. See, e.g., Joseph Gumina, From Austria to Sacco and Vanzetti: The Development of Frankfurter’s “Fundamental Rights” Theory, 30 W. NEW. ENG. L. REV. 389, 403 (2008); Seth F. Kreimer, Rejecting “Uncontrolled Authority Over the Body”: The Decencies of Civilized


[FN168]. See, e.g., Chad DeVeaux, Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin, 42 AKRON L. REV. 13, 27 (2009) (stating that in determining whether to incorporate a right, the question is whether the right “’is fundamental to the scheme of American justice’”); Michael Steven Green, Why Protect Private Arms? Nine Theories of the Second Amendment, 84 NOTRE DAME L. REV. 131, 135 (2008) (“Incorporation has been held to apply only to those provisions in the Bill of Rights that are ‘fundamental to the American scheme of justice.’” (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).


[FN171]. See discussion supra Part II.A.

[FN172]. See, e.g., Steven J. Eagle, supra note 57, at 936 (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.” (quoting Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321-22 (2002))); 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, 740 (2008) (noting that “the original plain meaning of the Takings Clause would preclude finding that the government had taken property” where “it does not physically seize anything from the property owner”).


[FN174]. See, e.g., John D. Echeverria, supra note 68, at 976 (2000) (“[Â] broad interpretation of the Takings Clause conflicts with an emphasis on fidelity to constitutional text.”); Hart, supra note 64, at 1134-35 (2000) (arguing that the plain meaning of the Takings Clause “appl[ies] only to concrete, physical appropriation of
private property for public use, and not to regulatory diminution of landowners' prerogatives’); David A. Thomas, Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine, 75 U. COLO. L. REV. 497, 541 (2004) (discussing John F. Hart's “argument that nothing in the text of the Takings Clause suggests that it was intended to govern regulation”); Mark Tunick, Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses, 3 U. PA. J. CONST. L. 885, 886 (2001) (arguing that the plain meaning of the Takings Clause “requires only that government must not ‘take’—grasp, seize, lay hold of—property without paying compensation, not that its regulations must be fair or promote a [public] purpose”).

[FN175]. See, e.g., Steven J. Eagle, Substantive Due Process and Regulatory Takings: A Reappraisal, 51 ALA. L. REV. 977, 1005 (2000) (advocating “a re-evaluation of the roles of the Takings and Due Process Clauses”); John D. Echeverria & Sharon Dennis, The Takings Issue and the Due Process Clause: A Way Out of Potential Confusion, 17 VT. L. REV. 695, 696-703 (1993) (arguing that “[t]he incorporation of due process thinking into the Takings Clause is problematic”); Kenneth Salzberg, “Takings” as Due Process, or Due Process as “Takings”? 36 VAL. U. L. REV. 413, 414 (2002) (“[T]he United States Supreme Court has been using the ‘takings’ clause of the Fifth Amendment as a basis for limiting or overturning land use regulations where the Court should have been analyzing the cases using the Due Process Clause of the same Amendment.”).


[FN178]. Id. at 734-40.

[FN179]. Id. at 737-38.

[FN180]. Eagle, supra note 57, at 954-57.

[FN182]. Krotoszynski, supra note 177, at 737 (citation omitted).

[FN183]. See id.

[FN184]. See discussion supra Part III.A.


[FN186]. Stevens, supra note 132, at 278.


[FN188]. McGreal, supra note 134, at 2440.


[FN191]. Id. A plain language textualist might have trouble explaining how two words “due process,” mean one word, “process.” Such a textualist should also be required to explain how the plain meaning “due process of law” can eliminate an explanation of the words “of law.” In other words, McConnell refers only to the plain meaning of “due process,” completely ignoring the fact that the clause refers to “due process of law,” not simply “due process.” Id. Presumably if each word has meaning, a fair presumption for someone relying on plain meaning, “due process” cannot have the same meaning as “due process of law.” So textualist approaches like those suggested by McConnell delete words from the text before providing a plain or obvious meaning. See id.


[FN197]. 1 Cranch (5 U.S.) 137 (1803)


[FN199]. Dorman v. State, 34 Ala. 216, 236 (Ala. 1859); see also United States v. Rathbone, 27 F. Cas. 711, 712 n.2 (C.C.S.D.N.Y 1828) (“The words, ‘by law of the land,’ and ‘by due course and processed law,’ contained in the constitution [sic], import a suit, trial and judgment according to the course of the common law.”); Trimble v. State, 2 Greene 404 (Iowa 1850) (“[D]ue process of law” means “by indictment or presentment of good and lawful men.”); Wynhamer v. People, 11 How. Pr. 530 (N.Y. Sup. Ct. 1855) (“[D]ue process of law’ means a trial and judgment in a regular judicial proceeding.”); In re John and Cherry Sts. 19 Wend. 659 (N.Y. Sup. Ct. 1839)(noting that due process of law means “some proceeding must be had in a court of justice”); People ex rel. Griffin v. City of Brooklyn, 9 Barb. 535 (N.Y. Gen. Term 1850)(“[T]he words ‘due process of law’ can not [sic] mean less than a prosecution or suit, instituted and conducted according to the prosecutorial forms and solemnities for ascertaining guilt, or determining title to property.”); White v. White, 4 How. Pr. 102, 5 Barb. 474 (N.Y. Gen. Term 1849) (“[T]he words due process of law can not [sic] mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property.”); Trs. of Univ. of N.C. v. Foy, 1 Mur. 58, 1805 WL 172, at *7 (N.C. 1805) (explaining that due process of law means “the judgment of the regular tribunals of the country”); Caleb Nelson, Adjudication in the Political Branches, 107 COLUM. L. REV. 559, 569 n.42 (2007).


[FN201]. Id. (quoting Taylor v. Porter & Ford, 4 Hill 140 (N.Y. Sup. Ct. 1843)).

[FN202]. Id.

[FN203]. Nelson, supra note 199, at 569.

[FN204]. Id. at n.42 (quoting, inter alia, Cohen v. Wright, 22 Cal. 293, 318 (Cal. 1863)); see also Harrison, supra note 192, at 511-20.


[FN206]. Id.


[FN210]. The entire tool kit for the plain meaning textualist is a statement of words' plain meaning; that is the essence of plain meaning declarations. The declarant states the meaning without resorting to history, context, or logic. Indeed, resorting to those approaches only confuses the plainness and simplicity of the text's meaning. For a more extensive presentation of this argument see, Durden, Plain Language Textualism, supra note 14, at 337-84.

[FN211]. See, e.g., Echeverria, supra note 68, at 975.


[FN220]. AmeriSource Corp. v. United States, 525 F.3d 1149, 1153 (Fed. Cir. 2008); see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974) ("[A] long line of prior decisions of th[e] Court establish the principal that statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents . . . ."). On the other hand, in 1996 one legal commentator was of
the view that the Supreme Court might find that seizures and forfeitures violate the Takings Clause. See J. Kelly Strader, Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation, 23 PEPP. L. REV. 449, 494 (1996). Similarly, the Supreme Court has yet to hold that property has been “taken” during a lawful Fourth Amendment search or even an unlawful search. See Arianna Kennedy Kelly, The Costs of the Fourth Amendment: Home Searches and Takings Law, 28 MISS. C. L. REV. 1 (2008-2009). Starting with “Margaret Radin's ‘personhood’ theory of property,” Arianna Kennedy Kelly suggests that the Takings Clause should provide compensation to those whose homes have been searched. Id. at 13-14 (citing Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982)). While she does not rely on plain language, it would support the result that the police, albeit temporarily, took possession of the home. See id.

[FN221]. See Gonzales v. Raich, 545 U.S. 1 (2005); see also Durden, Animal Farm Jurisprudence, supra note 14, at 360 n.30.


[FN226]. 2 U.S. (2 Dall.) 419 (1793).

[FN227]. U.S. CONST. amend. XI.


[FN229]. See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress did not provide enough evidence to support its assertion that it was protecting as opposed to creating a right to hold states liable to private suit). This Article does not assert that Congress cannot waive sovereign immunity of states, but that sovereign immunity creates a powerful (but unwritten) roadblock to the assertion of private claims against the state.

[FN230]. U.S. CONST. pmbl.

[FN231]. Jeffery Toobin, After Stevens: What will the Supreme Court be like without Its


[FN234]. Soon Hing v. Crowley, 113 U.S. 703, 711 (1885).


[FN240]. Id. For more on the discussion engendered by Amar's ideas, see Louis Michael Seidman, Akhil Amar and The (Preadmature?) Demise of Criminal Procedure Liberation, 107 YALE L.J. 2281 (1998).