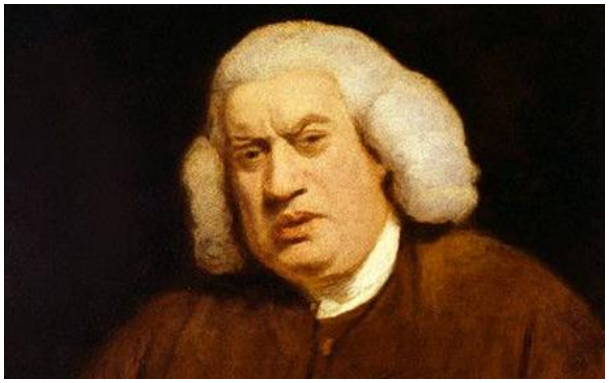
Samuel Johnson: Watch Your Definitions

Justice Scalia is getting a lot of attention for his comment that the Constitution is "dead, dead, dead", but obviously he didn't mean that the Constitution is no longer in effect. (See? Intent theory sometimes is helpful, Nino.). Rather, he meant that the Constitution does not have a meaning that changes over time. It has one meaning — its original one — and that's it. So for people who follow Scalia's "thought", or for those us who can't escape them because we have to deal with it, there's really nothing new here.

But one thing did occur to me: where does this leave the Takings clause? As William Michael Treanor has demonstrated, before the Court's decision in *Pennsylvania Coal v. Mahon,* few if anyone understood it to mean that it applied to regulations that did not physically occupy someone's property. Moreover, we can just think about the word "property." Modern property theory breaks the notion into a bundle of sticks — you can sell it, you can rent it, you can use it, you can split it up in time, etc. etc. — but no one in the late 18th century saw this as the meaning of property. Property was a thing. If you could occupy it, it was yours; Chief Justice Marshall in *Johnson v. M'Intosh* could distinguish between ownership and usufructuary rights, but it is fair to say that sticks theory was a later invention.

Even the very sharp Samuel Johnson — no progressive he — did not go much further. For Johnson, property was closely tied up with *possession.* His final three defintions of "property" are: "right of poffeffion" (sorry, can't resist); 'poffeffion held in one's right"; and "the thing poffeffed." (The first two define "property" as "peculiar quality" "quality; disposition"). So if, say, I don't give someone a right to build or develop my land, I am not taking his "property" because I am not interfering with his right to possess it.

Blackstone, too, was very solicitous of property rights; but what was the definition of "property" that one had a right to? The "sole and despotic dominion" that Blackstone identified as the "right" was extended to the "external things of the world." Michael

Rappaport, the hardest-working and most creative originalist out there, tries to save it by saying that Blackstone defined the *right* to property as consisting "in the free use, enjoyment, and disposal of all of his acquisitions, without any control or diminution, save only by the laws of the land." But that won't do for an original meaning textualist, because the Takings Clause doesn't protect the taking of a *right* to property; it protects *property.* And for Blackstone, property was not a right, but a thing: you *have* a right to property, but it is not the same thing as the property itself. (Besides, if the right to property was dependent upon the "laws of the land", that won't help very much with Takings.).

Similarly for Johnson, although it is somewhat more complicated because there are so many definitions, "take" as well is connected with the idea of receiving, seizing, snatching, laying hold of. So again, if the government enacts environmental regulations forbidding development, this would not, under Johnson's defintion, have anything to do with "taking" because it is not "seizing" or receiving anything.

If we use an "original meaning" theory of the Constitution, this would seem to rule out regulatory takings entirely. Regulating property with, say, height restrictions wouldn't be a problem because no "property" was taken. Ditto because no property was "taken" as the word originally meant at the time.

I should quickly say that ***I*** think that there is and should be a regulatory takings doctrine. In fact, I have written a little on how to make it easier for plaintiffs to win these things. But if you are an original meaning theorist, it will be a Rumsfeldian slog to figure out how to do it. Call this Reason #371 why Scalia's jurisprudence is overrated.