

ARTICLES

A REQUIEM FOR REGULATORY TAKINGS: RECLAIMING EMINENT DOMAIN FOR CONSTITUTIONAL PROPERTY CLAIMS

BY

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For the past forty years, the United States Supreme Court has embraced the doctrine of regulatory takings, despite being unable to provide any coherent and reliable guidance on when a regulation goes so far as to require compensation. But Justice Thomas's admission in Murr v. Wisconsin (2017) that there is no real historical basis for the Court's regulatory takings jurisprudence offers a chance to reconsider the doctrine anew. Looking back to Justice Holmes's prophetic statement in Pennsylvania Coal Co. v. Mahon, that a regulation can go too far and require an exercise of eminent domain to sustain it, I argue that the Court should embrace the common law of eminent domain to provide a rational and reliable set of parameters for evaluating the constitutionality of government action that stops short of physical appropriation. In order to reclaim eminent domain, however, the Court would need to reject Justice Scalia's elision of the harm-avoidance/benefit-conferring distinction of Lucas v. South Carolina Coastal Council and embrace the balancing rule of sic utere. It also needs to rethink its rejection of the public interest factor in Lingle v. Chevron U.S.A., Inc., for proper balancing requires a consideration of

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the public interest served by government action. The Court should embrace the balancing of harms and benefits and the offsetting of benefits from harms that routinely occur in eminent domain determinations. And finally, the Court should require that a cognizable property right be appropriated if compensation is to be paid. Thus, by realigning our constitutional property protections with the common law of eminent domain, the incoherence of the Court's current regulatory takings jurisprudence can be mostly eliminated. Although there will always be hard cases, relying on the centuries-old common law of eminent domain rather than the Court's failed experiment with regulatory takings can help provide a sensible and rational way to balance private property with the public welfare.

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I. INTRODUCTION

For property scholars, writing about the Takings Clause of the Constitution is a bit like English scholars writing about Shakespeare. It signals that one has reached an academic milestone and is prepared to tackle one of the most confounding legal doctrines facing the courts. But unlike the Shakespeare scholar who has 37 plays and 154 sonnets to work with, takings scholars have only those epigrammatic twelve words, “nor shall private property be taken for public use without just compensation,”¹

¹ See U.S. CONST., amend. V; Alfred Hart, *The Number of Lines in Shakespeare's Plays*, 8 REV. ENG. STUD. 19, 21 (1932); DYMUNA CALLAGHAN, SHAKESPEARE'S SONNETS 2 (2007).

and the framers left us with virtually no helpful guidance, interpretive principles, or even an alphabetical concordance.² Wandering in the dark, the courts issue ambiguous opinions, scholars opine endlessly on the abstruse arguments contained therein, then judges and their clerks read the labyrinthine scholarship, only to rely on out-of-context quotations and obscure principles in writing their bewildering and often incomprehensible opinions. This academic feedback loop is taken to extremes in Supreme Court scholarship and the high Court's opinions on the doctrine of *regulatory takings*.³

A regulatory taking is deceptively simple: it occurs when a government regulation of property goes too far in affecting property rights or values and requires compensation to support it.⁴ But what constitutes *property*, what constitutes a *regulation*, and when does the effect of the regulation go *too far* are questions that have spawned hundreds of books and articles, thousands of judicial opinions, and still we are left with more questions than answers. One of the reasons for the sheer quantity of scholarship on the subject is that, with each Delphic pronouncement from the Court, the foundations shift, the questions change, and if one issue is resolved five more are raised. In large part, the doctrine is a mess because the Court has created a constitutional doctrine out of whole cloth just in the past forty years,⁵ and in that time it has rejected most of the common law's long-standing principles, as though regulations negatively affecting property are a novel phenomenon.⁶

With countless scholars weighing in, it is not as though the world needs another article on the Takings Clause. Yet here I offer one, in part to show

² When we look to the original meaning of the Just Compensation Clause about the most we can say is that it is indeterminate. There was very little discussion of the Just Compensation Clause itself during the constitutional conventions, and the provision itself was added by Madison at the last minute. Emily A. Johnson, *Reconciling Originalism and the History of the Public Use Clause*, 79 *FORDHAM L. REV.* 265, 296–97 (2010). We cannot say that the clause was clearly intended to cover mere regulations, or that it was not. See James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 *CORNELL L. REV.* 87, 87–90 (1993) (noting the lack of consensus in scholarship in constitutional theory regarding retroactivity); 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, 734, 743 (2008) (discussing the “significant dispute in the scholarly literatures . . . exists on whether the original meaning of the Fifth Amendment Takings Clause restricts regulatory takings”); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 *AM. U. L. REV.* 181, 182, 185 (1999) (stating that the “lack of historical material on the Takings Clause has caused the original intent analysis to hinge largely on the scholar’s choice of emphasis”); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 *UTAH L. REV.* 1211, 1215 (1996).

³ See *infra* note 23 and accompanying text.

⁴ See *Pa. Coal Co. v. Mahon (Pennsylvania Coal)*, 260 U.S. 393, 415 (1922) (finding that a taking has occurred when regulatory restrictions on property go too far).

⁵ The term *regulatory taking* was not used by the Court until its 1981 decision in *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, 651 (1981), which is when the doctrine really began to have a life of its own.

⁶ See *infra* Part III.C.

that I have reached that academic milestone, and in part to suggest that perhaps the lack of comprehensible resolution in the doctrine indicates that the experiment has failed. Perhaps more accurately, it is time to lay the doctrine to rest, sing a requiem, release our clods of dirt onto the hollow casket, and find a different approach to balancing the interests of private property with the public welfare. Like the demise of substantive economic due process eighty-five years ago,⁷ the past forty years have shown once again that laissez-faire economics cannot support a legal doctrine of fundamental property rights. The law, and property rights, must grow and change with the public welfare, new technologies, and environmental pressures. This Article explores the doctrine's complex indeterminacy and the philosophical tensions at its roots with an eye toward finding a different path, away from constitutional law and in the direction of the common law's expansive pantheon of eminent domain.⁸

In the Court's most recent regulatory takings decision, the 2017 ruling in *Murr v. Wisconsin*,⁹ Justice Thomas became the first conservative on the Court to admit that there is no originalist justification for the regulatory takings doctrine.¹⁰ Historians,¹¹ scholars,¹² and liberal jurists¹³ have accused

⁷ In the late nineteenth century, the Supreme Court began to protect property rights through heightened scrutiny under due process, striking down legislation that unduly hampered private property or contract. Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 269–70 (1987); see discussion *infra* Part III.C. As the Court set about reining in the rampant regulations of the early twentieth century using economic substantive due process, an invigorated Commerce Clause, and Tenth Amendment jurisprudence, we found ourselves in an era of free-market capitalism with very little ability to regulate the harmful effects of industrialization, labor abuses, and development. See discussion *infra* Part III.C.

⁸ The origin of the term *eminent domain* comes from Grotius, who wrote that “the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property.” 1 PHILIP NICHOLS, *THE LAW OF EMINENT DOMAIN* 23 (1917). Eminent domain, therefore, meant the state has ultimate control over property, including private property, and if it takes property for public purposes it should pay for it. But the obligation to pay is one the state voluntarily takes on; it is not a necessary concomitant of property, and it is not always required.

⁹ 137 S. Ct. 1933 (2017).

¹⁰ See *id.* at 1957.

¹¹ See John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292 (1996) (“[The] Takings clause means what it says about land use regulation: nothing. The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking.”); see also Daniel Hulsebosch, *The Anti-Federalist Tradition in Nineteenth-Century Takings Jurisprudence*, 1 N.Y.U. J.L. & LIB. 967 (2005).

¹² See William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798–802 (1995) (“The predecessor clauses to the Fifth Amendment’s Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property.”); Kobach,

conservatives, for at least the last thirty years, of supporting a pro-property rights agenda under the Takings Clause that has no textual or historical basis. Yet rejecting originalism gets the Court nowhere. The supreme irony seems to be that regulatory takings is a solution in search of a problem where few can agree on the details of either the solution or the problem. Hopefully the decision in *Murr* is a wake-up call that we are trapped in the time warp of Lochnerism.¹⁴ But can we stop this ride and get off?

In the wake of unprecedented natural disasters, from Superstorm Sandy and Hurricanes Katrina, Harvey, Irma, and Maria, to the California wildfires and sea-level rise, our natural world is not waiting for the Court to come up with a solution to how we balance private property rights with the public welfare.¹⁵ And in this day of political partisanship and government dysfunction, the planet is not going to idly wait for humans to stop sniping at each other and invent a constitutional doctrine that soundly balances the interests of public and private property. To the extent ill-conceived regulatory takings doctrines result in chilling government action that might actually improve, or at least forestall, the deterioration of our lived environment, many truly feel that the Court is fiddling while Rome burns.¹⁶

In this Article I argue that regulatory takings will continue to be an incoherent, dysfunctional mess because of fundamental differences in how the Justices view both property rights and the proper scope of government action. The irreconcilable tensions within the Court lead me to argue that it should reject regulatory takings as a constitutional doctrine and turn back to the common law of eminent domain. Even a cursory study of nineteenth-century eminent domain cases reveals that the courts of that day faced legal issues that were just as complex as those we face today, and those courts used nuisance and eminent domain to balance the interests of private property rights and the public welfare. Examining those cases, resurrecting

supra note 2, at 1215–23 (illustrating “just how entrenched the assumption is that compensable regulatory takings were utterly alien to nineteenth-century jurisprudence”).

¹³ See *Pennsylvania Coal*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting) (describing how the police power had traditionally included use restrictions on property that did not require compensation); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (2002) (opining that the language of the Fifth Amendment is silent on regulatory takings).

¹⁴ See generally Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287 (2013) (discussing a possible scenario where courts may employ heightened scrutiny to land use regulations, similar to Lochnerism).

¹⁵ On October 6, 2018, the Intergovernmental Panel on Climate Change issued one of the most dire predictions yet, that humans must make drastic changes within the next decade to avoid catastrophic climate effects. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C, at 14 (Oct. 2018), <https://perma.cc/D2CS-DHGS> (summarizing the dramatic decrease in CO₂ emissions necessary to avoid exceeding the 1.5°C increase in expected global temperatures). These kinds of changes are going to severely test the regulatory takings doctrine. See J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69 (2012) (discussing the potential impact regulatory approaches to climate change will have on regulatory takings jurisprudence).

¹⁶ See Byrne, *supra* note 15.

nuisance from Justice Scalia's discursive elision,¹⁷ and embracing the tried and true common-law rules of property, can offer a path forward out of the regulatory takings impasse. And by limiting eminent domain to recognizable property rights, the Court can seize the opportunity to realign our constitutional protection of property and economic rights that Justice Thomas's concession has provided and perhaps avoid the economic crisis that precipitated the last major realignment in the Court's property jurisprudence nearly a century ago.¹⁸

II. THE INDETERMINATE LIMINAL SPACE OF REGULATORY TAKINGS

The Fifth Amendment of the Constitution provides protection for private property in two distinct provisions, the Due Process Clause and the Just Compensation Clause.¹⁹ The amendment reads, "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."²⁰ The Fourteenth Amendment prohibits the deprivation of property without due process by the states, but it does not include a just compensation clause.²¹ These provisions are generally interpreted to provide protections against arbitrary and unreasonable government regulation through the Due Process Clause, and against direct appropriation through the Just Compensation Clause.²²

The traditional scholarly narrative, which has been generally adopted by the Court, holds that in its first 130 years, the Just Compensation Clause applied only when government actually appropriated or took title to land.²³

¹⁷ In *Lucas v. South Carolina Coastal Council (Lucas)*, Justice Scalia claimed that there was no difference between harm-prevention and benefit-conferring legislation and that therefore, the long line of precedents permitting regulations of harm-producing behavior were no longer sound. 505 U.S. 1003, 1026 (1992); see discussion *infra* Part III.B.

¹⁸ See *Murr*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

¹⁹ U.S. CONST. amend. V.

²⁰ *Id.*

²¹ U.S. CONST. amend. XIV, § 1.

²² See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–37, 542 (2005).

²³ See Rappaport, *supra* note 2, at 735–36; Treanor, *supra* note 12, at 796; Hart, *supra* note 11, at 1255–56, 1290; see also William Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985). This idea is a perfect example of the feedback loop between scholarship and judicial opinions. Although the Fifth Amendment's Just Compensation Clause was not used to require compensation for regulations, that was in large part because the Fifth Amendment did not apply to state actions, only federal actions. Rappaport, *supra* note 2, at 736. Until it was incorporated in 1897, the Just Compensation Clause was hardly used. See discussion *infra* Part III.A. Yet, the state courts routinely ordered compensation for regulations that went too far. *Id.* More stunning is the fact that even the conservative wing of the Court, including Justice Scalia, has cited this historical understanding. *Lucas*, 505 U.S. 1003, 1014 (1992); see also *Murr*, 137 S. Ct. at 1942 (2017) (quoting *Lucas*, "[I]t was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession"). But see Kobach, *supra* note 2, at 1215–23 (explaining the myth that regulatory takings began with *Pennsylvania Coal* and yet how the academic feedback loop caused the Court to pick up the flawed narrative).

During this time, courts ordered compensation only when land itself was appropriated by eminent domain, and the Fifth Amendment was understood to impose a duty of compensation on governments that had, prior to 1791, generally not been held to such a duty.²⁴ No colonial charter or state constitution had a just compensation provision, although some provided procedural safeguards by requiring that appropriation be “by the Lawfull [sic] Judgment of [one’s] peers and by the Law of this province.”²⁵ The historical consensus seems to be that because there were virtually no compensation protections for property prior to adoption of the Bill of Rights, the Constitution imposed a relatively new duty of compensation as a way to protect private property from direct governmental appropriation.²⁶

²⁴ Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789–1910*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 132, 132–41 (Friedman & Scheiber eds., 1988); DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* 15 (2d ed. 2007). In the early republic, uncompensated takings for the common good, usually for right of way, were legitimate, although compensation was common for the destruction of improved or enclosed land. *Id.* at 15–16. But this was the legislature’s customary duty to provide for compensation for their own actions—the idea of a judicially-enforceable bill of rights was non-existent, and an independent and separate judiciary were nascent in this period. See William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760–1860*, 39 *EMORY L.J.* 65, 103–04 (1990). The move towards enshrining a just compensation requirement within the Constitution itself came in the general move away from republicanism to liberalism in the years after the Revolution. *Id.* at 95. The idea of a compensation requirement fit well with the legislative sovereignty and positivism espoused by Blackstone and framers like Madison. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 *MICH. L. REV.* 1, 6, 17 (1977); Treanor, *supra* note 12, at 787. The Takings Clause codified the practice of just compensation, as the Framers sought to constrain the redistributionist impulses of state legislatures in the 1780s. James W. Ely, Jr., “*That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle*,” 36 *AM. J. LEGAL HIST.* 1, 2, 4 (1992). But even then, the Just Compensation Clause was narrowly construed to prevent only direct, physical takings of property. Treanor, *supra* note 12, at 711. John Hart points out that, whatever changes the Constitution brought, there was largely silence and status quo, as the colonial property regime continued in the early republic. John F. Hart, *Land Use Law in Early Republic and the Original Meaning of the Takings Clause*, 94 *NW. U. L. REV.* 1099, 1131–33 (2000). Compensation remained normal when a statute appropriated property, but not when a legislature regulated according to its inherent powers. See *id.* at 1135; see also Treanor, *supra* note 12, at 785.

²⁵ New York Charter of Liberties and Privileges (1683), reprinted in 1 Bernard Schwartz, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* at 163–65 (Leon Friedman & Karyn Gullen Browne eds., 1971). See Treanor, *supra* note 12, at 786–87.

²⁶ Professor John Hart has taken great efforts to prove this view first in the colonial period. He points to extensive regulation by legislatures in efforts to contribute to the common good, to the extent even of compelling development and forfeiture of property rights if the owner wasted them. See Hart, *supra* note 11, at 1256. Regulation also extended to protection of aesthetic standards and wetlands, compelling enclosure, and ensuring that mines were being used as expeditiously as society required. *Id.* at 1258–65. This is not to say that constraints did not exist; property protections were generally based upon whether the regulation was prospective or retrospective, and it was customary for governments to pay anyway (an impulse recognized early on by the Court in *Van Horne’s Lessee*). See *id.* at 1283; see also *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308–13 (1795) (discussing Parliament’s lack of formal constitutional constraint but custom of paying for taken land). But there was no colonial right to be let alone—colonial ownership, customary constraints on arbitrariness existed, but was

The Constitution also imposed procedural safeguards through the Due Process Clause for other government limitations to property.²⁷ Even still, not all states had to provide compensation until the requirement of just compensation was incorporated to apply to the states through the Fourteenth Amendment's Due Process Clause in 1897, although by then many states had just compensation provisions in their own constitutions.²⁸

Although the historical evidence is contested and ambiguous, we can accurately say that there was precedent for not paying compensation even for a direct physical appropriation of land or personal property, and there were lots of uncompensated land-use regulations of the type that today would likely invoke a regulatory taking claim.²⁹ But there was also precedent that the colonies and states paid compensation both for physical appropriations in some cases, and for regulatory actions that would qualify as takings under today's doctrine.³⁰ There were competing views throughout the nineteenth century about the origins of property rights and whether the state's police power extended so far that it could limit or completely destroy private property rights without actual appropriation.³¹

The traditional narrative then posits that the Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*³² opened the door to a new doctrine—a regulatory taking—that occurs when a regulation of land goes so far as to be equivalent to a physical appropriation and thus requires compensation.³³ *Pennsylvania Coal* was a due process challenge involving a regulation that prohibited certain coal mining that jeopardized surface lands.³⁴ Justice Holmes wrote that a regulation can go so far in hampering private property as to require an exercise of eminent domain and compensation.³⁵ Although the idea of regulations as takings that require compensation was not

never absolute in our modern understanding of the word. Hart, *supra* note 11, at 1281. The idea that the Constitution imposed a duty to compensate has been interpreted by many conservatives to imply that property should have fundamental-rights status. See generally Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 9 (1996) (discussing the basic arguments by property rights advocates); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (discussing how the Court's treatment of property under the Fifth and Fourteenth Amendments parallels the "Court's protection of fundamental liberty rights from *Lochner* to *Roe*").

²⁷ Kainen, *supra* note 2, at 123–41 (arguing that retroactivity shifted from being a part of procedural due process to become a major element of substantive due process).

²⁸ *Chic., Burlington & Quincy R.R. Co. v. Chicago*, 129 U.S. 226, 241 (1897).

²⁹ See discussion *infra* Part III.A.

³⁰ Kobach, *supra* note 2, at 1234–59.

³¹ See John G. Sprankling, *The Property Jurisprudence of Justice Kennedy*, 44 McGEORGE L. REV. 61, 65–67 (2013); Treanor, *supra* note 12, at 699–706; Hulsebosch, *supra* note 11, at 971–76; Kobach, *supra* note 2, at 1229–34.

³² 260 U.S. 393, 415 (1922).

³³ *Murr*, 137 S. Ct. 1933, 1942 (2017) (“*Mahon*, however, initiated this Court's regulatory takings jurisprudence, declaring that ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’” (quoting *Pennsylvania Coal*, 260 U.S. at 415)).

³⁴ *Pennsylvania Coal*, 260 U.S. at 412–13.

³⁵ *Id.* at 415 (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

discussed at the Supreme Court level again until 1960, it was litigated in the lower courts, and had been for nearly a century before 1922.³⁶

Despite the accepted narrative holding that *Pennsylvania Coal* was the founding case for regulatory takings doctrine, the case did not acquire that exalted position until many decades later.³⁷ *Pennsylvania Coal* was cited by the Supreme Court only a handful of times between 1922 and 1960, all for due process considerations about exercises of the police power that did not satisfy the heightened scrutiny of *Lochner*-era substantive economic due process.³⁸ When the Court found a sufficient safety or public health justification, it upheld exercises of the police power that severely restricted, or even destroyed, private property rights, as in *Nebbia v. People of New York*³⁹ and *Weaver v. Palmer Brothers Co.*⁴⁰ None of these due process cases that cited to *Pennsylvania Coal* involved the issue of compensation for a regulation that went too far.⁴¹ In all cases in which the Court ruled the police power was exceeded, the regulation was struck down (a due process remedy); compensation was never ordered.⁴² Even despite Justice Holmes's dicta that compensation would be due for overreaching regulations, the remedy the Court ordered in *Pennsylvania Coal* was the due process remedy of rescission rather than compensation.⁴³

The Supreme Court did not order compensation as a remedy for a regulatory act until 1960 in *Armstrong v. United States (Armstrong)*,⁴⁴ when

³⁶ See discussion *infra* Part IV.A; Kobach, *supra* note 2, at 1234–53.

³⁷ *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960).

³⁸ The *Lochner*-era is a term defining the period between about 1890 and 1937 in which the Court struck down numerous pieces of economic legislation under a variety of constitutional grounds. See discussion *infra* Part III.C. If the legislation was passed by a state legislature, it was struck down under the Due Process Clause or the Contracts Clause; if it was passed by Congress, it was struck down under the Commerce Clause or the Tenth Amendment. *Id.* The Court heightened the level of scrutiny over economic legislation, demanding that the government prove that the law was necessary to protect public safety or had a legitimate welfare and morals justification. *Id.*

³⁹ 291 U.S. 502, 538–39 (1934) (upholding a price control regulation because it was in the public interest).

⁴⁰ 270 U.S. 402, 414–15 (1926) (striking down a regulation prohibiting use of a shoddy, in the interest of protecting public health, as purely arbitrary).

⁴¹ In many of the cases citing *Pennsylvania Coal* during this period, the issues involved state railroad commissions requiring that railroads pay for the costs of separating the grade of their tracks from the roadways or in the constitutionality of other health and safety regulations. See, e.g., *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 412 (1935); *Delaware, L. & W.R. Co. v. Town of Morristown*, 276 U.S. 182, 188 (1928); *Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kan.*, 294 U.S. 613, 614–15 (1935); *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 589 (1926).

⁴² See *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 562 (1923); *Charles Wolff Packing Co. v. Court of Indus. Relations of State of Kan.*, 262 U.S. 522, 544 (1923); *Weaver*, 270 U.S. at 415; *Frost & Frost Trucking Co.*, 271 U.S. at 599.

⁴³ 260 U.S. 393, 413–14 (“It is our opinion that the act cannot be sustained as an exercise of the police power.”).

⁴⁴ 364 U.S. 40 (1960). For takings cases before 1960 for awards of just compensation in light of physical intrusion or seizure, see generally *United States v. Causby*, 328 U.S. 256 (1946) (compensation awarded due to invasion of private airspace); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (involving physical invasion by flood waters); *United States v. Dickinson*, 331 U.S.

the combined effect of a government contract and sovereign immunity resulted in the destruction of materialman liens held by private companies on ships being built for the United States.⁴⁵ Until at least 1960, it seemed the Court viewed the *Pennsylvania Coal* case only as a due process case that restricted exercises of the police power if property rights were destroyed or materially impaired without a sufficiently important public interest.⁴⁶ That interpretation changed with *Armstrong*, however, which first cited *Pennsylvania Coal* for the proposition that compensation, not just rescission, could also be an appropriate remedy if property rights were destroyed by government actions.⁴⁷ Between 1960 and 1978, the Court cited *Pennsylvania Coal* only five times, and only once on the compensation question raised in *Armstrong*, and it held in that case that no taking had occurred.⁴⁸ For over half a century, *Pennsylvania Coal* stood for the unremarkable proposition that government regulations affecting property had to further some important public health, safety, or welfare purpose and not that compensation could be an appropriate remedy.⁴⁹

That changed in 1978, however, with the Court's pivotal decision in *Penn Central Transportation Co. v. New York City*.⁵⁰ *Armstrong* was the central case cited for the general proposition that a regulation could go so far in limiting private property that compensation would be required.⁵¹ But

745 (1947) (action involving the physical invasion by flood waters); *United States v. Kans. City Life Ins. Co.*, 339 U.S. 799 (1950) (compensation for flooding caused by navigable waters); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (just compensation for operating costs resulting from the temporary seizure of a coal mine during wartime).

⁴⁵ As Justice Black remarked in *Armstrong*, the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. at 49.

⁴⁶ It is important to note that the due process analysis in the *Lochner* and post-*Lochner* era focused on the importance of the government's interest, *i.e.*, the public health, safety, and welfare. D. Benjamin Barros, *The Police Power and The Takings Clause*, 58 U. MIAMI L. REV. 471, 489 (2004). Where the government's interest was notably weak and the interference with property rights great, the Court found a due process violation and struck down the law. *See* discussion *infra* Part III.C. The Court's current regulatory takings jurisprudence, however, has somehow morphed from its due process roots into a calculation completely devoid of any analysis of the government's interest. *Id.*

⁴⁷ *Armstrong*, 364 U.S. at 48–49. Notably, rescission would not have been a viable remedy in *Armstrong*, which suggests that these early regulatory takings cases evolved as exceptions, providing an equitable remedy when no other appropriate remedy existed.

⁴⁸ *See* *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (holding there was no taking when a town enjoined a sand and gravel pit operator from doing business until it obtained a permit); *see also* *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (Texas statute limiting the period of time to recover forfeited lands); *Jankovich v. Ind. Toll Road Comm'n*, 379 U.S. 487 (1965) (involving interplay between federal and state airport zoning acts); *Chongris v. Corrigan*, 409 U.S. 919 (1972) (Douglas, J., dissenting) (denial of *cert.* for involving airport zoning); *Massachusetts v. United States*, 435 U.S. 444 (1978) (action challenging a flat federal tax on aircraft to pay for federal aviation infrastructure and services).

⁴⁹ *See* Barros, *supra* note 46, at 471 (arguing that the police power was narrowed during the *Lochner* years from anything that benefitted the public to only health and safety legislation).

⁵⁰ 438 U.S. 104 (1978).

⁵¹ *Id.* at 123–24.

seeking a more distant precedent, the Court cited to *Pennsylvania Coal* as “the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”⁵² The Court also cited *Pennsylvania Coal* for the counter-proposition that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁵³ Since 1978, however, the Court has cited *Pennsylvania Coal* thirty-three times and *only* for the proposition that a regulation might go so far as to require compensation, thus perpetuating the misleading narrative that *Pennsylvania Coal* is the founding case for the regulatory takings doctrine. Ignoring the case’s due process meaning and its precedential legacy from 1922 to 1960, the Court fabricated a pedigree for its regulatory takings doctrine that gives it a larger historical significance, although it has also had to reckon with *Pennsylvania Coal*’s role in the now-discredited substantive economic due process of the *Lochner* era.

One of the many ironies of the development of regulatory takings is that, besides the fact that *Pennsylvania Coal* did not become a case about compensation until 1960, *Penn Central* was not supposed to set a precedent about regulatory takings at all.⁵⁴ Justice Brennan instructed his clerk to draft an opinion that resolved the issue in *Penn Central* in such a way as *not* to establish a precedent.⁵⁵ The *ad hoc* balancing the Court used was supposed to presage that there was no test and no doctrine for regulatory takings; it was simply a case of fact-specific inquiry into when the unusual effects of a regulation went so far, and its effects were so egregious, the Justices would either strike the law or order compensation if rescission was an inadequate remedy.⁵⁶ The *Penn Central* test-that-was-not-supposed-to-be-a-test consists of “essentially *ad hoc*, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.”⁵⁷ When a regulation significantly impedes the use of property, the Court has analyzed three factors, “(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.”⁵⁸ The fact that the Court was trying not to establish a test, but inadvertently

⁵² *Id.* at 127.

⁵³ *Id.* at 124.

⁵⁴ See Richard J. Lazarus, *Transcript: Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 307–08 (2004).

⁵⁵ See *id.* at 304, 307–08.

⁵⁶ Ironically, the Court was not planning on enunciating a binding test; rather, it hoped to render a decision in that case that would have no precedential force. See *id.* at 302–04 (Justice Brennan’s clerk at the time of *Penn Central*, discussing that Justice Stewart’s clerk had urged him to “make the opinion very, very narrow.” Rehnquist’s clerk further explaining that the Justices were concerned about the implications of the opinion would have on other contexts.).

⁵⁷ *Tahoe-Sierra*, 535 U.S. 302, 322 (2002) (emphasis added) (citations omitted) (quoting *Penn Central*, 438 U.S. 104, 124 (1978) and *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor J., concurring)).

⁵⁸ *Murr*, 137 S. Ct. 1933, 1943 (2017) (citing *Palazzolo*, 533 U.S. at 617; *Penn Central*, 438 U.S. at 124).

did so, and used a precedent that was not really a precedent, is symptomatic of the shifting sands on which regulatory takings doctrine rests.⁵⁹

Perhaps recognizing that *Penn Central* was not supposed to establish a bright-line regulatory takings test, pro-property-rights Justices pushed the Court to adopt more property-protectionist rules in later cases.⁶⁰ There are two instances in which the Court eschewed the multi-factor balancing test first articulated in *Penn Central* for a more bright-line test: when the regulation compels a physical invasion onto private land,⁶¹ or when a regulation results in a 100% loss in the value of the property.⁶² Landowners often try to manipulate their situation into the 100% economic loss *per se* rule, which would automatically compel compensation, while governments argue that if any value remains to regulated property, the appropriate analysis is the three-factor balancing test of *Penn Central*.⁶³ But despite all the hand-wringing and concern, neither of the *per se* tests has dramatically changed the takings game, for governments or landowners.⁶⁴

At bottom, however, the idea is simple. When government physically *appropriates* land or other property it exercises its eminent domain power, it must pay just compensation under the Just Compensation Clause, and the taking must be for a public use.⁶⁵ States may also *regulate* private property under their police power, or Congress may do so under the Commerce Clause. Those regulations are subjected to rational basis analysis under the Due Process Clause, and in most instances the regulatory effect on property is deemed constitutionally valid.⁶⁶ In fact, the last time the Court struck

⁵⁹ For example, Eric Claeys argues that “the doctrinal problems that have accreted around *Penn Central* over the last 25 years are a muddle of *Penn Central*’s making.” Eric Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1556 (2003).

⁶⁰ See *id.* at 1556–58.

⁶¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 458 (1982).

⁶² *Lucas*, 505 U.S. 1003, 1019 (1992).

⁶³ *Tahoe-Sierra*, 535 U.S. 302, 319–22 (2002).

⁶⁴ There have been over seventy law review articles with *Lucas* in the title just since 1992, presaging all sorts of disasters. See, e.g., Steven Ward, *Lucas v. South Carolina Coastal Council: A Categorical Rule in the Muddle of Takings Analysis*, 61 UMKC L. REV. 165 (1992); Cotton Harness, *Lucas and the Rebirth of Lochner*, 2 S.C. ENVTL. L.J. 57 (1992); Jonathan Federman, *Lucas v. South Carolina Coastal Council: An Antiquated Response to A Modern Problem*, 57 ALB. L. REV. 213 (1993). And although the jurisprudence of the Court has not been profoundly altered, it is likely that the case did lead to some chilling effect in state and local governments. See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 616–17 (2004); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 729–32 (2007).

⁶⁵ See *Kelo v. City of New London*, 545 U.S. 469, 483–84 (2005); Rubinfeld, *supra* note 26, at 1081–91 (discussing eminent domain and the distinctions between it and regulations that do not use but only devalue private property).

⁶⁶ The Court’s current test for whether a regulation passes due process muster is “shocks the conscience.” *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847–50 (1998). Thus, so long as a regulation does not shock the conscience, the Court is likely to uphold it as a valid exercise of the police power, although such a finding does not compel a finding that the regulation does not constitute a taking without just compensation. See *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199 (2003); J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L.Q. 471, 479–80 (2007).

down a piece of economic legislation under the Due Process Clause was in 1936 in *Morehead v. New York ex rel Tipaldo*,⁶⁷ when the Court struck down New York's minimum wage act.⁶⁸ Assuming a regulation satisfies the Due Process Clause, however, in certain instances the effects of a regulation or other non-appropriatory government action on private property are deemed so significant as to require compensation.⁶⁹ Thus, regulatory takings lies in the liminal space between due process and eminent domain. It occurs when a regulation "goes too far" or when "justice and fairness" require that public benefits disproportionately borne by a few must be compensated.⁷⁰ But after nearly forty years, we are no closer to knowing when a regulation goes too far than "I know it when I see it."⁷¹

This shifting of the precedential meaning of *Pennsylvania Coal*, and the ubiquitous narrative that it is the founding case of the regulatory takings doctrine, has led to the common assertion that 1922 was the turning point in using the Just Compensation Clause to protect private property from regulation. More accurately, however, that shift occurred in 1960 with the decision in *Armstrong* when compensation was first ordered for a regulatory action. Or more precisely still, that shift truly occurred in 1978 when the *Penn Central* case legitimated the doctrine by creating the now well-established balancing test.⁷² And those decades matter. On the one hand, we could easily have relegated *Pennsylvania Coal* to the dustbin of *Lochner*-era substantive economic due process if the case had not been resurrected in 1960, just as the Court was insisting that the Due Process Clause protections of property receive only rational basis review.⁷³ For the conservative Justices who want to use the Takings Clause to retrieve a heightened level of scrutiny

⁶⁷ 298 U.S. 587 (1936).

⁶⁸ *Id.* at 609.

⁶⁹ See *E. Enters v. Apfel*, 524 U.S. 498, 537–38 (1998); *Lingle*, 544 U.S. 528, 543 (2005).

⁷⁰ *E. Enters.*, 524 U.S. at 523; *id.* at 540 (Kennedy, J., concurring).

⁷¹ Justice Potter Stewart wrote these iconic words in an obscenity case in 1964 in his brief concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Even the Court admits that it cannot seem to come up with a coherent set of rules for when a regulation goes too far. The conservative Justice Scalia explained that in "70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far." *Lucas*, 505 U.S. 1003, 1015 (1992). The more moderate Justice Kennedy has cited the same claim, elaborating that a "central dynamic of the Court's regulatory takings jurisprudence thus is its flexibility." *Murr*, 137 S. Ct. 1933, 1937 (2017). Additionally, the liberal Justice Ginsburg has noted that "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area. . . . most takings claims turn on situation-specific factual inquiries." *Ark. Fish & Game Comm'n v. United States*, 568 U.S. 23, 31 (2012). Thus, despite the fact that the conservative Justices have tried to push for more bright-line, per se rules, they have all agreed that there are only two per se rules and even those have gaping holes, and they have left lower courts to read the tea leaves of their hotly contested 5-4 decisions to deduce when the factual circumstances are likely to be recognized as going so far as to require compensation.

⁷² Both commentators and the Supreme Court allege that 1922 was the founding of the regulatory takings doctrine. See, e.g., *Palazzolo*, 533 U.S. 606, 617 (2001); *Tahoe-Sierra*, 535 U.S. 302, 325 (2002) ("[I]t was Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* . . . that gave birth to our regulatory takings jurisprudence.")

⁷³ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730–33 (1963).

in economic regulatory cases, the older the pedigree the better. Although historians have soundly disproved any originalist pretensions to constitutional limits on regulation through the Just Compensation Clause,⁷⁴ originalists like Justice Scalia and Justice Thomas embraced regulatory takings doctrine despite its bastard pedigree, glossing over the clear evidence that the framers never intended the Takings Clause to apply to mere police power regulations.⁷⁵ Justice Thomas's admission in *Murr*, therefore, may blow some of the smoke from the cloud of history that lies over the *Pennsylvania Coal* case, and for that reason alone is quite remarkable.⁷⁶

But even after its most recent decision in *Murr*, the Court's regulatory takings jurisprudence remains a muddled mess, and the divisions run deep. Yet two points are indisputable. The liberals on the Court are not willing to abolish the doctrine and adopt the historical narrative that regulations are reviewed only under due process, especially so long as due process review continues to be extremely deferential and toothless.⁷⁷ At the same time, the conservatives on the Court are not willing to adopt the robust view of some scholars that all regulations require compensation, even if they have only a minor effect on private property.⁷⁸ All members of the Court continue to assert that *ad hoc* balancing is the best compromise because none seem willing to adopt a pure version of any bright-line test.⁷⁹ Moreover, only Justice Thomas seems willing to abolish the doctrine altogether, but he does so in favor of some other mechanism for protecting property rights, like the Due Process Clause, the Privileges or Immunities Clause, or the Equal

⁷⁴ See Hart, *supra* note 11; Treanor, *supra* note 12.

⁷⁵ Treanor, *supra* note 12, at 805. This is not to say that state courts had not interpreted their Just Compensation Clauses to apply to non-physical government actions in limited cases from the early 1800s on. They used an expansive definition of eminent domain, which had long jurisprudential roots. See discussion *infra* Part III.A.

⁷⁶ *Murr*, 137 S. Ct. at 1957 (Thomas, J., dissenting).

⁷⁷ We see this when the liberal Justices take the position to affirm regulatory takings in cases that would not qualify under a true originalist interpretation, such as Justice Ginsburg's opinion in *Ark. Fish & Game*, 568 U.S. 23, 33 (2012); Justice Brennan's famous dissent in *San Diego Gas & Elec.*, 450 U.S. 621, 639–43, 660–61 (1981) (Brennan, J., dissenting); and Justice Blackmun's opinion in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000–05, 1012–13 (1984).

⁷⁸ There are a number of conservative property rights scholars who argue that virtually all government devaluation of property should be compensated. The poster boy for that position is Richard Epstein, whose pathbreaking book *Taking: Private Property, and the Power of Eminent Domain*, has bolstered an army of pro-property rights absolutists like Roger and Nancie Marzulla, the Pacific Legal Foundation, and numerous others. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY, AND THE POWER OF EMINENT DOMAIN* 1–6 (1985); Roger J Marzulla & Nancie G. Marzulla, *Regulatory Takings in The United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991).

⁷⁹ John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1015 (2003) (“Indeed, while the justices have often widely disagreed over the scope of the regulatory takings doctrine, it is remarkable that in the eighty years since *Mahon* was decided, no justice has suggested that the regulatory takings doctrine be reconsidered (or be limited to cases of physical occupation), nor has any justice suggested that the regulatory takings doctrine should encompass all new restrictions on the use of private property. All seem to agree that either extreme would be unacceptable.”).

Protection Clause.⁸⁰ With each new takings decision, commentators predict either the demise of regulatory takings,⁸¹ the demise of regulations,⁸² or a continuance of the *ad hocery* that characterizes the jurisprudence today.⁸³ And just as Congress is wont to do, kicking the can down the road seems to be the Court's twenty-first century approach to difficult legal and social problems. Fundamental differences in constitutional philosophy and conflicting views of property rights have turned a non-existent constitutional doctrine into an incoherent and very sticky one.

III. FUNDAMENTAL INCONGRUITIES: THE MUDDLED MESS OF REGULATORY TAKINGS

One of the reasons regulatory takings doctrine is deemed by so many to be incomprehensible and irrational is that the Justices hold competing views of property, of the proper role of government, and of the Constitution's role in protecting property.⁸⁴ These competing views often align along what are considered to be the liberal and conservative philosophies of the Justices.⁸⁵

⁸⁰ See Rappaport, *supra* note 2, at 744–48 (suggesting that privileges or immunities might be a better choice to justify regulatory takings); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (finding that the Equal Protection Clause may protect against regulatory harms to land).

⁸¹ For instance, after the Court's 2017 decision in *Murr v. Wisconsin*, outlining a balancing test for determining the denominator in takings determinations, many commentators suggested that the Court was tossing its regulatory takings into the garbage can and would grant deference to regulators. See, e.g., Stewart E. Sterk, *Dueling Denominators and the Demise of Lucas*, 60 ARIZ. L. REV. 67, 87–89 (2018); Sara Beachey, et al., *Murr v. Wisconsin, The Larger Parcel Issue and the Future of Regulatory Takings Slides*, A.L.I.-CLE Course Materials (July 25, 2017).

⁸² Other commentators have interpreted pro-property rights takings decisions as presaging the demise of regulations and the police power. See, e.g., John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 16 (2016); Garrett Power, *Requiem for Regulation*, 44 ENVTL. L. REP. (Envtl. L. Inst.) 10923, 10926 (2014). The Justices also envision such drastic effects, as Justice Kagan predicted in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 626 (2013) (Kagan, J., dissenting) (“The majority’s approach, on top of its analytic flaws, threatens significant practical harm.”).

⁸³ See, e.g., Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 107–08 (2002); F. Patrick Hubbard, Palazzolo, Lucas, and Penn Central: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 472 (2001); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 544–46 (2009).

⁸⁴ See James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997) (“Regulatory takings are widely regarded as a puzzle. . . . [T]he opening cliché in most of the scholarly commentary is that the law in this area is a bewildering mess.”).

⁸⁵ Although it is inaccurate to call the Justices liberal and conservative, because the liberal wing of the Court are not true liberals and the conservatives are not traditional conservatives either, the terms are too ubiquitous to ignore. See Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 L. & CONTEMP. PROBS. 53, 54 (2004). The liberal wing consists of Justices Souter, Breyer, Ginsburg, Sotomayor, Kagan, Brennan, Marshall, Blackmun, and the later years of Stevens. See, e.g., *id.* at 54–55. The conservative wing is steady, consisting of Justices Rehnquist, Scalia, Alito, Roberts, Thomas, and Gorsuch. See, e.g., *id.* at 54. The centrist Justices, who are in fact quite conservative, are Justices O'Connor and Kennedy, who often provided the swing vote in many of the 5–4 takings decisions. See, e.g., *id.* at 58–59; see also James Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 L. & HIST. REV. 115 (2006) (discussing American liberalism's

Thus, the liberal wing generally views property rights as positivist creatures of law, approves regulation of property, and is deferential to the government; hence, the liberals view regulatory takings cases with great skepticism.⁸⁶ The liberals often feel that regulatory takings is an illegitimate constitutional doctrine because it has no historical foundation, unduly hampers important government protection of the public welfare and the environment, and often results in windfalls to landowners who game the system.⁸⁷ The conservative wing, on the other hand, feels that property rights are fundamental natural rights that pre-exist fallible and over-reaching government; without constitutional limits on government regulation, private property would be hijacked to serve public uses without compensation; and that we have, and need, a long history of constitutional protections for property that should be acknowledged and perpetuated.⁸⁸

Needless to say, neither narrative is completely true or accurate as a description of history, law, or principles of natural justice.⁸⁹ But these differences profoundly affect the rationale of the Court's opinions, the precedents it sets for lower courts, and even the public's perceptions of the Court's legitimacy. The liberal model tells a story of a constitutional doctrine run amok, and the conservative model tells a story of government run amok. To conservatives, private property is being constantly eroded for some amorphous public benefit, while to liberals the public treasury is being used to pay landowners not to damage the environment or create a nuisance.⁹⁰ To say that the Court's regulatory takings doctrine is a muddled mess is an understatement, not because the Justices cannot agree on a doctrine so much as because they keep undermining their own rationales and rejecting the pieces and rules and considerations that might give the doctrine some kind of internal logic.⁹¹

departure from traditional progressive-era liberalism, by focusing on the career of Justice Hughes).

⁸⁶ See Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 4, 8 (2017) (describing the traditional liberal view of property rights and the Takings Clause).

⁸⁷ See Justice Kagan's dissent in *Koontz*, 570 U.S. at 626, for her argument that the majority's decision would have drastic effects on local land use regulation and service delivery; and, of course, Justice Blackmun's colorful symbolism in his dissent in *Lucas* is legendary: "Today the Court launches a missile to kill a mouse." 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting). In that same dissent, Justice Blackmun questioned the majority's decision to move away from ad hoc balancing that considers the public interest. *Id.* at 1047. He cautioned against landowners marketing specialized estates to fit within the Court's per se rules. *Id.* at 1065; see also *Penn Central*, 438 U.S. 104, 130–31 (1978).

⁸⁸ Justice Roberts, in *Murr*, charged the government with "gerrymandering" to avoid takings claims. 137 S. Ct. 1933, 1956 (2017) (Roberts, C.J., dissenting). Justice Blackmun noted that the Fifth Amendment "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

⁸⁹ See Huslebosch, *supra* note 11, at 974 (describing colonial and early republican notions of property in traditional common law forms and its modification in the nineteenth century to the bundle of sticks).

⁹⁰ See Serkin, *supra* note 86, at 6.

⁹¹ For instance, some of the most obvious incongruities are whether or not the Court should adopt per se rules; whether the government interest should be a factor, and even

Also clouding the waters is the discursive move that Justice Scalia made in *Lucas v. South Carolina Coastal Council*,⁹² in which he rejected longstanding common-law distinctions between harm-prevention and benefit-conferring legislation.⁹³ For well over a hundred years, lower courts had distinguished between the two in nuisance cases, striking legislation or requiring compensation when legislation was designed to confer a benefit but not when it prevented harm to other landowners.⁹⁴ The elision, designed to push the Court toward more concrete per se rules, profoundly undermined the coherence of regulatory takings doctrine. And I would argue that the move has proven to be so unworkable that the Court has been forced to reject the per se rule Justice Scalia hoped to entrench, instead adding even more indeterminacy and ad-hocery in its 2017 decision in *Murr*.⁹⁵

A further factor making the doctrine so unbalanced is the pickle the Court has found itself in as a result of its deferential due process jurisprudence following the *Lochner* era. From the 1890s to 1937, the Court engaged in heightened judicial activism by striking down economic legislation under a severely cramped interpretation of the Commerce Clause, and expansive interpretations of the Due Process Clause and the Tenth Amendment.⁹⁶ When Justice Owen Roberts switched sides in 1937, the Court essentially relegated due process review of economic legislation to a toothless rational basis test.⁹⁷ In so doing, the Court dramatically eroded its

whether *Penn Coal* or *Keystone Bituminous* should be appropriate precedent. Even when the Court overturns itself it does not do so explicitly. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987) (essentially reversing its decision in *Pennsylvania Coal* without actually reversing it); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 241 (2003) (Scalia, J., dissenting) (essentially undermining the Court's decision in *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998)).

⁹² See Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 329, 334 (1995) (explaining how Justice Scalia's opinion blending formalism, modernism and post-modernism in *Lucas* causes confusion, rather than providing clarity); Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1470–81 (1997).

⁹³ See discussion *infra* Part III.B.

⁹⁴ See *id.*; Halper, *supra* note 92, at 346–47 (discussing how courts in South Carolina have historically recognized this nuisance distinction in their jurisprudence).

⁹⁵ See discussion *infra* Part IV.A.

⁹⁶ See MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S*, at 11 (2001).

⁹⁷ Much ink has been spilt on the *switch in time that saved nine*, the legend that President Roosevelt's threatened court-packing plan pressured Justice Roberts into changing his votes on economic legislation, thus effectively ending the *Lochner* era of heightened scrutiny on economic substantive due process cases. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 11, 13, 21 (1998). Some scholars have disagreed with the assertion that Justice Owen Roberts changed his vote because of pressure, not because of ideology, suggesting that he had never fully supported the heightened review of economic legislation and that his switch was not so unusual as to be attributable to the pressure of Roosevelt's plan. See, e.g., *id.* Regardless of the cause of Roberts's vote, the effect is undeniable. After 1936 the Court never again struck down economic legislation as a violation of the Due Process Clause under any semblance of heightened review. *Id.* at 13. Since that time, the Court has routinely been faced with an opportunity to elevate review, and it has consistently

ability to review economic legislation, leaving governments' ability to regulate property essentially unchecked. Because the *Lochner*-era Court went so far overboard in striking down economic legislation during a period of economic crisis, the modern Court hesitates to revive anything resembling substantive economic due process.⁹⁸ This hesitation, in the opinion of many scholars, has led the Court to distort the Just Compensation Clause to do the work of the Due Process Clause, inevitably confounding the fundamentally distinctive issues of eminent domain and due process.⁹⁹ More confounding is the fact that when the Court admitted it had merged the two in *Lingle v. Chevron U.S.A., Inc.*,¹⁰⁰ it rejected any analysis of the government's justification in its regulatory takings test, ironically making it even more difficult to do ad hoc balancing.¹⁰¹

When we combine the effects of the competing narratives, competing philosophies about property generally, the discursive elision of nuisance law, and the tensions over due process, we find a regulatory takings doctrine that is irretrievably incoherent. It is not simply a muddled mess, as so many scholars have called it,¹⁰² rather, it is so internally conflicted that the only way forward is to change course altogether. It is time to consider that regulatory takings may not be the answer to balancing private property and the public welfare, especially in this time of critical climate change and its predicted devastating effects on our entire world. Absolute property rights contributed to the economic crisis of the Great Depression and are on track to contribute to the devastating effects of climate change.

A. Irreconcilable Differences in Jurisprudential Philosophy

Much of the irreconcilability of regulatory takings doctrine lies in the fact that the Court has deployed competing narratives about the origins and justifications for its constitutional review of regulations that relies on ideological beliefs with little basis in fact. The liberal narrative of the doctrine as illegitimate in origin and wielded injudiciously to chill government action is just as inaccurate as the conservative narrative of government run amok.

refused to do so, citing the negative effects of the *Lochner* era. See PHILLIPS, *supra* note 96, at 32.

⁹⁸ PHILLIPS, *supra* note 96, at 5–6. See, e.g., Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 717 (2002).

⁹⁹ See, e.g., Krotoszynski, *supra* note 98, at 715; Byrne, *supra* note 66, at 472; Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1361 (2000).

¹⁰⁰ 544 U.S. 528, 542–43 (2005).

¹⁰¹ *Id.* at 547–48.

¹⁰² Carol Rose has called it a “muddled mess,” and others have called it even worse names. See Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); see also Poirier, *supra* note 83, at n.2 (providing numerous examples of names used to refer to the doctrine).

The liberal narrative, usually espoused by Justices Stevens, Blackmun, Breyer, and sometimes Souter, views property rights as malleable to be analyzed holistically, ad hoc balancing as preferable to per se rules, that the public interest is a key element in weighing the effects of regulations, and that regulatory takings doctrine should be applied sparingly because of its questionable historical basis and chilling effect.¹⁰³ A couple of points illustrate this approach. Justice Blackmun, in his dissent in *Lucas*, criticized the majority for creating a per se takings rule that side-stepped the need for balancing and, most importantly, eliminated the need to consider the public interest.¹⁰⁴ He wrote:

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced," . . . This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests."¹⁰⁵

For the liberals, consideration of the public interest is crucial in any regulatory takings analysis.

Justice Blackmun also criticized Justice Scalia's reference to some historical compact regarding the fundamentality of property.¹⁰⁶ He relied on Professors Treanor, Bosselman, and Horwitz's work uncovering the original meaning of the Just Compensation Clause as primarily limiting only direct appropriations of property, and not regulations.¹⁰⁷ In his dissent in *Lucas*, Justice Stevens also cautioned against "illogical expansion of the concept of 'regulatory takings.'"¹⁰⁸ He warned that the "elastic nature of property rights" will make the Court's categorical rule unworkable.¹⁰⁹

In addition to viewing property rights as malleable and subject to the public interest, liberals also worried that landowners would manufacture takings claims, especially under the per se rule of *Lucas*. Justice Stevens expressed the standard liberal narrative that

developers and investors may market specialized estates to take advantage of the Court's new rule. . . . Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect.¹¹⁰

¹⁰³ See, e.g., *Lucas*, 505 U.S. 1003, 1036–37 (1992) (Blackmun, J., dissenting).

¹⁰⁴ *Id.* at 1047–48 (Blackmun, J., dissenting).

¹⁰⁵ *Id.* at 1047 (Blackmun, J., dissenting).

¹⁰⁶ *Id.* at 1055–56 (Blackmun, J., dissenting).

¹⁰⁷ *Id.* at 1055–59 (Blackmun, J., dissenting).

¹⁰⁸ *Id.* at 1061 (Stevens, J., dissenting).

¹⁰⁹ *Id.* at 1065 (Stevens, J., dissenting).

¹¹⁰ *Id.* at 1065–66 (Stevens, J., dissenting). Blackmun's *Lucas* dissent was prescient. The 2017 *Murr* decision ultimately changed the denominator rules to render the categorical taking rule of *Lucas* virtually meaningless. See Sterk, *supra* note 81, at 88.

In all, the liberals on the Court are quite critical about the questionable history of regulatory takings and the appropriateness of *per se* rules in an area of law on which the uniqueness of land is a fundamental precept. They view property rights as positivist¹¹¹ creatures of law that serve public interests, and their concern about landowner manipulation reveals their deep ambivalence about regulatory takings generally.

By contrast, the conservative narrative focuses on the need to protect private property from overreaching government imbued with sovereign power.¹¹² The conservatives have been quite successful in characterizing the typical regulatory takings plaintiff as David taking on Goliath. The state is seen by the conservatives as a giant whirlpool that swallows all in its path, absorbing and exercising power to the detriment of individual rights and liberties. Conservatives worry that the ever-expanding coercive power of the state, which already maintains the privileged position of dictating and defining property through legislation and jurisprudence, may stack the deck both substantively and procedurally to ensure that it can take private property for public uses without oversight or the responsibility to pay for it.¹¹³ Theirs is a statement about power more than about property.¹¹⁴ And for the conservatives, power is something exercised over property with property being a bulwark against illegitimate power. To the liberals, power is property and property is power. To the conservatives, power should protect property.

¹¹¹ Sometimes scholars discuss the twentieth-century jurists as having a utilitarian view of property rights. See, e.g., D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 *FORDHAM L. REV.* 1853, 1854 (1995) (recognizing contradictions between utilitarian and liberal notions of property); Robert Brauneis, *"The Foundation of our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 *YALE L.J.* 613 (1996) (discussing Justice Holmes's positivist ahistorical notion of property); Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 *MARQ. L. REV.* 9, 16 (1997) (discussing the "segmentation" problem in takings law starting with Justice Holmes's treatment of it). The label does not matter as much as the differences. Natural law scholars view property rights as having core elements that cannot be infringed without running afoul of the Due Process or Just Compensation Clause. See e.g., Claey's, *supra* note 59. Positivists and utilitarians view property rights as open to adjustment to serve public, utilitarian ends. Glenn Fox, *The Origins, Nature, and Content of the Right to Property: Five Economic Solitudes*, 60 *CAN. J. AGRIC. ECON.* 11, 29 (2012).

¹¹² Between 1978, when the regulatory takings doctrine was articulated in *Penn Central*, and 1986, when Justice Antonin Scalia came to the bench, there was a growing pressure on the Court from property rights advocates to find some effective way to rein in what they perceived were over-reaching environmental and land use restrictions. See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 *HASTINGS L.J.* 759, 823–25 (2006) (discussing Justice Scalia's role in the property rights movement).

¹¹³ See Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 *SE. ENVTL. L.J.* 47, 56 (2006).

¹¹⁴ For conservatives, property rights tend to be relatively static and absolute, and government is always and inevitably limiting and infringing property rights. See, e.g., EPSTEIN, *supra* note 78; RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 56–61 (4th ed. 1992); Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 *COLUM. L. REV.* 1630, 1639–40 (1988).

Chief Justice Roberts, in his dissent in *Murr*, dutifully trotted out the narrative of a government manipulating its regulations to avoid takings liability.¹¹⁵ He wrote that:

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of “property” designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one “parcel,” solely for purposes of resisting a particular claim.¹¹⁶

He referred to it as “just another opportunity to gerrymander the definition of ‘private property’ to defeat a takings claim.”¹¹⁷ Chief Justice Roberts alleged in *Murr* that “the government’s goals shape the playing field before the contest over whether the challenged regulation goes ‘too far’ even gets underway.”¹¹⁸

One commonly cited instance of this government-as-Goliath narrative is the oft-repeated line from *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*¹¹⁹ that “a State, by *ipse dixit*, may not transform private property into public property without compensation.”¹²⁰ Another favorite of the conservatives on the Court is that the “State may not put so potent a Hobbesian stick into the Lockean bundle.”¹²¹ Uses of the *Webb’s Fabulous Pharmacies* quote have primarily come in the opinions of conservatives and most have been deployed to cajole the government for attempting to avoid a takings claim by redefining property rights.¹²² Of course, the fact that government defines and redefines property all the time, and that government agents have a duty to draft regulations that try not to unconstitutionally hamper property, does not seem to quell the ubiquitous narrative that the states “gerrymander the definition of private property” to somehow unjustifiably defeat a takings claim.¹²³ The conservatives rarely mention Justice Homes’ concession that government could hardly go on if it had to pay for every change to the law.¹²⁴

¹¹⁵ *Murr*, 137 S. Ct. 1933, 1950–57 (2017) (Roberts, J., dissenting).

¹¹⁶ *Id.* at 1954–55 (Roberts, J., dissenting).

¹¹⁷ *Id.* at 1956 (Roberts, J., dissenting).

¹¹⁸ *Id.* at 1955 (Roberts, J., dissenting).

¹¹⁹ 449 U.S. 115 (1980).

¹²⁰ *Id.* at 164.

¹²¹ *Palazzolo*, 533 U.S. 606, 627 (2001). This quote illustrates the competing views of property rights. Hobbes, like the liberals, saw property rights as positivist creations designed to benefit the sovereign. Locke, on the other hand, viewed them as natural rights, individual rights to be precise, the protection of which was a prime purpose of government. See, e.g., Sprankling, *supra* note 31, at 66; Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 942–43 (2000).

¹²² E.g., *Loretto*, 458 U.S. 419, 439 (1982) (Marshall, J., majority); *Phillips*, 524 U.S. 156, 167 (1998) (Rehnquist, J., majority); *Palazzolo*, 533 U.S. at 628 (Kennedy, J., majority); *Lucas*, 505 U.S. 1003, 1031 (1992) (Scalia, J., majority); *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot. (Stop the Beach)*, 560 U.S. 702, 715 (2010) (Scalia, J., majority); *Ruckelshaus*, 467 U.S. 986, 1012 (1983) (Blackmun, J., majority).

¹²³ See *Murr*, 137 S. Ct. at 1956 (Roberts, J., dissenting).

¹²⁴ Brauneis, *supra* note 111, at 621.

Nor do they acknowledge the extent to which landowners manipulate the denominator to manufacture a *Lucas* claim.¹²⁵

The conservative narrative envisions government power at odds with private property, which is usually described as government trying to sneak around a takings claim or gerrymandering the property rights to avoid one.¹²⁶ It also paints property rights as natural rights that precede government and law.¹²⁷ Justice Scalia noted in *Lucas* that if “the uses of private property were subject to unbridled, uncompensated qualification under the police power, ‘the natural tendency of human nature would be to extend the qualification more and more until at last private property disappear[ed].’”¹²⁸ And the conservatives point to *Pennsylvania Coal*, rather than *Penn Central* as the founding case for the regulatory takings doctrine, thus lending it greater legitimacy through a longer historical pedigree.¹²⁹

Not surprisingly, both of these creation myths are incomplete and misleading. The liberal narrative misstates the legal history of eminent domain where there was a rich history of providing compensation for the mere effects of regulation in the absence of physical appropriation.¹³⁰ Even Justice Holmes’s prophesy that regulation can go too far was not a sudden burst of inspiration, but a concept that he had addressed on the Massachusetts Supreme Court in eminent domain cases.¹³¹ The conservative narrative misstates the history as well, by glossing over the role of eminent domain and nuisance in the question of what happens when government regulation goes too far.¹³² The conservatives fail to mention that the real origins of regulatory takings doctrine, as it is currently divorced from

¹²⁵ See e.g., Sterk, *supra* note 81, at 78 (discussing to some extent that *Lucas* claims are subject to manipulation by landowners, developers, and municipalities).

¹²⁶ See, e.g., *Stop the Beach*, 560 U.S. at 713 (“States effect a taking if they recharacterize as public property what was previously private property.”).

¹²⁷ See *Van Horne’s Lessee*, 2 U.S. (2 Dall.) 304, 310 (1795) (“[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”). This view of natural property rights is reflected in Justice Scalia’s “historical compact” in *Lucas*, 505 U.S. at 1028 (“In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”).

¹²⁸ *Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal*, 260 U.S. 393, 415 (1922)).

¹²⁹ See *id.* at 1014–15 (referencing *Pennsylvania Coal* as the primary case that was built upon by later cases). Although the conservatives cite to the scholarship that the Just Compensation Clause was originally interpreted to apply only to physical appropriations, they view *Pennsylvania Coal* as righting the judicial ship, an expansion of just compensation to cover regulations because government keeps expanding, threatening to swallow private property entirely. See *Murr*, 137 S. Ct. 1933, 1956 (2017) (Roberts, C.J., dissenting) (“The majority’s new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.”).

¹³⁰ See Kobach, *supra* note 2, at 1215–16, 1218, 1220–22 (discussing Justice Blackmun’s mischaracterization of the history of eminent domain).

¹³¹ See discussion *infra* Part IV.B.

¹³² See Kobach, *supra* note 2, at 1221 (discussing Justice Scalia’s incorrect interpretation of the history of eminent domain).

eminent domain, originated only forty years ago.¹³³ And the conservatives quite logically have tried to distance themselves from the nearly two-hundred year history of nuisance regulations that did not require compensation at all when private property was severely hampered or even destroyed.¹³⁴

It is also clear that federal precedents on the subject are limited and provide little guidance—in large part because the Fifth Amendment was held to apply only against federal actions through most of the nineteenth century.¹³⁵ Until the Just Compensation Clause of the Fifth Amendment was incorporated into the Fourteenth Amendment in 1897, the *Barron v. Mayor and City Council of Baltimore*¹³⁶ rule prevailed. *Barron*, of course, held that the Just Compensation Clause did not apply to state or local actions.¹³⁷ But the character of the case illustrates the errors of both historical narratives, for landowners had been using a broad definition of take and eminent domain to challenge non-appropriatory government actions in the 1820s.¹³⁸ The action in *Barron* was not a physical appropriation, but rather city improvements that diverted streams and regraded streets which caused a build-up of silt and sand in the harbor adjacent to Barron's deep-water wharf, severely damaging the wharf's value.¹³⁹ Barron's wharf was not physically appropriated, nor was his land physically invaded.¹⁴⁰ *Barron* was a typical case of consequential damages from public works projects, a claim that was routinely successful in state courts under the common law of eminent domain.¹⁴¹

Deploying such divergent narratives, the Court continues to issue 5–4 decisions, sometimes favoring the conservative narrative and sometimes favoring the liberal narrative, most of which strain to fit within any conceivably rational view of regulatory takings. Cases like *Eastern Enterprises v. Apfel*,¹⁴² which ordered compensation for a law that required coal companies to pay money for health-care benefits;¹⁴³ *Brown v. Legal*

¹³³ See *supra* note 5 and accompanying text.

¹³⁴ The conservatives rarely cite to the nuisance line of cases, like *Mugler v. Kansas*, 123 U.S. 623 (1887), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and when they do it is to distinguish them, as Justice Scalia did in *Lucas*, when he said the noxious-use line of cases was inapposite. See *Lucas*, 505 U.S. at 1023.

¹³⁵ See, e.g., *Barron v. Mayor and City Council of Balt.*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (explaining that the Just Compensation Clause of the Fifth Amendment was only applicable as a limitation on the federal government).

¹³⁶ *Id.* See generally WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: BARRON V. BALTIMORE AND THE FOUNDATIONS OF AMERICAN LIBERTY (2017) (discussing at great length the legal challenges at both the state and federal levels for applying the Bill of Rights to the states and the Court's conservative reading of the Just Compensation Clause designed in part to forestall the social turmoil that would inevitably follow).

¹³⁷ *Barron*, 32 U.S. (7 Pet.) at 250–51.

¹³⁸ See discussion *infra* Part IV.A.

¹³⁹ *Barron*, 32 U.S. (7 Pet.) at 243–44.

¹⁴⁰ *Id.*

¹⁴¹ See discussion *infra* Part IV.A.

¹⁴² 524 U.S. 498 (1998).

¹⁴³ *Id.* at 514, 538.

Foundation of Washington,¹⁴⁴ which held that, although interest earned on attorney trust accounts was private property, taking it for public legal services was not a taking;¹⁴⁵ and *Horne v. Department of Agriculture*,¹⁴⁶ which held that confiscating raisins to maintain a thriving raising market was a taking are all examples of how incoherent the doctrine has become.¹⁴⁷

The Court is also subject to dramatic jurisprudential swings with its 5–4 decisions. It may decide a ripeness issue and express in dicta that the government will owe compensation, but then when the case reaches the Court on the merits a few years later, decide that the government act was not a taking.¹⁴⁸ It opines that landowners may not manufacture takings claims by severing their property rights and claiming that only the affected rights are taken,¹⁴⁹ and later it finds that severed property rights are taken and require compensation.¹⁵⁰

The differences in judicial ideology regarding the balance of property rights and government interests are also culprits in the Court's incoherent doctrine. Until 1987, one could properly say that the Court's approach to regulatory takings was skeptical, involved ad hoc balancing, and compensation was ordered only when the government action was quite unusual. In the nine years between 1978 and 1986, the Supreme Court decided twenty-one cases involving a potential regulatory taking.¹⁵¹ Of those, the Court found no taking on the merits in twelve,¹⁵² and that the issue was

¹⁴⁴ 538 U.S. 216 (2003).

¹⁴⁵ *Id.* at 240–41.

¹⁴⁶ 135 S. Ct. 2419 (2015).

¹⁴⁷ *Id.* at 2430.

¹⁴⁸ *Compare Phillips*, 524 U.S. 156 (1998) (leaving open the issue of whether interest income generated by funds within an Interest on Lawyer Trust Account (IOLTA), which is appropriated through a state regulation for legal access programs, is a taking warranting just compensation), with *Brown*, 538 U.S. 216 (2003) (holding that earnings resulting from an IOLTA and appropriated through state regulation is not a regulatory taking requiring just compensation because there was a zero pecuniary loss), and *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (holding the Agency's determination that the petitioner's land was ineligible for development was a final decision ripe for review, and suggesting a regulatory taking may result from the diminished value of their Transferable Development Rights), with *Tahoe-Sierra*, 535 U.S. 302 (2002) (holding that no regulatory taking had occurred by refusing to apply *Lucas*, finding the rule did not apply to the Agency's moratoria). In both sets of cases, the Court decided an issue that made commentators certain that the next time around the Court would order compensation, and then it found a way not to do so. See *Phillips*, 524 U.S. at 172; *Brown*, 538 U.S. at 240–41; *Suitum*, 520 U.S. at 749–50; *Tahoe-Sierra*, 535 U.S. at 333–34.

¹⁴⁹ *Palazzolo*, 533 U.S. 606, 631 (2001); *Penn Central*, 438 U.S. 104, 130 (1978) (6–3 split); *Murr*, 137 S. Ct. 1933 (2017).

¹⁵⁰ *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (unanimous decision); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 841–42 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

¹⁵¹ ROBERT MELTZ, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 8–10 (2015).

¹⁵² *Penn Central*, 438 U.S. at 138; *Andrus v. Allard*, 444 U.S. 51, 67–68 (1979); *Prune Yard Shopping Ctr. v. Robbins*, 447 U.S. 74, 88 (1980); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980); *Hodel v. Va. Surface Mining & Reclamation*, 452 U.S. 264, 294 (1981); *Hodel v. Indiana*, 452 U.S. 314, 335 (1981); *Dames & Moore v. Regan*, 453 U.S. 654, 689–90 (1981); *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982); *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 19 (1984); *United States v. Locke*, 471 U.S. 84, 107 (1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475

not ripe in four more, for a loss rate of 76%.¹⁵³ The Court found a regulatory taking requiring compensation in five of those cases,¹⁵⁴ despite the fact that it had found a regulatory taking requiring compensation in only one prior case: *Armstrong*.¹⁵⁵ One of the five cases, *United States v. Sioux Nation*,¹⁵⁶ involved land taken away from the owners through government action and thus really was an appropriation case.¹⁵⁷ And two others involved physical invasion, which had historically required compensation.¹⁵⁸ Only two of the cases could be described as pure regulatory takings, i.e., regulations that limited use or devalued property without any physical appropriation and with no corresponding benefit to the government or the public, and neither involved land.¹⁵⁹ These two cases are important, however, because they regularized the hitherto relatively novel claim that regulations affecting property rights without any physical appropriation or invasion, especially monetary rights and value, could be subject to judicial review under the Just Compensation Clause even if not under the Due Process Clause.¹⁶⁰

If the regulatory takings doctrine was on the runway after 1978, it finally took flight in 1986 with Justice Scalia's arrival on the bench. Justice Scalia's first term yielded no fewer than six regulatory takings decisions, with a noticeably better win-loss ratio.¹⁶¹ The Court found no taking in three

U.S. 211, 227–28 (1986); *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55–56 (1986); *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982); *United States v. Clarke*, 445 U.S. 253 (1980).

¹⁵³ *San Diego Gas & Elec.*, 450 U.S. 621, 633 (1981); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 (1985); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985); *MacDonald, Sommer & Frates v. Cty. of Yolo*, 477 U.S. 340, 352 (1986).

¹⁵⁴ *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980); *Webb's Fabulous Pharmacies*, 449 U.S. 155, 164–65 (1980); *Loretto*, 458 U.S. 419, 441 (1982); *Ruckelshaus*, 467 U.S. 986, 1020 (1984).

¹⁵⁵ Two of the five cases involved a physical invasion onto the land of another. *Loretto*, 458 U.S. at 421 (by a cable attached to a landowner's building); *Kaiser Aetna*, 444 U.S. at 165–66 (invasion by the public when a dredged pond came under the federal navigational servitude). Thus, extending the doctrine that invasion by government planes, *Causby*, 328 U.S. 256, 258 (1946), or government directed flood waters, *Pumpelly*, 8 U.S. 166, 167 (1871), is a form of appropriation requiring compensation to government permitted cable providers and the public. A third case, *Sioux Nation*, involved an 1877 statute that abrogated an earlier treaty protecting lands for the Sioux Nation, essentially resulting in a loss of lands equivalent to an appropriation. 448 U.S. at 424.

¹⁵⁶ 448 U.S. at 424.

¹⁵⁷ *Id.*

¹⁵⁸ *Loretto*, 458 U.S. at 441; *Kaiser Aetna*, 444 U.S. at 180.

¹⁵⁹ The Court in *Ruckelshaus* found a *partial* taking *might* have happened of *some* of respondent Monsanto's pesticide research when it was made available to competitors, in a case that did not sit easily with the Justices. *Ruckelshaus*, 467 U.S. at 1020. In *Webb's Fabulous Pharmacies*, the Court determined that the State of Florida could not appropriate the interest on a court-ordered escrow account by redefining private property as public property. 449 U.S. at 164. (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court.”).

¹⁶⁰ See *Ruckelshaus*, 467 U.S. at 1015–16; *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

¹⁶¹ *Fed. Comm'ns Comm'n v. Fla. Power Corp. (FCC)*, 480 U.S. 245 (1987); *Keystone Bituminous*, 480 U.S. 470 (1987); *Bowen v. Gillard*, 483 U.S. 587 (1987); *Hodel*, 481 U.S. 704 (1987); *Nollan*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304 (1987).

of the cases;¹⁶² it found a taking in two cases;¹⁶³ and the sixth involved a hypothetical that would plague the Court for years, which is whether compensation would be due even if the government invalidated the regulation and removed the restriction.¹⁶⁴ Although property rights advocates lost in three of the 1987 cases, the decisions had significant implications that moved the jurisprudence toward greater protection of property rights.¹⁶⁵

And if the tide shifted in 1987, the next few years saw the emergence of a pro-property rights Court with the conservative Clarence Thomas replacing the liberal Thurgood Marshall in 1991.¹⁶⁶ With Justice Thomas's arrival, Justice Scalia seemed poised to elevate scrutiny of land use restrictions to intermediate level scrutiny, and to posit a new categorical rule for loss of all economic value.¹⁶⁷ The decision in *Lucas v. South Carolina*

¹⁶² *FCC*, 480 U.S. at 254 (involving federal regulation of the rent that utilities can charge cable providers); *Keystone Bituminous*, 480 U.S. at 474–76 (involving an anti-subsidence law requiring that underground coal be left in place for safety purposes); *Bowen*, 483 U.S. at 589, 608 (involving amendments to federal welfare program resulting in lower benefits on the ground that a family has no property right to continued welfare benefits).

¹⁶³ *Hodel*, 481 U.S. at 718 (involving a federal statute that abrogates the right to descent and devise of allotted Indian land interests); *Nollan*, 483 U.S. at 841–42 (involving a permit condition that required a public access easement in exchange for a permit to expand a house).

¹⁶⁴ *First English*, 482 U.S. at 322 (assuming the County's ordinance had denied the appellant use of its property, and without payment of a fair value, the invalidation of the ordinance "would be a constitutionally insufficient remedy").

¹⁶⁵ *Bowen's* affirmance of the right to reduce welfare benefits was consistent with conservative political ideology limiting welfare entitlements and *FCC* involved two corporate entities at odds with each other. *Bowen*, 483 U.S. at 608; *FCC*, 480 U.S. at 247. Only *Keystone Bituminous* was a setback for property rights advocates, and ironically it was a near-perfect reversal of the case that was claimed to have started it all, *Pennsylvania Coal*. See *Keystone Bituminous*, 480 U.S. at 473–74. But that ruling could be justified as a legitimate safety regulation because subsidence from coal mining posed grave public threats.

The cases that ordered compensation, however, were especially critical to the new property rights movement. *Nollan* was important because it raised the level of review from rational basis to intermediate scrutiny in a relatively straightforward permitting case, marking a potential return to *Lochner*-era heightened scrutiny. *Nollan*, 483 U.S. at 841. And *Hodel v. Irving* brought constitutional protections not only to Indian lands, but to severed property rights (the rights to descent and devise). 481 U.S. at 718. The Court resisted conceptual severance in *Penn Central*, explaining that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. 104, 130 (1978). Although the Court had rejected conceptual severance in *Penn Central*, the Court in *Hodel v. Irving* ruled that compensation was due when a regulation destroyed two key sticks in the bundle of property rights. *Hodel*, 481 U.S. at 716–18. Moreover, *First English* launched a real bomb into local governments by holding that rescission of an unconstitutional regulation was an insufficient remedy; compensation might be due as well if the regulation went too far and the state merely rescinded the law. 482 U.S. at 322. *First English* also brought the Court full circle back to its blurring of the due process and just compensation lines that occurred in *Pennsylvania Coal*, a blurring that has yet to be cleared up. *Id.* at 321–22.

¹⁶⁶ Helen Dewar, *Senate Confirms Thomas by 52 to 48 to Succeed Marshall on Supreme Court*, WASH. POST, Oct. 16, 1991, at A1.

¹⁶⁷ The Court has developed three tiers of scrutiny in equal protection cases—rational basis, intermediate scrutiny, and strict scrutiny—and two tiers of scrutiny in substantive due process cases dealing with liberty interests—rational basis and strict scrutiny. Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1584 (2017); 16C C.J.S. Constitutional Law § 1876. It appears that the Court's treatment of exactions has created an

*Coastal Council*¹⁶⁸ seemed like a sudden brake to government regulators and a full-blown return to the *Lochner*-era protections for private property. The Court held that compensation was required when two beachfront lots were rendered unbuildable by new coastal erosion regulations following Hurricane Hugo.¹⁶⁹ The 1994 decision in *Dolan v. City of Tigard* further cemented that fear as intermediate scrutiny was affirmed in the common practice of conditioning permit approvals on land developers giving something back to the community to compensate for the externalities of their development activities.¹⁷⁰

At the same time, however, Justice Kennedy joined the liberal wing in denying regulatory takings claims in at least six other cases between 1992 and 2005.¹⁷¹ While Justice Scalia's ability to play well with others certainly played a part in the doctrine's growing incoherence,¹⁷² it was also true that the regulatory takings doctrine, with its questionable constitutional foundation and its ad hoc nature, has proven to be an unwieldy tool to reinvoke constitutional property protections.¹⁷³ Between 1988 and 2006, most regulatory takings cases resulted in a finding that no taking had occurred.¹⁷⁴ And between 2007 and 2018, the rate of takings cases before the

intermediate level of scrutiny within the Takings Clause that looks an awful lot like elevating scrutiny under due process. Matthew S. Watson, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 WHITTIER L. REV. 181, 210 (1998).

¹⁶⁸ 505 U.S. 1003 (1992).

¹⁶⁹ *Id.* at 1020, 1075.

¹⁷⁰ See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

¹⁷¹ *Palazzolo*, 533 U.S. 606 (2001); *Lingle*, 544 U.S. 528 (2005); *San Remo Hotel, L.P. v. City and Cty. of S.F.*, 545 U.S. 323 (2005); *Tahoe-Sierra*, 535 U.S. 302 (2002); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602 (1993).

¹⁷² See *Lazarus*, *supra* note 112, at 761.

¹⁷³ Takings claims have been even less successful in the lower courts, suggesting that judges at all levels tend to be skeptical of landowner claims and more likely to side with government than with landowners. In an empirical study of 1700 *Lucas* claims, which admittedly are hard to prove, only twenty-seven were successful. Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1849 (2017). This 1.6% success rate suggests that governments are not engaging in so much unconstitutional behavior that they need to be reined in by the courts. See *id.* at 1850. Even if the law places a heavy thumb on the government's side of the scales, such a low success rate would seem unusual given the political preferences of the judiciary. Assuming half the judiciary would self-identify as liberal, pro-government judges, the other half would self-identify as conservative, pro-property-rights judges. With such a balance on the judiciary, a 1.6% success rate is stunningly low. Add this to the fact that plaintiffs who cannot articulate a *Lucas* taking claim—and are stuck with *Penn Central* balancing—face an even more pro-government rule, it would appear that takings claims are not particularly successful. They eat up a lot of judicial resources for very little return.

¹⁷⁴ Although the Court resolved some preliminary ripeness and other procedural issues in ways that worried government regulators (*Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728–29 (1997); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998); *San Remo Hotel*, 545 U.S. at 341–42; *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 698–99 (1999)), the Court found no taking in nine cases (*Pennell v. City of San Jose*, 485 U.S. 1, 4 (1988); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301–02 (1989); *United States v. Sperry Corp.*, 493 U.S. 52, 58–59 (1989); *Yee*, 503 U.S. at 539; *Concrete Pipe & Prods., Inc.*, 508 U.S. at 647; *Bennis*

Court slowed; it decided only five major takings cases during that time.¹⁷⁵ And although three resulted in a finding that compensation was due, those cases did not make new law.¹⁷⁶ Moreover, its most recent case, *Murr v. Wisconsin*, dramatically undermines the per se rule of *Lucas* and may indicate that the Court is finally weary of its newfangled doctrine.¹⁷⁷

These fundamental disagreements in the Justices' ideologies, theories of property, and their commitment to a constitutional remedy for property claims have led to the creation of a regulatory takings monster. The 1992 decision in *Lucas* marked the most profound shift toward protecting property rights and away from the ad hoc exceptionalism that had characterized the law until then. And scholars bewailed and applauded the *Lucas* decision as making new law on the subject.¹⁷⁸ Yet despite the important changes the decision wrought in the law, those changes have not yielded the sea change that property rights advocates had hoped.¹⁷⁹ Partly that is because the other Justices could not fully accept the major change Justice Scalia tried to implement in traditional nuisance law and the narrowing of the scope of the police power,¹⁸⁰ and partly it is because the doctrine itself cannot be forced to fit into a series of per se rules. For as

v. Michigan, 516 U.S. 442, 453 (1996); *Palazzolo*, 533 U.S. at 616; *Tahoe-Sierra*, 535 U.S. at 332; *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003); *Lingle*, 544 U.S. at 548, and a taking in only four cases (*Lucas*, 505 U.S. at 1031–32; *Dolan*, 512 U.S. at 383, 396; *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997)). From 1988 to 2006 the Court went back and forth, often deciding procedural issues in favor of property owners (*Phillips*, 534 U.S. at 160–63; *Suitum*, 520 U.S. at 728–29), only to decide the actual takings case on the merits in favor of the government (*Brown*, 538 U.S. at 240; *Tahoe-Sierra*, 535 U.S. at 332; *Lingle*, 544 U.S. at 548). And of the four cases in which a taking was found, two of them, *Dolan* and *Babbitt*, were essentially relitigating the same issues as earlier cases, so they added little to the doctrine initially staked out by Scalia in 1987. *Dolan*, 512 U.S. at 383 (resolving a conflict arising out of the Court's decision in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)); *Babbitt*, 519 U.S. at 237, 243 (upholding the decision made in *Hodel v. Irving*, 481 U.S. 704 (1987)).

¹⁷⁵ See generally *Murr*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Ark. Fish & Game Comm'n v. United States*, 568 U.S. 23 (2012); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Stop the Beach*, 560 U.S. 702 (2010).

¹⁷⁶ *Koontz*, 570 U.S. at 2591 (expanding the *Nollan* and *Dolan* exactions to monetary exactions); *Ark. Fish & Game Comm'n*, 568 U.S. at 27 (ordering compensation for physical invasion caused by flooding); *Horne*, 135 S. Ct. at 2433 (ordering compensation for physical appropriation of raisin crop).

¹⁷⁷ See discussion *infra* Part IV.C. The addition of two new Justices, Neil Gorsuch and Brett Kavanaugh, may change this prediction.

¹⁷⁸ See generally Cotton Harness, *Lucas and the Rebirth of Lochner*, 2 S.C. ENVTL L.J. 57 (1992); William F. Funk, *Revolution or Restatement? Awaiting Answers to Lucas' Unanswered Questions*, 23 ENVTL. L. 891 (1993); Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907 (1993); Jill Dickey Protos, *Lucas v. South Carolina Coastal Council: A Tremor on the Regulatory Takings Richter Scale*, 43 CASE W. L. REV. 669 (1993); E. Paige Spencer, *Lucas v. South Carolina Coastal Council: A Narrow Exception to the Takings Clause*, 3 WIDENER J. PUB. L. 639 (1993); Richard Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411 (1993); Todd D. Brody, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas?*, 4 FORDHAM ENVTL. L. REV. 287 (1993).

¹⁷⁹ See *Brown & Merriam*, *supra* note 173, at 1849 (finding that only 27 out of 1700 *Lucas* claims were successful).

¹⁸⁰ See Lazarus, *supra* note 112, at 823.

Justice Holmes reminds us, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹⁸¹ Balancing private property rights and the public welfare is virtually impossible when the Justices cannot agree on the character of private property, the constitutional standard upon which to judge government effects on property, or the propriety of regulatory takings.

B. Justice Scalia’s Discursive Move to Undermine Traditional Nuisance Law

Justice Scalia further accelerated the incoherence in regulatory takings doctrine in *Lucas v. South Carolina Coastal Council*, when he derided the traditional common law distinctions between benefit-conferring and harm-avoidance under traditional nuisance law, a post-modern move that implied that government regulation—and judicial review—are mere semantics.¹⁸² For hundreds of years, the law of nuisance had provided limits to land uses that interfered with the property rights of neighbors.¹⁸³ When legislation attempted to accomplish the same ends, the courts generally permitted the same harms to befall landowners without requiring compensation as they had under private nuisance litigation.¹⁸⁴ Thus, land-use restrictions that avoided nuisances were deemed to be non-compensable, even if land was rendered valueless thereby.

But in *Lucas*, Justice Scalia claimed that there was no real distinction between harm-prevention and benefit-conferring legislation. As he explained:

The transition from our early focus on control of “noxious” uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South

¹⁸¹ *Pennsylvania Coal*, 260 U.S. 393, 413 (1922).

¹⁸² See *Lucas*, 505 U.S. 1003, 1024, 1026 (1992).

¹⁸³ *Id.* at 1022–23 (citing cases from the late nineteenth and early twentieth centuries in which states used their police powers to enjoin conduct on private property that amounted to public nuisances).

¹⁸⁴ *Mugler v. Kansas*, 123 U.S. 623, 668–69, 678 (1887); *Munn v. Illinois*, 94 U.S. 113, 123, 125–26, 130 (1876); *Hadacheck v. Sebastian*, 239 U.S. 394, 404–05, 412 (1915); and *Miller v. Schoene*, 276 U.S. 272, 277, 279–80 (1928) were all cases where the court denied compensation for property that was destroyed (*Miller*), rendered valueless (*Mugler*; *Hadacheck*), or dramatically devalued (*Munn*). Without directly overruling these precedents, Justice Scalia called into question their logic and called into question government claims that regulations were aimed at preventing private property owners from using their property to inflict harm on others.

Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.¹⁸⁵

This idea that harm-prevention and benefit-conferring are simply in the eye of the beholder implies that government regulation is always illegitimate—i.e., always overstepping and infringing property rights—and that when the government claims a legitimate harm-prevention motive, the Court should discount its justification as gerrymandering to avoid a takings claim.

However, courts had relied for nearly two centuries on the distinction between harm-prevention and benefit-conferring to help distinguish between land-use laws that prevented public harms and were therefore permissible under due process, and those that merely imposed harms to benefit the public generally, which would require an exercise of eminent domain.¹⁸⁶ Eliding these distinctions, Justice Scalia's discursive move untethered regulatory takings from any balancing between private and public interests and treated as equivalent the interests of landowners who pollute and those who don't want to suffer the effects of a neighbor's pollution. Although Justice Blackmun strongly criticized this move in his dissent in *Lucas*,¹⁸⁷ the decision fatally undermined the Court's long history of nuisance law. The post-modern move may be right in some abstract theoretical sense, but in the world of competing land use regulation, the discursive move was terribly consequential. And it is wrong. Of course there is a difference between stating that a law preventing you from hitting me in the nose with your fist is harm-prevention (which it is) or is benefit-conferring (which it is not) because I have every right not to be assaulted. The actions are not morally equivalent and it is dangerous to treat them as such.

It is true that harm-prevention and benefit-conferring assume an *a priori* status quo. Undeveloped land for many decades was considered a nuisance to neighbors who had expended great effort into wresting land from the natural elements and cultivating it to grow crops.¹⁸⁸ Weeds on undeveloped adjoining land could produce seeds that blew onto the cultivated land, it harbored animals that devastated crops, and it was unsightly.¹⁸⁹ But it would be very unusual to regard doing nothing on land as creating a nuisance. On the other hand, the landowner who built a cement plant that spewed dust, the slaughterhouse that emitted odors, and the shopping mall that introduces more traffic and crime are all actions that impose harms on neighboring lands. There are externalities to all land uses and land development. But only in some Coasian world of abstract post-modern economics is there a moral equivalent between stopping the landowner

¹⁸⁵ *Lucas*, 505 U.S. at 1024.

¹⁸⁶ See Halper, *supra* note 92. Justice Holmes, when he served on the Massachusetts Supreme Court, however, held that a regulation limiting the height of buildings around the Boston State House conferred a benefit that would require compensation. See *Parker v. Commonwealth*, 178 Mass. 199, 205–06 (1901).

¹⁸⁷ *Lucas*, 505 U.S. at 1060–61.

¹⁸⁸ See Joe Gelt, *Abandoned Farmland Often is Troubled Land in Need of Restoration* (Aug., 1993) (unpublished manuscript), <https://perma.cc/58UU-ZRUL>.

¹⁸⁹ *Id.*

whose development on the beach exacerbates erosion and threatens neighboring homes, and the landowner who insists that he should be compensated if he is not allowed to impose harms on his neighbors on the grounds that by not building he is imposing some benefit.

Furthermore, when Justice Scalia held in *Lucas* that any regulation that deprived property of 100% of its value must be compensated unless its uses could be constrained under traditional private nuisance doctrine, he undermined the exception to his own categorical rule.¹⁹⁰ As he put it, a

law or decree with such an effect [depriving land of all value] must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.¹⁹¹

His background principles of property law and nuisance ultimately elevated property rights to unchanging, absolute rights that were supposedly fixed on some particular date and could not be modified later without compensation unless the landowner sought to engage in a nuisance.

The nuisance exception, combined with the elision of *harm-prevention* and *benefit-conferring*, seriously undermined the validity of the public interest in the regulatory takings calculus. As Professor Louise Halper explained, Scalia’s move in *Lucas* “reduces the police power to no more than the extension to the commons of the rule of *sic utere*. The legislature’s role in land use is limited to codifying the common law of private disputes.”¹⁹² By limiting legislative action in *Lucas* to codifying only those restrictions on land that could already be accomplished through private nuisance disputes, Justice Scalia eliminated the legislature’s long-standing ability to choose between different private uses based on its judgment of the public interest. It also “strip[ped] the legislature of the police power, an attribute of sovereignty, by claiming that the public interest which the police power doctrinally protects does not exist as a formal entity.”¹⁹³

And by requiring compensation for all legislation with a negative effect on property unless it regulates nuisances, Justice Scalia reduced the police power to advance the public welfare into a narrow, nuisance-avoidance role only. He explained:

¹⁹⁰ After deriding the harm/benefit distinction and asserting that there was no normative difference between different land uses, and that nuisance was semantic nonsense, he then later articulated his categorical rule that if 100% of the economic value of property is wiped out, then compensation is automatically due *unless* the proscribed uses were not part of the title to begin with. He explained that the limitations on title “must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas*, 505 U.S. at 1029.

¹⁹¹ *Id.*

¹⁹² Halper, *supra* note 92, at 337.

¹⁹³ *Id.*

The “harmful or noxious uses” principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power. . . . “Harmful or noxious use” analysis was, in other words, simply the progenitor of our more contemporary statements that “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests.’”¹⁹⁴

Unfortunately, Justice Scalia’s discursive move collapsed the nuisance analysis into one about the legitimacy of the government’s objectives supporting the regulations. This sleight of hand means that government can regulate only if it *substantially* advances a legitimate state interest (which heightens scrutiny in property cases), and if the regulation destroys all economic value then the justification of the state interest can be no more than nuisance abatement.

With the semantic elision of the noxious use analysis, Justice Scalia not only untethered regulatory takings doctrine from a very long line of nuisance cases, he laid the foundation for the Court’s eventual elimination of the police power justification element altogether from regulatory takings calculations. Thus, in cases involving only partial harms, the state’s interest must be substantial to withstand a regulatory takings challenge, whereas before *Lucas* the focus was on whether the state was reasonably avoiding harms caused by conflicting or harmful uses.¹⁹⁵ And if the regulatory harm is a total wipeout, then compensation will be due in all cases unless the regulated activity constituted a nuisance under traditional *sic utere* balancing.¹⁹⁶ For partial harms the state must have a really good reason for what it is doing, not merely balancing the benefits and burdens of economic life; for total harms the state can regulate only if the landowner is engaging in uses that cause a nuisance.¹⁹⁷ But in his semantic move, he argued that there really is not any nuisance because harms and benefits are morally equivalent.¹⁹⁸

Yet nothing stands still in the world of regulatory takings. Although this claim that noxious use analysis has been superseded by an analysis of the legitimacy of the state’s interest test might accurately have described the Court’s jurisprudence between 1992 and 2005, the Court’s decision in *Lingle v. Chevron USA*, removing the state interest test, leaves us without any reference to the public goals of regulation.¹⁹⁹ After *Lingle*, there is essentially nothing on the government’s side to balance.

¹⁹⁴ *Lucas*, 505 U.S. at 1022–23, 1024 (citing *Nollan*, 483 U.S. 825, 834 (1987)).

¹⁹⁵ *Id.* at 1030–32; *Penn Central*, 438 U.S. 104, 124–26 (1978).

¹⁹⁶ *Lucas*, 505 U.S. at 1030–31.

¹⁹⁷ *Id.* at 1023–24, 1029–32.

¹⁹⁸ *Id.* at 1024–26.

¹⁹⁹ *See Lingle*, 544 U.S. 528, 540, 548 (2005) (concluding that whether or not a law substantially advances a legitimate state interest is no longer a valid takings test, thus removing the test that considered the government’s regulatory goals).

C. Lochner, Lingle, and the Revival of Substantive Economic Due Process

Another point of incoherence lies in the debate over what role the government's interest should play in the regulatory takings calculus. After Justice Scalia's elision of nuisance law and his rejection of the police power justification within the takings test, the only factor left that matters is the effect of the regulation on private property. But that is not what *ad hoc* balancing was supposed to mean. The liberals consistently argue that balancing means there needs to be something on the government's side of the scale.²⁰⁰ Unfortunately, unless the Court simply assumes the government interest is always valid, any concerted analysis of the public interest begins to look an awful lot like heightened due process review.²⁰¹ And reconciling that conundrum seems to have made things arguably even worse.

As discussed earlier, many scholars agree that a large contributor to the rise of regulatory takings doctrine, and the heightened scrutiny that the Court has imposed on certain types of economic regulation, was the demise of substantive economic due process in 1937.²⁰² The Due Process Clause has had a rocky history.²⁰³ For over a century after the founding, the Due Process Clause was interpreted to require certain procedural safeguards when laws inhibited property rights; it generally did not purport to dictate the substance of any formal laws or prohibit laws that arguably were passed legitimately under the police power.²⁰⁴ During a period between the 1890s and 1937, however, the Supreme Court struck down hundreds of laws under a strict natural rights theory of the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁰⁵ In these cases, the Court treated property and contract rights as fundamental and viewed police power regulations that limited those rights with skepticism. Unless there was a clear public health, safety, or morals justification for a law that negatively affected economic rights, the Court would strike it down as beyond the legitimate scope of the

²⁰⁰ See, e.g., *Lucas*, 505 U.S. at 1046–47 (Blackmun, J., dissenting).

²⁰¹ Considering the public interest in *ad hoc* balancing is different from intermediate level review of the government's justification, but the *Agins/Lingle* experiment shows how hard it is to keep these two considerations separate. See Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 528–29, 535–36 (2009).

²⁰² See, e.g., Byrne, *supra* note 66, at 474–75.

²⁰³ The Due Process Clause is believed to derive from the English “law of the land” provision in the Magna Carta, which limited governmental overreaching by requiring that any laws reducing certain property and liberty rights be done according to the law of the land. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428 (2010). For nearly a century in the U.S., the Due Process Clause was interpreted broadly to mean that so long as legislation was passed according to the proper procedure and did not violate certain fundamental natural rights, the legislation satisfied due process. *Id.* at 454, 457. It certainly had a procedural element to it that required proper procedure be followed in the promulgation of laws, as well as in the application of laws to individuals. People were not to be deprived of life, liberty, or property without proper notice and an opportunity to be heard. *Id.* at 453.

²⁰⁴ See Barros, *supra* note 49, at 475–84.

²⁰⁵ Typical cases cited for this period are *Lochner v. New York*, 198 U.S. 45 (1905); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

police power and therefore a violation of due process.²⁰⁶ As the Court explained in *Lochner v. New York*:

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; . . . In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary. . . ?²⁰⁷

By elevating the level of scrutiny on economic legislation, the Court refused to defer to legislative claims that a law promoted health or safety; instead, the Court analyzed the evidence on its own and replaced the legislature's judgment about the wisdom of the legislation with its own. By striking down countless laws in the name of a robust theory of property and contract rights, the Court precipitated a constitutional crisis that prompted President Roosevelt's court-packing plan, a plan to replace every Justice over age seventy who failed to retire with a new liberal Justice who would be more sympathetic to government regulation.²⁰⁸ Ultimately the plan failed, but the Court got the message.²⁰⁹ The Supreme Court never again ruled that any economic legislation violated the Due Process Clause after its decision in *Morehead*, on June 1, 1936.²¹⁰ And to this day, the accusation of reviving *Lochnerism* reminds the Justices that an activist Court can be hamstrung if it fails to recognize the direction of the political winds. As Professor Benjamin Barros has noted, during the *Lochner* period the meaning of the police power was severely narrowed, allowing state governments to pass only health and safety laws with strictly defined public benefits, rather than generalized laws with diffuse public impact.²¹¹

²⁰⁶ See, e.g., *Lochner*, 198 U.S. at 53–56.

²⁰⁷ *Id.* at 45, 56.

²⁰⁸ Justice Owen J. Roberts, who had frequently voted with the conservative Justices during the 1920s and 1930s to strike down economic legislation, voted with the liberals in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in what proved to be an epic reversal of property rights protections under the Due Process Clause and the interstate commerce power. Although many attributed his switch to pressure from President Roosevelt to pack the Court by adding six new Justices, scholars generally recognize that the causation explanation is too simplistic. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 67 (1998); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 560–62 (2002).

²⁰⁹ See CUSHMAN, *supra* note 208, at 67 (calling Roosevelt's court-packing plan "ill-fated").

²¹⁰ *Morehead v. People*, 298 U.S. 587 (1936).

²¹¹ Barros, *supra* note 49, at 489–90.

As scholars have noted, the demise of substantive economic due process has resulted in a level of scrutiny of land-use regulations that ironically is even more deferential than the standard of arbitrary and capricious.²¹² Regulations have to be “truly irrational,” produce “grave unfairness,” have “no conceivable rational relationship” to the ends sought, or must “shock the conscience”²¹³ to violate the Due Process Clause.²¹⁴ But as scholars have also noted, in its fear of reviving *Lochner*ism by reinvigorating due process review, the Court has heightened scrutiny of economic legislation under the doctrine of regulatory takings instead, thus further confounding the logic of the Just Compensation Clause.²¹⁵ Numerous commentators, as well as Justice Kennedy, see a benefit to at least a slightly more robust level of due process review rather than using the Just Compensation Clause to provide the check.²¹⁶ As Professor Ronald Krotoszynski so eloquently wrote:

The mere invocation of public safety must not serve as a shibboleth that precludes any meaningful judicial inquiry into the real intent and effect of the regulation at issue. Wrapping a de facto expropriation in the cellophane wrapper of a police power enactment should not preclude a property owner from obtaining ‘just compensation’ from the government. At the same time, however, the federal courts must not deploy the Takings Clause in a fashion that risks resurrecting the long-discredited doctrine of *Lochner v. New York*.²¹⁷

The problem with the heightened scrutiny that the conservative majority has deployed in regulatory takings cases is that it is remarkably similar to the same *Lochner*-era review that the Court simultaneously eschews.

Like Hamlet’s mother, who doth protest too much, the conservative members of the Court routinely elevate scrutiny, second-guess legislatures, and denounce the expertise of regulatory agencies, striking down economic legislation, all while loudly disavowing the *Lochner*-era judicial activism that accomplished the same goal using the Due Process Clause a century ago.²¹⁸ This came to a head in *Lingle v. Chevron USA, Inc.* in 2005.²¹⁹ The problems had begun twenty-five years earlier, in 1980, when the Court had articulated a slightly different test than *Penn Central* balancing in *Agins v. City of Tiburon*.²²⁰ The *Agins* two-part test would require compensation if a regulation “does not substantially advance legitimate state interests . . . or

²¹² Byrne, *supra* note 66, at 477; Krotoszynski, *supra* note 98.

²¹³ Byrne, *supra* note 66, at 9.

²¹⁴ *City of Cuyahoga*, 538 U.S. 188 (2003).

²¹⁵ Krotoszynski, *supra* note 98; *Nollan*, 483 U.S. 825, 844–46 (1987) (Brennan, J., dissenting) (critiquing the Court for requiring a stricter, due process style fit); *Dolan*, 512 U.S. 374, 410 (1994) (Stevens, J., dissenting).

²¹⁶ The Court’s decision in *Eastern Enterprises v. Apfel* raised this issue directly. 524 U.S. 498, 545 (1998); see also Wolf, *supra* note 99, at 1360–63, 1377–79; Thomas Colby & Peter Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 596 (2015).

²¹⁷ Krotoszynski, *supra* note 98, at 718–19.

²¹⁸ *Id.* at 717; see also Harness, *supra* note 178, at 70.

²¹⁹ *Lingle*, 544 U.S. 528, 544 (2005).

²²⁰ See 447 U.S. 255, 260 (1980).

denies an owner economically viable use of his land.”²²¹ Justice Powell, writing for the majority in *Agins*, cited *Nectow v. Cambridge*,²²² a due process case from 1928, for the first point, and *Penn Central* for the second. The *Agins* test, unfortunately, blended due process and regulatory takings explicitly through the *substantially advance* test, leading to confusion compounded in subsequent takings cases.²²³ Moreover, the term “substantially advance” in the *Agins* test clearly denoted a higher level of scrutiny than the “rationally related” means/end fit of rational basis due process review.²²⁴ This heightening of review and merging of due process in regulatory takings led many to criticize the Court, especially its decision in *Eastern Enterprises v. Apfel*.²²⁵

After much hand-wringing, in 2005, the Court expressly rejected the first prong of the *Agins* test in *Lingle v. Chevron USA*,²²⁶ noting that the government’s interest is a due process consideration and not a takings consideration. Justice O’Connor, writing for a unanimous court, noted that the substantially advances formula

has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. . . . But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.²²⁷

The decision in *Lingle* put the Court’s proverbial foot down on what had become an unwieldy revival of substantive due process in the regulatory takings context. The Court had heightened scrutiny of the government’s justification in many takings cases, and it had also begun to treat property rights as fundamental, deserving of heightened review whenever they were infringed or regulated. As Justice O’Connor explained:

Finally, the “substantially advances” formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies. . . . We find the proceedings below remarkable, to say the least, given that we have long

²²¹ *Id.*

²²² 277 U.S. 183 (1928).

²²³ *See Agins*, 447 U.S. at 260.

²²⁴ Rational basis review usually requires that the challenger show the law does not “bear[] a rational relation to a constitutionally permissible objective.” *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (Harlan, J., concurring).

²²⁵ *See Wolf*, *supra* note 99, at 1356, 1361; Krotoszynski, *supra* note 98, at 720.

²²⁶ 544 U.S. 528, 532 (2005).

²²⁷ *Id.* at 542 (citations omitted).

eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.²²⁸

The Court's unanimous rejection of the *Agins* "substantially advances" formula purported to establish a bright line, once again, between regulatory takings and due process. Unfortunately, however, the Court did not reverse the heightened scrutiny that the *Agins* substantially advance formula had wrought in the exactions cases of *Nollan* and *Dolan*,²²⁹ claiming that "[a]lthough *Nollan* and *Dolan* quoted *Agins*' language, the rule those decisions established is entirely distinct from the 'substantially advances' test we address today."²³⁰ By failing to reverse the heightened scrutiny of *Nollan* and *Dolan*, on the grounds that they did not explicitly use the *Agins* test, the Court kept alive the confounding heightened due process review in the exactions cases.

By drawing a bright line between due process and regulatory takings, however, the Court maintains the illusion that regulatory takings is a coherent constitutional doctrine with independent jurisprudential standing. But while many commentators applauded the Court for finally clearing up the due process/regulatory takings confusion that the *Agins* test had created, it seems to me that the *Lingle* decision is problematic on numerous grounds. First, as a unanimous decision, it makes one wonder why both the property-rights conservatives and the pro-government liberals would agree to remove the substantially advances formula from the Court's regulatory takings doctrine. Something was afoot. The liberals were perhaps happy because it undermined *Agins* altogether, where the other prong of the *Agins* test had provided the precedent for the disastrous per se test of *Lucas*.²³¹ They perhaps hoped that *Lucas* could be overruled as well. Although that hasn't happened explicitly, I argue below that it did essentially happen with the Court's 2017 decision in *Murr*.²³²

The liberals perhaps were also happy because it made explicit what many had been complaining about: the revival of *Lochnerism* in the guise of regulatory takings. But acknowledging the sleight of hand and then rejecting it ultimately left regulatory takings lopsided. Without any place for an explicit analysis of the legitimacy of the state's actions, regulatory takings has become solely about impact on the private property owner without any reference to the importance of the state's interest.²³³ Perhaps for that reason the conservatives were happy with *Lingle*. By eschewing the substantially

²²⁸ *Id.* at 544–45.

²²⁹ There is no question that the Court elevated scrutiny in the case of exactions, using a test that requires compensation if the exaction is not "reasonably necessary to the effectuation of a substantial government purpose," and that there be an "essential nexus" between the legitimate state interests and the permit condition. *Id.* at 834; *Dolan*, 512 U.S. 374, 386 (1994).

²³⁰ *Lingle*, 544 U.S. 528, 547 (2005) (citations omitted).

²³¹ *Lucas*, 505 U.S. 1003, 1015, 1016, 1024 (1992) (citing *Agins* as the basis for its decision).

²³² See discussion *infra* Part IV.B.

²³³ This is a move the property rights movement had been advocating for decades. See, e.g., *Horne*, 135 S. Ct. 2419, 2431 (2015) (quoting *Leonard v. Early*, 155 Md. 252, 258 (1928) on how types of private property are not "public things subject to the absolute control of the state").

advance formula, they could settle down to focusing solely on the impact of the regulation. Without the state's interest to balance on the other side, regulations look far worse when we only look to the impact. Removing the state's interest also reinforced Justice Scalia's elision of harm-avoidance and benefit-conferring by focusing solely on regulatory harms to private property without any reference to the public harms being avoided or to the owner's actions that made herself vulnerable to the purported harms of the regulation.²³⁴

While many scholars have bewailed the incoherence of the Court's regulatory takings doctrine, and a few have tried to offer ways to reconcile the cases under a somewhat consistent set of principles, by the time of *Murr* in 2017, most had given up.²³⁵ Scholars that sided with the liberal wing thought regulatory takings was on its way out with *Palazzolo* and *Tahoe-Sierra*, but then along came *Koontz*, *Stop-the-Beach*, and *Horne*.²³⁶ The conservative wing and its supporters hoped these cases presaged a reinvigoration of natural property rights doctrine and heightened protection despite *San Remo*, *Lingle*, and *Yee*.²³⁷ But then came *Murr* which, as I argue below, has fatally eroded *Lucas*, the lodestar in the conservative pantheon of takings cases. The Court cannot seem to make up its mind whether to evict the constitutional interloper of regulatory takings, or open the door and welcome it in. And while the Court cannot decide, the feedback loop continues to grow stronger and more incoherent. In the face of the Court's seeming paralysis, I would like to suggest that maybe a third way can be found—one that does a better job balancing government overreaching with landowner gamesmanship, that puts the environment first so we have a viable future, and resists government gerrymandering: reclaiming eminent domain.

IV. A WAY FORWARD

When we look at the fundamental philosophical differences between the liberal and conservative wings on the Court, and we see how those differences have resulted in the incomprehensible regulatory takings doctrine of today, we can perhaps find a third path forward. Instead of viewing regulatory takings as an independent constitutional doctrine, existing in the liminal space between due process and eminent domain, perhaps we can build on the flexible common law to bring due process and

²³⁴ See Danaya C. Wright, *A New Time for Denominators: Toward A Dynamic Theory of Property in Regulatory Takings' Relevant Parcel Analysis*, 34 ENVTL. L. 175, 175–178 (2004) (arguing that actions landowners take prior to the imposition of regulations that provide benefits but make them more vulnerable to regulatory harms should be considered in determining the denominator of the takings fraction).

²³⁵ See, e.g., Wolf *supra* note 99, at 1356, 1361.

²³⁶ See *Palazzolo*, 533 U.S. 606, 631–32 (2001); *Tahoe-Sierra*, 535 U.S. 302, 342 (2002); *Koontz*, 133 S. Ct. 2586, 2603 (2013); *Stop the Beach*, 560 U.S. 702, 715 (2010); *Horne*, 135 S. Ct. at 2433.

²³⁷ *San Remo Hotel*, 545 U.S. 323, 347–38 (2005); *Lingle*, 544 U.S. 528, 532 (2005); *Yee v. City of Escondido*, 503 U.S. 519, 539 (1992).

eminent domain together. Doing so would squeeze out the incoherent and illegitimate doctrine of regulatory takings that rests on conflicting notions of private property and competing definitions of the police power. And it would require not so much a full-scale reversal and repudiation of regulatory takings, but rather an embracing of the doctrine's common law roots and a return to Justice Holmes's fateful words in *Penn Coal* that a regulation that goes too far requires an act of eminent domain to sustain it.²³⁸ Moreover, if we pay heed to our *Lochner*-era history, we should reject regulatory takings as the twenty-first century substantive economic due process. And as the Court did with the one, so it should do with the other: return to a more positivist understanding of property rights, reject heightened scrutiny, and return regulatory takings to its eminent domain origins.

I am not the first to suggest that the Court should return to a more traditional form of eminent domain to resolve its regulatory takings quandary. Professor Jed Rubenfeld very cogently has argued that the Court should focus on regulations that cause private property to be put to a public use before compensation should be required.²³⁹ Thus, when private property is actually used for a public benefit, like seams of coal supporting public streets, then compensation should be due, but not when regulations simply prohibit certain desired uses of private property which do not directly benefit the public.²⁴⁰ And Professor Ronald Krotoszynski argues that compensation should be due only when government acts with *expropriatory intent*, i.e., that government action for which a landowner seeks compensation must be "tantamount to an eminent domain action."²⁴¹

I would like to build off the work of these scholars but go further and suggest that the government must actually exercise eminent domain and in fact appropriate the property if compensation is to be paid. If regulations do not affect a cognizable property right, one that can be appropriated through eminent domain, then damages might be due, but not compensation under the Takings Clause.²⁴² Part of the regulatory takings incoherence has been a blurring of the line between compensation and damages, a line that should

²³⁸ *Pennsylvania Coal*, 260 U.S. 393, 415 (1922).

²³⁹ Rubenfeld, *supra* note 26, at 1080.

²⁴⁰ *Id.*

²⁴¹ See Krotoszynski, *supra* note 98, at 719. Kris Kobach has also argued that regulatory takings has its origins in state eminent domain law. See Kobach, *supra* note 2, at 1229–34.

²⁴² There is a complicated distinction between compensation and damages that I won't go into in depth here. Suffice it to say that even the Court has trouble. See, e.g., *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197 (1985); *Suitum*, 520 U.S. 725, 734 (1997); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710 (1999). Logically, compensation is due when property is appropriated and damages are due when a property owner suffers additional damages from the appropriation. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 197. So in a partial taking, where only a portion of land is appropriated, a landowner is compensated for the land appropriated, and then paid damages for any consequential damages accruing to his retained land from the appropriation. See discussion *infra* Part IV.A. But one of the conundrums of regulatory takings is that the limitations of regulations are usually not an appropriation of a cognizable property right or physical items, but rather limitations on use that more accurately resemble the consequential damages actions of the nineteenth century. *Id.*

be reestablished. And in the event of either condemnation or a damages action, we should also return to the era in which benefits from government action are offset against the harms, thus more accurately applying the reciprocity of advantage that Justice Holmes invoked when he said that government could hardly go on if to some extent private property could not be infringed.²⁴³ That give and take is a necessary price of living in a modern society with all of the benefits of courts, police, and the administrative state that protects and privileges property of all sorts.²⁴⁴

Traditional eminent domain jurisprudence recognized this.²⁴⁵ Going back to a more robust understanding of eminent domain will necessitate a rejection of the natural rights theory of property that is the hallmark of the conservative wing of the Court with its penchant for per se takings rules. Going back to eminent domain will also require consideration of the public use or public purpose behind governmental actions, thus necessitating a rejection of the Court's decision in *Lingle*. Eminent domain also requires that government appropriate a cognizable property right, a requirement that may help break down some of the confusion between the police power and regulatory takings.²⁴⁶ The hundreds of class-action cases challenging the railbanking statute provides an excellent example of how the Court's current regulatory takings jurisprudence has created serious confusion in the lower courts and thereby imposed liability for regulations that do not actually take any cognizable property right.²⁴⁷ And finally, in true eminent domain fashion, the courts need to be able to offset benefits and advantages from the purported regulatory harms as was customary with the major infrastructure improvements of the nineteenth century.

I outline the basic contours of my argument below and conclude with a discussion of how a more robust notion of eminent domain would solve most, if not all, of the Court's incoherent cases.

A. Eminent Domain Has a Long Record of Balancing the Police Power and Private Property

The first step to realigning takings law is to remember Justice Holmes's entire passage in *Penn Coal* regarding regulations that go too far. The full passage reads:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for

²⁴³ See *Pennsylvania Coal*, 260 U.S. at 415.

²⁴⁴ See Torres, *supra* note 26, at 13; Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549–51 (2001).

²⁴⁵ See discussion *supra* Part II.

²⁴⁶ See discussion *infra* Part IV.A.

²⁴⁷ See discussion of railbanking issues *infra* Part IV.D.

consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.²⁴⁸

When Justice Holmes later states that “if regulation goes too far it will be recognized as a taking,”²⁴⁹ he is surely referring to the passage above that requires an exercise of eminent domain when the effects of the regulation are sufficiently significant. The linkage between compensation and eminent domain is a story that is completely lost in the two traditional narratives of regulatory takings. Thus, to the extent eminent domain can play a role in bringing rationality to regulatory takings, the discursive move of ignoring Justice Holmes’s admonition to exercise eminent domain has resulted in further untethering regulatory takings from its logical origins in eminent domain and just compensation.

Philip Nichols explains that the law of eminent domain was not limited to physical appropriation, but could be triggered by the effect of regulations.²⁵⁰ In the 1917 edition of his treatise on Eminent Domain, Nichols explains that:

There is nothing on the face of the constitutional provision in question which confines its application to a taking of property under color of eminent domain, and, although it was undoubtedly specifically aimed at the power of eminent domain, it nevertheless applies to all the sovereign powers of government which may be used to interfere with the quiet enjoyment of private property; but in its application to powers other than eminent domain it must be construed in the light of the universal understanding of the people when the constitutions were adopted that the participation in the protection and other benefits which an organized government affords is the only compensation to which an individual is entitled for the interference with certain of his property rights.²⁵¹

These *certain property rights* that may be interfered with without a duty of compensation include taking of property in time of war or other calamity, taking under the power of taxation, the requirement of personal services (like the draft), restrictions under the police power in regulations affecting the public health, morals, or safety, and in certain circumstances in

²⁴⁸ *Pennsylvania Coal*, 260 U.S. at 413.

²⁴⁹ *Id.* at 415.

²⁵⁰ Nichols was quite skeptical of the hyper-protections of private property rights that he saw in the first decades of the twentieth century, protections we associate with Lochnerism. NICHOLS, *supra* note 8, at 45. He blames this on the rise of an elected judiciary that would seek to please private interests, and the concomitant loss of an independent judiciary, with heightened private property protections that he viewed came at the cost of the public good. *Id.* at 45–46. Thus, while he saw the heightened protections of private property as a move away from the original constitutional balance inherent in the Just Compensation and Due Process Clauses, he did not take the position that regulation could never work a taking. *Id.* at 261. He saw Lochnerism as a move away from the constitutional balance of private property and public welfare, but he also did not limit eminent domain to physical appropriations. *Id.*

²⁵¹ *Id.* at 262.

regulations passed for the public welfare.²⁵² Regulations of the latter sort were the most open to challenge.²⁵³ Nichols distinguishes between those public welfare regulations that require compensation and those that do not, as follows:

In substance then, the prevailing doctrine seems to be that a general regulation which is not a mere meddlesome interference with the private affairs of individuals and which has some *real public* purpose behind it and bears a *direct* relation to the enhancement of the public welfare, may constitutionally be permitted to interfere with the manner in which private property is used without a right to compensation arising; but unless such a regulation is enacted in behalf of the public health, morals or safety, it is not within the power of a state to apply it so as to deprive an owner of an *ordinary, natural* and *remunerative* use of his property without compensation.²⁵⁴

Nichols's articulation of the relation between eminent domain and the police power, coming at the end of the nineteenth century, is remarkably prescient.²⁵⁵ Before wide-scale zoning, environmental laws, and historic preservation laws, the vast growth of urban and industrial development, along with the large-scale development of transportation infrastructure in the form of railroads and highways, gave plenty of scope for refining the distinction between regulations that go so far as to require an exercise of eminent domain, and those that merely balance the benefits and burdens of modern life.

There is no question that state courts had developed a coherent and generally sophisticated jurisprudence of eminent domain law that recognized nuanced property rights and that some governmental actions required an exercise of eminent domain even though the government did not initially seek to appropriate the property.²⁵⁶ Some of those cases fit within

²⁵² *Id.* at 262–63, 270–71, 276.

²⁵³ *Id.* at 276.

²⁵⁴ *Id.* at 279 (emphasis added).

²⁵⁵ But according to Nichols, pressure grew throughout the late nineteenth and early twentieth century to grant property rights greater protections through eminent domain and due process. Some of the ways the nineteenth century courts veered off course, according to Nichols, include:

the existence of private property rights in land which the public has acquired in fee; the doctrine that the rights of the public in a public highway are not as extensive in the rural districts as in a city; the doctrine that when part of a tract of land is taken the public cannot set off benefits to the remaining land from the value of the land taken, and the doctrine that the payment of compensation cannot be made conditional upon the institution of proceedings by the owner.

Id. at 46–47.

²⁵⁶ *Id.* at 272–73 (“When injury, is inflicted upon the value of a particular piece of real estate as an incident of a general regulation of a restrictive character, enacted in behalf of the public health, safety or morals, the courts are slow to consider such injury a taking of property for public use requiring compensation, and the same view is taken of a regulation enacted for similar objects which requires an actual outlay of money by property owners, such as an ordinance requiring the owners of tenement houses to equip them with fire escapes, or with

traditional private or public nuisance law while others recognized that government actions could negatively affect private property without being taken for public use or requiring compensation.²⁵⁷ At the same time, other cases required compensation for mere regulations that caused physical invasion, destruction of property, and even devaluation of property.²⁵⁸ Moreover, few states had just compensation requirements in their state constitutions, so most relied on the developing common law and notions of natural justice to require compensation when private property was taken for public use.²⁵⁹ State judges referred to “law of the land” provisions, Blackstone, Grotius, or Pufendorf, to protect private property from being taken without compensation or from being taken for a private use.²⁶⁰ The power of eminent domain, therefore, was of long-standing recognition and acceptance. And it had proved flexible enough to handle the technological expansion and public infrastructure developments of the nineteenth century.

As Nichols explains, there was little question that compensation would be required when private property was appropriated directly or was destroyed by government action from the early nineteenth century on.²⁶¹ Hence, land taken for a courthouse, a highway, or a railroad usually required compensation.²⁶² Similarly, land that was overflowed and destroyed by the government’s action would also require compensation.²⁶³ But government actions that devalued or injured property without fully destroying it were not so obviously within the scope of eminent domain.²⁶⁴ Not surprisingly, the

sanitary plumbing. But it is always a question of degree, and a restriction of the most general nature, with the public health, safety or morals most clearly its object, if in effect it deprives the owners of lawfully acquired property which is not in itself a nuisance of the opportunity to make any beneficial use thereof, may be held to be so severe as to amount to a taking, and to be forbidden by the constitution unless the property which it affects is paid for.”).

²⁵⁷ Nuisance cases did not require compensation and many cases of indirect harms did not require compensation. *See id.* at 272–273, n.38–39.

²⁵⁸ *See, e.g.,* Bent v. Emery, 173 Mass. 495, 496, 498 (1899); Beebe v. State, 6 Ind. 501, 513 (1855); People v. Van De Carr, 178 N.Y. 425, 428 (1904); Wynehamer v. People, 13 N.Y. 378, 383–85, 405–06 (1856).

²⁵⁹ *See* NICHOLS, *supra* note 8, at 118–20 (discussing compensation for takings as a natural right rather than a constitutional guarantee).

²⁶⁰ *Id.* *See generally* Robert P. Burns, *Blackstone’s Theory of the “Absolute Rights of Property”*, 54 U. CIN. L. REV. 67 (1985) (discussing Blackstone’s theory of property as an absolute right vested in the individual by natural law); Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT’L & COMP. L. REV. (2007) (discussing the influence of Grotius and Pufendorf on the recognition of property as a fundamental right).

²⁶¹ *Id.* at 282–84.

²⁶² *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) (referring to the condemnation of land for the use of a railroad as a familiar example of the power of eminent domain); NICHOLS, *supra* note 8, at 53–54 (discussing the use of eminent domain to create government buildings). Land taken for roads often did not require compensation because the benefits of the road outweighed the burden, or because the road was seen to have a reciprocity of advantage. *See* MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, 63–64 (1977); Treanor, *Origins and Original Significance*, *supra* note 23, at 695.

²⁶³ *See* NICHOLS, *supra* note 8, at 286 (emphasizing that compensation is owed when valuable property is destroyed because of public necessity).

²⁶⁴ *Id.* at 293–94.

difficult cases usually involved not land, but subsidiary rights associated with land ownership, like riparian or access rights.²⁶⁵

In a foundational case in 1816, *Gardner v. Trustees of Newburgh*,²⁶⁶ Chancellor Kent found that compensation was due when the Village of Newburgh diverted water from a spring to provide water for the Village, but thereby reduced the flow of water to downstream users.²⁶⁷ The *Gardner* case later became a precedent for other cases involving consequential damages, as when waste water was discharged onto private land,²⁶⁸ or when public infrastructure resulted in upstream flooding.²⁶⁹

These non-appropriative takings cases tended to involve damage or destruction to property rights that were already recognized under the common law, like usufruct rights, riparian rights, leaseholds, and the like. For instance, Chief Justice Shaw, in *Patterson v. City of Boston*,²⁷⁰ recognized that compensation was due when construction widening a street resulted in the removal of the front part of a store and prevented the tenant from using the store for twenty-five months.²⁷¹ Justice Shaw ordered compensation for the value of the lease, the expense of moving the tenant's goods, and the loss of business associated with the store being closed.²⁷² In essence, the court ordered compensation for what was taken—a leasehold—plus the associated damages to what property was left. In a further case involving consequential damages from railroad construction that destroyed the complainant's well, Justice Shaw stated that: "It is made in the spirit of the declaration of rights, giving compensation to persons *sustaining damage* for the public benefit."²⁷³ The nineteenth-century courts were developing a jurisprudence that distinguished between land that was appropriated and for which compensation was undoubtedly due, and consequential harms that required compensation or damages if the harm was 1) a *direct* consequence of government actions that infringed certain 2) *legally cognizable* property rights.²⁷⁴ There were many cases in which government actions that adversely affected access rights to land also required compensation, as when streets were closed, widened, or construction necessitated temporary re-routings of the public and consequential damages accrued thereby.²⁷⁵ On the contrary, compensation was not due for indirect consequences that harmed only the economic value or other non-legally cognizable property rights.²⁷⁶

²⁶⁵ See *id.* at 404–60 (discussing takings in the context of riparian rights).

²⁶⁶ 2 Johns. Ch. 162 (N.Y. Ch. 1816).

²⁶⁷ *Id.* at 164.

²⁶⁸ *Hooker v. New Haven & Northampton Col.*, 14 Conn. 146, 151–52, 166–67 (1841).

²⁶⁹ *Sinnickson v. Johnson*, 17 N.J.L. 129, 143–44 (N.J. Sup. Ct. 1839).

²⁷⁰ 37 Mass. (20 Pick.) 159 (1838).

²⁷¹ *Id.* at 165.

²⁷² *Id.* at 162, 165–66.

²⁷³ *Parker v. Boston & Maine R.R.*, 57 Mass. (3 Cush.) 107, 113 (1849) (emphasis added).

²⁷⁴ See, e.g., *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146, 168–69 (1841) (explaining damages must be caused by a direct government action).

²⁷⁵ See NICHOLS, *supra* note 8, at 172–77 (discussing the use of eminent domain to widen highways).

²⁷⁶ See, e.g., *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 437–438 (1823) (explaining compensation is not due for indirect consequences).

At the same time as state courts were recognizing that eminent domain applied to non-appropriations of property, they also rejected many claims that sounded in nuisance. For instance, in 1845, the Supreme Judicial Court of Massachusetts reasoned that a statute prohibiting the removal of sand and gravel from beaches was not a taking of property requiring compensation because a landowner who removed sand and gravel from his own land would be injuring the public's interest in the beaches.²⁷⁷ In 1877, the Supreme Court of North Carolina upheld a state statute regulating drainage of wetlands, asserting that the state's police power extended to making property of A subservient to the property of B if doing so served a public purpose.²⁷⁸ In 1882, the Supreme Court of New Jersey held that a law prohibiting pollution of waterways was not a taking.²⁷⁹ It stated:

[the] design of the act is not to take property for public use, nor does it do so within the meaning of the constitution. It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the state. Such acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim, '*sic utere tuo, ut alienum non lædas.*' Nor does such a restraint, although it may interfere with the profitable use of property by its owner, make it an appropriation to a public use so as to entitle him to compensation.²⁸⁰

In 1896, the Supreme Court of Michigan upheld a statute prohibiting the cutting of vegetation in riparian waters, even by the owner of the riparian rights, as not a taking.²⁸¹ And in 1912, the Supreme Judicial Court of Massachusetts held that a statute prohibiting the discharge of sawdust into a stream with fish of sufficient value was not a taking without just compensation.²⁸² The Supreme Court of Rhode Island held that laws prohibiting water pollution are not a taking.²⁸³

Eminent domain applies only to a taking and not a regulation of use of private property. There is sometimes a nice line of distinction between the two, but in this instance the distinction is plain. There is no taking of private property involved. The right to pollute public waters and endanger public health cannot be acquired as a private property right. Neither the town nor an individual can acquire a prescriptive right to endanger public health by discharging sewage into public waters.²⁸⁴

These cases can be distinguished from those awarding compensation by noting that the consequential damages cases usually involved public works, and the question for the court was simply a matter of how far out damages

²⁷⁷ Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 59 (1846).

²⁷⁸ Pool v. Trexler, 76 N.C. 297, 298 (1877).

²⁷⁹ State v. Wheeler, 44 N.J.L. 88, 91 (1882).

²⁸⁰ *Id.*

²⁸¹ People v. Silberwood, 67 N.W. 1087, 1087, 1089 (Mich.1896).

²⁸² Lyman v. Comm'rs on Fish and Game, 97 N.E. 66 (Mass. 1912).

²⁸³ Bd. of Purification of Waters v. Town of East Providence, 133 A. 812, 815 (1926).

²⁸⁴ *Id.*

would be owed. Obviously the land or water appropriated directly would require compensation, adjacent landowners directly affected would require compensation, and possibly downstream landowners, or others suffering unique adverse effects of some sort, would be entitled to compensation. Where the regulation prohibited certain uses, such as placing obstructions in public ways, discharging effluent, or removing sand and gravel from the beaches, the regulations did not originate in a public work for which eminent domain was used, but rather sought to limit private land uses that imposed harms on the public property or public welfare. Those cases never required compensation.

Even physical destruction of property did not require compensation in cases of grave public necessity. The Supreme Court of Connecticut held that destruction of a diseased tree was not a taking requiring compensation.²⁸⁵

The destruction of a tree affected by a disease of that character, without compensation to the owner, and against his will, is as fully within the police power of a state as the destruction of a house threatened by a spreading conflagration, or the clothes of a person who has fallen a victim to smallpox. Such property is not taken for public use. It is destroyed because, in the judgment of those to whom the law has confided the power of decision, it is of no use, and is a source of public danger.²⁸⁶

The Supreme Court followed the same reasoning three decades later in *Miller v. Schoene* in 1928.²⁸⁷

These cases show that courts were routinely dealing with land-use and environmental regulations that devalued or even destroyed private property, and some were not deemed to be an exercise of eminent domain requiring compensation, while some were. Eminent domain was required when land, title, or a cognizable property right was physically appropriated for a public use, as when land was taken for a road, a railroad, or a public wharf. If legally recognizable property rights were taken or impaired, compensation would also be due. But mere regulations limiting some land uses and that did not involve physical invasion, especially when they prevented public harms, were not considered compensable under eminent domain.

I admit that these cases are sometimes difficult to reconcile, but on closer examination several points of distinction appear. One line of distinction is between affirmative and negative acts. In the cases requiring compensation the government was usually engaging in an affirmative act, like piping springs, widening streets, and authorizing the building of

²⁸⁵ *State v. Main*, 37 A. 80, 84 (Conn. 1897); *see also* *Urbach v. City of Omaha*, 163 N.W. 307, 308 (Neb. 1917) (finding that limitations on garbage collection is not a taking of the property of the restaurateur who wants to sell his table scraps).

²⁸⁶ *State v. Main*, 37 A. at 84.

²⁸⁷ *Miller v. Schoene*, 276 U.S. 272, 278–80 (1928) (finding no compensation due for destroying cedar trees infected with a disease that harmed nearby apple trees).

railroads.²⁸⁸ In the cases denying compensation, the government merely prohibited landowners from engaging in a use that inflicted harm on neighbors or the public.²⁸⁹ A second distinction is between vested property rights that were either legally cognizable property rights or consisted of uses that were currently being undertaken, and use rights that were speculative or ancillary to ownership of land, especially when other valuable use rights remained.²⁹⁰ Regulations that resulted in the destruction of commonly-recognized property rights were considered compensable under the common law and state and federal Just Compensation Clauses.²⁹¹ But mere use rights or development plans were much more complicated. Activities such as cutting weeds, discharging sawdust into the river, keeping diseased trees or livestock, and even removing sand from one's own land were curtailed without compensation.²⁹²

Even the Supreme Court's early consideration of a consequential damages case under eminent domain law in 1870, *Yates v. City of Milwaukee*,²⁹³ dealt with the standard access and riparian rights of a landowner who lost his wharf through a regulation prohibiting locating the wharf in the navigable part of the river.²⁹⁴ In the nineteenth century, riparian and access rights to waterways were important and highly valuable property rights, recognized at common law; they were marketable as independent property rights, and as such were deemed compensable when public infrastructure imposed significant limitations on the private rights.²⁹⁵

Restrictions prohibiting building structures above a certain height; manufacturing alcoholic beverages; engaging in businesses that polluted through dust, noise, and effluent; cutting plants; and removing sand and gravel were all uses that were ancillary to ownership of land and, because other uses were still permitted, they were generally not compensable even when the harms from the regulation were significant.²⁹⁶ The clearest way to reconcile these conflicting state-law eminent domain cases is to realize that compensation was ordered for the acquisition or destruction of recognizable property rights, for invasion onto one's land, and for the proximate harms caused by public works, even when those harms were to a business or to a

²⁸⁸ See e.g., *Patterson v. City of Boston*, 40 Mass. (23 Pick.) 425, 426–30 (1839) (discussing how Boston's decision to tear down a warehouse to widen a street entitled the warehouse's owner to compensation).

²⁸⁹ See *Miller*, 276 U.S. at 279.

²⁹⁰ See *id.* at 277 (providing an example of a right ancillary to land ownership).

²⁹¹ See *Patterson*, 40 Mass. (23 Pick.) at 430, 433 (ordering compensation for a taken leasehold plus associated damages based on a state compensation statute).

²⁹² See, e.g., *Miller*, 276 U.S. at 279 (allowing diseased trees to be cut without compensation).

²⁹³ 77 (10 Wall.) U.S. 497, 502 (1870).

²⁹⁴ *Id.* at 498. Kris Kobach makes a big deal of this case as the first regulatory takings case, even though it was not decided on constitutional principles and fit squarely within state-law eminent domain cases involving riparian and access rights. See Kobach, *supra* note 2, at 1267–76.

²⁹⁵ NICHOLS, *supra* note 8, at 404–27.

²⁹⁶ *Id.* at 51 (discussing the basic benefit-burden analysis for takings compensation and how some harms that restrict some uses but leave others are not compensable).

use commonly-associated with specific property rights. Compensation was not ordered when only certain damaging uses were curtailed leaving other permissible uses, when there was a reciprocity of advantage, when uses were only speculative, and when there was no government action besides curtailing the harmful uses. And until the 1870s, the courts had made a clear distinction between uses that caused harm or were a nuisance, which could be readily constrained, and uses that flowed naturally out of specific marketable property rights.²⁹⁷

Thus, assuming we can identify with somewhat broad brush-strokes certain distinct property rights, like riparian rights, access rights, usufruct rights, and the like, and find them to be compensable when government activity causes consequential harm as a result of public works, or regulatory harm as a result of legislative declarations that destroy those rights, we are well on the way toward resurrecting a coherent eminent domain jurisprudence. Polluting, land uses that impose external harms on neighbors or the public, and uses that impose health and safety risks clearly fit within the law of nuisance and can be constrained without compensation. That leaves a gray area wherein land use activities that are not quite so obviously nuisances and involving property rights that are not quite so obviously of long-standing independence may or may not require compensation. And the question is, how does eminent domain help us with these hard cases?

I would suggest that a reinvigoration of the harm/benefit distinction in nuisance, an emphasis on a cognizable property right, the consideration of the important public purpose and thus a repudiation of *Lingle*, and allowing the benefits of public uses to offset the burdens, as was typical of eminent domain, would help us with the hard cases and get us well on the way to replacing the incoherent regulatory takings doctrine with a revived and coherent law of eminent domain. We also need to rethink how we treat property rights by rejecting the natural rights ideology and revive, instead, the post-*Lochner* positivism that permits regulation so long as there is an important public purpose. I will discuss each of these.

B. Reject Natural Rights Ideology

The tension between theories of fundamental natural rights and positivist property rights is not new or uncontested. Justices of the colonial period, in the early republic, the antebellum years, Reconstruction, the *Lochner* era, the New Deal, and into the modern period have all dealt with the question of just how far government can modify or destroy property rights without running afoul of the Constitution's property protections.²⁹⁸ Whether property rights are creatures of state law, subject to being defined and redefined at will, or whether there is some core set of principles

²⁹⁷ Following well-established distinctions between benefit-conferring and harm-avoidance, the Wisconsin Supreme Court readily accepted that compensation was not due for Yates' wharf when the state had identified it as a nuisance. See *Yates v. Judd*, 18 Wis. 118, 127–28 (1864).

²⁹⁸ See generally Hulsebosch, *supra* note 11 (tracing takings jurisprudence from early colonial America up to the nineteenth century).

protecting property that cannot be infringed is a question that has plagued judges, philosophers, and political writers for centuries.²⁹⁹ And even the brilliant minds on the Supreme Court will not settle the dispute, although they may establish precedents that reflect one theory or the other. But as we saw with the fundamental rights of the *Lochner* era, the prevailing theory of property rights is only as persuasive as the economic and environmental pressures on the Court. As the pendulum swings toward greater protection of property rights, the law of eminent domain lies in the crosshairs, and compensation is ordered for government regulations and consequential harms that would be deemed to be merely a cost of living in civil society in a different era. And just as state judges have grappled with the changing terrain of property rights, so too has the Supreme Court.

Following the Civil War, the crisis of slavery severely tested natural rights theories of property.³⁰⁰ In one articulation of the balance between private property and public rights, the Court of Appeals of Kentucky noted that government is that which defines and protects property as well as that which destroys property for public purposes.³⁰¹ In a case alleging that the government should compensate for the destruction of property rights in slaves, the court explained that property rights must be balanced with the public welfare:

But . . . the warrantor of title [the private slave owner who sold a slave to a buyer just before emancipation and was sued by the buyer when the property rights were nullified] never was the guarantor of the future action of the Government. Its subsequent action therefore, whether legal or revolutionary never can be a breach of the warranty. If the action is legal then it is but the exercise of a right attached to all property held under its sovereignty, that the public necessity is superior to the individual right, and that the sovereign may resume the property when such public necessity arises, and that the Government must judge of this. Without those political organizations known as government, to which is delegated the sovereign power of the people, by written constitutions, declaring, delegating and restricting the sovereign powers conferred and of the people themselves and declaring the rights of the citizen, property would be of little consequence and the right thereto ideal; as each must, therefore look to those political organizations known as states, in the larger or more restricted sense for the vindication and protection of his rights of property, as well as life and liberty, he must also submit to such political changes and the modification of those rights which the Government may legitimately make, or which it has the physical power and inclination to force on all.

The warranty of title by one individual to another can never be construed as warranting against the superior right of the Government to resume the property on compensation when the public necessity shall require, because the rights of

²⁹⁹ *Id.*

³⁰⁰ See *Hood v. Yowel*, 3 Ky. Op. 357, 358 (Ky. App. 1869) (dealing with a slave owner who brought a takings claim to recover for emancipation).

³⁰¹ See *id.* at 359 (discussing the government's power to destroy a home in order to prevent the spread of fire).

the purchaser as a citizen is equally involved in that public necessity with the warrantor and his compensation for the deprivation of a private right for the public good is to come from the Government. The right to blow up and destroy a house in a town or city to prevent the spread of a conflagration is a legal public right, residing in all towns and cities as a public necessity, and this even without compensation, for it is not the exercise of eminent domain, yet this would be no breach of warranty of title by a vendor, but is a condition annexed to all property so situated. So of revolutionary physical power residing in the masses, when by physical revolutionary power they determine to modify or change their political institutions, however, they may be violative of the private rights of the citizen, he must submit because there is no remedy, but is one of the conditions annexed to the absolute necessity, each is under of being a party of some political family.³⁰²

In contrast to the Kentucky Court of Appeals decision, the Supreme Court's decision in *Yates v. Milwaukee* applied an expansive and robust theory of property rights involving consequential damages in the height of Reconstruction. In *Yates*, the City of Milwaukee had established a wharf line in the Milwaukee River (a line between the public navigable portion of a navigable river and the non-navigable shallow edges) and prohibited Yates from retaining his wharf past that line.³⁰³ Even though the line actually extended landward into the non-navigable portion of the river and thus through Yates' pre-existing wharf, the City claimed his wharf was a nuisance because it was within the supposedly navigable portion of the river.³⁰⁴ The City ordered it destroyed as an obstruction to navigation even though the actual wharf did not extend into the actual navigable part of the river.³⁰⁵ Relying on the state law of eminent domain, the Supreme Court held that drawing the wharf line where it did took Yates' riparian rights and required compensation.³⁰⁶ Despite an ordinance designating Yates' wharf as a nuisance, the Court insisted that the riparian and access rights were vested and valuable property rights, that unless their use created a nuisance they could not be infringed without compensation, and simply calling something a nuisance did not make it so.³⁰⁷ Although *Yates* was decided without reference to any constitutional just compensation doctrine and under state law of eminent domain, Justice Miller's skepticism of the government's justification of the wharf as a nuisance can't help but resonate in Justice Roberts' fear that government will gerrymander to avoid takings claims.³⁰⁸

That robust sense of property rights prevailed again in 1871 when the Court, using a state constitution's Just Compensation Clause, ordered compensation for land overflowed by water from a downstream dam in

³⁰² *Id.* at 359–60.

³⁰³ *Yates*, 77 U.S. (10 Wall.) 497, 498 (1870).

³⁰⁴ *Id.* The City was permitted by statute to dredge the river to the full wharf line to make the river more navigable, but it did not do so. *Id.*

³⁰⁵ *Id.* at 498–99.

³⁰⁶ *Id.* at 505, 507.

³⁰⁷ *Id.* at 504–05.

³⁰⁸ *See id.* at 503–05; discussion of Roberts's dissent in *Murr*, *supra* Part III.A.

*Pumpelly v. Green Bay Co.*³⁰⁹ *Pumpelly* was a case, however, that fell within the long line of water-invasion cases from the earlier half of the century.³¹⁰ But the Court was unwilling to adopt a strong theory of fundamental property rights only a few years later in *Railroad Co. v. Richmond*³¹¹ in 1877 and *Transportation Co. v. Chicago*³¹² a year after that. Ironically, as the *Transportation Co. v. Chicago* Court rejected a robust theory of property rights, it used a deferential interpretation of the police power to deny compensation for indirect and consequential damages to property.³¹³ Essentially, the Court held that state eminent domain law might provide remedies for the consequential damages of public works, but doing so was not required by the Constitution.³¹⁴ In *Transportation Co.*, Justice Strong rejected a takings claim by a passenger steamer company for damages to its business when it could not land ships at the public wharf or an adjacent street because of public works construction that interfered with its riparian rights.³¹⁵ Although this case looked an awful lot like the cases involving consequential damages to property rights resulting from public works projects that had been decided by earlier state courts, Justice Strong rejected a constitutional theory of recovery, explaining:

The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. . . . [A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action.³¹⁶

This rejection of a robust theory of eminent domain in the context of regulations and public works that inflict consequential or collateral damage to property rights is difficult to explain in light of *Yates*, but was consistent with a judicial retrenchment in the application of national rights and constitutional protections against state action. Notably, *Yates* was decided as a matter of common-law eminent domain while *Railroad Co.* and *Transportation Co.* were constitutional cases.³¹⁷ Thus, the *Slaughter-House Cases*, *Bradwell v. State*, *Munn v. Illinois*, *Mugler v. Kansas*, and the *Civil Rights Cases* all reveal a Court taking a relatively hands-off approach to claims that the states were infringing federally-protected constitutional

³⁰⁹ 80 U.S. (13 Wall.) 166, 167, 176–78, 181 (1871).

³¹⁰ NICHOLS, *supra* note 8, at 311–315.

³¹¹ R.R. Co. v. Richmond, 96 U.S. 521, 528–29 (1877).

³¹² Transp. Co. v. Chicago, 99 U.S. 635, 641–42 (1878).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 639–40.

³¹⁶ *Id.* at 641–42.

³¹⁷ *Yates*, 77 U.S. (10 Wall.) 497, 504 (1870); *R.R. Co.*, 96 U.S. 521, 529 (1877); *Transp. Co.*, 99 U.S. at 642.

rights.³¹⁸ Of course, that philosophy would change in the last decade of the nineteenth and early decades of the twentieth century as the Court used the Constitution's protections of individual property rights as a sword to strike down hundreds of state laws during the *Lochner* period.³¹⁹ But in the aftermath of Reconstruction and before incorporation of the Just Compensation Clause to the states in 1897, the Supreme Court used rescission and not compensation as the preferred remedy for government run amok.³²⁰

It would certainly not be inaccurate to describe the Supreme Court's property jurisprudence as swinging back and forth on how much deference should be paid to state determinations of the public welfare and the scope of the police power.³²¹ The Court was relatively unconcerned with the scope of the police power in the first half of the nineteenth century (a result of *Barron v. Baltimore*).³²² But then there was a more aggressive application of federal common law and constitutional protections in the 1860s and 1870s, followed by a retrenchment as the heyday of public works were underway in the 1880s and 1890s.³²³ Then there was another period of aggressive review during the *Lochner* era, followed again by a repudiation of heightened scrutiny and a rejection of economic substantive due process in 1937.³²⁴ Finally, there is a revitalization of heightened scrutiny in the 1980s through the present in the jurisprudence of regulatory takings.³²⁵ Is the third time the charm?

This ever-moving pendulum swing in the Court's approach to property rights, seeing them as fundamental natural rights for a while, and then as positivist creations of law, illustrates the difficulty of striking the right balance between the public welfare and private property rights. It seems that as soon as the Court swings one way, governments gerrymander to destroy private property. When the Court swings back to protect certain core property rights, environmental and public necessity impels a rejection of landowner gamesmanship. And not surprisingly, striking the right balance is not a problem unique to our times, for it was well-remarked upon by scholars of an earlier period.

Thomas Cooley, in his 1868 treatise on constitutional limitations, rejected strong property rights protections under the Constitution for consequential damages or the devaluation of property, claiming instead that:

³¹⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 37–38 (1872); *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 138–39 (1872); *Munn v. Illinois*, 94 U.S. 113, 114 (1876); *Mugler v. Kansas*, 123 U.S. 623, 623–24 (1887); *Civil Rights Cases*, 109 U.S. 3, 3–4 (1889).

³¹⁹ See *supra* notes 38–40 and accompanying text.

³²⁰ See *supra* notes 41–43 and accompanying text.

³²¹ See *Barros*, *supra* note 49, at 478–83.

³²² See *supra* notes 136–144 and accompanying text.

³²³ Compare, e.g., *Pumpelly*, 80 U.S. (13 Wall.) 166 (1871), with *Chic., Burlington & Quincy Ry. Co. v. People*, 200 U.S. 561 (1905).

³²⁴ See *supra* notes 37–41, 68 and accompanying text.

³²⁵ James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL'Y REV., 315, 323–28 (2010).

Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action. If, for instance, the State, under its power to provide and regulate the public highways, should authorize the construction of a bridge across a navigable river, it is quite possible that all proprietary interests in land upon the river might be injuriously affected; but such injury could no more give a valid claim against the State for damages, than could any change in the general laws of the State, which, while keeping in view the general good, might injuriously affect particular interests.³²⁶

Cooley's treatise was relied upon by Justice Strong in *Transportation Co.*, where the Court denied a constitutional remedy for consequential damage caused by public works construction.³²⁷ For Cooley, compensation should be provided only for direct encroachment upon private property, i.e., appropriation, invasion, or destruction, as the Court held in 1871 in *Pumpelly v. Green Bay & Mississippi Canal Co.*³²⁸ *Pumpelly* was decided under the Wisconsin constitution's Just Compensation Clause but Justice Stone noted that where

real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.³²⁹

³²⁶ THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 541–42 (1868).

³²⁷ *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878).

³²⁸ 80 U.S. 166, 181 (1871). COOLEY, *supra* note 326, at 541–45.

³²⁹ *Pumpelly*, 80 U.S. at 181. It would also seem that Kobach's description of the Supreme Court's heightened protection of property through application of eminent domain in cases of consequential damages may be a bit of an over-statement. *See* Kobach, *supra* note 2, at 1268–73. In *Yates*, the case was decided under state common law, and in *Pumpelly*; the case was decided under the state's constitution, but the former involved removing a wharf that had been used and relied upon for years (i.e., was a vested property right), and the latter involved physical invasion of water in the permanent flooding of the petitioner's land. *Compare Yates*, 77 U.S. 497, 503–07 (1870), *with Pumpelly*, 80 U.S. at 176–77. Neither case involved the devaluative regulatory taking that some state courts had recognized under their common law of eminent domain. Hence, when the Court rejected consequential damages as a result of public works in 1877 and 1878 in *Railroad Co.* and *Transportation Co.*, and cited Cooley that any remedies lay at state law, I don't believe the latter cases evidenced a retreat in property protections so much as a clarification that federal constitutional protections provided a floor, and not a ceiling for property rights. Both *Yates* and *Pumpelly* involved physical invasion and harm to land, harms that easily fit within common-law eminent domain principles, while mere consequential damage was a much more contested subject. Justice Miller, in *Pumpelly*, also acknowledged that collateral damages were not recoverable in many states. He explained, "We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no

In the height of the *Lochner* era, Nichols complained that property rights were being too assiduously protected at the expense of public rights, and he yearned for a return to Cooley's view of eminent domain liability only for direct harms to vested property rights.³³⁰ Nichols explained, in 1917, that the loss of an independent judiciary, particularly with the adoption of rules allowing for judicial recalls and judicial elections, had elevated private property rights in derogation of public rights.³³¹ He argued:

[n]ot one man in a thousand realizes that a decision in favor of the land owner is a decision against the public, and that a series of such decisions will result in the complete subordination of the essential public right of eminent domain to the private rights of ownership in land. As a result, the decision in favor of the land owner is always the popular one, and to a judge seeking re-election even at the expense of the maintenance of sound principles of law the only safe course is to decide against the public rights in every eminent domain case that arises.³³²

For Nichols, the public interest had to be considered in eminent domain cases or else private property rights would hijack the police power. Nichols argued that before the loss of the independent judiciary, a landowner who was upset about state actions had to go to the legislature for a remedy.³³³ He further explained:

After the majority of the states had lost their independent judiciary, cases of individual hardship received a different treatment. When the legislature of a state intentionally or inadvertently had enacted a law which authorized the interference with private property rights in a novel, harsh or unjust manner, although not in violation of any express provision of the constitution, the highest court of the state, instead of enforcing the law and letting the public, if it so desired, elect a legislature that would remedy the injustice, would sometimes evolve a subtle theory by which it could be demonstrated to the satisfaction of those who were anxious to be convinced that the victims of the law were being deprived of their constitutional rights. The theory thus evolved would be seized upon with eagerness by the courts of other states, and by equally heedless annotators, regardless of the fact that the effect of the acceptance of the theory would be the curtailment of public rights and sometimes even the surrender of public property without the consent of the people or their representatives, and in a very short time the new theory would become known as the "enlightened doctrine," and be adopted as a binding principle of constitutional law in many if not all of the states which had established an elective judiciary. As a result of the acceptance of these novel theories, limiting the exercise of the power of eminent domain in so many particulars, in many states the construction of public improvements has been

redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating." *Id.* at 180–81.

³³⁰ NICHOLS, *supra* note 8, at 3–4.

³³¹ *Id.* at 45.

³³² *Id.* at 45–46.

³³³ *Id.* at 46.

rendered extremely precarious, and the development of the resources of the community retarded to a marked degree.³³⁴

Nichols' version of the rise of private property rights, tied to the rise of the elected judiciary, may be oversimplified. But he is correct that property rights protections were not as stringent, nor did they have the constitutional basis, that they acquired during the *Lochner* era when he was writing, during Reconstruction when Justice Miller penned *Yates*, or in the modern regulatory takings era. Narrowing the law of eminent domain has been just one effect of the elevation of private property over public rights; regulatory takings seems to be another. And with that shift government has lost much of its power to protect the public at large from degradation of the environment, the effects of climate change, the destruction of wildlife and its habitat, and the guarantee of a safe and clean urban landscape.

With eminent domain, as with regulatory takings, it is not always easy to draw a bright line between regulations that go too far and those that simply adjust the benefits and burdens of modern life—i.e., between regulatory takings and the police power. Nichols provides a distinction between mere police power regulations and assertions of eminent domain by explaining: “the police power may be somewhat loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare.”³³⁵ He goes on to explain:

In the exercise of eminent domain property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public; in the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him, because his use or enjoyment of such property is injurious to the public welfare.³³⁶

Justice Holmes, writing at the same time as Nichols, viewed the balance between eminent domain and the police power somewhat differently. An important decision is *Parker v. Commonwealth*³³⁷ in which a Massachusetts statute, passed in 1899, limited the height of buildings on lands near the state house.³³⁸ The statute expressly provided that damages would be available for any petitioner who was deprived of rights existing under the Constitution.³³⁹ Writing for the majority, Justice Holmes explained that the law did more than take an easement to benefit the state house; rather, the statute benefitted the people of the state by saving the dignity and beauty of the city, and its narrow application to a few small tracts of land did not disqualify it

³³⁴ *Id.* at 46–47.

³³⁵ *Id.* at 53.

³³⁶ *Id.* at 54.

³³⁷ 59 N.E. 634 (Mass. 1901).

³³⁸ *Id.* at 634.

³³⁹ *Id.* at 635.

from serving a public goal.³⁴⁰ The question for the court, however, was whether the right to compensation was triggered only to the extent the statute exceeded the scope of the police power, or whether the right to compensation extended to everyone affected by the statute, regardless of the extent or lack of actual damage.³⁴¹ Holmes explained:

[t]he exercise of the police power always deprives a party of what would be his rights under the constitution but for [an adjudication that the public needs require the restriction of property rights without compensation]. The justification of a building law is not that it does not qualify or affect a right under the constitution; if that were the justification the petitioners would be entitled to nothing because no right of theirs would have been infringed. The justification is that although the law affects or even takes away such rights it may do so within reasonable and somewhat narrow limits upon considerations which the constitution cannot be supposed to have been intended to exclude.³⁴²

Justice Holmes, in this case, viewed the duty to compensate as tied to the existence or absence of a legislative declaration of public need, and not on some quantum of the magnitude of the restriction.³⁴³ As he explained, “[t]he right to build the seventy-first foot from the ground is just as much a right under the constitution as the right to build the sixty-ninth or the first. It may be of less importance, but it is the same in kind.”³⁴⁴

For Holmes, all property rights are constitutionally protected, but some infringements are too minor or too necessary for the public good to require an exercise of eminent domain and compensation. They are the price one pays to live in a civilized society. If the infringement is de minimis or the public interest justifies the infringement, then the harm is non-compensable and the government’s act is permissible under the police power and the regulatory harms fall outside the bounds of constitutional protection. For Nichols, however, only when a cognizable property right is directly taken for public use must eminent domain be exercised and compensation paid. If property is merely infringed or restricted, then the regulation is squarely within the police power and does not implicate eminent domain.

The subtle distinctions between Nichols’s version of property rights and Holmes’s version reflects the timeless and ever-shifting nature of balancing private property with the public welfare. Both Nichols and Holmes were writing in the height of the property-protectionist *Lochner* era. But Nichols

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at 635–36. In this case, the statute allowed for compensation when constitutional rights were deprived, but the legislature did not state that there was a public need for the legislation. *Id.* at 635. The court therefore held that compensation was due for the entire scope of the act, not just for the effects of the act that went beyond permissible police power limitations. *Id.* Expressing the discomfort with an interpretation that allowed government to regulate up to some hypothetical line without a duty to compensate under the police power, but then the duty to compensate kicks in for all regulations beyond that line, Holmes instead focused on the public need and not on the quantity of the restriction. *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

viewed the mis-steps of the era's embrace of robust private property rights as a result of politics and institutional pressures, while Holmes viewed property as static and only the government's justifications as the relevant variable in the constitutional analysis. For Nichols, property was a positivist creature of law that served public needs, while for Holmes property was an absolute. For Holmes, however, despite the belief that property rights were absolute, constitutional protections rose or fell with the importance of the government's interest and the extent of the effect of regulations on private property. For Nichols, private property served public ends only, and when private property rights are elevated at the public expense it was because of a dysfunctional political process. For Holmes, property rights are always affected by regulations, but balancing the public need and the private harms in light of important governmental goals was at the heart of his interpretation of the Constitution's property protections.

Throughout our history, there has been tremendous pressure on state courts to view property rights as fundamental, natural rights, as entitlements that could not be negatively affected without compensation even for consequential damage or devaluation caused by public works or by regulations. Yet despite the pressure, commentators and judges generally rejected the extreme view that consequential damages required compensation. And of course, if any consequential damages were going to be compensated, courts would have to draw a line between those that were direct enough to deserve compensation and those that were not. One of those lines appears to be between vested property rights, i.e., use rights currently being enjoyed, and those that were only speculative. Another line was between direct and consequential damages. A third was between affirmative government action pursuing active public works, and regulations that simply prevented certain harmful uses. A fourth was between government actions that resulted in invasion or destruction of property and those that simply resulted in inconvenience, or devaluation. In all of these cases, however, there was a strong recognition by judges and commentators that property is held at the will of the government, and that eminent domain is the right of the sovereign to determine when private property rights must give way to public needs.

As Thomas Cooley explained:

[a]ll these rights rest upon a principle which in every sovereignty is essential to its existence and perpetuity, and which, so far as when called into action it excludes pre-existing private rights, is sometimes spoken of as based upon an implied reservation by the government when its citizens acquire property from it or under its protection. . . More accurately, it is the rightful authority which must rest in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, convenience, or necessity may demand.³⁴⁵

³⁴⁵ COOLEY, *supra* note 326, at 524.

Thus, fundamental property rights, as pre-dating government or as consisting of strong natural rights was soundly rejected by many legal scholars of the nineteenth century as they acknowledged that sovereignty entails the power to define property rights and the power to reclaim them for public needs. This positivist understanding of property rights, although perhaps not uniformly accepted by political theorists, was the prevailing view of property by judges, lawyers, and commentators facing the great developments of the nineteenth and early twentieth centuries as each experiment with strong property rights failed.³⁴⁶

*C. Reinvigorate the Harm/Benefit Distinction in Nuisance and Rethinking
Lingle*

Another important aspect of rationalizing regulatory takings jurisprudence through revitalizing eminent domain and positivist property rights will be to reinvigorate the harm/benefit distinction from nuisance law that Justice Scalia undermined in *Lucas*. And although I am not one to disagree with torts scholars that nuisance law is a “wilderness’ of law,”³⁴⁷ a “mystery,”³⁴⁸ an “impenetrable jungle,”³⁴⁹ and a “legal garbage can”³⁵⁰ full of “vagueness, uncertainty and confusion,”³⁵¹ I do believe nuisance continues to serve as a viable and valuable legal tool. When Justice Scalia elided the benefit-conferring and harm-prevention aspects of nuisance, he essentially removed consideration in constitutional cases of all normative characteristics of particular property uses and the public purpose. He asserted that David Lucas building a home was just as valuable and innocent as his neighbors wanting better beach protection. But as a quick analysis of nuisance laws will show, there are land uses that inevitably impose harm on neighbors. Dumping sawdust into a river, excavating sand and gravel from the beach, cutting vegetation, dispelling surface water, emitting noise and effluent, and even expanding one’s hardware store to attract more shoppers are all uses of land that impose external harms on neighbors. Developments that worsen the effects of natural disasters, like floods and hurricanes, which cause untold damage to neighboring properties are nuisances, even if they also have positive externalities as well.

The problem with Justice Scalia’s elision of harm-prevention and benefit-conferring is that there are certain uses of private property that impose tremendous harms, even if they are also important and valuable uses. The cement plant, the brick factory, the slaughterhouse, and the pig

³⁴⁶ See Hulsebosch, *supra* note 11, at 974 (explaining that property rights were understood in relation to writs rather than an inherent right).

³⁴⁷ HORACE WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS: INCLUDING REMEDIES THEREFORE AT LAW AND IN EQUITY, at iii (3d ed. 1893).

³⁴⁸ Warren Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952) (quoting *Delaney v. Philhern Realty Holding Co.*, 280 N.Y. 461, 468 (1939)).

³⁴⁹ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 549 (1941).

³⁵⁰ William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942).

³⁵¹ *Id.* at 550.

farm are all valuable land uses, but they are also productive of great harm to neighboring lands. We cannot say that some uses are always and only bad and some are always and only good. In that sense, Justice Scalia was right. But the solution is not to give up the point, but to embrace the social utility balancing that is the heart of the police power. The social utility balancing of nuisance is precisely the right tool to determine whether the burdens of certain land uses outweigh the benefits and it represents the same ad hoc balancing the Court adopted in *Penn Central* and seems unwilling to renounce.

Reclaiming the viability of nuisance law does not require that we make perfect sense of the vagueness, uncertainty, and confusion of nuisance. What it does require is that eminent domain jurisprudence engage in a social utility balancing of private rights and public harms. If all land uses are deemed to be morally equivalent, as Justice Scalia claimed, then social utility balancing is impossible. However, the Court's 2017 decision in *Murr* affirmed the importance of balancing the benefits and burdens of public life.³⁵² It is necessary, therefore, to eschew strict formulas and per se rules and engage, instead, in thoughtful balancing of the harms that all land uses inflict. This balancing must be done with the public interest in mind for, as Cooley noted, sovereignty is the rightful authority to control private property for public benefit.³⁵³ To do so a court must consider the public benefit in weighing the constitutionality of private harms.

The Court's decision in *Murr* was a significant retreat from the per se rules of the conservative wing of the Court, undermining *Lucas*, and marking a possible retreat from the rigid property rights of modern regulatory takings. For if a court must consider multiple factors, like the treatment of the land under state and local law, the physical characteristics of the land, and the prospective value of the regulated land in order to determine a landowner's reasonable expectations,³⁵⁴ the court will be engaging in ad hoc balancing simply to determine the property being affected by a regulation or government action.³⁵⁵ More importantly, as Justice Kennedy explained, "[t]he inquiry is objective and the reasonable expectations at issue derive from background customs and the whole of our legal tradition."³⁵⁶ By viewing property rights within the context of our legal tradition, including the common law of eminent domain and nuisance, as well as the regulatory environment under which the property was acquired, a court can do precisely the social utility balancing that Justice Holmes identified in *Penn Coal* and which is necessary in non-appropriative eminent domain actions.

³⁵² *Murr*, 137 S. Ct. 1933, 1943 (2017).

³⁵³ COOLEY, *supra* note 326, at 524.

³⁵⁴ *Murr*, 137 S. Ct. at 1938.

³⁵⁵ This is precisely what Justice Blackmun predicted would result from the per se rule of *Lucas*. See *Lucas*, 505 U.S. at 1066 (Blackmun, J., dissenting) ("Either courts will alter the definition of the 'denominator' in the takings 'fraction,' rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect.").

³⁵⁶ *Murr*, 137 S. Ct. at 1945.

Moreover, the kind of balancing needed for a coherent law of eminent domain requires consideration of the public interest. Without the public interest on one side of the scale, private property rights become intransigent. As a result, the Court needs to rethink exactly what it meant in *Lingle*. Although I sympathize with the pickle the Court found itself in from too much blurring of due process and regulatory takings as a result of the language in the *Agins* test, simply excluding the public interest flies in the face of the common law's rich legal tradition. If the eminent domain cases show anything, it is that the public purpose of government action is a valid factor in any compensation analysis. Certainly, a purported public interest that in fact disserves the public good should be suspect, and regulations that serve only to deprive one of private property without any corresponding public benefit should make one pause. But in all of the eminent domain cases discussed in Part IV.A *infra*, the public interest was front and center. Roads, railroads, canals, navigable waterways, bridges, courthouses, and other public infrastructure clearly meet the constitutional requirement of a taking for public use. So too was preventing pollution, erosion of beaches, and destruction of wildlife habitat. Without a viable public interest requirement, it becomes very difficult to distinguish between taking private property for private use, which is never permitted, and taking it for a public use, which is permitted with compensation. And restricting property to avoid the harms of a nuisance also require a consideration of the public purpose of the restriction. Thus, distinguishing between unconstitutional government acts, constitutional acts that require compensation, and constitutional acts that are part of the benefits and burdens of modern life and therefore do not require compensation must consider the public purpose.

D. Require a Cognizable Property Right and an Act of Appropriation

The Court has struggled in considering what to do with regulations that devalue property or limit its use without entailing a physical invasion, appropriation of a cognizable property right, or a clear nuisance. But the nineteenth-century eminent domain cases make clear that vested property rights are a precursor to a regulatory eminent domain case.³⁵⁷ In the grey area between nuisance and vested property rights, mere regulations that do not actually appropriate private property for public use should be deemed, as Jed Rubenfeld argues, non-compensable.³⁵⁸ In order for a property claimant to receive compensation, she should be required to give up ownership of a legally-cognizable, marketable property right. And to illustrate why that should be a requirement, consider the hundreds of cases currently before the Court of Claims and the Federal Circuit regarding the railbanking statute.³⁵⁹

³⁵⁷ See *supra* note 261 and accompanying text.

³⁵⁸ Rubenfeld, *supra* note 26, at 1080.

³⁵⁹ See Danaya C. Wright, *Rails-to-Trails: Conversion of Railroad Corridors to Recreational Trails*, in 11 POWELL ON REAL PROPERTY § 78A.13 (Michael Allan Wolf ed., 2018).

The popular rails-to-trails program has generated hundreds of lawsuits and been found to require millions of dollars in compensation when a railroad corridor is converted to a recreational trail.³⁶⁰ But compensation is not due in all cases and, as I would argue, should not be due in hardly any. In certain situations, a railroad holds only an easement or a defeasible fee in its corridor, and private landowners own the underlying fee or a reversionary interest.³⁶¹ When a railroad then seeks to discontinue railroad operations and transfer its corridor lands to a trail group, it can *railbank* its corridor by seeking railbanking authorization from the Surface Transportation Board.³⁶² If the corridor is railbanked, it may be used for interim trail use, it is preserved for future rail reactivation, the railroad retains its common carrier obligations, federal regulatory jurisdiction remains over the corridor, and the adjacent landowners are precluded from regaining possession during the period of railbanking.³⁶³ The federal railbanking statute provides that state-law private property rights will be held in limbo during the period of railroad abeyance and interim recreational trail use.³⁶⁴ Thus, through a regulation governing the federal railroad regulatory authority, railroads have a choice of fully abandoning their corridors, in which case corridor land they do not own in fee becomes unburdened or reverts to private landowners, or they can railbank the corridors, in which case possession of the land remains

³⁶⁰ *Id.* at § 78A.02 (discussing many such cases).

³⁶¹ If the railroad holds only an easement, then someone else owns the underlying fee interest. But because railroad easements are exclusive, the underlying fee owner does not have access to or possession of that fee interest; the land will simply become unburdened upon termination of the railroad easement. *See id.* § 78A.06[2]. If the railroad holds a defeasible fee of some sort, as a fee simple on condition subsequent or a fee simple determinable, then the railroad has the present estate and someone else owns the future interest. *See id.* Usually that future interest is a reversionary interest (a power of termination or a possibility of reverter), that is triggered when the present estate terminates, allowing the future interest holder to acquire possession. *See id.* Unfortunately, many courts addressing the complicated issue of railbanking and trail conversion do not appropriately distinguish between the two kinds of interests and often refer to them collectively as “reversionary interests.” *See id.* Although for simplicity’s sake I also refer to the rights of landowners as reversionary rights, the legal effects and meaning of the two different categories can be quite distinct. *See id.*

³⁶² *See* Wright, *supra* note 359, § 78A.11[1].

³⁶³ 16 U.S.C. § 1247(d) (2012) states:

in the case of interim use of any established railroad rights-of-way . . . if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

The reason for passing the statute was to preserve these valuable railroad corridors for future rail service, utility placement, and interim trail use. *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 17–18 (1990). Congress provided the option to keep the corridors intact during a period of interim discontinuation and trail use, keeping open the option of future reactivation and thus postponing the abandonment of the corridors and the reversion of any private property rights in the corridor land. *See* Wright, *supra* note 359, § 78A.11[1].

³⁶⁴ *See* Wright, *supra* note 359, § 78A.11[1]. The railbanking statute was held to be a constitutionally permissible regulation under the Commerce Clause in *Preseault*, but Justice O’Connor stated in her concurring opinion that whether the statute works as a taking depends on how the property rights are defined under state law. *See* 494 U.S. at 23–24.

with the railroad or its grantee. Prior to the railbanking statute, railroads only had one option upon discontinuation: full abandonment and loss of possession of the corridor land.³⁶⁵

Some courts have described the railbanking process as a *taking* of the landowners' reversionary rights; others refer to it as a postponing of a non-vested future interest.³⁶⁶ In either event, the argument is that *but for* the statute giving railroads the railbanking option, a railroad that sought to abandon presumably would do so and the landowners would regain unencumbered possession. With the ability to railbank, landowners are precluded from exercising their reversionary property rights to regain possession of land within the abandoned rail corridor. This statute provides an excellent illustration of the incoherence of regulatory takings and how eminent domain would help solve the conundrum.

With the typical railbanked corridor, federal regulatory jurisdiction remains over the railroad corridor through the Surface Transportation Board's issuance of a Certificate of Interim Trail use.³⁶⁷ Because the STB did not authorize final abandonment, the private landowners may not claim possession of the corridor land and the corridor can then be transferred intact to a trail group, usually a state or county parks department or a highway department.³⁶⁸ When landowners successfully claim a regulatory taking of their reversionary rights in the railroad corridor, the United States pays compensation to the landowners but receives nothing in return.³⁶⁹ Landowners do not deed a property right to the federal government, nor is anything recorded down at the courthouse. Because the federal government receives nothing for its compensation, there is no property right it can transfer to the local trail group.³⁷⁰ Because the effect of the statute is to preempt the vesting of a future interest, there is no vested property right that is taken; the statute merely postpones the event that would trigger the landowner's right to possession.

This is not the place for a lengthy discussion of the intricacies of railbanking, which is provided in other articles.³⁷¹ Rather, the railbanking

³⁶⁵ See Wright, *supra* note 359, § 78A.03 (describing the mass abandonment of railroad lines before the rail-to-trail program).

³⁶⁶ Howard v. United States, 106 Fed. Cl. 343, 368 (2012); Macy Elevator, Inc. v. United States, 97 Fed. Cl. 708, 730 (2011). *But see* Lowers v. United States, 663 N.W.2d 408, 413 (Iowa 2003) (holding that the state's marketable title act extinguished the property rights before they could vest so there was no taking because the landowner had no property rights in the railroad corridor).

³⁶⁷ See Wright, *supra* note 359, § 78A.11[2].

³⁶⁸ *Id.* § 78A.11[1], [4].

³⁶⁹ *Id.* § 78A.11[1].

³⁷⁰ See *id.* (describing the railroad's retention of their rights throughout the railbanking process).

³⁷¹ See generally Wright, *supra* note 359, § 78A.11; Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Jurisprudence?*, 26 COLUM. J. ENVTL. LAW 399 (2001); Danaya C. Wright, *Reliance Interests and Takings Liability for Rail-Trail Conversions: Marvin M. Brandt Revocable Trust v. United States*, 44 Envtl. L. Rep. (Envtl. L. Inst.) 10173 (2014); Danaya C. Wright, *The Shifting Sands of Property*

statute illustrates why regulatory takings can be so incoherent and how a requirement that a vested property right be appropriated when compensation is paid would help solve the problem. Thus, if a regulation is so severe as to destroy or devalue a vested property right, then, as Justice Holmes admonished, eminent domain should be exercised, compensation paid, and a property right appropriated. A landowner who receives compensation for the pre-emptive effects of the railbanking statute, therefore, should have her reversionary interest condemned and a deed should be provided. Then, if the railroad or trail group later fully abandons the corridor, the landowner may not claim possession. If, however, the regulatory action merely postpones the triggering event, an event that is uncertain to occur anyway, and for which no one has a vested property right in its occurrence, then no protected property right has been taken and no compensation should be due.³⁷² The reversionary interest remains in the landowner and, when railbanking ends, and the corridor is permanently abandoned, the landowner may reclaim unencumbered possession.

In a situation like railbanking or the effects of marketable title acts,³⁷³ for instance, we should leave it to the landowner to decide whether to bring an inverse condemnation action for a mandamus, requiring the government to exercise eminent domain and appropriate the reversionary property rights, or to bring a suit for damages to their property rights from the expansion of the railroad use to a railroad and trail use.³⁷⁴ If the landowner

Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail-Trail Conversions, 38 ENVTL. L. 711 (2008).

³⁷² The common law typically distinguishes between vested property rights and contingent property rights, which is why the rule against perpetuities, for instance, does not work a taking; it terminates only contingent property rights. See DANAYA C. WRIGHT, *THE LAW OF ESTATES AND FUTURE INTERESTS: CASES, EXERCISES, AND EXPLANATIONS* 171 (1st ed. 2015) [hereinafter WRIGHT, *ESTATES*]. Marketable title acts, stale uses and reversions acts, and the rule against perpetuities all operate to terminate contingent future interests that serve only as a cloud on title. See *id.* at 137–71 (explaining how marketable title acts, stale uses and reversions acts, statutes of limitations, and other statutory mechanisms terminate contingent future interests). The railbanking statute operates in much the same way.

³⁷³ Marketable title acts were subject to takings challenges, but most survived so long as the rights destroyed were unvested, and the landowner had a suitable period to preserve her rights. See, e.g., *Texaco v. Short*, 454 U.S. 516, 531 (1982); *Biltmore Village v. Royal*, 71 So. 2d 727, 727–29 (Fla. 1954); see also WRIGHT, *ESTATES*, *supra* note 372, at 148–49.

³⁷⁴ The term *inverse condemnation* has been adopted by numerous modern courts to refer to regulatory takings, as though the government by regulation is doing the opposite of what it should do directly through eminent domain. See Michael Rikon, *Inverse Condemnation*, 67 N.Y. ST. B. J., Dec. 1995, at 28, 28. However, the term *inverse condemnation* was originally used to describe a private cause of action for mandamus to require a local government, or more frequently a railroad or other common carrier corporation, to initiate condemnation proceedings rather than simply trespass and enter land without tendering compensation. *Id.* Inverse condemnation referred to a condemnation action brought by the landowner not for compensation directly, but for a mandamus to require the state or private corporation to condemn and pay for the land they have taken. Roger A. Cunningham, *Inverse Condemnation as a Remedy for “Regulatory Takings”*, 8 HASTINGS CONST. L.Q. 517, 528 (1980–1981).

When land is damaged by a condemnation action, or a landowner suffers damages as a result of an eminent domain action, or the failure of the entity to initiate condemnation, an action for damages may be appropriate. But it is important to note that inverse condemnation is a cause of

does not bring suit within a reasonable period of time, her right to do so terminates, as is the case with marketable title acts and other statutes of limitations.³⁷⁵ We can think of railbanking and interim trail use as a taking of an additional easement for a recreational trail, or an expansion of the scope and burden of a railroad easement on the one hand, or as a taking of a reversionary right on the other. In the former, the damages are likely to be limited because the railroad easement is an exclusive possessory right in the railroad and the additional use is fairly insignificant.³⁷⁶ In the latter, compensation would be due for the taking of a contingent future interest, an interest that would normally have a fairly low value because it is not certain to ever vest.

I would also assert that without the exercise of eminent domain and an appropriation, the landowner retains her reversionary interest, but it is subject to evolving shifts in the legal definition of the events that trigger it. For as many courts have stated: no one has a vested right in a particular statutory scheme.³⁷⁷ The railbanking statute operates like the ubiquitous marketable title act and statute of limitation to modify the time allowed for, and the requirements of triggering events that cause, forfeiture of land. However, if compensation is paid, then the landowner gives up all claims to the railroad corridor land and provides a deed, to be recorded, and to indicate that the future possessory rights to the land now lie with the federal government. Then, the land office should convey those rights to whoever succeeds to the railroad's property rights in its corridor and that successor should not be liable, again, if the corridor land is used for other public purposes, like recreational trails or utilities.³⁷⁸ If the land is later abandoned, it would then revert to the government and not the private landowner who was already compensated for her future interest.

One of the many ironies of the incoherence of the regulatory takings doctrine in the context of railbanking is that landowners are paid compensation for the mere postponement in their contingent right to possession, but they are also compensated because a new recreational trail

action requesting the exercise of eminent domain, not a cause of action for damages as a result of regulatory action. *See* Kobach, *supra* note 2, at 1227 n.88.

³⁷⁵ WRIGHT, ESTATES, *supra* note 372, at 162–63. Marketable title acts operate to terminate contingent future interests in land that hamper marketability. Most acts have been held to be constitutional, even though they destroy property rights, either because the landowner has a sufficient opportunity to protect her property rights, or because the rights are deemed to be too contingent and therefore too speculative to be the subject of a taking. *See* WRIGHT, ESTATES, *supra* note 372, at 148–49.

³⁷⁶ In the case of commercial easements in gross (of which a railroad easement is a typical example), the easements are generally deemed to be freely transferable, divisible, and apportionable without consideration of the underlying fee owner's rights because the underlying fee owner does not have the right to joint possession of the land. *See* RESTATEMENT (FIRST) OF PROPERTY §§ 489–495 (AM. LAW INST. 1936).

³⁷⁷ *See, e.g.*, Moon v. N. Idaho Farmer's Assn., 96 P.3d 637, 646 (Idaho 2004); Burns v. Burns, 11 N.W.2d 461, 461 (Iowa 1943); The Port of New York Authority v. Heming, 34 N.J. 144, 155 (1961); Perez v. Marshall, 946 F. Supp. 1521, 1530 (S.D. Cal. 1996).

³⁷⁸ Kaseburg v. Port of Seattle, No. C14-0784 JCC, 2015 WL 6449305, at *5 (W. Wash. Oct. 23, 2015).

easement is imposed, above and beyond the railroad easement.³⁷⁹ However, since they do not have the present possessory rights in the land, it is difficult to see how the imposition of a trail easement burdens any property right they possess. Rationalizing the law of eminent domain, returning to Justice Holmes's admonition that eminent domain should be exercised, and requiring that a cognizable property right be appropriated if compensation is paid for a regulatory taking will help draw a line between appropriatory regulations and mere non-compensable land use restrictions that adjust the benefits and burdens of modern life.

If the Court were to return to a more robust sense of eminent domain to fill the gap currently occupied by its incoherent regulatory takings doctrine, there would have to be some parameters to avoid creating a similar incoherence. As state courts noted time and again, whether a regulation rises to the level of requiring eminent domain depended on the justification for the regulation and the effect on the property owner. To the extent the Court resurrects some analysis of the state's justification, despite *Lingle*, one can assume that this element would be fairly straightforward. The more difficult element, as it currently is with regulatory takings, is what property right is being affected. Without following the rabbit hole of conceptual severance and the denominator problem, the Court would need to rationally circumscribe its eminent domain jurisprudence. One way would be to require that when compensation is paid, some cognizable property right must be appropriated.

The Court has stated in its regulatory takings cases that the issue is not about what the government receives but rather what the landowner loses.³⁸⁰ That is backwards. If the government is paying compensation it must receive something. That something, as with all eminent domain actions, must be a recognizable property right, a property right that can be transferred by deed and can be recorded at the courthouse. Thus, fee title, a leasehold, an easement, a future interest, a servitude, or even a profit are all recognized property interests that have existed and been marketable for centuries. Mere limitations on use do not rise to the level of recognized property rights, for landowners do not have a vested property right in dumping sawdust into a river, removing sand and gravel from lands over which the public has a right of access, or inflicting external harms on neighbors through noise, air pollution, odors, and the like. Although requiring a cognizable property right and actually appropriating it may still yield some uncertainty at the margins, many regulatory takings puzzles could be easily resolved. For instance, limitations on how, where, and how high one can build on one's own land is not an appropriation of a cognizable property right except, perhaps, in New York City which has a market in transferable air rights.³⁸¹ Other regulatory

³⁷⁹ See Wright, *supra* note 359, §78A.13.

³⁸⁰ *Penn Central*, 438 U.S. 104, 137 (1978).

³⁸¹ CITY OF N.Y. DEP'T OF CITY PLANNING, A SURVEY OF TRANSFERABLE DEVELOPMENT RIGHTS MECHANISMS IN NEW YORK CITY 3 (2015), <https://perma.cc/3BLM-WU2E>. Thus, under an eminent domain approach, *Penn Central* might have been entitled to compensation although the ability to transfer its air rights may offset any compensation due. See discussion *infra* Part V.E. But

effects, like permit requirements, exactions, development limits, and the like would not be compensable because those regulations do not prohibit all uses and do not affect cognizable property rights.

E. Balance the Benefits and Burdens

Justice Holmes stated in *Penn Coal* that government hardly could go on if it had to pay for every change to the common law.³⁸² That philosophy has been a core principle of the common law since its origin. Behind that principle is a recognition that government provides benefits as well as burdens to property, liberty, and civil rights.³⁸³ With Bell and Parchomovsky's groundbreaking article in 2001, the recognition of givings has gained traction in takings scholarship although not so much in takings jurisprudence. Bell and Parchomovsky explored how government creates value all the time, yet only when it takes value do people complain and demand compensation.³⁸⁴ Yet, when Justice Holmes spoke of a reciprocity of advantage in *Penn Coal*, he was alluding to a long-standing principle of eminent domain that compensation should be reduced or eliminated if government action also provides substantial benefits. This idea, hotly contested in *Penn Central's* discussion of the role of transferable development rights,³⁸⁵ has not been adequately resolved and remains a subject of controversy in the Court's regulatory takings jurisprudence. We see it in *Horne v. U.S. Department of Agriculture*, when Justice Breyer dissented on the theory that the increased value to the Hornes' retained raisins should offset the costs of the raisins that were appropriated to maintain a stable market.³⁸⁶ It also appeared in the exactions cases, especially *Nollan v. California Coastal Council*, in the discussion of how the government benefit of being able to build a bigger and more valuable beach house should be offset against the burden of having to surrender a public beach easement.³⁸⁷ It is notable that only the liberal wing of the Court has argued that offsetting benefits belongs in the regulatory takings calculation, for the conservative wing rejects any linkages with the doctrine's origins in eminent domain.³⁸⁸

In the case of eminent domain, benefits from public works were routinely offset against the harms caused by disruptions to businesses or to land being appropriated. Where a railroad appropriated a strip of land

David Lucas would not be entitled to compensation as he still owns his land and can still profit from it. See *Lucas*, 505 U.S. 1003, 1031–32 (1991). The obligation to pay pension benefits in *Eastern Enterprises*, or to apply IOLTA funds for legal aid in *Brown* and *Phillips* do not involve cognizable property rights of the sort typically protected under eminent domain law.

³⁸² 260 U.S. 393, 413 (1922).

³⁸³ See Bell & Parchomovsky, *supra* note 244, at 578.

³⁸⁴ *Id.* at 550–51.

³⁸⁵ See 438 U.S. at 150–52 (Rehnquist, J., dissenting).

³⁸⁶ See 135 S. Ct. 2419, 2434–36 (2015) (Breyer, J., concurring in part and dissenting in part).

³⁸⁷ *Nollan*, 483 U.S. 825, 856–57 (1986) (Brennan, J., dissenting).

³⁸⁸ See, e.g., *Horne*, 135 S. Ct. at 2434–36; *Nollan*, 483 U.S. at 825, 856 (illustrating how liberal Justices like Breyer and Brennan argue that offsetting benefits belongs in the regulatory takings calculation, while it is absent in the conservative Justices' opinions).

through private property, courts regularly adjusted the compensation due to recognize that the addition of the railroad would often dramatically increase the value of the retained land.³⁸⁹

Thomas Cooley explained that the mere “benefit and protection [one] receives from the government are not sufficient compensation; for those benefits are the equivalent for the taxes he pays, and the other public burdens he assumes in common with the community at large.”³⁹⁰ However, when special benefits arise from government action, it is possible that compensation will be zero. Cooley explained:

When, however, only a portion of a parcel of land is appropriated, just compensation may perhaps depend upon the effect which the appropriation may have on the owner’s interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if in consequence it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damnified by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public use by the owners of lands, without any other compensation or expectation of compensation than the increase in market value; . . . It seems clear that, in these cases, it is proper and just that the injuries suffered and the benefits received, by the proprietor, as owner of the remaining portion of the land, should be taken into account in measuring the compensation.³⁹¹

The Court’s regulatory takings jurisprudence seems to have lost track of this important aspect of eminent domain, a feature that should be returned to its rightful place if the Court could turn back to the long-standing traditions of eminent domain. And ironically, where states modified their laws to adjust or eliminate this long-standing principle, it was only in the case of private corporations, like railroads, who were expected to compensate for the land without reference to the benefits accruing to the

³⁸⁹ *Upton v. S. Reading R.R. Branch Co.*, 62 Mass. (8 Cush.) 600, 600–01 (1851); *McIntire v. State*, 5 Blackf. 384, 384–85, 389 (Ind. 1840); *Little Miami R.R. Co. v. Collett*, 6 Ohio St. 182, 182, 185–87 (1856). As the century wore on, however, a number of courts ruled that private railroads could not offset benefits although public entities could. *See e.g.*, *Isom v. Miss. Cent. R.R. Co.*, 36 Miss. (7 George) 300, 313 (1858); *E. Tenn. and Va. R.R. Co. v. Love*, 40 Tenn. (3 Head) 63, 63 (1859); *Weckler v. City of Chi.*, 61 Ill. 142 142–43, 149–50 (1871).

³⁹⁰ COOLEY, *supra* note 326, at 559. *See Palmer Co. v. Ferrill*, 34 Mass. (17 Pick.) 58, 58, 64 (1835) (where “the respondent cannot give in evidence by way of set-off to the damage done to the land flowed, the consequential benefits resulting to the complainant from the erection of the dam, by reason of an increase of population, markets, schools, stores, and other improvements in the vicinity[,]” because “the supposed benefits arising from the increased general prosperity to a settlement . . . are too contingent, remote and indirect to be brought into consideration”).

³⁹¹ COOLEY, *supra* note 326, at 565.

landowner from the development of the railroad, and this occurred only in the later part of the nineteenth century.³⁹²

When Justice Holmes wrote of reciprocity of advantage, this offsetting of burdens and benefits is what he meant, for it was a common understanding of his day.³⁹³ Only when landowners faced unique or unusual burdens, not offset by any special benefits, would compensation be due. Certainly this occurred when all of a landowner's land was physically appropriated. And it could occur when the unique characteristics of land resulted in unique harms from regulation or from a partial taking.³⁹⁴ But where government action provided unique benefits, beyond the mere security of living in a society protected by the rule of law, then those benefits should offset the unique harms faced by property owners whose rights are taken or infringed to provide public benefits.

This principle operates in countless cases. Landowners whose land was flooded by a mill dam found their compensation offset by any benefits to them directly from the presence of the dam.³⁹⁵ Similarly, landowners whose land was taken for streets or canals would have the increased value offset against the harms of the taking.³⁹⁶ The same was true for railroads.³⁹⁷ And benefits are still considered today in eminent domain cases.³⁹⁸ Although courts are careful to exclude the negative effects the proposed project might inflict as a result of the announcement of the public project (the project-influence rule), they continue to offset special benefits.³⁹⁹ Yet the Court rarely discusses benefits directly in regulatory takings cases. This oversight has, I would argue, further intensified the conflicts and incoherence of the doctrine.

One might object that in the context of regulatory takings, offsetting benefits would be much more difficult because regulations tend to have general applicability and thus would yield generalized benefits. In many

³⁹² See JAMES ELY, RAILROADS AND AMERICAN LAW 189–94 (2001); see also NICHOLS, *supra* note 8, at 783–84.

³⁹³ In fact, when he served on the Massachusetts Supreme Court he wrote the opinions in *Smith v. City of Worcester*, 182 Mass. 232, 234 (1902), and *Sears v. Bd. of Street Comm'rs of Boston*, 180 Mass. 274, 278–79 (1902), which expressly offset benefits against the costs of government action.

³⁹⁴ See Abraham Bell & Gideon Parchomovsky, *Partial Takings*, 117 COLUM. L. REV. 2043, 2055–60 (2017).

³⁹⁵ See *Avery v. Van Deusen*, 22 Mass. (5 Pick.) 182, 182–84 (1827); *Palmer Co.*, 34 Mass. (17 Pick.) 58, 60–61 (1835).

³⁹⁶ See *In re Furman St.*, 17 Wend. 649, 659 (1836); *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch C.C. 599, 601 (1829); *James River & Kanawha Co. v. Turner*, 36 Va. (9 Leigh) 313, 318–19 (1838); *Jacob v. City of Louisville*, 39 Ky. (9 Dana) 114, 116 (1839); *Symonds v. City of Cincinnati*, 14 Ohio 147, 175 (1846) (dissenting strongly that benefits should not be offset).

³⁹⁷ See *M'Intire v. State*, 5 Blackf. 384, 387–89 (Ind. 1840); *Woodfolk v. Nashville & Chattanooga R.R. Co.*, 32 Tenn. (2 Swan) 422, 427, 436–37 (1852); *Greenville & Columbia R.R. Co. v. Partlow*, 39 S.C.L. (5 Rich.) 428, 437 (1852); *Milwaukee & Miss. R.R. Co. v. Eble*, 4 Chand. 72, 84–85 (Wis. 1851).

³⁹⁸ See *CED Properties, LLC v. City of Oshkosh*, 909 N.W.2d 136, 141 (Wis. 2018); *Borough of Harvey Cedars v. Karan*, 70 A.3d 534, 526–27 (N.J. 2013).

³⁹⁹ See, e.g., *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 151–52 (Tex. App. 2013); *Gomez v. Kanawha Cty. Comm'n*, 787 S.E.2d 904, 915–16 (W. Va. 2016).

respects, of course, that is the point. Where mere regulations simply devalue certain property but yield overall generalizable benefits, there should be no constitutional obligation to compensate. Only where there are special consequential damages as a result of unique harms that fall on a small number of landowners should compensation be an issue, and for those landowners the benefits of the regulation, if any, should be taken into account and offset against the harms of the regulation. For example, in the railbanking case, if the presence of a recreational trail adjacent to a landowner's home raises the market value of her home from its prior value with only an adjacent railroad track, then that increase in market value should be taken into account when considering just compensation. Assuming that railbanking takes a trail easement or takes the reversionary future interest, the value of those interests should be offset by any increase in the value of the remaining property.

It is illogical that benefits are not considered in the Court's regulatory takings jurisprudence when they are so clearly a factor in eminent domain. Thus, by requiring an act of eminent domain and an appropriation of a cognizable property right, courts can better determine what constitutes just compensation and move us beyond the incoherence of regulatory takings that look only at the harm to the property owner and not the regulation's benefits to the public or to the private owner. Only by looking holistically at all the effects can the true impact of a regulation be determined. And the fact that courts do so in eminent domain and not in regulatory takings highlights how courts got off the just compensation rails and illustrates how judges find it easier to strengthen private property rights and discount the public interest. Whether they favor private property rights because they are elected or because the narrative of government-as-Goliath speaks to a powerful constituency is not the question. The real question is how we get back to a coherent and historically grounded jurisprudence of eminent domain.

Hence, bringing the public interest back from the wrong turn the Court made in *Lingle*, reviving the harm/benefit distinction of nuisance, focusing on the sensible precedents from the law of eminent domain, and better addressing the benefits of regulations can help make the law of regulatory takings more consistent, historically accurate, and rational. Doing so can also help distinguish between government actions that balance the benefits and burdens of modern life and those that force some to bear burdens that, in all fairness, should be borne by the public at large.

VI. CONCLUSION

The history of regulatory takings, and the extensive and varied scholarship criticizing the doctrine from just about every angle, suggest that it may be time to give up on the experiment. It has been around for nearly half a century and we are no closer to a set of defining principles than we were in 1978 other than "I know it when I see it." "Justice and fairness" are laudable goals but they are not very predictable tools for governments trying to cope with excessive development, environmental degradation, climate

change, natural disasters, and a politically divided nation. So one solution would be to jettison the doctrine entirely and permit governments to regulate and limit property as they choose, subject only to rational basis scrutiny and compensation only when they appropriate title or physically invade land. This might appeal to some true originalists, but is not likely to appeal to the conservative wing of the Court which thinks that the modern regulatory state is out of control. Without a return to *Lochnerism*, they don't want to give up the only tool they have to rein in governments that gerrymander property rights.

Justice Thomas's admission, however, may presage that the smoke and mirrors of the regulatory takings doctrine is clearing. But the fact that there is no clear constitutional basis for the doctrine does not mean there is not a legitimate need to limit overzealous regulatory actions in some circumstances. Just as abolishing the Equal Protection Clause would not make everyone suddenly equal, abolishing regulatory takings doctrine will not make the fact of regulatory takings disappear. So after *Murr* one must ask: has the death knell been sounded and, if so, do we need to find an alternative mechanism (due process? equal protection? privileges and immunities?) to strike an appropriate balance between the interests of private property and the police power? If not, will regulatory takings continue to have vitality, despite its lack of constitutional pedigree and its use in overtly political ways? My solution is a return to a more robust and historically-grounded version of eminent domain, with a strong reliance on nuisance and a balancing of the public interest.

With the *Lochner*-era elevation of private property rights, the vocabulary of eminent domain was eventually dropped, as it was in *Penn Coal*, and the language of the Takings Clause focused on regulatory effects, not public benefits. Thus, the Court's decision in *Lingle* to entirely eradicate the public interest element in regulatory takings law was the final straw undermining the common law of eminent domain that prevailed in land-use regulation disputes for nearly two centuries. Going back to eminent domain—and embracing its ability to distinguish between regulations that do not require compensation and those that do—will recalibrate the public interest element while also recognizing that the long-standing common law doctrine of *sic utere* can provide appropriate protections for private property without descending to the constitutional quagmire of regulatory takings.

Like many commentators before me, I recognize the difficulty of reining in exuberant governments while forestalling gamesmanship by clever landowners who see the government as a deep pocket. Government can “go[] too far” in Justice Holmes's iconic phrase,⁴⁰⁰ and some constitutional brake must be applied. At the same time, landowners, like taxpayers, look for loopholes to minimize costs and maximize returns on their property. While the law permits such rent-seeking behavior, in most regulatory takings cases landowner freedoms and compensation come at the cost of other

⁴⁰⁰ *Pennsylvania Coal*, 260 U.S. 393, 415 (1922).

landowners who bear the brunt of excessive development, degradation of water supplies, over-use of public facilities and utilities, and very real harms from trespass and nuisance. If a landowner is compensated for restrictions to her property, that money comes from the public treasury and has an impact on everyone. Recalibrating the constitutional protections of property back to their due process and eminent domain elements can help us regain control of a constitutional doctrine that has no basis in the Constitution, works against the public interest, and has revived *Lochner*-era property protections that operate against the private property rights of the average taxpayer.