

THE MISTAKEN IDEA OF GENERAL REGULATORY TAKINGS

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INTRODUCTION

In the recent case of *Murr v. Wisconsin*,¹ the Supreme Court revisited its regulatory-takings doctrine,² apparently limiting the reach of that doctrine as established in *Lucas v. South Carolina Coastal*

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1. *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).
2. *See id.* at 1937-38.

Council.³ The decision drew two dissents, a lengthy objection by Chief Justice Roberts and a brief comment by Justice Thomas.⁴ Remarkably, given the fact that they were dissents and the prevailing view about the political alignments of their authors, both were based on premises that would undermine significant portions of the doctrine. Together with the majority opinion, which offered only a confused explanation of its own holding and of its reason for distinguishing *Lucas*, the case reveals a deep conceptual instability in the Court's regulatory-takings jurisprudence.⁵

This Article argues that "regulatory takings" is in fact two separate doctrines. The difference between the two depends on whether the alleged taking is a government action directed against a specific piece of property⁶ or an action that affects a significant number of properties in the same essential way.⁷ The requirement that

3. See *id.* at 1946-47; see generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

4. See *Murr*, 137 S. Ct. at 1950-57 (Roberts, C.J., dissenting); *id.* at 1957-58 (Thomas, J., dissenting).

5. This seems to be a matter of consensus among early commentators. See Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 70 (2017) (suggesting that the decision introduces "a bad variable . . . [into] the equation" for determining compensation issues); Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in Murr v. Wisconsin*, 11 N.Y.U. J.L. & LIBERTY 151, 215 (2017) (stating that the decision establishes "a facts-and-circumstances test that is all too malleable in individual cases and gives no guidance to landowners as to which regulations can be imposed without compensation"); Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, CATO SUP. CT. REV. 131, 139 (2017) (stating that the decision "replaces one of the few clarifying principles in the regulatory takings muddle" with a "subjective and unpredictable" test).

6. Of course, the government entity that carries out a specific regulatory taking, such as a planning commission or an environmental protection agency, will typically be authorized to act by some general provision of law. But the action itself, as carried out by the authorized entity, is directed against a specific piece of property. Virtually all the regulatory-takings cases, both general and specific, come from the states; thus, the nature of this authorization will be a matter of state law and is typically not subject to control by the federal constitution. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (endorsing the so-called Dillon Rule, which holds that local governments are creatures of the state); see generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

7. The distinction is a familiar one and has been discussed by commentators as an element or consideration of various prudential tests that have been proposed for determining whether government actions should be considered a compensable taking. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF

the government compensate property owners for specific regulatory takings relies on the Due Process Clause and on its dependent and subsidiary Takings Clause.⁸ It thus has a valid constitutional basis, although the extent of the government's obligation to compensate will depend on various additional factors.⁹

The second and smaller category of decisions, initiated by *Pennsylvania Coal Co. v. Mahon*¹⁰ and represented in modern law by *Loretto v. Teleprompter Manhattan CATV Corp.*,¹¹ *Lucas*, and now *Murr*, cannot rely on the Due Process and Takings Clauses as they are currently interpreted. The reason is that these clauses apply to procedures, that is, to government action against specified persons. To strike down regulatory laws of general application, a substantive principle, such as free speech or free exercise of religion, is required. Where property is concerned, the substantive principle cannot be found in the text of the Constitution.¹² Instead, that principle is substantive due process—the use of the Due Process Clause to extend protection to interests not identified in the constitutional text. Substantive due process is alive and well, of course; the Supreme Court recently relied on it, and indeed enthusiastically endorsed it, in

EMINENT DOMAIN 93-104 (1985); see also John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). The argument here is that the distinction, although supported by prudential considerations is primarily doctrinal. See *infra* Part IV. Its basic conclusion is that general regulatory action is not subject to the Takings Clause but rather a matter for the political process to determine. See *infra* Part IV.

8. U.S. CONST. amend. V.

9. The Fifth Amendment contains an additional requirement, which is that the property is being taken for “public use.” U.S. CONST. amend. V. This has been the subject of great controversy in recent years due to the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which allowed a local government to transfer property obtained through eminent domain to a private developer on the basis of the benefit to the community that the developer's project would produce. See generally Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). Public use is an independent requirement for a valid taking and thus lies outside the scope of this Article. The question does not arise in most regulatory-takings cases. But see generally Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077 (1993) (proposing to reinterpret the public use requirement to resolve uncertainties in takings doctrine by distinguishing between cases when the government impedes the owner's use of the property).

10. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

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

12. See Merrill, *supra* note 9, at 115.

Obergefell v. Hodges.¹³ But it no longer applies to economic interests, such as the general contours of property rights.¹⁴ That doctrine was definitively rejected in 1937,¹⁵ and there is no sign that it will be revived. In other words, the general regulatory-takings cases rest on the repudiated doctrine of economic due process.

To clarify, the term “property rights” often refers to the set of legal rights established by positive law.¹⁶ There can be little dispute that such rights are crucial for a modern economy and for modern people’s sense of well-being.¹⁷ Another possible meaning is that a person’s property cannot be taken away by the state except under specified conditions, specifically a showing that positive and generally applicable law has authorized such action or, in the absence of that showing, with compensation for the value of the taken property.¹⁸ That is the due process right that supports constitutionally imposed limits on specific regulatory takings. Although the scope of this right is open to debate,¹⁹ there can be equally little doubt that the right itself is

13. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (striking down state laws that restrict a person’s choice of spouse on the basis of gender). The Court might have decided the case on Equal Protection grounds, thereby avoiding reliance on substantive due process doctrine. Instead, it based the opinion on substantive due process, beginning with a ringing reaffirmation of it: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.” *Id.* at 2593.

14. See generally *United States v. Carolene Prods.*, 304 U.S. 144 (1938); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

15. See *Carolene Prods.*, 304 U.S. at 148; *W. Coast Hotel Co.*, 300 U.S. at 398.

16. See *Merrill*, *supra* note 9, at 115 (discussing how the Constitution does not create property rights).

17. See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 130 (2002) (discussing the long and contentious history of property rights in the United States).

18. See *Merrill*, *supra* note 9, at 115 (discussing the role of state law in defining takings for private use).

19. See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 120 (1995) (noting that governments often protect property rights, but courts must intercede where property owners are politically disadvantaged); see also EPSTEIN, *supra* note 7, at 102 (arguing that courts have permitted governments to interfere with many property rights that should be protected from diminution); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT’L REV. L & ECON. 125, 125 (1992) (using public choice analysis to conclude that legislators will typically compensate landowners, and that legal requirements simply add certainty and predictability); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L.

essential for anything that we would recognize as a just society.²⁰ But neither of these versions of property rights can support general regulatory-takings doctrine because the scope of both types of rights depends on positive law, either to create the legal right to property or to define the property to which the constitutional due process right attaches.²¹ General regulatory-takings doctrine operates as a limit or constraint on positive law.²² It invalidates certain positive laws that decrease the value of people's property and do not provide compensation for that loss.²³ Thus, it necessarily relies on the idea that there is a "right to property" that limits the reach of positive law when private property is being affected.²⁴

The impression that such a right exists in our legal system typically arises from the assumption that common law has independent authority: that it can, by its own force, constrain the power of the state to create, alter, or abolish property rights through positive law.²⁵ This was the basis for the *Lochner* Court's economic due process doctrine, which struck down a variety of Progressive Era enactments.²⁶ It possesses intuitive appeal because common law is in fact the source of traditional property law rules.²⁷ For some, it gains additional appeal from their hostility toward administrative governance, because that is the mechanism by which common-law property rules have been displaced. This assumption tends to be left unstated, however, because it is no longer an accepted legal doctrine. Economic due process doctrine is therefore incapable of generating a right to private property in the sense that would support the general regulatory-takings decisions.

REV. 1165, 1212-14 (1967) (arguing that the takings doctrine involves a balance of fairness and economic efficiency).

20. See *infra* Section II.B-III.A (discussing the scope and rationale of the Due Process Clause).

21. See Merrill, *supra* note 9, at 115 (discussing how property rights are defined by independent sources of positive law).

22. See Holly Doremus, *Takings and Transition*, 19 J. LAND USE & ENVTL. L. 1, 3 (2003).

23. See *id.* (discussing how takings claims operate).

24. See Fee, *supra* note 7, at 1004 (describing how takings law affects private property).

25. See *id.* at 1016 (discussing the role of the common law in takings jurisprudence).

26. See *id.* at 1027 (explaining that a court's decision must be grounded in a "consistent definition of private property" to avoid classification as *Lochnerian*); see generally *Lochner v. New York*, 198 U.S. 45 (1905).

27. See Fee, *supra* note 7, at 1016 (explaining the common law is the source of traditional property law).

A consequence of relying on the now repudiated right to economic due process is that the general regulatory-takings decisions that the Court has reached are incoherent.²⁸ Of course, many of the Court's decisions are subject to this criticism; given the high profile and controversial nature of Supreme Court cases, such criticism is probably inevitable. But in the general regulatory-takings cases, a specific type of incoherence can be identified—one that is directly related to their lack of any valid legal foundation.²⁹ This is the failure of the decisions to distinguish, in any principled or even comprehensible way, between property that is protected by the doctrine and property that is not so protected and thus can be reduced in value by positive law without requiring compensation for the owner. Because there is no right to property in the form on which the Court is necessarily relying, the distinctions that the Court has attempted to articulate between protected and unprotected property are built on sand and collapse when subjected to analysis.

Part I of this Article delineates the distinction between specific regulatory actions and general regulatory actions. Part II explains that constitutional restrictions on general regulatory actions are not based on any recognized constitutional right. Instead, they are a form of economic due process, a repudiated doctrine. Part III discusses some of the Court's best-known regulatory takings cases, specifically *Mahon*, *Loretto*, and *Lucas*, as well as *Murr*. It shows how these cases fail to distinguish protected from unprotected property and how that failure is attributable to the absence of any right that could support such a distinction. Part IV argues that abolishing general regulatory-takings doctrine should not be a cause of alarm or concern. The doctrine does not protect any type of property nor any group of people that we regard as meriting special solicitude.

I. THE DISTINCTION BETWEEN SPECIFIC AND GENERAL REGULATORY TAKINGS

The term “regulatory taking” typically refers to a government action that diminishes the value of a piece of property but does not transfer title or control of any portion of that property.³⁰ In *Tahoe-*

28. See Doremus, *supra* note 22, at 1.

29. See *id.* at 1-2 (explaining that even the Supreme Court recognizes the incoherence of takings doctrine jurisprudence).

30. The terminology is not precise. Some of the cases that involve compensable reductions in value involve government action that is in no sense regulatory. See, e.g., *United States v. Causby*, 328 U.S. 256, 262 (1946) (requiring

Sierra Preservation Council v. Tahoe Regional Planning Agency,³¹ the Court, in an opinion by Justice Stevens, distinguished regulatory takings from physical or direct takings and argued that different rules should apply to each category.³² The argument here, however, groups together physical takings and one type of regulatory taking, a specific taking, as types of government action that are eligible for compensation under the Due Process and Takings Clauses. It distinguishes them from general regulatory takings that are not eligible for compensation under any constitutional provision. The distinction, in other words, is based on doctrinal rather than prudential or economic considerations.

The prevailing test in current law for determining whether a regulatory taking has occurred, and thus whether compensation is required, was articulated by the Supreme Court in *Penn Central Transportation Co. v. City of New York*.³³ But the criteria established by this decision—generally called the *Penn Central* test—were formulated in the context of a specific regulatory taking and make sense only in that context. Most of the regulatory-takings cases that the Supreme Court has decided belong in this same category of specific takings. The *Penn Central* test and its various applications have been the subject of considerable controversy,³⁴ but that issue will

compensation when airplane landing patterns destroyed the value of a farm); see also *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 179 (1872) (requiring compensation when construction of a dam inadvertently flooded nearby land). The argument here does not depend on whether the taking is truly regulatory, however, but only whether it results from general or specific government action.

31. See generally *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

32. See *id.* at 321-30. The rationale for the distinction is, first, that direct takings involve a greater interference with property than regulatory takings and, second, that compensation for regulatory takings would constitute an excessive burden on land use planning and other public functions. See *id.* at 324; Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra's Distinction Between Physical and Regulatory Takings*, 34 *ECOLOGY L.Q.* 381, 384 (2007). For a critique of this distinction, see Fee, *supra* note 7, at 1026-27 (arguing that the distinction lacks “plausible textual legitimacy”).

33. See generally *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (setting forth a judicial test for regulatory takings).

34. See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *U. MIAMI L. REV.* 471, 471 (2002) (arguing test has produced widespread confusion); Doremus, *supra* note 22, at 7 (explaining that although the test has been repeated many times, the Court has “never refined the meaning of [its] factors, or explained how they should be weighed”); Steven J. Eagle, *The Four-Part Penn Central Regulatory Takings Test*, 118 *PENN ST. L. REV.* 601, 602 (2014) (arguing test is “a compilation of moving parts that are neither individually coherent nor collectively

not be addressed here. Instead, this Part will simply note that most of these cases are distinguishable from the smaller number of decisions that found general regulatory takings. The following Part will then explain why the specific regulatory-takings cases rest upon a valid constitutional foundation, regardless of whether they interpret that foundation correctly, while the general regulatory-takings cases lack any such foundation.³⁵

In *Penn Central*, New York City's Landmarks Preservation Commission, acting pursuant to statutory authorization, prohibited the Penn Central Transportation Company from utilizing the air rights above Grand Central Terminal.³⁶ The Court, in an opinion by Justice Brennan, explained the procedure by which the Commission issued its prohibition.³⁷ Commission staff identified the Terminal as meeting the criteria established by law for assigning landmark status to a structure.³⁸ The Commission then held a public hearing on the staff recommendation and, after the hearing, designated the Terminal as a landmark.³⁹ Several months later, Penn Central applied to the Commission for permission to use the air rights above the terminal to build a fifty-three or fifty-five story structure.⁴⁰ The Commission

compatible"); John D. Echeverria, *Making Sense of Penn Central*, 23 J. ENVTL. L. 171, 173 (2005) (explaining test is based on valid principles but needs to be revised); FISCHER, *supra* note 19, at 49-51 (maintaining test is so vague as to be of little use and makes no economic sense); Gary Lawson, Katherine A. Ferguson & Guillermo A. Montero, "Oh Lord, Please Don't Let Me Be Understood!": *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*," 81 NOTRE DAME L. REV. 1, 48 (2005) (describing how the test is reasonably successful in framing debate about regulatory impacts on property); Merrill, *supra* note 9, at 93 (arguing the test's reliance on totality of the circumstances "masks intellectual bankruptcy"); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CALIF. L. REV. 1299, 1316 (1989) (arguing test is vague and has been applied so inconsistently that it provides no comprehensible guidance); Poirier, *supra* note 17, at 100 (explaining that test allows for necessary flexibility regarding regulatory takings).

35. See *infra* Part II.

36. See *Penn Cent. Transp. Co.*, 438 U.S. at 108-09.

37. See *id.*

38. See *id.* at 110. The criteria, as quoted by the Court, are that the structure has "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." *Id.* While an area of the city can be given landmark status, these criteria, when applied to a single structure such as Grand Central Station, are necessarily specific to that structure.

39. See *id.* at 115-16. This decision was confirmed, as the law required, by the New York City Board of Estimate. See *id.* at 116.

40. See *id.* at 116-17. The application was filed by both the Penn Central Transportation Co. and UGP Properties, Inc., with whom Penn Central had entered into a renewable 50-year lease. See *id.* at 116. Both companies were appellants in the Supreme Court case. See *id.* at 118-19.

denied the request, stating that the proposed addition would destroy the historic character of the Terminal.⁴¹ As is evident from this cursory description, the entire procedure was an effort to determine the status of a specific building and displayed features such as a hearing and appeal that are associated with such individualized determinations.

In asserting its claim that the prohibition amounted to a taking, Penn Central repeatedly relied on the fact that its property had been “singled out” by the Commission,⁴² and Justice Rehnquist’s dissent began by using the same term.⁴³ In other words, Penn Central was not challenging the constitutionality of the Landmarks Commission itself, or the criteria that guided its decision, but rather was challenging the application of those criteria to its particular property. The Court conceded this point and denied relief on the ground that the Commission was not acting arbitrarily but according to the established criteria.⁴⁴ It began its explanation of the principles applicable to such criteria with a caveat: “[W]hether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstances [in that] case.’”⁴⁵ The Court then articulated its three-part test: “[t]he economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the government action,” particularly whether “interference with property can be characterized as a physical invasion by government.”⁴⁶ It

41. *See id.* at 117.

42. *Id.* at 131 (“[A]ppellants’ position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship . . . is to [provide] . . . compensation.”); *see id.* at 132 (explaining appellants claimed that landmark laws require compensation for economic loss because they “apply only to selected parcels.”); *id.* (discussing that appellants claimed that landmark designation is “arbitrary[,] or at least subjective, because it is basically a matter of taste’ . . . thus unavoidably singling out individual landowners for disparate and unfair treatment”); *id.* at 133 (explaining that appellants’ assert that “the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities”).

43. *Id.* at 138 (Rehnquist, J., dissenting) (“Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.”); *id.* at 140 (“Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings . . .”).

44. *See id.* at 130-35.

45. *Id.* at 124 (alteration in original) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

46. *Id.* at 124.

concluded that no compensation was required in the particular circumstances of the case, which included the owner's ability to use the building for its existing purposes and the possibility that some other use of the air rights might be approved by the Commission in the future.⁴⁷

The *Penn Central* test was thus designed to deal with the claim of a specific regulatory taking, that is, the air rights above a single building.⁴⁸ Whatever the value of this test when applied in such a specific situation, it is a bad fit when applied to general regulation. To begin with the initial caveat that the Court declared, "the particular circumstances" are necessarily of central importance in a specific regulatory-takings case because the scope and economic impact of the government's action will necessarily depend upon the effect of the regulation on the piece of property in question.⁴⁹ When the government enacts a general regulation, however, there needs to be some overall standard to determine whether it is valid against all the property owners to which it applies. In this context, the Court's insistence that particular circumstances control each potential challenge is not a recognition of reality but an admission of defeat.

Penn Central's three criteria are equally problematic when applied to general governmental action. The first, namely the economic impact on the plaintiff, sounds reasonable but suffers from an ambiguity. If it is essentially a synonym for the market value of the property, it is a correct, although perhaps overly simplified, statement of the law,⁵⁰ but then there would seem to be no reason not to utilize

47. *See id.* at 136-37.

48. *See id.* at 135-36.

49. *Id.* at 124 (quoting *Cent. Eureka Mining Co.*, 357 U.S. at 168).

50. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. L. REV. 677, 678 (2005) ("For all the disagreement and uncertainty in the rest of takings jurisprudence, compensation is considered straightforward; it is measured by the fair market value of the property taken."). In fact, there is a substantial amount of controversy about both the way that market value is to be determined and whether it provides a fair or efficient measure of value. *See* FISCHER, *supra* note 19, at 325-67 (noting various factors that affect the level of compensation); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 571 (1984) (using economic analysis to argue that compensation should be treated as a form of insurance against regulatory risk); Yun-chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation is Efficient?*, 20 SUP. CT. ECON. REV. 35, 38-39 (2012) (arguing that fair market value compensation is inefficient and should be supplemented by bonuses for residential owners, but that it is efficient for non-residential owners); Hanoch Dagan, *Taking and Distributive Justice*, 85 VA. L. REV.

the more familiar term. If it means that the existence of a taking will depend on how severely the property owner is affected, it seems incorrect. The right that the Takings Clause protects is not a right to suffer only limited damage from governmental action but rather a right to the value of the property that has been taken. Typically, just compensation means the market value of the property, whether the property is the sole asset of an individual or an infinitesimal fraction of a giant corporation's total assets. It would be a clear violation of current doctrine and, in fact, of our overall conception of legal rights, to deny compensation to a property owner on the ground that the owner is so wealthy that its loss of a particular property has little economic impact on it.

“[D]istinct investment-backed expectations” is also of questionable applicability when general governmental action is involved.⁵¹ In this context, it would create a formidable disincentive against changing public policy. It is one thing to take the owner's expectations into account when valuing a particular piece of property that the government has decided to appropriate, but it would be quite another thing to lock public policy in place by requiring compensation for the expectations of the market or the general public. Finally, the reference to invasion seems appropriate for transfer of title, the typical form of an individualized taking, rather than for general regulations, which can rarely be characterized in this manner. While some regulations might be regarded as physical invasions, many leave the property unaltered and simply restrict some future change or use.⁵²

The Court seems to have recognized the difficulty in applying the *Penn Central* test to general regulatory takings in *Lingle v. Chevron, U.S.A. Inc.*⁵³ The case involved a challenge to a state statute that placed limits on the rental amount that an oil company could charge its lessees who operated service stations.⁵⁴ The Court of Appeals sustained the challenge on the basis of language in an earlier case, *Agins v. City of Tiburon*.⁵⁵ In *Agins*, the Court rejected a claim

741, 743 (1999) (arguing for a progressive compensation approach that would incorporate considerations of distributive justice).

51. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

52. The exception is *Loretto*, where this language was at least conceivably relevant. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Its relevance may have been a factor in the Court's decision in that case. See *infra* notes 226-247 and accompanying text.

53. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 548 (2005).

54. See *id.* at 528.

55. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

that a zoning ordinance constituted a taking that required compensation but declared, in reaching its decision, that “[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”⁵⁶ The *Lingle* decision unanimously upheld the statutory rental limitation, thereby reversing the lower court, but also overruled or perhaps excised the “substantially advances” language used in *Agins*.⁵⁷ That language, the Court pointed out, was a reversion to *Lochner* Era jurisprudence, when federal courts used the Due Process Clause to assert that the constitutionality of generally applicable economic regulation depended on whether it served a legitimate public purpose.⁵⁸ Such an inquiry, the Court said, was, in fact, “derived from due process, not takings, precedents.”⁵⁹ The Court followed this principle in concluding that the “substantially advances” test, whatever its validity, had no relevance to takings doctrine.⁶⁰

Instead, the Court held, takings challenges, at least in the regulatory context, are to be evaluated by use of the *Penn Central* test.⁶¹ However, the Court declared there are “two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.”⁶² These are “where [the] government requires an owner to suffer a permanent physical invasion of her property—however minor,” as exemplified by the decision in *Loretto* and where the government enacts “regulations that completely deprive an owner of ‘all economically beneficial us[e],’” as exemplified by *Lucas*.⁶³ But “[o]utside these two relatively narrow categories,” the *Lingle* Court declared, the *Penn Central* test should control.⁶⁴ The Court was thus aware that its two leading general regulatory-takings decisions were in some sense anomalous. Further, in the course of writing an opinion that clearly distinguished between the Due Process Clause analysis of economic regulation—which it rejected—and the Takings Clause analysis of regulatory action—which it clarified—the Court limited

56. *Id.*

57. *See Lingle*, 544 U.S. at 548.

58. *Id.* at 540-42.

59. *Id.* at 540. The Court was referring to the idea that the compensation provided when property is taken by the state is an alternative to due process, not an aspect of it, as will be discussed below. *See infra* Section III.A.

60. *See Lingle*, 544 U.S. at 545.

61. *See id.* at 528.

62. *Id.* at 538.

63. *Id.* (emphasis in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

64. *Id.*

the scope of these anomalous decisions and endorsed the test it had developed in *Penn Central*.⁶⁵ What the Court failed to do is explain why it had recognized the exceptions, that is, why physical invasion and eliminating all the economic value of a property justified extending a doctrine derived from specific governmental action to general governmental action.

The *Lingle* Court was accurate, however, in stating that decisions requiring compensation for general regulatory takings are exceptional.⁶⁶ The great majority of regulatory cases that have required compensation, both before and after *Penn Central*, have involved specific action. Typical examples are: *Nollan v. California Coastal Committee*, where the property owner was required to grant an easement across beachfront property as a condition for receiving a permit to rebuild a house on the property;⁶⁷ *Kaiser Aetna v. United States*, where a developer that converted a private pond into a marina was required to grant public access to the marina as a navigable waterway;⁶⁸ and *United States v. Causby*, where routing airplane landings over a chicken farm destroyed the value of the farm.⁶⁹ In contrast, losses caused by regulatory action that affects groups of

65. See *id.* at 536–45.

66. See *id.* at 538.

67. See *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825, 827 (1987); see also *Koontz v. St. John’s River Water Mgmt. Dist.*, 570 U.S. 595, 611 (2013) (holding that granting a property owner permission to develop his property only if he paid for improvements unrelated to the property constituted a taking). The decision has been criticized as an extreme interpretation of the Takings Clause. See, e.g., *id.* at 626 (Kagan, J., dissenting); see also Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENVTL. L.J. 247, 290–92 (2015). In any event, this case also involves action taken against one specific property. See *Koontz*, 570 U.S. at 599.

68. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“The Government contends that as a result of one of these improvements, the pond’s connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”).

69. *United States v. Causby*, 328 U.S. 256, 259, 261 (1946). The distinction is particularly clear in this pre-*Penn Central* case. The Court, per Justice Douglas, noted: “The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain.” *Id.* at 266. But it went on to conclude that flights over private land constitute a taking if they are “so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.” *Id.* In other words, airplane noise that affects large groups of people is not a taking, however annoying, but distinctive damage to a particular property is a taking that requires compensation.

people are generally not regarded as takings and thus do not require compensation for any economic losses that the regulation causes.⁷⁰ Examples include a zoning law that decreases the economic value of all property within a given area,⁷¹ a welfare law that shifts child support payments from private parties to the government,⁷² and a restriction on mining coal in a way that would cause subsidence of the surface land above the mine.⁷³ The *Penn Central* court, however, confused this issue by citing, in support of its conclusion, holdings in cases challenging general regulatory action.⁷⁴ To be sure, the decisions

70. One other exception to the pattern of modern Takings Clause cases that limits the compensation requirement to individualized action is *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980). Upon learning that the firm it had purchased had debts greater than the purchase price, Eckerd's filed a complaint of interpleader in state court that named the purchased firm and its creditors and tendered the purchase price to the court. *See id.* at 156-57. The clerk of the court deposited the money in an interest-bearing account. *See id.* at 157. When the interpleader fund was transmitted to the receiver, the court retained, pursuant to statute, not only the prescribed court fee, but also the interest on the fund. *See id.* at 158. The Supreme Court held that the interest was private property and that the state court's retention of the interest constituted an uncompensated taking. *See id.* at 164-65. In an opinion by Justice Blackmun, the Court acknowledged that property is created by state law. *See id.* at 161. The court held that state law defined the interest as belonging to Webb's creditors. *See id.* at 164. Retaining the interest is "analogous to the appropriation of the use of private property in [*Causby*]." *Id.*

Causby, however, involved an individualized action. *See* 328 U.S. at 258. In *Webb's Fabulous Pharmacies*, the state court acted pursuant to statute. *See* 449 U.S. at 164-65. The action involved, however, has a sort of random, particularized feel to it; Webb's creditors were denied the interest because Eckerd's purchase price happened to fall into the control of the court, rather than being dealt with through some other mechanism. *See id.* at 156-57. In addition, the statute's operation may raise procedural due process concerns; it appears as a kind of penalty for making use of the judicial system. The possibility that these additional concerns led the Supreme Court to require compensation for action taken pursuant to a general statute is further suggested by its subsequent rulings in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 160 (1998) and *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 220 (2003). These cases concerned state legislation providing that interest on client funds that lawyers hold in trust can be taken by the state to support legal services when the amounts involved are too small to be conveniently returned to the client (so-called IOLTA programs). *See Brown*, 538 U.S. at 220; *Phillips*, 524 U.S. at 159-60. In *Phillips*, the Court felt compelled to follow *Webb's Fabulous Pharmacies* and hold that the interest was property, 524 U.S. at 172, but in *Brown* it declined to grant compensation because the clients had lost nothing of value. 538 U.S. at 240-41.

71. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926) (prohibiting industrial use of property).

72. *See Bowen v. Gilliard*, 483 U.S. 587, 605 (1987).

73. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501-02 (1987).

74. *See Penn Central Transp. Co.*, 438 U.S. at 124-28.

deny compensation, but they do so on a different basis than the denial in *Penn Central*, which, as just described, was an action taken against, or singling out, an individual property.

II. RESTRICTIONS ON GENERAL LAWS AFFECTING PROPERTY AS SUBSTANTIVE DUE PROCESS

A. The Absence of a General Right to Property in the Constitution

The Framers of the U.S. Constitution implicitly assumed that the rules regarding private property would be subject to the authority of government. Because the national government they were creating had only delimited or enumerated powers, and those powers did not extend to most legal relations among citizens, the Framers did not need to assert any general authority to determine property rules. But they did not hesitate to grant the national legislature plenary authority over property rights in those areas where they deemed national authority appropriate.⁷⁵ These included, at the least, interstate commerce, commerce with the Indian tribes, bankruptcy, copyrights, and patents.⁷⁶

In leaving most legal relations among citizens under the control of the states, the Framers were of course aware that these relations would be governed by English common law. At the time of the Constitutional Convention, the states had been exercising control over legal relations for over a decade and none had displaced the common law that the colonial courts had applied.⁷⁷ But the Framers were also aware that the states had full authority to enact legislation changing common law, and that this could include the rules regarding private property.⁷⁸ The Constitution that they drafted made no effort to place any restriction on state authority to do so.

This is a notable absence because the document contains a provision, Article I, § 10, that places an extensive series of other restrictions on the scope of state legislation.⁷⁹ It prohibits states from

75. See U.S. CONST., art. I, § 8, cl. 3-4, 8.

76. See *id.*

77. See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 79-81 (3d ed. 2005).

78. See *id.* at 167-81.

79. See U.S. CONST., art. I, § 10. There can be little question that ideas about natural law and natural rights were widely discussed among the Framers. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 185-98* (enlarged ed. 1992); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 288-338 (1996); Thomas C. Grey, *Origins of the*

entering into treaties, coining money, issuing bills of credit or paper money, passing ex post facto laws and bills of attainder, granting titles of nobility, imposing import or export duties, and waging war or maintaining troops in time of peace.⁸⁰ The Clause ventures into commercial matters as well by prohibiting states from passing any “law impairing the obligation of contracts,” a matter that will be discussed below.⁸¹ If the Framers had believed that there should be limits on the government’s authority to control and alter the common-law rules regarding private property, this was certainly the place to say it, but they declined to do so.

In fact, the original Constitution uses the word property only once. Article IV, § 3, Clause 2 states: “The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”⁸² It is notable that the original Constitution’s only reference to property is an assertion of governmental power, not a protection of private rights.⁸³

Reference to private property appeared in the Constitution when the Bill of Rights was added; the Fifth Amendment states that no person shall “be deprived of life, liberty, or property, without due process of law.”⁸⁴ This provision was based on English precedent; due process had been recognized as a constraint on governmental action for six hundred years, since Magna Carta.⁸⁵ Like the Bill of Rights in general, it was originally applicable only to the federal government,

Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843, 843 (1978); see generally LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007) (development of human rights concepts during the eighteenth century). But if the Framers thought that property rights belonged in this category, and merited special protection, one would expect to see that view reflected in the constitutional text.

80. See U.S. CONST., art. I, § 10.

81. See *id.*; *infra* notes 141-50 and accompanying text.

82. U.S. CONST., art. IV, § 3, cl. 2.

83. James Ely concedes this point in his spirited defense of private property as a constitutional norm. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 46 (1992) (the original Constitution contained “no language that broadly affirmed the right of property. Unlike many of the early state constitutions, the federal Constitution did not proclaim the natural right of property ownership”).

84. U.S. CONST. amend. V.

85. For the history of the document itself, see J.C. HOLT, *MAGNA CARTA* 78-79 (1992). For the historical background, see STEPHEN CHURCH, *KING JOHN: AND THE ROAD TO MAGNA CARTA* (2015). See also DAN JONES, *MAGNA CARTA: THE BIRTH OF LIBERTY* (2015). For its influence on American law, see A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968).

but it became the first Bill of Rights provision to be applied to the states through what became known as the incorporation doctrine.⁸⁶

As its language clearly indicates, the Due Process Clause does not create any rights to private property or place any restrictions on the government's ability to alter the rules by which property is created, transferred, or destroyed. What it says is that the government may not impose any disadvantage on an individual, including the deprivation of property that the individual possesses, in accordance with some other legal rule, unless it follows due process, that is, proper procedures.⁸⁷ Its appearance in Magna Carta predates the institution of jury trials in England by several months,⁸⁸ but that procedure, as it developed over time, became recognized as the model of due process.⁸⁹

The basic and generally familiar concept that underlies this provision is that the government, either by positive legislation or by delegation to other officials such as common law judges or administrative agencies, enacts general rules. Many of these rules subject groups of people to a restriction or a disadvantage: individuals who knowingly buy cocaine will go to prison, butchers must pay a special tax. The due process right then requires the government to use

86. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 237 (1897). The Court did not explain the doctrinal basis for its decision at the time but only in a subsequent opinion. See *Twining v. New Jersey*, 211 U.S. 78, 90-91 (1908). With respect to the other Bill of Rights provisions, see generally *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the Free Speech Clause). On incorporation generally, see AKHIL REED AMAR, *THE BILL OF RIGHTS 181-230* (2000) (arguing that the Fourteenth Amendment incorporates the entire Bill of Rights, but only some Bill of Rights provisions establish individual rights while others protect the states). See also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (arguing the Fourteenth Amendment was intended to incorporate the entire Bill of Rights).

87. See Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WISC. L. REV. 573, 585-86 (2013).

88. Magna Carta was promulgated in June, 1215. At the time, the ordinary mode of proof was the ordeal. See ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL 1* (1986). It was displaced as a result of the canons promulgated by the Fourth Council of the Lateran, which convened in November of that year. See *id.* at 1, 53. The reference to the "lawful judgment of his peers" in Chapter 39 probably refers to the procedure specified in Chapter 61, that is, the Court of Twenty-Five. See Holt, *supra* note 85, at 78-80, 327-31. The "law of the land" means the recently established common law. See *id.* at 328.

89. See, e.g., JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 1* (2003); FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, VOL 1*, at 144 -56 (1952) [1898].

specified procedures to demonstrate that a particular individual falls within the legally established group before it can impose the legally enacted disadvantage on that individual. The individual cannot challenge the general rule criminalizing cocaine on the basis of the Due Process Clause, but he can argue that he himself did not know that the nature of the substance that he purchased. The butcher cannot challenge the state's authority to impose the tax, but she can assert that she does not belong in the group subject to the tax, as defined by the taxing statute, because she sells only veggie burgers. Thus, the Due Process Clause is similar in effect to the Bill of Attainder Clause in Article I, § 10 of the original Constitution in that it forbids the government from enacting legislation that singles out an individual for disadvantageous treatment.⁹⁰

This understanding of the Due Process Clause was articulated in two Supreme Court cases, *Londoner v. Denver*⁹¹ and *Bi-Metallic Investment Co. v. State Board of Equalization*,⁹² ironically decided at the height of the *Lochner* Era. In *Londoner*, the City of Denver assessed a tax on property owners who benefitted directly from an improvement to the street on which their property was located.⁹³ The City declared, in effect, that each particular assessment was conclusive and declined to grant the property owners a hearing on whether the amount of the tax on each one had been assessed in accordance with the law.⁹⁴ The Supreme Court reversed, holding that denying them such a hearing violated the Due Process Clause.⁹⁵ A few years later, the State of Colorado enacted a law increasing the valuation of all taxable property in Denver by 40%.⁹⁶ In response to a claim that property owners had been denied a hearing that would enable them to contest the tax, the Court held that no hearing was required because the tax applied generally to all the property in Denver.⁹⁷ Writing for the majority, Justice Holmes declared: "General statutes within the state power are passed that affect the person or property of individuals,

90. See U.S. CONST. art. I, § 10.

91. See generally *Londoner v. Denver*, 210 U.S. 373 (1908).

92. See *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 443-44 (1915).

93. See *Londoner*, 210 U.S. at 373.

94. See *id.* at 374-76.

95. See *id.* at 386.

96. See *Bi-Metallic*, 239 U.S. at 443-44. There is, of course, the lurking worry that the issue would not have been so crisply decided had not these contrasting enactments involved the same city and the same area of law.

97. See *id.* at 445.

sometimes to the point of ruin, without giving them a chance to be heard.”⁹⁸

The distinction is strongly supported by the basic theory of representative democracy. Because they must be elected to gain or retain their positions, policy makers in a representative democracy need to be attentive to the views of their constituents. This enables groups of people to influence their representatives but also means that they must accept the possibility that other groups will be more influential and that the inevitable conflicts will be resolved in ways that they dislike. Individuals acting on their own, however, generally have no ability to exercise such influence. They cannot protect themselves if the legislature, or some other institution to which the legislature has delegated rulemaking authority, decides to single them out for disadvantageous treatment. Consequently, the Due Process Clause provides that when the government takes action that disadvantages the individual in some way, it must prove to some independent decision-maker that the person belongs to a general category on which the disadvantage has been imposed through the political process.⁹⁹

98. *Id.* The plaintiff’s claim was that it had not been given a chance to contest the validity of the forty percent increase. *See id.* at 443-44. It would have been entitled to a hearing if it raised a claim that involved the application of the increase to its individual circumstances—for example, that its property was located outside the boundaries of Denver. *See id.* at 444-45.

99. For a challenge to this approach, see EPSTEIN, *supra* note 7, at 93-104. *See also* RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY (2008). Professor Epstein argues that there should be no difference between taking one person’s property and taking many people’s. *See* EPSTEIN, *supra* note 7, at 94. In fact, he says, “the greater the numbers, the greater the wrong.” *Id.* The problem with this argument is that the change in the number of people affected is not simply a difference in scale but a different in kind. That is black letter constitutional law, having been established in the *Londoner* and *Bi-Metallic* cases and, as stated above, reflects basic democratic theory. Epstein’s argument applies if the Landmarks Commission in *Penn Central* had prohibited a series of specifically identified structures from using their air rights but not for a generally applicable law. Epstein continues: “What stamps a government action as a taking simpliciter is what it does to the property rights of each individual who is subject to its actions.” *Id.* That view, however, seems to depend on an a priori preference for property rights over democratic decision making, a view with neither doctrinal nor normative support, and one he never attempts to justify. He also argues that giving the government the power to reduce property values by general enactment may lead to bad public policy. *See* EPSTEIN *supra* note 7, at 263-82. That may be true in some cases, such as “spot zoning,” but it is a matter that we necessarily leave to democratically elected legislatures. A further argument is that general statutes may in fact be masquerades for individualized takings. EPSTEIN, *supra* note 7, at 101 That is in fact a problem, but it is the sort of problem that is appropriately referred to courts,

The Contracts Clause, one of the Constitution's Article I, § 10 restrictions on state governmental action, was almost certainly understood in similar terms at the time the original Constitution was drafted. It was designed to prohibit state legislatures from passing laws denying specified creditors the right to collect on a debt, a tempting type of enactment during the post-Revolutionary period in cases where the debtor was an influential citizen and the creditor a foreign speculator.¹⁰⁰ As such, it was also similar to the Bill of Attainder Clause, which appears immediately before it in § 10.¹⁰¹ Since the adoption of the Fifth Amendment shortly thereafter, it has been regarded as an attribute of the due process guarantee and thus governed by the same distinction that informs *Londoner* and *Bi-Metallic*.¹⁰² Even the *Lochner* Court understood it in this way, rejecting

which should strike down legislation that purports to be general but in fact is directed toward a single individual.

100. See RON CHERNOW, ALEXANDER HAMILTON 297-99 (2004); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 95-103 (1957). As Hammond notes, another way to achieve the same result was for these influential citizens to induce the state legislature to issue paper money that they could use to pay their debts. *See id.* at 96. Being general legislation, this practice would not have fallen under the prohibition of the Contracts Clause, and thus had to be prohibited by a separate provision in § 10 denying states the power "coin money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts." U.S. CONST. art. I, § 10.

101. See MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 439-40 (1966). According to Madison's notes for August 28, Rufus King, after the Convention had voted 8-1-1 in favor of language that would become § 10, proposed to add "a prohibition on the States to interfere in private contracts." *Id.* at 439. Gouverneur Morris objected: "That would be going too far. There are thousands of laws related to bringing actions—limitations of actions & which affect contracts . . ." *Id.* (emphasis added). After further colloquy, James Wilson responded: "*The answer to these objections is that retrospective interferences only are to be prohibited.*" *Id.* at 440 (emphasis added). Madison asked whether that was "*already done by the prohibition of ex post facto laws.*" *Id.* He then notes: "Mr. [John] Rutledge moved instead of Mr. King's motion to insert—'nor bills of attainder nor retrospective laws.'" *Id.* His motion carried, 7-3. *See id.* The Contracts Clause did not appear in the subsequent Committee on Style draft that Madison copied, *see id.* at 597, but—according to his notes again—it was added on September 14. *See id.* at 619.

102. The result is that the Court has almost invariably rejected challenges to legislation based on the Contracts Clause. *See* *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 506 (1987); *Energy Reserves Grp. v. Kan. Power & Light*, 459 U.S. 400, 410 (1983); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437-38 (1934).

a challenge to a state law that prohibited banks from foreclosing on mortgages once the law was enacted.¹⁰³

Another way to understand the status of property rights under the Due Process Clause is to compare the protection afforded to these rights with the Clause's protection of liberty. The Supreme Court clearly recognizes that rights best characterized as liberty can be created by state law and that such rights receive due process protection under the same rationale as state-created property rights.¹⁰⁴ But, in contrast to property, the Court has also recognized that liberty, unlike property, includes intrinsic rights possessed by all human beings and more specifically all citizens.¹⁰⁵ These include such essential freedoms as the right to move freely about, the right to choose one's place or residence, the right to choose one's intimate partners, and the right to give birth to and raise children.¹⁰⁶ In other words, liberty, unlike property, is not created by state law; it is a basic condition guaranteed by the Constitution.

This means that liberty must be defined by constitutional law. As in the case of property, the government may deprive citizens of their liberty under certain circumstances as long as it provides them with due process, that is, as long as it uses specified procedures to show that they belong in a legally defined category that has been determined, through the political process, to merit the imposition of a disadvantage.¹⁰⁷ But the intrinsic quality of liberty means that there are

103. See generally *Blaisdell*, 290 U.S. 398. This continues to be regarded as the leading case. It is typically stated as holding that the Contracts Clause applies only to existing contracts and not to future ones, a principle that is sufficient to decide the issue in the case. This is essentially equivalent to the singling out formulation, since the legislation could hardly single out an individual contract for disadvantageous treatment if that contract was not yet in existence.

104. See *Paul v. Davis*, 424 U.S. 693, 710 (1974) (liberty as well as property interests attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law"). The clearest examples of state-created liberty interests are prisoner's rights cases because they involve rights granted to individuals against the background of a justified deprivation of basic liberty. *E.g.*, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (state created parole system with definitive criteria creates a liberty interest); see also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (state-created good time credit program creates a liberty interest). However, the Court cut back severely on this doctrine in *Sandin v. Conner*, 515 U.S. 472, 501 (1995) in favor of an approach to prisoners' rights that focuses on intrinsic or constitutionally defined liberty.

105. See *Paul*, 424 U.S. at 701.

106. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2635 (2015) (right to choose one's spouse); *Saenz v. Roe*, 526 U.S. 489, 492 (1999) (right to travel); *Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (right to raise one's children).

107. See *Santosky*, 455 U.S. at 764.

also limits, arising from the Constitution itself, on the sorts of legally defined categories that the government may create.¹⁰⁸ This is the doctrine of substantive due process, which holds that the Due Process Clause, in addition to providing procedural protection for individuals, imposes substantive limits on general legislation through its concept of liberty.¹⁰⁹

Substantive due process presents difficulties because the constitutional text does not specify the elements contained in the term liberty.¹¹⁰ In reaction to the *Lochner* Era decisions, the Supreme Court has tried to combat this uncertainty by using other portions of the text, most notably the other Bill of Rights amendments, to give it content.¹¹¹ Ultimately, however, the Court has been compelled to recognize that the absence of at least certain elements of liberty from the text does not indicate an intent to exclude them but simply their lack of salience at the time the text was drafted or amended.¹¹²

A further indication of the difference between the Constitution's concept of property as a creation of state law and liberty as an intrinsic human right is provided by the final clause of the Fifth Amendment, which is of course the basis of the regulatory-takings doctrine.¹¹³ It

108. *See id.* at 756.

109. *See* United States v. Guest, 383 U.S. 745, 755 (1966) (right to travel).

110. *See id.* at 764.

111. Most notably, with respect to the constitutional right of privacy. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas, writing for the Court in a decision that struck down a state law prohibiting the distribution of contraceptives, began by declining to employ the substantive due process doctrine:

Overtones of some arguments suggest that *Lochner v. [New York]* . . . should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish* . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

Id. at 481-82. Instead, Justice Douglas said: “[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.” *Id.* at 484 (citation omitted). He then went on to identify the First, Third, Fourth, Fifth, and Ninth Amendments as the guarantees that formed this penumbra by their emanations. *See id.* A similar rationale was employed in a number of other decisions that grounded reproductive rights on the idea of constitutional privacy in *Roe v. Wade*, 410 U.S. 113 (1973) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

112. *Obergefell*, 135 S. Ct. at 2596 (“Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.”); *see* *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (describing the view that liberty includes choice of one’s intimate partner as an “emerging awareness”).

113. *See Obergefell*, 135 S. Ct. at 2633.

states: “[N]or shall private property be taken for public use, without just compensation.”¹¹⁴ This is, in effect, an alternative to due process.¹¹⁵ Instead of demonstrating that the individual whose property is taken is subject to such disadvantageous treatment because she belongs within a general, legally established category, the government, acting in its executive capacity, can simply take the individual’s property for a public purpose.¹¹⁶ Such action, of course, creates precisely the danger of oppression that the Due Process Clause is designed to prevent. In this case, however, oppression is avoided by providing the individual with monetary compensation for the loss of property.¹¹⁷ The market thus takes the place of the legislature, setting the value of the individual’s property independently of the particularized action.¹¹⁸ The individual may not appeal to the courts to contest the government’s right to take his property, so long as it meets the public use requirement, but may contest the government’s particularized assessment about what the property is worth.¹¹⁹

The availability of this alternative to due process rests on the principle that no one in modern society possesses unrestricted or “allodial” rights to property.¹²⁰ All property is subject to government

114. U.S. CONST. amend. V. As noted above, *supra* note 86 and accompanying text, this was the first provision of the Bill of Rights to be applied to the states. *See* *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234-35 (1897).

115. *See id.* at 235-36.

116. *See id.* at 229.

117. *See id.* at 229-30.

118. *See id.* at 237-38.

119. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984); *United States v. 564.54 Acres of Land, More or Less*, 441 U.S. 506, 511-12 (1979); Blume & Rubinfeld, *supra* note 50, at 569; Chang, *supra* note 50, at 71; Dagan, *supra* note 50, at 750; Serkin, *supra* note 50, at 712.

120. Such rights may have existed in Anglo-Saxon England, although this is a matter of debate. *See, e.g.,* TOM LAMBERT, *LAW AND ORDER IN ANGLO-SAXON ENGLAND* 296-306 (2017) (kings continued pre-existing private rights to land when expanding their territory); *see also* PAUL VINOGRADOFF, *THE GROWTH OF THE MANOR* 212-13 (1905) (property in land existed as a remnant of previous tribal arrangements); PATRICK WORMALD, *LEGAL CULTURE IN THE EARLY MEDIEVAL WEST: LAW AS TEXT, IMAGE AND EXPERIENCE* 313-32 (1998) (no private property rights to land existed; all land belonged to the king). The general view is that any such allodial rights came to an end with the Norman Conquest, when William I declared himself the allodial owner of all the land in England. *See* HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 440 (1983); NORMAN F. CANTOR, *THE CIVILIZATION OF THE MIDDLE AGES* 4 (rev. ed. 1993); R.H.C. DAVIS, *A HISTORY OF MEDIEVAL EUROPE FROM CONSTANTINE TO ST. LOUIS* 284-87 (2d ed. 1988); DAVID C. DOUGLAS, *WILLIAM THE CONQUEROR: THE NORMAN IMPACT ON ENGLAND* 265-316 (1967). This claim is also open to debate. *See* SUSAN REYNOLDS, *FIEFS AND VASSALS:*

control and thus to the government's power of eminent domain as well as its power to enact general rules.¹²¹ This was the understanding of the Takings Clause at the time of its enactment, as the historical scholarship of John Hart and William Treanor reveals.¹²² Because liberty is not subject to government control in the same way, there is no equivalent to the Takings Clause for liberty interests. The government may not incarcerate an individual it dislikes and compensate her for her loss of freedom, or compel an individual to carry out a particular task on the government's behalf and pay him the value of his labor, or prevent an individual from marrying the person of her choice and give her a nice house in compensation.¹²³ Here again,

THE MEDIEVAL EVIDENCE REINTERPRETED 48-53 (rev. ed. 1996) (arguing that even so-called allodial rights had always been subject to royal control).

121. See *Kirby Forest Indus.*, 467 U.S. at 9-10.

122. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1256 (1996) (colonial legislatures regarded as legitimate laws that restricted the use of land in order to achieve public purposes); John F. Hart, *Land Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1100 (2000) (legislatures in the period after independence engaged in extensive regulation of landowners' use of their property); Treanor, *supra* note 7, at 787 (Framers viewed the Takings Clause as protecting against political process failures, specifically seizure of land, slaves, and military supplies); see also J. Peter Byrne, *Ten Arguments for the Abolition of Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 91-96 (1995) (tracing the interpretation of the Taking Clause for the first century after its enactment). The argument that regulation of economic interests was neither unknown nor unaccepted in the early years of the nation has recently been buttressed by Jerry Mashaw. See JERRY MESHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 9 (2012).

123. This last example was arguably the law in England during the feudal era. Because a fief was regarded as a provisional grant of land by the king, given in exchange for loyalty and certain specific obligations, it was personal to the grantee. See MARC BLOCH, *FEUDAL SOCIETY* 318 (L.A. Manyon, trans., 1961). If the grantee died, his widow came into possession. But to allow her to marry whom she wished would be to place a person in control of the land who had not necessarily sworn allegiance to the king or undertaken the required obligations. See *id.* Consequently, the widow could only remarry with the king's permission. See *id.*; F.L. GANSHOF, *FEUDALISM* 143-44 (Philip Grierson trans., 1996); REYNOLDS, *supra* note 120, at 19 (questioning whether this rule was ever a reality). In any case, the abolition of this restriction, which became practical as general obligations of loyalty to the monarch took hold and mercenary armies replaced feudal levies, was provided for in Chapter 8 of Magna Carta. See HOLT, *supra* note 85, at 199-202. The significant point here is that a restriction which was originally part of the feudal law of property came to be perceived as a constraint on liberty, which is of course how we would regard it today. The distinction between liberty and property is thus a product of the privatization of property law that resulted from the growth of centralized royal administrations. It thus

our legal system distinguishes property from liberty and treats property rights as the product of government policy, not as intrinsic to the person's status as human being or citizen.

B. The Economic Due Process Doctrine of the *Lochner* Court

Although the conception of property as the product of state law is securely established in the Anglo-American system, and although it is embodied in the text of the U.S. Constitution, it has not been an easy principle for some people to accept. One feature of modern government that creates this difficulty is democratic rule. At least since Aristotle, the fear has been that the unpropertied masses will vote to transfer large amounts of valuable property to themselves or undermine the institution of private property in its entirety.¹²⁴ A second, and related, fear is that these masses will elect representatives who will impose extensive regulations on property in an effort to achieve various policies they favor.¹²⁵ This fear of administrative government, together with the related fear of unshackled democracy, became insistent during the Progressive Era.¹²⁶ Progressivism, a broad-based social movement,¹²⁷ was responding to the momentous transformations engendered by the growth of industrialism in the

predates the advent of democratic governance, although it was necessarily buttressed by that development.

124. See THE POLITICS OF ARISTOTLE 193 (Benjamin Jowett, trans., 1952).

125. See *id.* at xxxv.

126. See RICHARD HOFSTADTER, THE AGE OF REFORM 4 (1955); see generally JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890-1920 (1992); ERIC F. GOLDMAN, RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM (1952); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA (2003); NELL IRVIN PAINTER, STANDING AT ARMAGEDDON: THE UNITED STATES, 1877-1919 (1989); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

127. See, e.g., DONATELLA DELLA PORTA & MARIO DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION 59 (1999) (discussing the idea of social movements generally); WILLIAM A. GAMSON, THE STRATEGY OF SOCIAL PROTEST 455 (2d ed. 1990); ALBERTO MELUCCI, NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY 168-69 (John Keane & Paul Mier eds., 1989); SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS 143 (1994); ALAIN TOURAINE, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS 102-03 (Alan Duff, trans., 1981); Anthony Oberschall, *Social Conflict and Social Movements*, 52 SOCIAL FORCES 577, 578 (1974) (reviewing LOUIS KRIESBERG, THE SOCIOLOGY OF SOCIAL CONFLICTS (1973)).

United States¹²⁸—the advent of enormous industrial corporations, their development of factory-made consumer products, the mass marketing of these products to an enthusiastic but unwary public, the expansion of the urban working class needed to produce these consumer products, the harsh and impecunious conditions to which the workers were subjected, and the vast disparities of wealth between the workers and the new elite that owned and managed the industrial corporations.¹²⁹ Progressives chose to combat these problems in a variety of ways, but a leading strategy, and perhaps the dominant one, was to enact state and federal legislation that embodied consciously developed social policies.¹³⁰ Laws to protect workers from injury, enable or require them to earn sufficient wages, protect consumers from fraudulent or defective products, and improve living conditions in the burgeoning cities proliferated rapidly as Progressives gained political control.¹³¹ This legislation necessarily displaced the existing common law rules regarding property with a different and more restrictive legal regime.

In response, a number of Supreme Court Justices at this time settled on the idea that Anglo–American law embodied a basic right

128. See, e.g., SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT* 6 (3d ed. 1993); see also WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* 8 (1993); CHARLES R. MORRIS, *THE TYCOONS: HOW ANDREW CARNEGIE, JOHN D. ROCKEFELLER, JAY GOULD, AND J.P. MORGAN INVENTED THE AMERICAN SUPRECONOMY* 5 (2005); Glenn Porter, *Industrialism and the Rise of Big Business*, in *THE GILDED AGE: PERSPECTIVES ON THE ORIGINS OF MODERN AMERICA* 11 (Charles W. Calhoun, ed., 2007); W. Bernard Carlson, *Technology and America as a Consumer Society in 1870–1900*, in *THE GILDED AGE: ESSAYS ON THE ORIGINS OF MODERN AMERICA*, *supra* at 29.

129. There were related developments in agriculture. While production remained in the hands of individuals—the proverbial family farm—it shifted from subsistence farming to the production of cash crops. The marketing and distribution functions that necessarily accompanied this shift were controlled by large national corporations that paralleled the industrial firms. The Grange was a social movement that reacted directly to this situation, while Populism was a more general response to both agricultural and urban conditions. See CHAMBERS II, *supra* note 126, at 2-3; LAWRENCE GOODWYN, *THE POPULIST MOVEMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 8 (1978); MCGERR, *supra* note 126, at 4, 7; ROBERT C. MCMATH, JR., *AMERICAN POPULISM: A SOCIAL HISTORY 1877-1898* 5, 19 (1992); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE 1877-1917*, 14-17 (1999); Worth Robert Miller, *Farmers and Third-Party Politics*, in *THE GILDED AGE: ESSAYS ON THE ORIGINS OF MODERN AMERICA*, *supra* note 128, at 283.

130. See EDWARD L. RUBIN, *SOUL, SELF, & SOCIETY: THE NEW MORALITY & THE MODERN STATE* 11 (2015).

131. See *id.* at 15-16.

to private property and that Progressive legislation, if not properly crafted and carefully contained, could violate this right.¹³² With the emblematic decision in *Lochner v. New York*, they located this right in the Due Process Clause's protection of liberty, which they recognized as a term that, unlike property, must be defined by constitutional doctrine.¹³³ Anglo-American common law, they declared, establishes liberty of contract, the basic right of people to negotiate commercial agreements without government interference.¹³⁴ This then became the doctrine of substantive due process in the economic realm and the instrument that the Court deployed to protect private property rights.¹³⁵

132. See *Lochner v. New York*, 198 U.S. 45, 64 (1905).

133. See *id.* at 57.

134. Liberty of contract was explicitly identified as a property right. See *Adair v. United States*, 208 U.S. 161, 172 (1908); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

135. There is a substantial amount of recent scholarship about the economic due process decisions of the *Lochner* Era. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 23, 127 (2011) (arguing that the decisions were based on natural rights element of social contract theory); see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 19 (1993) (arguing that the decisions were based on skepticism about class legislation and a demand for government neutrality); PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 5 (1998); DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* 43 (2011) (arguing that the decisions were based on defense of liberty); NOGA MORAG-LEVINE, *CATCHING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE* 63–85 (2003); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1399 (2001); Robert C. Post, Lecture, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1495–96 (1998). A number of these works attempt to rehabilitate these decisions, arguing that they were based on important and defensible principles, rather than political preferences. As I have suggested elsewhere, however, these arguments fail to take account of the Commerce Clause decisions of the same era. E.g., *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918) (striking down legislation that prohibited interstate shipment of goods produced by child labor); see also *United States v. Butler*, 297 U.S. 1, 78 (1936) (striking down legislation that attempted to raise the price of agricultural products by inducing farmers to decrease production); *Carter v. Carter Coal Co.*, 298 U.S. 238, 316 (1936) (striking down legislation that that set maximum hours for coal miners); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935) (striking down legislation that established a pension system for railroad employees). These decisions rest on federalism grounds and are thus doctrinally unrelated to the due process decisions, but they have the same political valence. See Edward L. Rubin, *Lochner and Property*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY MASHAW* 398 (Nicholas Parrillo, ed., 2017).

The doctrine may have seemed plausible at the beginning of the Progressive Era because common law rules still predominated in American law, but it became both conceptually and politically indefensible as progressive legislation displaced common law with the administrative state. Ultimately, the doctrine was overturned by the Court in *West Coast Hotel Co. v. Parrish*¹³⁶ and *United States v. Carolene Products Co.*¹³⁷ In the same session that the Court decided *Carolene Products*, it decided *Erie Railroad v. Tompkins*,¹³⁸ which declared that in a diversity case, as opposed to a federal question case, there is no federal common law to apply. Instead, the federal judge must determine what the common law or positive law of the relevant state provides.¹³⁹ The decision thus recognizes that common law is merely state law established by legislative delegation to the judiciary rather than by legislative enactment.¹⁴⁰ By thus demoting common law, *Erie* refuted the underlying principle on which the economic due process cases were based, namely, the principle that common law is superior to positive law and that common law rights are included in the constitutionally defined liberty that the Due Process Clause protects.

136. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) (upholding state minimum wage law for women employees).

137. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 144 (1938) (upholding prohibition on sale of milk mixed with vegetable oil). For an illuminating account of this case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 397 (1987). Like the decisions they overruled, these decisions are often explained in purely political terms, as Justice Owen Roberts' "switch in time that saved nine." Here too, however, there is a revisionist account, in this case more convincing. Barry Cushman argues that the 1937–38 decisions were principled ones based on a gradually evolving understanding that the *Lochner* Court's distinctions between justifiable and unjustifiable economic regulation were incoherent. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 11-65 (1998).

138. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938).

139. See Gillian E. Metzger, *Ordinary Administrative Law as Common Law*, 110 COLUM. L. REV. 479, 495 (2010). Rejecting the existence of general common law does not mean that there is no federal common law, of course. Federal common law will exist in any circumstance where the federal courts have been authorized by Congress, explicitly or implicitly, to develop rules in an area subject to federal control. Such areas include labor law, the law regarding the commercial paper of the United States, and administrative law. One of the most famous non-constitutional cases of the past half century, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), can be regarded as federal common law.

140. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (state common law of defamation is state action subject to First Amendment restrictions); *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (state common law of contracts is state action subject to Fourteenth Amendment).

The 1937–38 rejection of substantive due process for economic interests was definitive. But the belief that common law property rights have constitutional status retained its normative appeal despite the explicit recognition of its invalidity. Without any clear justification, the Court maintained the belief that only rights created by common law were entitled to constitutional protection under the procedural aspect of the Due Process Clause; rights created by statute, it held, could not serve as a basis for constitutional protection.¹⁴¹ This distinction, the so-called rights–privileges distinction,¹⁴² was grounded in the *Lochner* Era substantive due process doctrine that the Court had rejected. While the Court no longer claimed that common law property rights were protected by substantive due process, there was never any doubt that they continued to be protected by procedural due process; that is, those disadvantaged by the government could not challenge the law establishing the disadvantage, but could challenge the application of that law to their particular situations.¹⁴³ The Court then committed the logical error of concluding that the inverse of this rule was also true, namely, if a right was not created by common law, then it was not protected by the Due Process Clause. The source of this error was the continued belief that common law had some sort of constitutional significance; even if it no longer was a source of substantive due process protection, it was still a precondition for procedural due process protection.

After two decades of cases that challenged this distinction, and a leading law review article by Charles Reich,¹⁴⁴ the Court finally recognized that the rights–privileges distinction was invalid.¹⁴⁵ Any

141. See *Flemming v. Nestor*, 363 U.S. 603, 610 (1960).

142. See, e.g., *id.* at 611 (denying due process protection for termination of government benefits); see also *Barsky v. Bd. of Regents*, 347 U.S. 442, 452 (1954) (denying due process protection for termination of government license); *Levine v. Farley*, 107 F.2d 186, 191 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 622 (1940) (denying due process protection for termination of government employment). The classic statement is by then-Judge Oliver Wendell Holmes in a state case, *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892): “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

143. See *Barsky*, 347 U.S. at 455.

144. See Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 740, 742 (1964); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1246 (1965).

145. See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970). In the majority opinion, Justice Brennan wrote: “[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be

substantial right, no matter what its source, merits due process protection. The purpose of the Due Process Clause is to protect typically powerless individuals from oppression, and taking away a person's welfare benefits or driver's license is just as oppressive as taking away her bank account or automobile. Thus, having grappled with Progressive, New Deal, and Great Society legislation for seven decades, the Supreme Court finally recognized the basic status of property in the Anglo-American legal system. As Justice Stewart, writing for the majority in *Board of Regents v. Roth*, declared: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" ¹⁴⁶

III. THE GENERAL REGULATORY-TAKINGS CASES

By the mid-1970s, it appeared that the conceptual confusion regarding property rights that had afflicted the Supreme Court since the beginning of the century had been resolved.¹⁴⁷ The Justices understood that property rights are entirely subject to state law in our legal system and thus to be determined by the political process, not the Constitution.¹⁴⁸ They further understood that common law is simply one form of state law, so that even if property rights are determined by judges through the common law, they remain subject to the political process and do not acquire constitutional status.¹⁴⁹ Finally, they understood that, with respect to property rights, the Due Process Clause imposes only procedural requirements on the treatment of individuals and that the constitutional protection that attaches to those requirements does not extend to the general rules by which property is created and structured.¹⁵⁰

But the willingness to accept these conclusions was diminished, perhaps by the torrent of regulatory law rivaling that of the Progressive and New Deal Eras that emerged during the 1960s and early 1970s in areas such as civil rights, environmental protection, and consumer

answered by an argument that public assistance benefits are "a *privilege*," and not a "right." *Id.* at 262 (emphasis added) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)) (emphasis in original).

146. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

147. *See id.*

148. *See id.*

149. *See id.* at 576-77.

150. *See id.* at 576.

protection.¹⁵¹ This dramatic development seems to have revived the age-old and only recently rejected concern that it would be dangerous to leave the rules regarding private property in the hands of a democratic populace or to allow that populace to empower regulatory agencies to protect its interests. Confronted with laws that seemed to impose particularly severe impacts on certain types of property held by private individuals, the Court extended regulatory-taking doctrine to generally applicable governmental law or regulations.¹⁵² As stated in the previous Part, this application of the Takings Clause requirement depends on the idea that there is a right to private property that limits such generally application actions.¹⁵³

The fact that there is, in our legal system, no such right has rendered these decisions incoherent. This Part shows the way in which the leading regulatory-takings decisions suffer from such incoherence and how it results from the absence of the right on which the decisions claim to rest. It begins with a discussion of *Mahon*,¹⁵⁴ the seminal case,

151. See generally Endangered Species Act of 1973, 16 U.S.C. § 1531 (2012); Truth in Lending Act of 1968, 15 U.S.C. § 1601 (2012); Voting Rights Act of 1965, 52 U.S.C. § 10301 (2012); Magnuson-Moss Warranty Act of 1975, 15 U.S.C. § 2301 (2012); Federal Water Pollution Control Act of 1972, Pub. L. 92-500, 86 Stat. 816 (1972); Clean Air Act of 1966, Pub. L. 89-675, 80 Stat. 954 (1966); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); RANDALL WOODS, *PRISONERS OF HOPE: LYNDON B. JOHNSON, THE GREAT SOCIETY, AND THE LIMITS OF LIBERALISM* (2016); JULIAN E. ZELIZER, *THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY* (2015).

152. See Schwartz, *supra* note 67, at 248 (arguing that the doctrine of regulatory takings is not supported by any mode of constitutional interpretation and instead rests on a preference for a laissez-faire political economy). The argument here is different in that it maintains that only restrictions on general regulatory-takings lack constitutional foundation. See *id.* at 270-71. Restrictions on specific regulatory takings, it is argued, are justified by the Due Process Clause and its conjunction with the Takings Clause. See *id.* But the particular way in which the Takings Clause has been interpreted in some of the specific regulatory-takings cases in fact seems to suffer from some of the interpretive problems that Professor Schwartz identifies.

153. See *supra* Section II.A.

154. See generally *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). The *Penn Central Transportation Co. v. City of New York* Court also identifies *Mahon* 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.’” *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978). General discussions of regulatory takings doctrine typically begin with *Mahon*. See generally FISCHER, *supra* note 19; Byrne, *supra* note 122; Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

and proceeds to the two leading general regulatory-takings decisions as identified by *Lingle*, namely *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁵⁵ and *Lucas v. South Carolina Coastal Council*,¹⁵⁶ then discusses the Court's recent modification of *Lucas* in *Murr v. Wisconsin*.¹⁵⁷ The basic doctrinal defect of general regulatory-takings doctrine is described in the preceding Part; this Part shows how that defect is reflected in the Court's leading efforts to deny it.

A. *Pennsylvania Coal Co. v. Mahon*

In *Mahon*, a mining company had conveyed the surface rights to a property it owned but expressly reserved the right to mine coal underneath.¹⁵⁸ The owner of the surface rights, who had built a residence on the land, sought to prevent the company from exercising its contractual right to extract the coal on the basis of a state statute that forbid mining that would cause the subsidence of a private residence above the mine.¹⁵⁹ After conceding 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,” the Court noted that the effect of the government's regulation in this case was to destroy the entire value of the mine.¹⁶⁰ Such regulation “goes too far,” it concluded, and thus should be “recognized as a taking” for which compensation must be paid.¹⁶¹

This decision was handed down at the height of the substantive due process era, and there is thus nothing particularly surprising about its result. The Court was applying its principle that there is a right to private property that acts as a constraint on positive law—that is, a right that limits the circumstances and extent to which a democratically enacted law of general application could reduce the value of private property.¹⁶² For the most part, it located this right in the substantive meaning of the Due Process Clause. Thus, the Court

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

156. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

157. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1937-39 (2017).

158. See *Mahon*, 260 U.S. at 412.

159. See *id.* at 412-13.

160. *Id.* at 413, 419.

161. *Id.* at 415.

162. See BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 114 (1977) (identifying the *Mahon* decision as substantive due process); see also Schwartz, *supra* note 67, at 248 (stating entire regulatory-takings doctrine is based on laissez-faire policy).

held in contemporary cases that the state could not, through general legislation, limit the price a company charged for theater tickets,¹⁶³ prohibit a company from using rags to stuff mattresses,¹⁶⁴ or stop a company from selling ice unless it obtained a license.¹⁶⁵ If the state wanted to achieve these results, it was required to treat the reduction in value as a taking and compensate the property owners for their loss.¹⁶⁶ In *Mahon*, the Court held that the state could not prohibit a company from mining in a way that would produce surface subsidence unless it treated the reduction in value in this same way.¹⁶⁷

What was surprising about *Mahon* was that the opinion was written by Justice Oliver Wendell Holmes, generally an opponent of substantive due process doctrine,¹⁶⁸ as well as the author of the *Bi-Metallic* decision.¹⁶⁹ For this reason, subsequent courts have treated it with respect, rather than dismissing it as they do other such decisions from the *Lochner* Era. But the *Mahon* decision, despite its honored authorship, belongs securely in this disfavored category.¹⁷⁰

163. See *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 442-43 (1927).

164. See *Weaver v. Palmer Bros.*, 270 U.S. 402, 409, 415 (1926).

165. See generally *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

166. The principle was well established prior to the *Lochner* Era. See *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178 (1872) (discussing inadvertently flooding a particular piece of land when building a dam is a taking that requires compensation).

167. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

168. Most famously in the emblematic *Lochner* case, where he wrote: “This case is decided upon an economic theory which a large part of the country does not entertain The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York*, 198 U.S. 45, 75 (1905).

169. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 443 (1915).

170. Holmes was undoubtedly a great judge, but his decisions do not preclude criticism. He shifted his interpretation of the clear and present danger test that he had developed in the Court’s first free speech decisions, see *Frohwerk v. United States*, 249 U.S. 204, 205-06, 210 (1919) (Holmes, J.) (criticism of American entry into World War I is not protected speech); *Schenck v. United States*, 249 U.S. 47, 47-52 (1919) (Holmes, J.) (circulation of a leaflet opposing military conscription as a form of involuntary servitude is not protected speech), and later conceded that his earlier interpretation had been in error. See DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 279-97 (1997); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 192-211 (2004); David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1208-09 (1983). His opinion in *Buck v. Bell*, 274 U.S. 200, 205 (1927), allowing a possibly impaired woman to be sterilized, is now regarded as an error and a disgrace. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* 117-22, 401-02 (expanded ed.

Examination of the opinion suggests one possible reason why Justice Holmes diverged from his usual position regarding regulation. It seems that he was approaching the case as if it involved government action directed toward a single piece of property. He began the opinion by describing the contract between the coal company and the home owner, pointing out that “[t]he deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal.”¹⁷¹ He continued: “[P]laintiffs say that whatever may have been the Coal Company’s rights, they were taken away by an Act of Pennsylvania.”¹⁷² All these statements are accurate, but the phraseology seems to imply that the statute was directed to this specific contract, an impression supported by Holmes’ following statement that “the statute is admitted to destroy previously existing rights of property and contract.”¹⁷³

Holmes concedes that the state was imposing the prohibition on the coal company pursuant to a general statute and that many such statutes diminish the value of private property.¹⁷⁴ But then he wrote: “This is the case of a single private house.”¹⁷⁵ It was not, of course; the case affected the status of every private house in Pennsylvania that came within the terms of the statute. Holmes continued: “A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public.”¹⁷⁶ The difficulty with this is that many private actions that endanger public health affect people one at a time. It is true that a law regulating a factory’s release of noxious gas clouds protects against a danger that would afflict a mass of people simultaneously, but a law regulating a factory’s production of a poisoned medicine protects against a danger to each individual consumer at the time she takes the pill.

2012); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 1-6 (2014); PAUL LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 157-84 (2008); VICTORIA NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 29-31 (2008).

171. *Mahon*, 260 U.S. at 412.

172. *Id.*

173. *Id.* at 413.

174. *Id.* (“Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

175. *Id.*

176. *Id.*

Perhaps Holmes went off track at this point because he reverted to the idea that the government action in question was directed against a single individual, stating that the statute “purports to abolish what is recognized by Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.”¹⁷⁷ He then continued with a statement that sounds like a counterfactual but seems to embody his actual view of the case: “If we were called on upon to deal with the plaintiff’s position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.”¹⁷⁸ According to archival research by Joseph DiMento, Holmes’ original draft of the opinion ended with this statement and a “short comment about the usual deference due the legislature.”¹⁷⁹ He only included his further discussion of the statute’s general reach on the urging of Chief Justice Taft, and he did so by reluctantly conceding that “the case has been treated as one in which the general validity of the act should be discussed.”¹⁸⁰ It was in this subsequently added discussion that he made the famous or notorious statement that “if regulation goes too far, it will be recognized as a taking.”¹⁸¹

The basic problem with *Mahon* is that it enforces a right that was the basis of the economic due process doctrine that the Court has subsequently repudiated. Holmes, who generally rejected that

177. *Id.* at 414. The phrase “recognized in Pennsylvania as an estate in land” is presumably a reference to common law. *Id.* Here, again surprisingly for Holmes, is the theme that runs through many of the general regulatory-takings cases, which is that common law exists independently, as apparently in some higher plane, from the other laws established by the state. See *infra* notes 263-270 and accompanying text, Section II.B.

178. *Mahon*, 260 U.S. at 414.

179. Joseph DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396, 406 (1990). Moreover, the draft stated that the case was not one “of streets used by the public or other matters of immediate public interest.” *Id.*

180. *Mahon*, 260 U.S. at 414. Professor DiMento concludes that the “[o]pinion grew from one perhaps over-hastily drafted and of limited application (to an individual private citizen) into one which is a lodestar in the law of regulation of property.” DiMento, *supra* note 179, at 419.

181. *Mahon*, 260 U.S. at 415. He went on to concede: “It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule.” *Id.* Criticism of this case often focuses on the intrinsic vagueness of this formulation. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 84 (1981); see also Byrne, *supra* note 122, at 102-06; Rubinfeld, *supra* note 9, at 1111-14; Rose, *supra* note 154, at 566-70; Sax, *supra* note 7, at 37.

doctrine, was willing to write an opinion that reached the same result because he somehow saw the case as involving government action against an individual piece of property, and thus depending on the genuine right to just compensation. But that view of the facts is unsupportable; the decision strikes down a generally applicable statute for no other reason than its intrusion upon private property. As such, it lacks a legal basis.

It is this lack of a valid underlying right, rather than the vagueness of the “goes too far” formulation, that produces the decision’s incoherence and the inability of subsequent cases to make sense of it.¹⁸² It reifies the adventitious configuration of the property in question, a problem that cannot be solved by clarifying or elaborating the “goes too far” formulation.¹⁸³ For the purposes of the due process right to liberty, the boundaries of a person are fixed; every person has exactly one body, and a deprivation of liberty means an action that involves that body and nothing else. Property, however, can be increased, decreased, combined, or divided to a virtually unlimited extent; the mine might well have extended under agricultural land as well, in which case the statute would only have eliminated a fraction of its value and would not, according to the Court’s own explanation, go “too far.”¹⁸⁴ In other words, the implicit right to property that the *Mahon* case creates seems to rely on a naïve, almost fetishistic idea that the right in question belongs to the property itself rather than its owner, that is, the idea that a particular physical object is entitled to constitutional protection. If that were true, it could readily have served as the basis for the Court to fashion a “too far” jurisprudence; the problem is that it is false.¹⁸⁵

B. *Loretto v. Teleprompter Manhattan CATV Corp.*

Loretto, the first major general regulatory-takings decision after *Mahon*, involved a challenge to a New York State statute that required owners of rental property to allow the installation of cable television

182. *Mahon*, 260 U.S. at 415.

183. *Id.*

184. *Id.* This can be regarded as a version of the “denominator” problem that became apparent after *Lucas*. See *infra* Section IV.A. In terms of *Mahon*’s facts, one manifestation of the problem is the possibility that the mine owner could compel the government to compensate it for the law’s effect on a mine that did not eliminate the total value of the mine by creating two separate legal entities, one of which would hold the part of the mine under the residential area while the other held the under the part under the farmland.

185. *Mahon*, 260 U.S. at 415.

equipment (cables and junction boxes) on their property.¹⁸⁶ Loretto, the purchaser of a property in which this equipment had already been installed, argued that the statute constituted a taking that required compensation by the state.¹⁸⁷ In an opinion by Justice Marshall, the Supreme Court concluded “that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”¹⁸⁸

Given that *Loretto* was decided in 1982, rather than 1922, the result is genuinely surprising.¹⁸⁹ A large category of property owners in New York State were required by a democratically enacted state law to comply with certain regulatory requirements that affected only their economic interests and had no impact on their personal liberty.¹⁹⁰ This is a standard type of enactment in an administrative state, one that imposes obligations on commercial property for the protection or benefit of a public that depends, for many of its necessities and amenities, on commercial establishments of various kinds. Loretto was not claiming that her particular property was incorrectly subjected to the statutory requirement; if she had advanced that claim, she would of course have been entitled to due process procedure to resolve it. Rather, her claim was that the statute itself constituted a taking of property from all the rental buildings that were subject to its requirements.¹⁹¹

The efficiencies and equities of the New York statute can be debated; to do so, however, would reiterate the extensive debate about takings law in its entirety. None of this should matter in the case of a general regulatory enactment like the statute in *Loretto* because courts stopped imposing constitutional limits on the efficiencies and equities of such enactments in 1937. Perhaps it was the distinctive facts of the *Loretto* case that were responsible for its anomalous result. First, the cable equipment at issue was installed by a private company, rather than by the property owner pursuant to regulatory instructions.¹⁹² Second, the equipment, at least initially, did not benefit the residents

186. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

187. See *id.*

188. *Id.* at 426. The invasion, as described by the Court, consisted of “a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall.” *Id.* at 438.

189. See *id.* at 419.

190. See *id.* at 421.

191. See *id.* at 424.

192. See *id.* at 421-22.

of the owner's building but served as part of the transmission system for other buildings in the vicinity.¹⁹³ Third, the statutorily authorized fee, set by a state agency, was an insulting "one-time \$1 payment."¹⁹⁴ But the dominant factor, the one on which the Court relied and that *Lingle* identified as an exception from the *Penn Central* test, was the characterization of the statute as an "occupation" of the property, a "permanent physical invasion" in the words of the *Lingle* Court.¹⁹⁵

There is, to be sure, a visceral sense, derived perhaps from pre-administrative common law that the government may not intrude upon a person's property without providing compensation.¹⁹⁶ But to describe the New York statute as an occupation or invasion elevates metaphor over reality. It conjures up the image of state agents physically entering a private property and using it for their own purposes while the owner huddles in a corner.¹⁹⁷ Implicit in this image is that the intrusion is directed against a specific property. In fact, the New York statute simply added one more restriction, by operation of general law, to the wide range of restrictions typically imposed on

193. *See id.* at 422. The cable was connected to the units in Loretto's building two years after she purchased the property. *See id.*

194. *Id.* at 423.

195. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 537-38.

196. *See* Michelman, *supra* note 19, at 1226-29. Professor Michelman notes that a physical invasion standard involves contradictions because it may compensate for nominal harms or harms that are no greater than related ones that are deemed non-compensable. *See id.* at 1226. He also questions the principle that "physical use or occupation by the public of private property may make it seem rather specially likely that the owner is sustaining a distinctly disproportionate share of the cost of some social undertaking," on grounds that it too fails to distinguish between significant and insignificant losses. *Id.* at 1227. These concerns certainly apply in *Loretto*, where an actual loss of value would be difficult to discern, although the loss or opportunity to demand additional payment is real enough. Ultimately, Michelman concludes that fairness alone cannot justify treating physical invasion as a special case but that emotive factors may be relevant, at least from a utilitarian perspective. *See id.* at 1228. The "psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader." *Id.* Even if we want to take such factors into consideration, however, they seem unlikely to apply to a big-city landlord. Beyond the facts of the *Loretto* case, it would seem that a generally applicable regulation would be less likely to induce the shock and protest that Michelman describes because it would involve interferences with the property that are shared by other similarly situated people.

197. In *Mahon*, Justice Holmes referred to "the blowing up of a house to stop a conflagration" *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). That is a total taking, of course, but one might picture the fire officers as damaging the house by running equipment through it to combat a nearby conflagration. Here again, the image fits specific governmental action but not general action.

urban rental properties.¹⁹⁸ Surely, anyone who owns an apartment building in a city is already accustomed to extensive requirements regarding habitability, heating, fire safety, and structural integrity and to repeated inspections by government officials to determine compliance with those various requirements.

Applied to general rather than specific governmental action, the Court's decision necessarily rests on the idea that there is something about property itself that constrains the government from enacting general legislation that restricts its use. As in *Mahon*, reliance on that illusory foundation produces a fatal incoherence in the decision, an inability to distinguish property that is protected from property that can be reduced in value without requiring compensation. The Court, aware of this issue, offered reassurance that its decision "in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building."¹⁹⁹ But it failed to explain exactly why this was true, other than to say that the challenged statute authorized "permanent occupation of the landlord's property by a third party."²⁰⁰ In fact, the difference between cable equipment and utility connections or mail boxes cannot be explained in terms of the impact on the owner; in each case, a general regulation compels all owners of a particular form of property to dedicate a small portion of their property for a designated public purpose.²⁰¹

The problem extends beyond regulatory laws that require installation of devices in a rental property. How is the law struck down

198. See Rubinfeld, *supra* note 9, at 1152–54 (observing that the requirements in *Loretto* did not interfere with the owner's use of the property). Professor Rubinfeld treats this lack of interference with the owner's use as the determinative factor by reinterpreting the public use requirement of the Takings Clause. See *id.* at 1153. Here, the lack of interference is simply as an indication of the statute's general regulatory character.

199. *Loretto*, 458 U.S. at 440.

200. *Id.* This failure was emphasized by the dissent. *Id.* at 452–53 (Blackmun, J., dissenting).

201. The amount of space that the equipment occupied was minimal, consisting of:

[A] cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof . . . [and] two large silver boxes along the roof cables.

Id. at 422 (majority opinion). None of it interfered with any of the building's functions. See *generally id.*

in *Loretto* to be distinguished, in any coherent way, from a law that requires a factory to install pollution control devices on its smokestacks or filters on the pipes that drain wastewater into an adjoining river? How is it to be distinguished from the ubiquitous state and local ordinances that require restaurants and gas stations to have toilet facilities for employees and customers?²⁰² How is it to be distinguished from the Federal Aviation Administration's (FAA) rule that requires a flight recorder, or "black box," to be installed in privately owned airplanes?²⁰³ It is true that the law at issue in *Loretto* did not give the property owner the opportunity to choose the required device from a variety of private suppliers, but it is difficult to see why this opportunity should be regarded as a constitutional right. The FAA rule includes elaborate requirements regarding the design and operation of the flight recorder.²⁰⁴ If the government chose to manufacture these devices itself, is it likely that court would declare a constitutional right to resist their installation?

202. See, e.g., CA. HEALTH & SAFETY CODE § 114276(a) (West 2016) ("A permanent food facility shall provide clean toilet facilities in good repair for use by employees."); see also *id.* at § 114276(b)(1) ("A permanent food facility shall provide clean toilet facilities in good repair for consumers, guests, or invitees when there is onsite consumption of foods or when the food facility was constructed after July 1, 1984, and has more than 20,000 square feet of floor space."); N.Y. COP. CODES R. & REGS. tit. 10, § 14-1.142(a) (2019) ("Each food establishment is to have adequate, conveniently located, and properly installed toilet facilities for its employees. Such facilities are to be accessible at all times."); CITY OF PHILADELPHIA DEP'T OF HEALTH, Regulations Governing Food Establishments § 46.823(b) (2009) ("At least one toilet and not fewer than the toilets (and urinals, if used) required by the Department of Labor and Industry shall be provided."); TEX. HEALTH & SAFETY CODE § 341.061 (West 1989) ("An operator, manager, or superintendent of a public building, schoolhouse, theater, filling station, tourist court, bus station, or tavern shall provide and maintain sanitary toilet accommodations.").

203. See FAA Flight Data Recorders and Cockpit Voice Recorders, 14 C.F.R. § 91.609 (2010). This provides a good analogy to one of the features of the New York statute that may have troubled the Court, namely, the fact that the cable *Loretto* was required to install did not benefit her own tenants, at least at the time of installation. See *Loretto*, 458 U.S. at 422–24. This is also true of the black box with respect to the airplane on which it is installed; its main purpose is to provide a benefit to the public after the airplane has been destroyed and all the passengers are dead.

204. See Federal Aviation Administration, 14 C.F.R. §§ 23.1457, 25.1457, 27.1457, 29.1457. These rules are in turn supplemented by Technical Standing Orders.

C. *Lucas v. South Carolina Coastal Council*

Lucas, the second exception to the *Penn Central* rule recognized in *Lingle*,²⁰⁵ is a more direct descendent of the *Mahon* decision. Pursuant to the federal Coastal Zone Management Act of 1972, as amended in 1980, which directed states to restrict development in coastal areas,²⁰⁶ South Carolina passed the Beachfront Management Act.²⁰⁷ The Act authorized a state agency to establish a boundary beyond which no improvements that could be occupied would be allowed.²⁰⁸ *Lucas*, a developer, had purchased two parcels with the intent of building single-family residences.²⁰⁹ Once the agency established the required boundary, however, *Lucas*'s parcels fell on the seaward side of the boundary, which meant that residential development was forbidden.²¹⁰ *Lucas* brought suit claiming that the state's action constituted a taking that required compensation, and the Supreme Court agreed.²¹¹ Justice Scalia's opinion for the Court declared: "[W]hen the owner of real property has been called upon to sacrifice *all* the economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."²¹²

Like *Mahon* itself, and like *Loretto*, the *Lucas* decision applies the Takings Clause to a generally applicable positive law, as Justice Stevens pointed out in dissent.²¹³ While the explicit basis for the Court's ruling in *Lucas* is that it protects individuals who own property from regulations that are tantamount to takings, the decision in fact protects the property itself from complete destruction of its value. This makes sense, once again, only if there is some sort of constitutional right to private property.²¹⁴ The fact that no such right exists renders

205. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

206. See Coastal Zone Management Act, 16 U.S.C. § 1456 (2012).

207. See S.C. CODE ANN. § 48-39-250 (2018).

208. See S.C. CODE ANN. § 48-39-120 (2018).

209. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006-07 (1992).

210. See *id.* at 1007.

211. See *id.* at 1007, 1032.

212. *Id.* at 1019 (emphasis in original).

213. See *id.* at 1072 n.7 (Stevens, J., dissenting).

214. Having made the point that the action at issue in the case was generally applicable, Justice Stevens went on to observe that even a law burdening the free exercise of religion can pass constitutional scrutiny if it is "a 'valid and neutral law of general applicability.'" *Id.* at 1072 n.7 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 879-80 (1990)). Justice Scalia's response in the majority opinion merits full quotation:

The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion . . . is a law that destroys the value

the decision incoherent. There is simply no way to make sense of it, either in terms of the impact of the government's action on the owner or in terms of the way that property rules operate in our society.

In terms of the impact on the owner, the Court might have held that a generally applicable regulation constitutes a taking if it decreases an individual's wealth by a certain amount of money or by a certain proportion. Such rules are not inconceivable, but they do not exist in our legal system. The familiar counter-example to regulatory-takings claims, down-zoning, is applicable here. If a property is originally zoned for commercial use, its market value, based on a realistic possibility that the property owner could have built a shopping center on it, might be \$50,000,000. Down-zoned to residential use only, the property's market value might decrease to \$500,000. The owner, according to law before and after the *Lucas* decision, could not have received compensation for its \$49,500,000 loss.²¹⁵ But, according to *Lucas*, if the state then prohibited residential

of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in [*Mugler v. Kansas*, 123 U.S. 623 (1887)] comes to mind—cannot constitute a compensable taking But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.

Id. at 1027 n.14 (majority opinion) (emphasis in original). To begin with, Justice Scalia fails to explain the basis on which he finds *Mugler* acceptable. His description states that the law in question was generally applicable and criminal, but the Beachfront Management Act was generally applicable as well, and there seems no reason why a criminal law should be treated differently other than the fact that it is likely to be general. *Id.* On the question of inhibiting the practice of religion, Justice Stevens was making an *a fortiori* argument, that is, a generally applicable law might be valid even if it restricts a constitutional right. *Id.* at 1072 n.7 (Stevens, J., dissenting). The implicit point, which could certainly have been more clearly stated, is that a generally applicable law is valid if there is no constitutional right that its restrictions affect. In responding, Justice Scalia treated this argument as if the problem of specificity involved the subject matter of the law, not its impact on individuals. That is true for religion because there is a constitutional right to practice one's religion free of state interference, a point for which no argument is needed. In claiming that the same is true for land use, he simply assumes that there is a similar right to hold private property without state interference. But he provides no argument in support of this position.

215. See generally *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that zoning restrictions are a valid exercise of the police power and do not constitute a taking). For a defense of this decision, see generally Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990). Professor Epstein argues that zoning laws constitute a taking unless they abate a nuisance or constitute a sort of

use and the market value dropped to zero, the state would need to compensate the owner for the loss of the remaining \$500,000 in market value. This would be true, moreover, whether the owner was an individual of modest means with only this one property, a wealthy individual with five other parcels, or a land development corporation for which the \$500,000 was an insignificant loss. In other words, the constitutional status of the owner's loss is not being determined according to any criterion related to the owner but rather one related to the piece of property itself. It seems to be the property itself that possesses a right not to have its value reduced to zero.²¹⁶

Justice Scalia was apparently aware that the source of such a right could not be found in any constitutional provision. He conceded, as Justice Holmes had in *Mahon*, that government regulation can reduce the economic value of property to zero without triggering the compensation requirement if the regulation is justified by sufficient public interest or necessity.²¹⁷ This principle was well-recognized throughout the *Lochner* Era. In *Miller v. Schoene*, for example, the state was allowed to order the destruction of red cedar trees without compensation because the trees were infected with a parasite that might otherwise become an epidemic.²¹⁸ The *Lucas* Court, in dealing with this settled principle, rejected the traditional (and *Lochner* Era) formulation that the state would not be required to compensate only if the conditions that it sought to remedy were "akin to public

carefully tailored users fee. See EPSTEIN, *supra* note 7, at 130-45. His position depends, however, on his claim that there is no difference between specific and general government action.

216. A variation suggested by the facts of several regulatory-takings cases, although not resolved by them, involves the issue of exceptions to a generally applicable statute. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001), the owner applied for permission to develop its property in a manner that was arguably prohibited by a general land use regulation adopted by the enforcing agency. The issue readily lends itself to due process analysis. If the agency had discretion to deny the request, there is no right to a hearing and thus no issue. See *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) (since prison authorities have full discretion to transfer prisoners between institutions, no hearing is required); *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972) (since a university had full discretion to terminate the employment of a probationary employee, no hearing is required). If the agency's discretion was constrained by stated rules, then the applicant is entitled to a hearing on whether those rules would support its request. In a case like *Palazzolo*, that would mean a hearing on whether the agency was required to grant the request as an exception to the land use statute. If the agency was so required it could still prevent the owner from developing its land, but in that case it would need to compensate the owner.

217. See *Lucas*, 505 U.S. at 1015.

218. See generally *Miller v. Schoene* 276 U.S. 272 (1928).

nuisances.”²¹⁹ This doctrine of harmful or noxious use was, in the Court’s view, no longer valid because it failed to comport with the “reality we nowadays acknowledge explicitly with respect to the full scope of the state’s police power.”²²⁰

Having rejected this formulation, Justice Scalia was then required to articulate its replacement. He declared: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”²²¹ But that much goes without saying; if there was positive law—that is, a statute or regulation—that proscribed the use before the owner bought the property, the matter would be free from doubt. Purchasers of land on the seaward side of the South Carolina boundary could hardly argue that they are entitled to compensation for their inability to carry out legally forbidden construction. But in the absence of such a law, Justice Scalia asked, what power did the state have to prevent construction?²²² He attempted to answer this question at the end of the opinion when he stated the principles for deciding Lucas’ claim upon remand: “[T]o win its case . . . as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses” that the property owner intends.²²³

This formulation can only escape the reliance on the public nuisance doctrine that Justice Scalia abjured if it does precisely what the *Lochner* Court did in its economic process cases, that is, constitutionalize common law. The opinion cushions, or perhaps obscures, this result by treating common law as the basis of people’s reasonable expectations.²²⁴ This formulation suffers from several fairly

219. *Lucas*, 505 U.S. at 1022.

220. *Id.* at 1023.

221. *Id.* at 1027.

222. *See id.* at 1031.

223. *Id.*

224. *See id.* at 1027. The Court said, in explaining its test:

This accords, we think, with our “takings” jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the “bundle of rights” that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers

obvious practical difficulties. The first, as Justice Kennedy pointed out in his concurrence, is its “inherent tendency towards circularity,” since people’s expectations will be shaped by judicial doctrine.²²⁵ Second, the Supreme Court has no reliable mechanism for assessing what people’s actual expectations may be, so any assertion about these expectations becomes a restatement of the Justices’ own views in social science clothing.²²⁶

The real problem with the Court’s formulation, however, is that it does not actually avoid the *Lochner* Era’s use of the “legitimate state interests” standard to police economic regulation. That standard was based on the underlying idea that common law rules, and particularly the rules regarding property, possess constitutional significance, so that the government cannot change them without some special showing. Justice Scalia’s language avoids the *Lochner* standard but continues to rely on its underlying idea. The real problem, as discussed above, is that this idea is foreign to our legal system; common law

Id.

225. *Id.* at 1034 (Kennedy, J., concurring). The point well exemplified by the facts of *Lucas*. When the plaintiff bought his two parcels of beachfront property in 1986, the federal Coastal Zone Management Act had been in place for fourteen years, and the amendments that triggered the South Carolina law had been in place for six. *See generally* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Moreover, no one in our society could be unaware that the preservation or development of coastal land was a matter of intense political controversy which might lead to regulatory restrictions on development.

226. This argument does not necessarily apply to specific regulatory takings for two reasons. First, there is a higher level of uncertainty in such cases. People know, or should know, that all property is subject to regulation and that they must factor that possibility into their investment decisions. But specific takings depend upon the further possibility that the government will demand their particular piece of property. This is a much rarer occurrence and is not necessarily something the people should be expected to consider in advance. Second, people have recourse against the enactment of a general regulation, namely the political process. They have no recourse against a specific taking, whether direct or regulatory. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001), which was probably a specific regulatory-takings case, the Court held that acquisition of land after a land use regulation had been enacted does not prevent the acquirer from challenging a restriction based upon the regulation. This seems correct according to this Article’s analysis; the action to which the owner could not object, namely the regulation, had already occurred, but the action to which the landowner could object, that is, a restriction on its particular parcel, had not. If the state had already imposed the particular restriction, however, the acquirer would have been bound by it, as the Court recognized. *See id.* at 628 (when there is a direct condemnation of a property, “the fact and extent of the taking are known . . . [and] it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser.”).

itself recognizes that positive law, the law enacted by the government, prevails over any judge-made doctrine or “background principles.”²²⁷ As stated, the *Lochner* Era’s constitutionalization of common law might have seemed plausible in the pre-administrative era when the country had a predominantly common law legal system on which positive law episodically intruded. But it became both conceptually and politically indefensible with the advent of the administrative state. The law at issue in *Lucas*, like the ones at issue in *Loretto* and *Mahon*, is nothing more than typical regulatory enactment, in this case one that protects the environment rather than tenants or homeowners.²²⁸ Despite the fact that it places restrictions on land, the focus of pre-modern property law, it should be controlled only by the political process, not by the judiciary. Judicial supervision of state law depends on the existence of a legal right, and there is no right on which the judiciary can rely.²²⁹

Here again, the absence of a recognizable right to support the Court’s decision leads to incoherence. As in *Mahon* and *Loretto*, there is no way to distinguish the type of property right that is being from the larger group of property rights that are subject to regulation by positive law. In *Lucas*, this difficulty is the well-known denominator problem.²³⁰ The only reason the plaintiff lost all the value, or at least all the development value, of its property was that the lot in question was located entirely on the seaward side of the legislatively defined boundary. Had the exact same piece of property been part of a larger lot that extended onto the landward side, the loss of value would only have been partial. Had that larger lot been large enough, the loss might

227. See FRIEDMAN, *supra* note 77, at 167-81; *supra* notes 75-77 and accompanying text.

228. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992).

229. See Byrne, *supra* note 122, at 117-23 (regulatory takings decisions are an effort to reverse environmental laws). An alternative but related interpretation is that the general regulatory taking cases emerge from the Court’s hostility toward redistributive legislation. See Rose, *supra* note 215, at 582-95. Regulatory legislation is not necessarily redistributive; the Federal Communications Act, 47 U.S.C. § 151 (2012) creates property rights and thereby enriches those it regulates. Conversely, redistributive legislation, like a progressive income tax, is not necessarily regulatory. But there is a substantial overlap and, from a political perspective, opponents of one are often opponents of the other.

230. See EPSTEIN, *supra* note 5, at 162-67; Fee, *supra* note 7, at 1029-33; Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 694-707 (1996); Danaya C. Wright, *A New Time for Denominators: Toward A Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190 (2004). See generally John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1994).

have represented a minimal reduction of the overall value.²³¹ The problem has been widely noted; the point here is that it could be readily resolved if there were some body of doctrine that could determine when a piece of property merited protection against a reduction in value. But there is no such right, and thus there can be no such doctrine.

D. *Murr v. Wisconsin*

The Court's opinion in *Murr* is an effort to resolve the widespread confusion that followed from *Lucas*. As stated, however, this confusion, because it results from the absence of a legal right that would support the decision, cannot be resolved, and *Murr* does not resolve it. The case, like *Lucas*, was a claim that an environmental protection statute restricting development on property that fell within a given area, in this case a river valley, constituted a taking of one particular property that was subject to the general restriction.²³² Two lots along the river had been purchased separately and transferred at different times to a single owner.²³³ A recreational cabin had been built on one of the two lots, and the second lot was unimproved.²³⁴ According to the statute and its implementing regulations, the two lots, due to their common ownership, constituted a single property.²³⁵ This meant, again according to the statute and regulations, that only one structure could be built on the combined property and that the property could only be sold as a single unit.²³⁶ The owners claimed that this eliminated the entire value of the unimproved lot and thus required compensation.²³⁷

Assuming that *Lucas* is good law, the crucial issue in the case is the denominator problem: whether the property is regarded as one lot or two. If viewed as two lots, the value of the second lot was in fact entirely eliminated; if viewed as one lot, the limitations on

231. In fact, a perfectly plausible scenario is that its value would not have been reduced at all. *Lucas*'s loss of his right to develop the seaward part of the property might have been counterbalanced by the increase in the value of the landward part, which would then be guaranteed a clear view of the sea. A property seller's ability to assure potential buyers that the property's scenic view is legally protected has real economic value.

232. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1939-40 (2017).

233. See *id.* at 1940.

234. See *id.*

235. See *id.* at 1941.

236. See *id.*

237. See *id.*

construction and subdivision are standard zoning regulations that have been repeatedly upheld. Justice Kennedy's opinion for the Court stated that reviewing courts should attempt to determine "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."²³⁸ This inquiry, he continued, "is objective, and the reasonable expectations at issue derive from the background customs and the whole of our legal tradition."²³⁹

Kennedy then proceeded to identify three considerations that courts should use in pursuing this purportedly objective inquiry. First, they "should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law."²⁴⁰ Next, they "must look to the physical characteristics of the landowner's property," including the "surrounding human and ecological environment."²⁴¹ "Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings."²⁴² After all, he pointed out, the regulation may add "value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving the surrounding natural beauty."²⁴³ Applying these three criteria, the Court concluded that the regulation was not a taking and thus no compensation was required.²⁴⁴ Despite this apparently systematic and "objective" analysis, the opinion contains a sort of leitmotif that regulatory-takings doctrine is irremediably vague and uncertain; that it is "ad hoc," flexible, and non-formalistic;²⁴⁵ that it "cannot be solved by any simple test;"²⁴⁶ and that it must rely on the experience and care of state and federal judges.²⁴⁷

238. *Id.* at 1945.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 1946.

243. *Id.*

244. *See id.* at 1950.

245. *Id.* at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)) ("This area of law has been characterized by 'ad hoc factual inquires.'"); *id.* at 1943 ("A central dynamic of the Court's regulatory jurisprudence, then, is its flexibility."); *see id.* at 1946 (both parties "ask this Court to adopt a formalistic rule" that fails "to capture the central legal and factual principles" governing this area of law).

246. *Id.* at 1950.

247. *See id.* at 1946.

Justice Kennedy's effort to turn the judicial vice of vagueness and uncertainty into a virtue may not be laudable, but it is understandable.²⁴⁸ In the absence of any legal right on which the regulatory-takings doctrine can be grounded when applied to generally applicable governmental action, no clear test can be formulated to determine when the doctrine applies and when it does not. Justice Kennedy's second consideration—the physical characteristics of the property, such as its environmental value—will determine whether the state must compensate when it reduces the value of property through specific regulatory action, as in *Penn Central*.²⁴⁹ It is irrelevant, and a reversion to substantive due process doctrine, in a case of general regulatory action, as the Court held in *Lingle*.²⁵⁰ Kennedy's third consideration goes to the amount of compensation that the government should pay, not to the right to obtain such compensation. In a case where the owner is alleging that the government reduced the value of the property through regulation, rather than having transferred title to some portion of it, the fact that the burden on one portion of the property increased the value of the property as a whole would mean that there is simply no loss to be compensated.²⁵¹ Thus, the real issue seems to be the first consideration,

248. See *id.* at 1954. In fact, the Court, which divided five to three on the merits, was unanimous regarding the doctrine's vagueness and uncertainty. Chief Justice Roberts' dissent, while criticizing the majority opinion for unnecessarily complicating the issue, states that "[f]or the vast array of regulations . . . a flexible approach is more fitting," and that *Penn Central*'s "parcel as a whole" language" is "enigmatic." *Id.* at 1952 (Roberts, C.J., dissenting).

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

250. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-42 (2005); *supra* notes 50-64 and accompanying text. Of course, the restriction that the land must be taken for a public use would still apply.

251. See *Murr*, 137 S. Ct. at 1949. The Court noted that the combined lots were valued by an appraiser at \$698,300, considerably more than the sum of the separate value of the lot with the cabin, valued by the county at \$373,000, and the unimproved lot, valued by the owner's appraiser at \$40,000. *Id.* "The value added by the lots' combination," the Court said, "shows their complementarity and supports their treatment as one parcel." *Id.* What this computation actually shows, however, is that it does not make sense to reify a particular piece of property and determine the validity of a general law or regulation by whether its effect is to reduce that value of that particular piece to zero. The boundaries of property, particularly land, are malleable, and their value depends on the way they are combined or separated, something that is often within the power of the property owner. This issue would not arise in a case where the Takings Clause was truly applicable because the government had taken action against a specific piece of property. If the government takes title to one tenth of a person's land to build a road, there is no question that a taking has

which is the legal status of the owner's property. This is precisely what Chief Justice Roberts argued in his dissent. The majority "goes astray," he wrote, "in concluding that the definition of 'private property' at issue in a case such as this turns on an elaborate test looking not only to state and local law," but also to the Court's other considerations.²⁵² The way the case should be decided, he stated, is to "stick with our traditional approach[.] State law defines the boundaries of distinct parcels of land, and those boundaries should determine the 'private property' at issue in regulatory takings cases."²⁵³

The majority and dissent are correct in identifying state law as the crucial issue, and the dissent is correct in arguing it should be the determinative one. But both opinions misunderstand the nature of state law. The general rules of property certainly count as state law, but so do any generally applicable statutes or regulations that redefine or alter those general rules. The restriction on coal mining in *Mahon*,²⁵⁴ the requirement imposed on rental property in *Loretto*,²⁵⁵ and the development limits in *Lucas* and *Murr* were all validly enacted provisions that are entitled to as much deference from a constitutional court as any common law decision.²⁵⁶

When the majority identifies "the treatment of the land, in particular how it is bounded or divided, under state and local law" as its first consideration, however, it is clearly referring to the common law of property.²⁵⁷ When the dissent says that "[s]tate law defines the boundaries of distinct parcels of land and those boundaries should determine the 'private property' at issue in regulatory takings cases,"²⁵⁸ it is referring to common law as well. But neither the majority nor the dissent makes this obvious identification. The reason

occurred. The road might increase the value of the remaining nine-tenths by making it more accessible, and that increase in value might be greater if the owner combined the remaining land with another lot. This increase might mean that the owner sustained no economic damage, and was thus not entitled to compensation, but it would not alter the conclusion that a taking had occurred.

252. *Id.* at 1950 (Roberts, C.J., dissenting). Chief Justice Roberts listed four considerations that were extraneous in his view—the two numbered considerations that the majority opinion specified, plus its reliance on reasonable expectations and on background customs. *See id.*

253. *Id.*

254. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

255. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-39 (1982).

256. *See Murr*, 137 S. Ct. at 1940; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007-08 (1992).

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

258. *Id.* at 1950 (Roberts, C.J., dissenting).

is that doing so invalidates the entire doctrine of general regulatory takings. Common law is undoubtedly state law, but it does not prevail over other laws; it has no superior status. If a statute, or a regulation enacted under statutory authority, alters a common law rule, then that altered rule, and not the original common law rule, becomes the law of the enacting jurisdiction. It is that law which “defines the boundaries of distinct parcels of land,” and determines the rights that the landowner possesses. In an administrative state, regulatory laws of this sort, and not common law, will be increasingly determinative of people’s property rights.

The irony of the *Murr* decision is that the two dissents, while seemingly supportive of the property owner’s claim, in fact represent a repudiation of the entire regulatory-takings doctrine when applied to general governmental action. The majority opinion, apparently concerned about the possibility that *Lucas* would place excessive limits on beneficial legislation, particularly in the environmental area, seeks to limit that decision’s reach by adding considerations beyond “state law” that reviewing courts should take into account.²⁵⁹ Chief Justice Roberts’ dissent, however, declares that the scope of property rights should be exclusively determined by state law.²⁶⁰ Because he apparently assumed that only common law was state law, he thought he was thus endorsing a more stringent limit on regulatory law. But since regulatory law is state law as well, he was in fact rejecting the entire idea that the Due Process and Takings Clauses place any limits on state law, as opposed to the application of that law to individuals. Justice Thomas, in a separate dissent, wrote that “it would be desirable for us to take a fresh look at our regulatory takings jurisprudence to see whether it can be grounded on the original public meaning on the Takings Clause of the Fifth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment.”²⁶¹

The result of such a fresh look would be the same: repudiation of the doctrine that those Amendments place any limits on general state legislation regarding private property.²⁶²

259. *See id.*

260. *See id.*

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

262. Justice Thomas seems to have the opposite result in mind, since he follows his call for a fresh look at the original text by citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008). As the title suggests, Professor Rappaport concedes that the original meaning of the Fifth Amendment’s Takings Clause was limited to physical takings.

IV. NORMATIVE CONSIDERATIONS

The importance of private property for a modern economy and for modern people's sense of security and well-being is widely recognized; some observers make even stronger claims.²⁶³ But the scope of these rights has been consigned to the political process in our

See id. at 734-37. Relying on the argument in AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998), that the original Bill of Rights was primarily concerned with structural issues, while the Fourteenth Amendment was directed toward rights protection, Rappaport argues that this latter Amendment can be read to imply a concept of takings that extends to regulatory action. *See* Rappaport, *supra* at 743-57. Professor Amar has certainly unearthed some important and previously unappreciated elements of the Bill of Rights, but there is simply too much rights-related discourse at the time of its enactment to accept the idea that its purpose is predominantly structural. *See, e.g.*, BAILYN, *supra* note 79, at 185-98; *see also* RAKOVE, *supra* note 79, at 288-338 (footnote omitted) ("The language of rights came naturally to the colonists; it was, they thought, their native tongue."). Conversely, while the Fourteenth Amendment certainly emerged from a somewhat different worldview than the Bill of Rights, its repetition of the Fifth Amendment's wording counts strongly against the idea that it reflects a distinctly different intent. The only definitive evidence that Rappaport offers for the idea that it was designed to provide more extensive protection for private property is that John Bingham, its lead author, proposed that the Amendment repeat the words of the Takings Clause. *See* Rappaport, *supra* at 752. This does not prove very much, however, since he was proposing the same words that had been understood to be limited to physical takings, as Rappaport concedes. *See id.* Besides, the fact that the language was proposed is counterbalanced, at the very least, by the fact that it was not enacted. In any case, the only point that Rappaport's article claims to make, and could possibly make, is that the Fourteenth Amendment was intended to reach some regulations that reduced the value of property, not that it included regulations that were generally applicable. *See generally* Rappaport, *supra*.

263. *See* THE POLITICS OF ARISTOTLE, *supra* note 124, at 458-59 (evaluating the practical value of private property); MEIR DAN-COHEN, *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 264-301 (2002) (discussing private property and people's sense and image of themselves); Jeremy A. Blumenthal, *To Be Human: A Psychological Perspective on Property Law* 83 TUL. L. REV. 609, 610 (2009) (stating that property determines what it means to be human); Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. 1, 3 (2006) (suggesting that property is a social as well as an economic institution). *See generally* BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1981) (explaining the relationship between property ownership, public conceptions about law, and the sense of freedom); LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY* (2009) (stating that claims to property rights are based on core values); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (explaining that control of property is part of an individual's sense of self); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287 (2014) (stating that property shapes the social relations that are crucial in establishing a democratic polity).

system of law. General regulatory-takings doctrine relies on legal principles that we have rejected for reasons that are currently well-recognized and accepted. As a result, it does not serve any purpose that has normative validity in our system. It does not protect property itself because, as the Supreme Court's general regulatory-takings cases show, there is no coherent distinction between the type of property they attempt to protect and the types of property that virtually no one wants to protect and could not conceivably be protected without destroying modern government. In addition, the doctrine and its underlying right to property do not protect any group of people that we would regard as meriting protection. This final Part will consider these two points in turn. Its conclusion is that reversal of the general regulatory-takings cases would be normatively desirable as well as doctrinally correct.

A. Protection of Property

The preceding Part has described the inability of general regulatory-takings cases to explain why some reductions in value are regarded as takings as others are not.²⁶⁴ Why was the governmentally required installation of cable wires in *Loretto* deemed a taking but the required installation of smoke detectors and mailboxes in the same building treated as a valid regulation? Why were the restrictions on the land in *Lucas* treated differently from the way the same restrictions on another piece of land would have been treated if that land were a portion of a larger parcel? These unexplained and incoherent variations, it was argued, indicate the absence of an underlying right to property that would support the results in the cases. Here, the point will be generalized to explain why such an underlying right is normatively undesirable.

At the beginning of his wide-ranging study of regulatory takings, William Fischel derides the claim that "mere regulation," as opposed to a transfer of title, is exempt from the requirement that government compensate property owners for the economic losses that the regulation imposes.²⁶⁵ He writes: "Everything the law student has been taught . . . indicates that legal 'property' is not a clod of earth but a bundle of legal entitlements How can the government get away without paying for the many restrictions that it unilaterally

264. See *supra* Part III.

265. FISCHEL, *supra* note 19, at 2.

imposes?”²⁶⁶ The distinction between transfers of title and general regulatory laws, however, does not depend on the idea that they involve different types of property, but rather that they involve different types of government action. When the government transfers title to land, it is typically taking action against a specific individual, and compensation is required because individuals typically do not have recourse to the political process. But when the government takes action by “mere regulation,” it may well be acting through generally applicable laws which affect groups of people.²⁶⁷ In that case, we rely on the political process to determine which groups are advantaged and which groups are disadvantaged.

Fischel’s observation about the nature of property is correct, but it argues in favor of the distinction between title transfer and regulation that he wants to refute. Virtually all regulatory-takings cases involve a “clod of earth,” that is, real property.²⁶⁸ This is probably because the power of eminent domain, the power to take title to a specific piece of property, is typically needed and satisfies the public use requirement, where real property is involved. The first regulatory-takings case, *Mahon*, involved land (underground land, to be sure) and is based upon a superficially appealing analogy: If the government must pay when it takes a person’s land by eminent domain, why should it not pay when it reduces the value of a person’s land to zero through a regulation? It was perhaps the force of this analogy that led Justice Holmes to overlook the fact that the regulation operated generally and to treat it instead as affecting “a single private house.”²⁶⁹ Subsequent regulatory takings cases have also involved real property, whether they are specific actions, as in *Penn Central*, or general actions as in *Loretto*, *Lucas*, and *Murr*.²⁷⁰

266. *Id.*

267. *Id.*

268. *Id.*

269. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

270. The Supreme Court recently decided a general regulatory-takings case, *Horne v. Dep’t of Agriculture*, 135 S. Ct. 2419 (2015) that involved chattels, not land, but the circumstances were unusual. *See id.* at 2424. Regulations adopted under the Agricultural Marketing Act of 1937 require raisin processors to set aside, or “reserve,” a specified portion of raisins they are processing, calculated as a percentage of each producer’s total crop. *See generally* Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (1937). These reserved raisins may not be sold by the processors on the open market; instead, their disposition is determined by a committee established by the Department of Agriculture. *See generally id.* The committee is authorized to dispose of the raisins in ways that do not compete with the domestic market; typically, it sells them overseas or gives them away to school lunch programs. *See generally id.* If there are proceeds, they are distributed, after deduction of the Raisin Committee’s

As Fischel points out however, there is no principled distinction between real property and other forms of property; the bundle of legal entitlements can attach to a wide range of tangible and intangible entities as well as to a “clod of earth.”²⁷¹ But recognizing a right to property for entities other than land, and thus requiring compensation when the government reduces their value by general legislation, is inconceivable in our system of government. Suppose the government decides to prohibit the possession or sale of a previously legal substance such as alcohol, heroin, or Ecstasy. Prior to the prohibition, people’s inventory of these substances was private property; its possession was protected by criminal laws against theft and its sale was facilitated by the civil law of contract. After the prohibition, the value of the inventory has been reduced to zero. Must the government compensate the owners for this loss of value resulting from the general prohibition of the substance?²⁷² If the government reduces the length

administrative costs, to the producers on a pro rata basis. *See generally id.* at 172. The Hornes’ raisin processors who refused to set aside any reserve raisins, as required by the regulation, argued that the reserve requirement is an uncompensated taking and thus unconstitutional. *See Horne*, 135 S. Ct. at 2422. In an opinion by Chief Justice Roberts, the Court agreed, holding that the “reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government.” *Id.*

The problem is that no one questions the constitutionality of general legislation that stabilizes prices by restricting the quantity of crops that farms may produce. From the processors’ perspective, a regulation that forbids them from selling their excess raisins is equivalent to a regulation that prevents them from growing those raisins in the first place. What makes the regulation in the case different from a regulation limiting production, according to the Court, is that the government is taking “[a]ctual raisins.” *Id.* at 2422, 2430-31. But that was not properly regarded as a transfer of title; it was a means of enforcing a general regulatory statute. The raisins were, in effect, contraband; they had been produced in violation of a valid regulation. In doctrinal terms, *Horne*, like *Mahon* (at least in Justice Holmes’ view) is a general regulation case masquerading as a specific regulatory taking and thus does not alter the conclusion that general regulatory action does not violate any constitutional right and thus should not be considered takings. In figurative terms, the issue in the case involved a product grown on agricultural land, and so the decision only moderately alters the observation that most general regulatory-takings cases involve real property. *See id.* at 2430-31.

271. FISCHEL, *supra* note 19, at 2.

272. *See Andrus v. Allard*, 444 U.S. 51, 67-68 (1979) (holding that no compensation is required when law prohibits the sale of eagle feathers, thereby substantially reducing their value to the owners); *Mugler v. Kansas*, 123 U.S. 623, 633, 657 (1887) (holding that no compensation is required where a state prohibition on the sale of alcohol reduced the value of the owner’s brewery from \$10,000 to \$2500). The *Mugler* decision turned, to some extent, on the ground that the state found alcohol to be a public nuisance, but this rationale would apply to the prohibition of

of time or scope of coverage for copyrights or patents, must it pay the owners for the resulting loss of value?²⁷³ The same point can be made about the right to practice one's profession. Suppose the government prohibits suicide assistance, gambling, prostitution, cryogenic chamber therapy,²⁷⁴ or lying down on railroad tracks therapy.²⁷⁵ Must those who earned a living from these fields now be compensated for their loss?²⁷⁶

The pragmatic reason why compensation for prohibited substances and discontinued practices cannot be provided is apparent;

any substance or profession. See *Mugler*, 123 U.S. at 673. In reaching its decision, the Court distinguished *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1972), which held that the state must compensate the owner of land it flooded when it built a dam. See *Mugler*, 123 U.S. at 668. Writing for the Court, Justice John Marshall Harlan said: "The question in *Pumpelly v. Green Bay Co.*, arose under the state's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people." *Id.* A dam might be justified on grounds of public health or safety, however. The real difference in the case is that in *Mugler* the state was protecting health and safety through general legislation, whereas in *Pumpelly* it flooded the land of a specific individual. See *id.*

273. See generally Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637 (2000) (arguing that intellectual property merits equal treatment with land, but limiting the recommendation to specific takings, such as a copyright or trade secret).

274. *ActiveCryo Cryotherapy Chamber*, VACUACTIVUS, <https://vacuactivus.com/cryotherapy-capsule-active-cryosauna> [<https://perma.cc/FQ3X-JRDA>] (last visited Apr. 22, 2019).

275. CBC NEWS, *Indonesians Lie on Train Rails for "Therapy"*, (Aug. 2, 2011, 9:49 AM), <http://www.cbc.ca/news/health/indonesians-lie-on-train-rails-for-therapy-1.1044184> [<https://perma.cc/DG7Y-9WE5>].

276. Another example is the group of legal restrictions that led to the virtual disappearance of the urban horse. As late as the 1870s and 80s, the streets of American cities were filled with horses hauling freight, carrying people, and pulling the horsecars and omnibuses that comprised the mass transit systems of that time. See CLAY MCSHANE & JOEL A. TARR, *THE HORSE IN THE CITY: LIVING MACHINES IN THE NINETEENTH CENTURY* 57-101 (2007). By the 1930s, they were largely gone, together with the extensive stables that had been built for them and the teamsters who often had acquired significant levels of specialized skills. See *id.* at 165-81. Additional restrictions continue to be imposed, and horse owners complain, but no compensation for their losses is proposed, or likely to be forthcoming. See Katherine Clarke, *City Carriage Horse Stable Owners in Crisis Over Whether to Sell Before de Blasio's Proposed Ban*, N.Y. DAILY NEWS (Dec. 6, 2014), <http://www.nydailynews.com/news/politics/city-stable-owners-crisis-sell-ban-article-1.2036487> [<https://perma.cc/U4W7-PCTZ>]; Lianne Hart, *Houston Horse Owners Saddle Up Against Law*, CHI. TRIB. (Jan. 29, 2006), http://articles.chicagotribune.com/2006-01-29/news/0601290393_1_horse-owners-riding-fourth-largest-city [<https://perma.cc/E94E-6XPB>].

any such requirement would burden or preclude the legal changes that are necessary in a modern society. The normative reason is apparent as well. Some people sustain losses as a result of legal change, but others recognize gains, and there is no apparent reason to favor one group over the other; rather, the conflict between them is what our political process is designed to resolve. It would appear that this well-accepted principle has troubled the Supreme Court in one specific type of case, that is, where a general governmental action decreases the value of real property. As Fischel points out, however, no doctrinal principle or normative consideration in our modern law of property justifies this separate treatment.²⁷⁷ The Court speaks often, in all regulatory-takings cases, about “investment backed expectations.” But there is no reason why investment in land should be favored over investment in any other form of property. People invest in chattels, factory buildings, and in intellectual property as often as they do in land. If there is any normative argument to be made, it would be in favor of people’s training for a particular career, since that represents lost time that is in some sense irreplaceable. Frank Michelman attempts to justify the *Mahon* decision in terms of the “demoralization costs” resulting from the coal company’s loss of bargained-for rights.²⁷⁸ But mining companies, real estate developers, and New York City landlords hardly seem like particularly sensitive types of people. Losing the benefits of one’s invention or the ability to make a living from one’s chosen career would seem to have a greater potential to demoralize, but these types of losses are virtually never compensated.

Quite possibly, the favored status of land is simply an atavism, a holdover from the feudal era when land ownership was genuinely different because it conferred status and constituted the means by which the central government established control over its territory. But those times are long past; we now have an administrative state, where government authority is exercised by appointed, hierarchically organized officials. Land remains valuable, but its value is far exceeded by the value of machinery, financial instruments, intellectual property, and all the other forms of property that lie outside the ambit of the regulatory-takings doctrine and could not conceivably be brought within it.²⁷⁹

277. FISCHEL, *supra* note 19, at 2.

278. Michelman, *supra* note 19, at 1212–14.

279. Larger questions about why property ownership should be treated differently from religious observance, self-expression, or other values lie outside the scope of this Article. The familiar arguments are that the zone of autonomy that we recognize for individual liberty of various kinds does not apply to property. Some

B. Protection of Property Owners

While it does not protect any conceptually coherent or normative category of property, the right to property on which general regulatory-takings decisions rely does protect a recognizable group of people. This group, of course, is property owners and specifically landowners. General regulatory-takings decisions favor landowners over the public, which includes those who do not own property and may be able to obtain legislation that favors competing interests through the political process. The question is why courts should inject themselves into such controversies and tilt the political playing field to the landowners' advantage.

Nothing in constitutional law or public policy supports this result. Far from being a "discrete and insular"²⁸⁰ minority, landowners—if a minority at all—are broadly dispersed throughout

property, such as a person's clothing, souvenirs, and personal work products can be placed within this zone, *see, e.g.*, DAN-COHEN, *supra* note 263, at 264-301; *see also* Rose, *supra* note 263, at 6, but property rights in general, as we conceive them, necessarily extend far beyond the ambit of the individual. They involve the control of social resources and, consequently, the ability to exercise direct control over other individuals. To impair the ability of the citizenry, acting through its elected representatives, to define and control such rights is to undermine our basic system of government. For present purposes, it is sufficient to note that the Supreme Court has definitively rejected the idea that the Constitution limits the regulation of private property by means of generally applicable enactments. The argument here is that that there is no reason to carve out an exception for real property from this well-accepted principle. The fact that real property is typically the object of specific government action, whether direct or regulatory, and that such action is subject to constitutional limits does not justify differential treatment of this property when it is subject to a different type of governmental action.

280. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938). For a discussion of this formulation, and account of its relationship to democratic theory, *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77-88, 135-79 (1980); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982). For the suggestion that it is diffuse groups, not insular ones, who may be in most need of protection, *see generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 *HARV. L. REV.* 713 (1985). The thrust of Professor Ackerman's argument is that we should not ignore "the anonymous and diffuse victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization." *Id.* at 745. His point may be well taken, although it has been disputed. *See generally* Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead?—Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 *CALIF. L. REV.* 685 (1991). In any event, property owners do not fit within Ackerman's "victims of poverty and discrimination" any more than they fit within *Carolene Products*' "discrete and insular" minorities. *Carolene Products*, 304 U.S. at 152 n.4; Ackerman, *supra* at 745.

the nation and entirely integrated into its society. They have full access to the political process and, as people who have been able to purchase a valuable asset, are likely to possess resources that enable them to participate effectively. The mining companies lost out to residential home owners in Pennsylvania, landlords lost out to tenants in New York State, and developers and residential users lost out to environmentalists in South Carolina and Wisconsin. But there are many other states and other circumstances where the political competition has produced the opposite result.

To emphasize this somewhat obvious point, consider *Loretto*, a constitutional challenge to a public policy decision favoring the economic interests of tenants over the economic interests of landlords. This is a conflict that arises in a variety of situations, including habitability, rent withholding, termination, eviction, security deposits, and rent control. In New York State, tenants seem to wield significant amounts of political influence and are able to obtain legislation favorable to their interests. In other states, the balance may be more likely to favor landlords and other property owners. A decision striking down the New York law as overly burdensome to landlords would then open the question of whether different laws in Nebraska or Arizona should be struck down as overly burdensome to tenants.

In order to choose one of two politically competing groups, to strike down general legislation or regulation favoring the interests of landlords, or, in the other decisions, of mining companies, developers, and recreational land owners, some presumption in favor of these groups must be invoked. Since, as argued in the previous Part, there is nothing particularly special about land as opposed to other forms of property and, as argued here, there is nothing special about either landowners or property owners as a group, the presumption must come from somewhere else. When the general regulatory-takings decisions are examined in this light, it appears that the presumption comes from an underlying hostility to administrative governance. Landowners derive their rights from common law, the body of judicially fashioned doctrine that the United States inherited from England and developed incrementally while maintaining its basic legal structure. Environmentalists, consumers, and tenants derive their rights from regulatory laws whose explicit goal is to replace the common law with different rules, reflecting different values.²⁸¹ Those values are the

281. The law involved in *Mahon* favored residential homeowners, to be sure, but, in the context of that situation, they can be assimilated to consumers in the sense that they were individuals opposing the contractual rights that a large corporation had

products of modern industrial society in at least two senses. First, they provide protection for people against hazards and oppressions that did not exist in pre-modern society. Second, they have emerged from modern sensibilities regarding the normative value of ordinary people as opposed to economic and social elites, of nature as opposed to development, and of conscious social policy as opposed to the maintenance of tradition. These values are generally not reflected in common law because they post-date its formation.²⁸²

At various times, the Supreme Court has evinced a decided hostility toward administrative governance, perhaps due to political conservatism, perhaps because the Justices on the Court have identified with economic and social elites, and perhaps because it prefers established law to legal change. This hostility was most apparent during the *Lochner* Era, when the Court struck down a variety of laws that emerged from the Progressive Movement. Those decisions were repudiated as having no doctrinal basis, and as reflecting values that were at the very least contestable, and thus subject to political determination. At present, however, that hostility seems to have re-emerged in the general regulatory-takings cases. But, once again, they have no doctrinal or normative basis.

The Court's reliance of the idea of investment-backed expectations can be examined once again in light of these observations. In cases of a specific regulatory taking, the principle is justifiable because it is one way of measuring the potential loss to individuals who have no access the political process. But when general governmental action is involved, landowners should be required to submit themselves to that process along with everybody else. Undoubtedly, the policy of investment supports economic development, but there is no reason to assume that the nation as a whole favors development over other values. Property owners may have expectations about the limits of government action, but other groups of citizens may have expectations that the government will protect them from substandard products, oppressive landlords, and environmental degradation or catastrophe. There is no normative basis or reason for the courts to intervene in this debate in favor of one side or the other.

obtained against them and that were somewhat analogous to a waiver of liability. In any event, the case fits the larger pattern because the more economically powerful party derived its rights claim from common law, while the economically disadvantaged party derived its rights claim from a regulatory statute.

282. See EDWARD L. RUBIN, *Beyond Camelot: Rethinking Politics and Law for the Administrative State* 25-29 (2005); Rubin, *supra* note 87, at 113-29.

CONCLUSION

There can be little doubt that settled legal rules that allow people to hold, use, and transfer rights to tangible and intangible things are essential to the operation of a modern commercial economy. There can be equally little doubt that collective action by society is essential to prevent those who achieve the vast power that such rules provide from oppressing their employees, misleading consumers, and destroying the environment. Balancing those interests, and providing the overall coordination that will produce general benefits to the society from that balance, is a task that we assign, for better or worse, to the political process. We constrain or limit that process only when we can identify some definitive right that represents an independent and more important value, something that we do not want to see traded or compromised in the ordinary course of our collective deliberations.

When the government takes action against specified individuals, whether to deprive those individuals of liberty or property, we recognize a right that constrains such action. This is the right to due process. It provides that disadvantages may not be imposed on individuals unless two conditions are met: First, the disadvantage must be established by the political process, that is, a democratically based or authorized decision, and second, that a fair procedure, implemented by an independent adjudicator, has been used to determine that the particular individual belongs within the category of people on whom the disadvantage has been imposed. If the disadvantage involves liberty, these conditions must be met. But if it involves property, where individual rights are less central and social coordination more important, the government is granted a second option. It can take away an individual's rights without showing that the individual belongs within a politically defined category as long as it compensates the individual for the market value of the property. In this case, the market replaces an independent adjudicator as an external control on arbitrary public power.

When the government acts generally, however, there is no right that constrains its basic, established ability to alter or abolish property rights. In response to a dramatic shift in the balance between property rights and public regulation that occurred during the Progressive Era, however, the Supreme Court attempted to contrive a right of this sort. It decided that the common law property rights that had always been regarded as subject to statutory control were constitutionally protected, so that regulatory legislation was void unless it could demonstrate some exceptional justification. This anti-administrative

approach prevailed for the first third of the century but was decisively repudiated in 1937.

The current Court has revived this same anti-administrative stance. In addition to enforcing the Clause as an adjunct to the recognized right of due process when the government takes action against specific pieces of property, it has decided that the Clause applies when the government reduces the value of property by general regulation. Because no basis for this right exists in our legal system, the cases that depend upon it have been fatally incoherent. They offer no comprehensible explanation of the property that is being protected and the property that remains fully subject to the political process, and they offer no rationale on which this distinction can be based.

These decisions should be overturned. Doing so will not produce a major change in legal doctrine. Most of the takings cases, which involve specific government action, will remain in place. Moreover, reversal of the general regulatory-takings cases will not produce any sweeping practical effects, since the decisions have been limited to a few areas, mainly involving land, and have failed to articulate any general principle that would extend their reach. The application of the Takings Clause to general regulatory enactments is a legal error, a source of confusion, and an impediment to valid public policy, and it has no place in our legal system.