



The Shadow Takings Doctrine

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THE SHADOW TAKINGS DOCTRINE

Ryland Li¹

*

*Property and law are born together, and die together. Before the laws were made there was no property; take away laws, and property ceases.*²

*Property rights serve human values. They are recognized to that end, and are limited by it.*³

*As the usages of society alter, the law must adapt itself to the various situations of mankind.*⁴

*

I. INTRODUCTION

The Fifth Amendment Takings Clause provides “nor shall private property be taken for public use, without just compensation.” Historically, the Clause protected landowners against appropriation by the state and against permanent physical occupation equivalent to “practical ouster of the owner’s possession.”⁵ In 1922, the Supreme Court in *Pennsylvania Coal Company v. Mahon* enacted a sea change in the doctrine by recognizing that a taking can occur when a regulation “goes too far.”⁶ Over time, the Court has developed a takings jurisprudence for temporary physical intrusions as well as regulations of use, which I term the “shadow takings doctrine.”

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² JOHN G. SPRANKLING, PROPERTY 3 (2012) (quoting JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (Oceana Publications, Inc. 1975) (1802)).

³ State v. Shack, 58 N.J. 297, 303 (1971).

⁴ Harwell v. Brooks, 3 Doug. 371, 373 (K.B. 1784) (Lord Mansfield).

⁵ Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1014 (1992).

⁶ 260 U.S. 393, 415 (1922).

Although the Court has never offered any convincing explanation for the doctrine—and has at times, expressly declined to do so⁷—its cases appear to be a subtle attempt to preserve existing entitlements to property, akin to *Lochner v. New York*.⁸ Just like *Lochner* and its progeny, the shadow takings doctrine, by stagnating the ability of property law to adapt to contemporary needs, entrenches existing entitlements in the face of societal change. In doing so, it threatens to undermine property’s utilitarian justification. Thus, this shadow doctrine should be abandoned. Instead, the doctrine’s chief purpose—which is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”⁹—can and should be advanced solely through other elements of the federal Constitution and state law.

In Part II, I describe the main outlines of the Court’s takings jurisprudence, focusing on the “property” and “takings” terms of the Clause, with a focus on the Court’s land use and environmental cases. I recharacterize the Court’s takings cases as falling into two strands: the “original takings” strand that includes confiscation and its equivalent of permanent physical occupation, and a shadow takings doctrine that includes temporary physical occupation and regulations on use. In both strands, the Court asserts that “property” is defined by non-constitutional, positive law, but the Court in practice defines property interests by selectively favoring common law over other forms of law. The Court also, without explanation, selectively gives the rights to exclude and to convey unduly heightened protection over the right to use.

Part III argues that the Court’s shadow takings doctrine is wrong. First, the doctrine should be rejected because it is inconsistent with the original understanding of the Takings Clause as well as the early doctrine, and because it is extremely confusing. Second, the Court’s jurisprudence cannot be justified on either utilitarian or natural rights grounds broadly defined. Rather, the doctrine parallels the Court’s efforts in *Lochner* to protect existing entitlements of resources against legislative change, and ought to be rejected just as *Lochner* was in 1937.

Part IV argues that abandoning the shadow takings doctrine would not implicate the fundamental fairness concern of the doctrine, because state law and other provisions of the federal Constitution adequately address it. Part V concludes.

II. THE DOCTRINE: SELECTIVE DEFINITION AND SELECTIVE PROTECTION OF PROPERTY RIGHTS

In deciding whether a government action satisfies the Takings Clause, a court confronts four major questions:

1. Is it private “property”?
2. Is it a “taking”?
3. Is the taking for “public use”?

⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (stating that “this Court, quite simply, has been unable to develop any ‘set formula’” for determining what is a taking, and instead engages in “essentially ad hoc, factual inquiries”).

⁸ 198 U.S. 45 (1905).

⁹ *Penn Central*, at 123-24 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

4. Is “just compensation” paid?¹⁰

This Essay looks at the Court’s answers to the first two questions: is something private property, and is the government action a taking? Note that the answer to the second question depends on the first: only if a person has a property interest can the government take that interest.

In response to the definitional question, the Court has stated that property is defined by non-constitutional, positive (as opposed to natural) law. In practice, however, the Court favors the use of one form of positive law—background principles of common law—to define property. At times, the Court also relies on some statutes to define property, while inexplicably condemning other statutes as takings.

In response to the taking question, the Court has held that government confiscation and permanent physical occupation—which is effectively akin to confiscation—are takings. This part of the doctrine is consistent with the original understanding of the Clause and the early doctrine. But beginning in 1922 with *Pennsylvania Coal Company v. Mahon*,¹¹ the Court expanded takings beyond its original meaning in what I term its “shadow” takings doctrine. In this shadow doctrine, the Court has accorded heightened protection for government intrusions upon the rights to exclude and to convey, while providing meager protection for restrictions on use.

A. SELECTIVE DEFINITION

Although the Court asserts that property is a creature of positive law, it has in fact defined property by selectively looking to certain sources, but not others, of positive law.¹² In fact, a positivist approach to defining property *cannot* produce a regulatory takings doctrine. In considering what sources of law to draw upon in defining property, the Court gives special preference to “common-law” “background principles” of nuisance and property law,¹³ and more generally to property interests “long recognized under state law.”¹⁴ At times, the Court has also inexplicably given preference to certain statutes over other statutes of the same state.

The Court has often asserted that property is defined by non-constitutional, positive law: “Property interests 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.”¹⁵ This positivist approach makes sense in cases of confiscation and permanent physical occupation. In a case of confiscation, the state has not altered its definition of property rights, but appropriated property from the private owner to itself (or alternatively, to a third party). Similarly, in a case of permanent physical occupation, the state has de facto appropriated

¹⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 656 (4th ed. 2011).

¹¹ 260 U.S. 393 (1922).

¹² This selective definition also pervades the Court’s attempts to define property under the due process clauses of the Fifth and Fourteenth Amendments. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 147 (1990).

¹³ *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992).

¹⁴ *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998).

¹⁵ *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). For a brief history of this part of the doctrine and the influence of *Roth*, see Merrill, *supra* note 12, at 887-88.

the property: the government “chops through the bundle [of property rights], taking a slice of every strand.”¹⁶

The Court, however, claims it applies a positivist understanding of property not only in cases involving confiscations and permanent physical invasions, but also in those involving other physical and all regulatory takings. But in these arenas, the positivist approach makes no sense. To understand why this is, consider that regulation that restricts property rights can be conceptualized as either 1) taking away an owner’s existing property rights under positive law, or 2) redefining what the owner’s property rights are.

Under the first approach, *any* new restriction on the owner’s property rights is a taking. Consider a zoning ordinance: suppose that a person owns an undeveloped plot of land, and the state enacts a zoning ordinance limiting development to residential housing. The ordinance can be conceived of as taking away an owner’s previously existing right to develop the land for non-residential use, and thus a taking. But this is not where the doctrine is—with rare exceptions, the Court has rejected Takings Clause challenges to zoning ordinances.¹⁷ Nor is it where the doctrine should be: “[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.”¹⁸

Under the second approach, no restriction is a taking: the state has not “taken” anything; it has only *redefined* what the owner’s property rights are.¹⁹ In the zoning example, the ordinance does not take away anything from the owner, but only redefines the owner’s use rights. In other words, if property is what the state says it is, then when the state says property means something else, it means that other thing, and there is no a taking. But this is not where the doctrine is either because the Court has found some regulations to be takings.

A positivist approach to property does not produce the current doctrine. Instead, the Court picks and chooses which property interests are worthy of protection, giving special preference to those interests found in background principles of common law, and, on occasion, to some statutes over others. For example, in *Lucas v. South Carolina Coastal Council*, the Court held that a South Carolina statute prohibiting the construction of any permanent habitable structures on beachfront property was a per se taking, as it denied “all economically beneficial or productive use of the land.”²⁰ The Court, however, also devised an exception to the per se taking rule, stating that restrictions on land use that “inhere[d] in the title itself”²¹ could justify denial of all economic use. In other words, those limitations that inhere in the title can *never* be takings, because they define what the property interest is in the first place.

¹⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

¹⁷ See *infra* note & text accompanying note 46.

¹⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹⁹ See Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 206-08 (2011) (“[T]he idea that states define property rights is completely incompatible with the idea that states, when exercising that definitional power, destroy them. Either they can define them, or they cannot define them; it cannot be both.”).

²⁰ *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

²¹ *Id.* at 1029.

In assessing what the property interest was, however, the Court limited the inquiry to “common-law” “background principles” of nuisance and property law.²² The Court gave preference to state common law over statutory law or regulation. It also gave preference to “background principles,” whatever that means—but likely indicating a preference for vintage common law over newly minted common law.²³

Outside the land use context, the Court’s definition of property is at times even more confusing. Consider *Webb’s Fabulous Pharmacies v. Beckwith*, where the Court held that a Florida statute, Section 28.33,²⁴ providing that interest accruing on an interpleader account belonged to the government was a taking.²⁵ (An interpleader account temporarily holds funds that are subject to competing claims). Another Florida statute, Section 676.106(4), provided that creditors held a property right on the principal on the interpleader,²⁶ and the majority rule at common law dictated that the interest follows the principal (i.e., it belongs to the creditors, not the government).²⁷

The Court defined the property right at issue—the interest accruing on the interpleader account—by looking to the common law majority rule plus one of the two relevant statutes, Section 676.106(4). Without explanation, however, the Court characterized Section 28.33 (the statute providing that the interest belonged to the government) not as defining the property right, but rather as a taking. But

if . . . all sources of Florida law must be consulted in defining the creditors’ property rights, why was the Florida statute authorizing the creation of an interpleader fund to resolve creditors’ claims a source of property rights for the

²² *Id.* at 1031. Although there is language in *Lucas* that suggests the Court looks to all “background principles of the State’s law of property and nuisance” (that is, including statutory law and regulations), *id.* at 1029, the Court’s application of its test focuses exclusively on the common law, *id.* at 1031-32, and makes clear that the common law, not statutory law or regulations, receive special preference in assessing what is property.

²³ The term “background” principles suggests that the law must be of a certain vintage, but the Court has never made clear what exactly it means. Compare *id.* at 1031 (citing RESTATEMENT (SECOND) OF TORTS § 827 (1979)) (noting that “changed circumstances or new knowledge may make what was previously permissible no longer so”), with *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001) (stating that “a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title”), and *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion) (holding that a judicial decision can enact a taking). See generally Sprankling, *supra* note 2, 699.

²⁴ FLA. STAT. § 28.33 (1977).

²⁵ 449 U.S. 155 (1980); see Merrill, *supra* note 12, 936-37 (describing *Webb’s Fabulous* as “one of the quirkiest of the modern decisions to raise a question about the meaning of constitutional property”). The subsequent discussion of this case is based on Merrill, *supra* note 12, 836-38.

²⁶ FLA. STAT. § 676.106(4) (1977).

²⁷ *Webb’s*, 449 U.S. at 162-63. A third statute, not at issue in the case, provided that the government could deduct a fee for managing the interpleader account. FLA. STAT. § 28.24(14) (1977).

creditors, while the Florida statute directing the clerk to keep the interest on the fund was not a source qualifying those property rights?²⁸

Note this result cannot be explained merely by the *Lucas* preference of common law over statutory law in defining property. Here, the Court did do that (defining the property interest based on the common law rule that interest follows the principal on the interpleader), but it also favored one Florida statute (giving creditors a property right in the interpleader account) over another Florida statute (giving the interest on the account to the government).²⁹ The Court gave no explanation for why one statute was favored over another, but whatever explanation one can make up,³⁰ it is not the positivist theory of property expressly articulated by the Court.

B. SELECTIVE PROTECTION

Once the Court has defined the property by picking and choosing from the various sources of positive law, it then selectively protects certain property rights over others ones. Unlike in the property definition context, however, the Court does not claim that it resorts to positive law to determine what a taking is. Rather, with two categorical exceptions,³¹ the Court

²⁸ Merrill, *supra* note 12, at 937.

²⁹ A similar case is *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 162 (1998); see Merrill, *supra* note 12, at 895-98. In *Phillips*, the Court held that interest paid on lawyers' trust accounts was client property. Prompted by a Federal Reserve Board opinion, the Texas Supreme Court created a rule requiring lawyers to create trust accounts that pooled together funds from several clients and to deliver the resulting interest to charitable legal services foundations. The principal on the client funds belonged to the clients, and could only be commingled in a trust account when putting the funds into a separate account generated no net interest (because the administrative fee for the separate account was greater than the interest). That is, absent the rule authorizing the trust account, the principal, and thus the client, would earn no interest. With the rule, however, the principal earned interest, but the interest went to a third party. The Court held that the interest was client property, relying on the majority rule at common law that interest follows principal. Similar to *Webb's* and *Lucas*, in defining property, the Court relied on a common law rule—but not the Texas Supreme Court's rule or the Federal Reserve Board's opinion.

³⁰ Professor Merrill explains the decision as the Court's attempt to give effect to social expectations, where social expectations and positive law diverged too much. Merrill, *supra* note 12, at 836.

³¹ The two categorical tests are "(1) where government requires an owner to suffer a permanent physical invasion of her property [and] (2) where regulations completely deprive an owner of all economically beneficial use of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528 (2005).

claims that it performs an ad hoc balancing inquiry³² to determine when a regulation “goes too far.”³³

In practice, the Court has created a hierarchy of real property rights.³⁴ First, government appropriations and permanent physical occupations are per se takings. As discussed below, these cases are consistent with the original understanding of the takings doctrine. Second, the Court grants heightened protection against restrictions on the right to exclude and to convey property. Finally, the Court grants minimal protection against restrictions on use, except when the restriction deprives property of all “economically beneficial use.”³⁵ These latter two categories of cases are not supported by the original understanding of the doctrine and have been made up by the Court, so I term them the “shadow” takings doctrine.³⁶ Within this shadow doctrine, the Court has never explained the variable tiers of protection for exclusion, conveyance, and use.

The Court has held that the right to exclude is a “fundamental element” of property.³⁷ “an essential element of individual property is the legal right to exclude others from enjoying it.”³⁸

³² *Id.* at 538-39 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (assessing “the economic impact of the regulation on the claimant,” “particularly to the extent to which the regulation has interfered with distinct investment-backed expectations,” and the “character of the governmental action”).

³³ *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

³⁴ While this Essay focuses on doctrinal distinctions among intrusions on real property, the doctrine has also distinguished between different types of property. Real property receives by far the highest level of protection. By contrast, government restrictions on personal and “new” property are hardly ever deemed takings, either because the owner lacks a property interest, *see, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (noting that government action affecting state employees’ contractual rights was not a taking: employees lacked a property interest because the government had retained the right to alter the contractual rights in a generic reservation clause in the Social Security Act of 1938), or because the owner purportedly ought to be aware that his property may be subject to greater restrictions, including the “possibility that new regulation might even render his property economically worthless.” *Lucas*, 505 U.S. at 1027-28. Government imposition of general liability (like a tax) is not a taking. *Eastern Industries v. Apfel*, 524 U.S. 498 (1998) (plurality opinion). There, the plurality would have found a taking, but a majority of five Justices agreed that general liabilities are not takings.

³⁵ *Lucas*, 505 U.S. at 1019.

³⁶ The Court prefers to divide its takings jurisprudence into confiscatory, “physical” and “regulatory” takings. “Physical” takings involve both permanent and temporary physical intrusions, while “regulatory” takings involve restrictions on use. The line between physical and regulatory takings is confusing, because while permanent physical occupations are practically equivalent to confiscation, temporary physical intrusions seem more akin to restrictions on use. Accordingly, I group together temporary physical intrusions and restrictions on use, along with restrictions on conveyance, under the header of “shadow” takings.

³⁷ *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

³⁸ *Id.* at 180 n.11 (quoting *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

Outside of its confiscation and permanent physical occupation cases, the vast majority of cases where the Court has found a taking has involved an invasion of the right to exclude. For example, the Court has found a taking where government action is akin to taking an easement,³⁹ including where government action renders the property unusable for some purposes.⁴⁰ Or for instance, where the government requires an owner to give the public an easement as a condition for development, the Court finds a taking unless the exaction has an essential nexus with a legitimate state interest and also is “roughly proportional” to the impacts of the proposed project.⁴¹ Nevertheless, not all physical invasions are takings. For example, where a landowner has voluntarily opened her property to the public, the government may regulate the landowner’s ability to exclude certain individuals;⁴² or where a landowner has voluntarily leased space on its property, the government may also regulate the conditions of that lease through rent control.⁴³

In a single case, the Court has also indicated its willingness to protect the right to convey real property, and in particular the right to pass on one’s property to one’s heirs. In *Hodel v. Irving*,⁴⁴ a federal law prevented inheritance of certain Indian property. The Court held that a taking existed because “the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property . . . to one’s heirs,” noting that “the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”⁴⁵ *Hodel* demonstrates the Court’s willingness to find a taking even when a law only disrupts one of several ways to convey property.

³⁹ *Id.* (government order that private waterway be opened for public use).

⁴⁰ *United States v. Causby*, 328 U.S. 256, 265 (1946) (government flights over land that are “a direct invasion of respondents’ domain”); *see also* *Griggs v. Allegheny Cnty.*, 369 U.S. 84 (1962) (same); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (government firing of guns over land that constituted “successive trespass[es]” on defendant’s land).

⁴¹ *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834-837 (1987) (permit to develop beachfront lot conditioned on granting of an easement allowing the public to cross the lot on the ocean side of the seawall lacked essential nexus to state interests and thus was a taking); *see also* *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (permit to expand commercial development conditioned on granting of pedestrian/bicycle pathway and public greenway easements lacked rough proportionality to state interests and thus was a taking).

⁴² *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980) (state constitution requiring shopping centers to be open to public speech activities not a taking); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (public accommodations provision of the Civil Rights Act of 1964 not a taking).

⁴³ *Yee v. City of Escondido*, 503 U.S. 519 (1992) (rent control statute not a physical invasion; whether the statute was a regulatory taking was not before the Court); *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988) (dictum) (ordinary rent control statutes not takings); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (rent control statute for use of utility poles not a taking).

⁴⁴ 481 U.S. 704 (1987).

⁴⁵ *Id.* at 716. *But see* *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that a limit on alienation of bald or golden eagle parts is not a taking, noting that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’” of the bundle[, here the right to alienate,] is not a taking, because the aggregate must be viewed in its entirety”). These two cases

By contrast, the Court accords minimal protection to the right to use. Limits on use, even those that deprive property of significant value, are generally not takings.⁴⁶ Even a temporary bar on all development is not a taking, so long as the government action is reasonable.⁴⁷ The key exception is where a government action deprives an owner of “all economically beneficial use” of the land, unless the restriction is justified under “background principles of nuisance and property law.”⁴⁸

Why are the right to exclude and convey given much greater protection than the right to use? Although the Court has suggested that physical invasions are somehow qualitatively different from other regulations,⁴⁹ it has never given any convincing reasons. It has suggested that the right to exclude is somehow more fundamental than other property rights, and that physical invasion is of an unusually serious character.⁵⁰ It also has indicated that the right to pass on property to one’s heirs is of a historic and important nature in our legal system.⁵¹ But of course the right to use one’s property is also a right of historic and fundamental dimensions.⁵² In

are in tension, but perhaps the most obvious way to reconcile them is the Court’s usual regime of heightened protection for real property over personal property. *See supra* note 34; *see also* CHEMERINSKY, *supra* note 10, at 673 (suggesting that these cases may be distinguished based on the government’s interest, with the Court giving more weight to protecting endangered species and less to reuniting small parcels of Indian land).

⁴⁶ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (state law prohibiting development on most of property not a taking, because owner could still build on a section of the property); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (state law restricting mining to fifty percent of coal so as to prevent subsidence not a taking); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (ordinance requiring property be used for single family as opposed to multi-family residences not a taking); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (zoning ordinance that effectively shut down quarry not a taking); *see also* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (restriction on development of a public landmark, the Grand Central Terminal in New York City, not a taking); *id.* at 131 (the Court’s cases “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking,’” *see* *Euclid v. Ambler Realty Co.*, 272 U.S. 365 . . . (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 . . . (1915) (87 1/2 % diminution in value)).

⁴⁷ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

⁴⁸ *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992).

⁴⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”).

⁵⁰ *See supra* notes & text accompanying notes 37-38.

⁵¹ *See supra* notes & text accompanying note 45.

⁵² For example, the right to use and enjoy property is protected at common law by the tort of nuisance, an action that has historic roots in thirteenth-century England. Modern commentators agree the rights to use, exclude, and convey are all important sticks in the property bundle. Craig Arnold, *The Reconstitution of Property: Property As A Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 285 n. 20 (2002) (citing numerous authorities); *see also* Sprankling, *supra* note 2, 5

short, the Court accords greater protection to the rights to exclude and convey than to the right to use, but it's not clear why.

III. THE DOCTRINE IS WRONG

The shadow takings doctrine—in particular, the Court's selective definition of property rights and selective protection of particular rights—is wrong and should be discarded. First, while the text of the Clause may be read to encompass non-possessory deprivations, the history of its framing as well as the first 131 years of doctrine uniformly reject such a reading. The doctrine can also at times be very confusing and unpredictable. Second, even on a theory that the meaning of the Constitution changes with the times, the doctrine should be rejected as an illegitimate attempt by the judiciary to stagnate the development of property law, for the same reasons as *Lochner v. New York* was rejected in 1937.

A. THE DOCTRINE IS INCONSISTENT WITH ORIGINAL UNDERSTANDING AND PRE-*MAHON* DOCTRINE, AND IS EXTREMELY CONFUSING

Even assuming that “the text of the Clause can be read to encompass regulatory as well as physical deprivations,”⁵³ the original understanding and the pre-*Mahon* doctrine reject the shadow takings doctrine. Moreover, the doctrine is extremely confusing and often unpredictable.

Professor Treanor, the seminal authority on the original understanding of the Clause,⁵⁴ has persuasively argued that the Clause “originally protected property against physical seizures.”⁵⁵ James Madison, who drafted the Fifth Amendment, intended the Clause “to apply only to direct, physical taking of property by the federal government.”⁵⁶ The Clause, and its early state counterparts, were directed against physical seizures because of particular concerns regarding the failure of political process regarding the seizure of land by legislatures and the

(stating that the “most important sticks in the [property rights] bundle” are the rights to exclude, transfer, possess and use, and destroy).

⁵³ *Lucas*, 505 U.S. at 1028 n.15. I believe that Justice Scalia was correct in *Lucas*, but even the textual point is disputed. For example, Professor Byrne argues that the drafters of the Fifth Amendment used “absolute language,” not “words of degree” such as “‘excessive’ or ‘unreasonable’” regulation of property. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 91-92 (1995). But this argument seems untenable unless the Court is to renovate a great deal of its constitutional doctrine. Consider the Free Speech Clause. Although it employs absolute language, the Court has never adopted the position that free speech protection is absolute; rather speech restrictions may be “permitted for appropriate reasons.” *Elrod v. Burns*, 427 U.S. 347, 360 (1976).

⁵⁴ Professor Treanor's studies on the Clause have been cited by two Supreme Court dissents. *Lucas*, 505 U.S. at 1056, 1057, 1059 (Blackmun, J., dissenting); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, J.J.).

⁵⁵ William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *COLUM. L. REV.* 782, 782 (1995); see also Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 58 (1964) (“[T]he clause was designed to prevent arbitrary government action, rather than to preserve the economic status quo.”).

⁵⁶ William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 711 (1985).

seizure of goods by the military.⁵⁷ Madison in particular was also concerned about the seizure of slaves without compensation.⁵⁸

Moreover, the Framers recognized the necessity of property regulation. Although they were strongly influenced by Lockean liberal, natural rights theory, they also espoused a republican theory of property: a concept of property as created by the polity and subject to regulation in service of republican liberty. In other words, the Framers did not intend to protect all “natural” property rights through the Takings Clause.⁵⁹ *Federalist No. 10* makes this point forcibly, showing that the Framers recognized the importance of redistribution as a central function of government:

[T]he most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. *The regulation of these various and interfering interests forms the principal task of modern legislation* and involves the spirit of party and faction in the necessary and ordinary operations of government.⁶⁰

The early doctrine agrees with the history. In 1870, the Court stated that “[the Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.”⁶¹ The modern Court has not disputed this reading—the *Lucas* majority admitted that until *Mahon*, the Court had consistently interpreted the Clause to reach only direct appropriations or the “practical ouster of the owner’s possession.”⁶² Moreover, outside of the Takings Clause context, early cases invoking natural rights also support government regulation of property, stopping short of appropriation.⁶³

The doctrine is also extremely confusing. Commentators agree on this point, calling the doctrine a “crazy-quilt pattern,”⁶⁴ “a muddle, a chaos of confused argument, and a welter of

⁵⁷ Treanor, *supra* note 55, at 825-836.

⁵⁸ *Id.* at 851-55.

⁵⁹ *Id.* 819-825.

⁶⁰ *Id.* at 842 (quoting THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added)).

⁶¹ Legal Tender Cases, 79 U.S. 457, 551 (1870).

⁶² *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted).

⁶³ *Slaughter-House Cases*, 83 U.S. 36, 76 (1872) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823)) (describing as fundamental “the right to acquire and possess property of every kind . . . subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole”); *see also* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (In defining a long list of “vital principles in our free republican governments” that restrain the legislative power, the Court discusses property, and states that “a law that takes property from A and gives it to B”—in other words, a direct appropriation—would not be a “rightful exercise of legislative authority.”).

⁶⁴ Sax, *supra* note 55, 37.

confusing and apparently incompatible results.”⁶⁵ Even Justice Stevens admitted that “the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”⁶⁶ A great deal of the confusion arises because the Court employs four different tests for analyzing whether there is a taking—which can lead to contradictory results—and it is not always clear which test applies.⁶⁷

B. THE DOCTRINE IS PHILOSOPHICALLY UNJUSTIFIABLE

The shadow takings doctrine is a judicial invention and an extremely confusing one at that. But not only has the Court failed to articulate any coherent theory for its doctrine,⁶⁸ the doctrine appears philosophically unjustifiable on conventional grounds for justifying property law, such as the utilitarian and natural rights theories.⁶⁹ Rather, the doctrine parallels the Court’s efforts in *Lochner* to protect existing entitlements of resources against legislative change. But the Constitution does not confer upon the judiciary authority to defend the economic status quo, and thus the doctrine ought to be rejected just as *Lochner* was in 1937.

1. Two Major Philosophical Justifications for Property: Utilitarianism and Natural Rights Theory

Philosophical justifications for property may be roughly categorized into two camps: property as a means and property as an end in itself. The first camp posits that property is a means to another end, such as social utility or democratic self-government. Utilitarian and republican justifications for property fall within this camp. Underpinning the concept of property-as-means is a recognition the state may and ought to revise property law in response to changing circumstances.⁷⁰

This positivist understanding of property as expressed through utilitarian theory is the “dominant theory underlying American property law,”⁷¹ and rightly so. The Court has expressly recognized the positivist theory of property since 1972, and many earlier decisions impliedly adhere to the same theory.⁷² Moreover, the dynamic nature of property law has been a consistent feature of Anglo-American common law and American statutory law.⁷³

⁶⁵ Byrne, *supra* note 53, at 103 & n.90; *see also* Treanor, *supra* note 55, at 880-81 (“It is difficult to imagine a body of case law in greater doctrinal and conceptual disarray”).

⁶⁶ *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

⁶⁷ Treanor, *supra* note 55, at 880-81; Byrne, *supra* note 53, at 103-05. The four tests are the ad hoc balancing test of *Penn Central*, the *Lucas* test for deprivation of all economic use, the land use exaction standard of *Nollan/Dolan*, and the physical takings test. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005). One treatise argues that the Court’s takings jurisprudence should be conceptualized as six separate tests. RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 964-66 (5th ed. 2012).

⁶⁸ *See supra* note and text accompanying note 7.

⁶⁹ Other conventional justifications for property law exist, such as republicanism, personhood theory, libertarian theory, and more. *See* Sprankling, *supra* note 2, at 12.

⁷⁰ *See id.* at 16-17; Byrne, *supra* note 53, at 126-27.

⁷¹ *See* Sprankling, *supra* note 2, at 16.

⁷² *See supra* note and text accompanying note 15.

⁷³ Professor Sax provides a concise sampler of the numerous changes:

Consider for example land use regulation and its roots in the tort of nuisance.⁷⁴ Traditional English law, as adopted by early American courts, found that “virtually any conduct that seriously impaired another’s use of land constituted a private nuisance and was automatically enjoined.”⁷⁵ But in response to social changes (in great part spurred by the shifting demands on land use brought about by the Industrial Revolution),⁷⁶ American nuisance law gradually departed from these categorical principles and embraced considerations of utility.⁷⁷ The modern rule, as restated in the *Restatement (Second) of Torts*, is that an activity must unreasonably interfere with another’s use of land in order to be a nuisance; and in many cases, the available remedy is not specific relief, but damages.⁷⁸ By the early twentieth century, however, in response to “[u]rbanization, industrialization, population growth, technical change, and other economic and social forces,” legislatures began enacting zoning ordinances,⁷⁹ which eventually superseded nuisance law as the primary legal tool for reconciling land uses.⁸⁰ In more recent decades, environmental statutes have also become important for dealing with the environmental concerns of land use.

The second camp posits that property is an end in itself; that is, property ownership is a right that is worthy of protection for its own sake. Natural rights theory falls within this second camp. The most influential version of this theory was developed by John Locke. Locke famously argued that because each person owns his body and accordingly the labor his body performs, he

Examples of property law’s adaptation to social changes abound. In a ruder world, nuisance law originally imposed unprecedented duties of neighborliness on owners’ rights. The Kentucky Constitution once opined that “the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.” In eighteenth century America, the states abolished feudal tenures, abrogated primogeniture and entails, ended imprisonment for debt, and significantly reduced rights of alienation, as well as dower and curtesy. In the nineteenth century, to promote industrialization by hydropower mills, courts redefined the traditional rights of natural flow in water established during a preindustrial economy. The rules changed again when log-floating became a necessary way to get lumber to markets. In the arid west, landowners’ riparian rights were simply abolished because they were unsuited to the physical conditions of the area. As the status of women changed, laws abolished husbands’ property rights in their wives’ estates.

Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1447-48 (1993). See generally LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 230-57, 412-438 (2d ed. 1985) (chronicling the history of American property law through the end of the nineteenth century); Sprankling, *supra* note 2, at § 8 (chronicling the history of the estates in land system).

⁷⁴ Sprankling, *supra* note 2, at 485.

⁷⁵ *Id.* at 484.

⁷⁶ See generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

⁷⁷ Sprankling, *supra* note 2, at 484.

⁷⁸ *Id.* at 488.

⁷⁹ *Id.* at 610.

⁸⁰ *Id.* at 485.

acquires property rights when “mixes” his labor with things in nature.⁸¹ Accordingly, a person acquires property in land by working it; for example, a family can acquire title to a tract of prairie by cultivating and harvesting wheat on the land.⁸²

A key difference between utilitarianism and natural rights theories is that under the latter property is not a mere creation of the state for the sake of advancing social utility.⁸³ Rather, “a natural rights theory asserts that the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state.”⁸⁴ Since property is not created by the state but exists as a natural norm, the state cannot legitimately alter property law in response to societal change without compensation. “*All* regulations, *all* taxes, and *all* modifications of liability rules are takings of private property *prima facie* compensable by the state.”⁸⁵

For a number of reasons, “[l]egal scholars are almost uniformly critical of Lockean labor theory as a justification for private property rights.”⁸⁶ Regardless, we need not take a stand on which theory is better in order to condemn the Court’s takings jurisprudence, because it fails to square with either utilitarianism or natural rights theory.

Table 1 Utilitarian and Natural Rights Theories of Property

Theory	Purpose of property	Purpose of government	Origin of property rights	Government changes to property rights
Utilitarianism	Means to another end (utility)	To advance the public good (utility)	State (positivism)	Presumably acceptable as redefinition of property
Natural Rights	End in itself	To protect liberty and property rights	Nature (pre-political)	Invades property rights and presumably must be compensated for

2. *The Doctrine is Unjustified by Either Theory of Property*

Consider first an utilitarian justification for property. Neither the Court’s selective definition nor selective protection is grounded in utilitarianism. First, the Court’s favoring of background principles of common law over statutory law makes no sense. Although common law continues to form an integral part of property law and land use regulation, it merits no

⁸¹ *Id.* at 15. See generally RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3-6 (1985).

⁸² Sprankling, *supra* note 2, at 15.

⁸³ *Id.* at 14-15; Epstein, *supra* note 81, at 5.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 16.

⁸⁶ Sprankling, *supra* note 2, at 15. For one, the theory suggests that a person should receive the fruits of her labor, not title to land. Moreover, the theory seems to only honor “first” labor, not all labor; for example, the theory does not posit that hired farmworkers can acquire ownership of the farm through laboring on it. The theory also assumes an unlimited supply of land and other natural resources per person, which is increasingly unlikely as population density increases.

priority over statutory law on utilitarian grounds. To the contrary, the Court long ago recognized that “the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”⁸⁷

For example, the common law is not well-suited dealing with environmental problems.⁸⁸ Environmental harm is often widely dispersed, and thus not amenable to suits for private nuisance or trespass, which focus on the harm against a small number of plaintiffs. The connection between human activity and environmental harm is often uncertain, and causality can be difficult to establish, especially where multiple polluters contribute to the same harm. Polluting activities are often highly beneficial and not unreasonable, and thus courts are reluctant to enjoin them or to order more than a payment of damages. Moreover, common law suits are generally retroactive and ad hoc (i.e., not all polluters will be sued), the amount of damages awarded can seem arbitrary, litigation costs are burdensome, and generalist courts lack expertise in environmental matters.

By contrast, legislatures can craft forward-looking statutes that deter widely dispersed harms, dispense with common law causality requirements, and require pollution controls regardless whether the activities are economically profitable. Agencies charged with administering environmental statutes can develop institutional expertise in both technical and legal matters, and more capably make environmental judgments. This is, of course, not to say that environmental statutes and their administration are without problems, but there are strong reasons to believe that environmental regulation is a more effective means of promoting the public good than the common law.

Similarly, the Court’s heightened protection for the rights to exclude and convey over the right to use is not grounded in utilitarianism. Surely in some cases deprivation of the former rights is more worthy of just compensation than deprivation of the right to use. But it is difficult to imagine why this would hold true as a general principle: why it would generally be more unfair for an owner to bear one type of deprivation over the other. Perhaps this is one reason why the Court denies it has a coherent theory for these cases, but regardless, the shadow takings doctrine lacks an utilitarian justification.

Nor does natural rights theory support the doctrine. Whatever one’s conception of natural property rights are, “background principles” of “common law” could not have codified those natural rights. After all, the common law changed a great deal throughout Anglo-American history,⁸⁹ and moreover, even at the same historical time, each state has different common laws. But the whole point of natural rights is that they are *natural*: they should not vary depending on what state one’s property is in or in what year one holds title. Moreover, it seems rather strange

⁸⁷ *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

⁸⁸ See generally JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 44-46 (3d ed. 2010). But see, e.g., Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923 (1999) (arguing that the common law would produce better environmental policy). The Court has recognized the unsuitability of common law adjudication for environmental problems. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) (climate change); *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981) (water pollution).

⁸⁹ See *supra* notes & text accompanying notes 73-80.

to assert that “background principles” of common law, but not contemporary common law, best reflects natural property rights. That is, even if one were to assume that the common law reveals natural law (a view the Court decisively rejected in *Erie Railroad v. Tompkins*⁹⁰) it is a mystery why only a particular, vintage set of common law has that revelatory feature.

Similarly, the Court’s preference for the rights to exclude and convey over the right to use is not justified by natural rights theory. Commentators uniformly recognize all three rights as basic and historic property rights.⁹¹ In fact, Locke’s justification for property was rooted in the owner’s actual use of the property: “As much Land as a Man Tills, Plants, Improves, Cultivates, and can *use* the Product of, so much is his Property.”⁹²

Moreover, it is undisputed that total deprivation of *any* one of these rights is not fatal to ownership itself.⁹³ For example, the right to exclude is not necessary to property ownership.⁹⁴ One might own property subject to an easement for others to cross the land; or to a lease to a tenant for a term of years; or to a rent control law from evicting one’s tenant without good cause.⁹⁵ Neither is the right to convey necessary to ownership, much less the right to pass on property to one’s heirs. For example, “although certain pension rights and spendthrift trust interests cannot be transferred, they are still property.”⁹⁶

It should also be noted that public intrusion on the right to exclude, especially during the first century of the republic, is an ordinary feature in the common law, and hardly of a deprivation of an “unusually serious character” that the Court asserts it is.⁹⁷ At common law, the public trust doctrine protects certain public rights to use and enter property and takes precedence over private rights.⁹⁸ For example, the public has a right to navigate on navigable-in-fact waters.⁹⁹ Moreover, in the period before the Civil War, the public’s rights were significantly greater than they are today: in a number of states, the public had a right to enter unenclosed

⁹⁰ 304 U.S. 64, 79 (1938).

⁹¹ See *supra* notes & text accompanying notes 50-52.

⁹² Sprankling, *supra* note 2, at 15 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 290-91 (Peter Laslett ed., student ed. 1988) (3d ed. 1698)) (original emphasis removed; emphasis added).

⁹³ *Id.* at 6-8.

⁹⁴ As the Court has recognized, “[a]t least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). More generally, property “denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it,” and the Takings Clause is “is addressed to every sort of interest the citizen may possess.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

⁹⁵ Sprankling, *supra* note 2, at 6.

⁹⁶ *Id.*

⁹⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

⁹⁸ See Sprankling, *supra* note 2, at 516-17; *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892). For a critical analysis of public rights and how the term has been used, see JAMES L. HUFFMAN, PRIVATE PROPERTY AND THE CONSTITUTION ch.4 (2013).

⁹⁹ See *Gibson v. United States*, 166 U.S. 269, 271 (1897).

private lands.¹⁰⁰ In some of those states, the public had further rights to graze livestock, hunt, fish, forage, and prospect for minerals on unenclosed private lands, and the government had the right to use unenclosed lands as militia training grounds.¹⁰¹

In sum, not only has the Court failed to articulate a theory for its shadow takings doctrine, the doctrine is inconsistent with utilitarianism and natural rights theory. To the extent these theories justify our property regime, the doctrine undermines the legitimacy of the institution of property.

3. *The Doctrine Attempts to Preserve Existing Economic Entitlements, Akin to the Right to Contract Protected by Lochner and Its Progeny*

If the doctrine fails to promote the social good or to protect natural rights, what exactly does it do? The takings doctrine, just like the right to contract espoused by *Lochner* and its progeny, is best explained as an attempt to preserve existing economic entitlements that the Court finds valuable.¹⁰² This is not a legitimate exercise of the judicial role, and thus the Court should reject the doctrine for the same reasons that it rejected *Lochner*.

Lochner's sin, and the trouble with the modern takings doctrine, is not mere judicial activism, but rather the constitutionalizing of a particular strand of economic theory and the allocation of entitlements set by a common law baseline.¹⁰³ It must be emphasized that so-called "judicial activism" is not itself improper.¹⁰⁴ Rather, *Lochner*'s error was to rely on "a bad

¹⁰⁰ See ERIC FREYFOGLE, ON PRIVATE PROPERTY 29-44 (2007).

¹⁰¹ See *id.*

¹⁰² See generally Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 BOSTON UNIV. L. REV. 605 (1996). It must also be emphasized that the doctrine *cannot* be explained as a naked preference for the common law. Rather, the Court only prefers "background principles" of common law in defining property. Contemporary common law is not given the same weight, and indeed, a plurality of the Court has recently argued that contemporary judicial decisionmaking can enact a taking. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion).

¹⁰³ See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) ("For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements."). For a critical analysis of Professor Sunstein's view, see David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

¹⁰⁴ Rather, our tradition has long affirmed the importance of judicial review as a fundamental bulwark of our scheme of separation of powers and safeguard of our constitutional liberties. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Even aggressive judicial interference may be warranted in the face of legislative action offending the Constitution. See *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). Moreover, where the text of the Constitution is amenable to novel constructions, the Court properly adapts the Constitution to the times to seek a freer and more just society. See

‘baseline’” by taking “the existing distribution of rights and entitlements as a neutral or natural standpoint from which to see whether government had been impermissibly partisan.”¹⁰⁵

The takings doctrine makes the same mistake. Consider first the Court’s favoritism for background common law principles in defining what property interests are.¹⁰⁶ For the Court, the baseline, just as in *Lochner*, is government inaction in the face of the background common law and the existing entitlements under that regime. As we have seen above, this baseline cannot be justified on utilitarian or natural rights grounds, and appears to simply perpetuate historical practices.

The Court’s heightened protection for the right to exclude and convey over the right to use is more difficult to explain in this way. Nevertheless, at least with regard to the rights to exclude and use, a rough analog can be drawn to tort law, which (at least, in much of the twentieth century)¹⁰⁷ has accorded far greater protection to intrusions on the right to exclude (trespass) than on the right to use (nuisance). Under modern tort law, the general rule is that trespasses are enjoined and compensated for,¹⁰⁸ while nuisances often are only compensated for and do not give rise to injunction.¹⁰⁹

Thus, tort law suggests that landowners who suffer interferences with use caused by private activity can be made whole by money, while landowners who suffer physical intrusions cannot be made whole by mere payment: the right to exclude is more sacrosanct in kind than the right to use because it cannot be “bought off” with money. By analogy, landowners who suffer interferences with use caused by government action need not even be compensated, while those who suffer intrusions on the more sacrosanct right to exclude must be paid off. Viewed in this light, the takings doctrine attempts to preserve, albeit imperfectly, the greater protection accorded to the right to exclude found in the common law.

Because the takings doctrine is *Lochner* redux, it ought to be rejected for the same reasons *Lochner* was: the role of the judiciary is not to perpetuate existing socioeconomic entitlements. Rather, in view of changing circumstances, the legislature must be allowed to adjust the legal framework so as to serve the public good, including through redistribution. As it did in abrogating *Lochner*, the Court should recognize that existing property entitlements at common law are not necessarily the proper baseline, but may in fact be societal subsidies for the advantaged.¹¹⁰ To the contrary, the proper distribution of entitlements is a question for the

Lawrence v. Texas, 539 U.S. 558, 579 (2003); see also DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); LAWRENCE H. TRIBE, THE INVISIBLE CONSTITUTION, 168-71 (2008) (distinguishing *Lochner* from the Court’s protection of unenumerated personal rights).

¹⁰⁵ GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 763 (7th ed. 2013). Or as Justice Holmes famously said in his dissenting opinion in *Lochner*, “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York*, 198 U.S. 45, 75 (1905).

¹⁰⁶ See *supra* notes & text accompanying notes 21-22.

¹⁰⁷ See *supra* notes & text accompanying notes 76-77.

¹⁰⁸ Sprankling, *supra* note 2, at 505.

¹⁰⁹ *Id.* at 494-97; see also *Boomer v. Atlantic Cement Co.*, 309 N.Y.S. 2d 312 (1970).

¹¹⁰ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937) (“There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining

political process, and courts should apply no more than rational basis review to the wisdom of the legislature's policy choices.¹¹¹ The shadow takings doctrine should be rejected.

IV. THE DOCTRINE IS UNNECESSARY

With the shadow takings doctrine gone, the Court would be left with the original understanding of takings: government confiscations and, by practical equivalence, permanent physical occupations are takings, and no more. One might wonder whether such a dramatic cutback on takings protections would threaten the fundamental concern of the doctrine: to avoid forcing some landowners “to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹¹² It would not. First, landowners are a majority group and not vulnerable to political process failures. In fact, landowners have actively and effectively defended their interests through the political process. Second, to the extent that landowners are unfairly singled out or subject to arbitrary laws, other constitutional provisions provide protection.

First, landowners as a group are not vulnerable to political process failures so as to merit constitutional interference.¹¹³ The most prominent explanations for constitutional interference with legislative judgments were put forth in Footnote Four of *Carolene Products*.¹¹⁴ According to Footnote Four, there are three reasons for interference: first, “when legislation appears on its face to be within a specific prohibition of the Constitution”; second, when legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”; and third, when legislation discriminates “against discrete and insular minorities.”¹¹⁵

The first reason simply re-asks the question: does regulating property violate the Takings Clause? As argued above, the Takings Clause should not be construed this way. The second and third reasons counsel against judicial interference. To the contrary, property owners are a majority of the American population,¹¹⁶ and moreover, they are both active and effective in

power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.”)

¹¹¹ See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

¹¹² *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

¹¹³ The point is of course not that landowners will never be subject to unfair burdens, but rather that there is no basis for constitutional interference. Byrne, *supra* note 53, at 129.

¹¹⁴ 304 U.S. 144, 152-53 n.4 (1938).

¹¹⁵ *Id.*

¹¹⁶ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 612 tb.992 (Homeownership Rates by Age of Householder and Household Type: 1990 to 2010) (Home ownership rate was 66.9% in 2010.), *available at* <http://www.census.gov/compendia/statab/2012/tables/12s0992.pdf>.

defending their property interests.¹¹⁷ For example, numerous states have enacted property rights protections beyond the requirements of the Takings Clause. These protections include takings impact assessments (requiring the state to engage in a procedural assessment of the impact of a government regulation on private property), enhanced compensation provisions (including for reductions in use value by more than a certain percentage), statutory causes of action for deprivations that may not trigger constitutional concerns, statutory limits on moratoria on property development, limits on the ability of local governments to impose impact fees on new development, and more.¹¹⁸ State courts have also shown themselves capable of policing regulations, whether under the state constitutional takings doctrine or under other state law doctrines to control local regulatory abuse (such as state law preemption, Dillon's Rule, and due process).¹¹⁹

Second, to the extent that landowners are unfairly singled out or subject to arbitrary laws, the equal protection and due process guarantees of the Fifth and Fourteenth Amendments, as well as the First Amendment, provide sufficient protection.¹²⁰ For example, the equal protection clause protects persons from zoning laws and land use regulations that are arbitrary¹²¹ or substantially infringe upon fundamental rights.¹²²

V. CONCLUSION

The Court's shadow takings jurisprudence should be rejected. The doctrine is inconsistent with original understanding and the first 131 years of Court precedent, and is moreover, extraordinarily confusing. It lacks a coherent theoretical justification, is inconsistent with utilitarian and natural rights justifications for property law, and undermines the legitimacy of property. The concerns of the doctrine for fundamental fairness can be and are being addressed through existing political processes and other constitutional guarantees.

More than ever, the Court should return to the original understanding of the takings doctrine because of the pressing need for changes to property law necessitated by humankind's evolving role in and understand of the natural world. Today, more than at any other time in our history as a species, human activity has and is capable of shaping and destroying the natural environment.¹²³ Manmade climate change poses an existential threat to human life as we know

¹¹⁷ See Byrne, *supra* note 53, at 129 n.252 ("Home ownership, for example, is supported by a famous tax subsidy. 26 U.S.C. s 25 (1988 & Supp. V 1993). Moreover, high income owners of beachfront property, very often expensive vacation homes, have succeeded in obtaining heavily subsidized flood insurance from the federal government."). *But see* Treanor, *supra* note 55, at 872-80 (arguing that government actions should be subject to heightened scrutiny under the Takings Clause when the action seems particularly vulnerable to process failure, as in environmental justice cases).

¹¹⁸ Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 257-60 (2004).

¹¹⁹ *Id.* at 261-70.

¹²⁰ See generally Sprankling, *supra* note 2, § 38.

¹²¹ Village of Willowbrook v. Olech, 528 U.S. 52 (2000).

¹²² Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion).

¹²³ See, e.g., THOMAS BERRY, THE DREAM OF THE EARTH (1988); AL GORE, EARTH IN THE BALANCE (1992); BILL MCKIBBEN, THE END OF NATURE (1989).

it.¹²⁴ Science and technology are progressing at an exponential pace,¹²⁵ and our understandings of ecology and the environment are rapidly advancing. In the face of these radical changes, a growing number of moral philosophers and religious leaders advocate for a recognition of moral and religious obligations to care for the earth.¹²⁶ Visionary thinkers increasingly propose new conceptions of property and the rights and obligations of landowners.¹²⁷ And governments are acting to make real these new paradigms of property and humankind's place in the natural world.

The original understanding of the Takings Clause did not enact the shadow takings doctrine. And a judicially crafted doctrine ought not impose an obstacle to our nation's urgent need to adapt to a changing world. It's time for the Court to let go of what it has made.

¹²⁴ See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT: APPROVED SUMMARY FOR POLICYMAKERS (2014); UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL ENVIRONMENT OUTLOOK (GEO-5): ENVIRONMENT FOR THE FUTURE WE WANT (2012).

¹²⁵ See Ray Kurzweil, *The Law of Accelerating Returns*, in ALAN TURING: LIFE AND LEGACY OF A GREAT THINKER 381-416 (Christof Teuscher ed., 2004).

¹²⁶ See generally JOSEPH R. DES JARDINS, ENVIRONMENTAL ETHICS (2012); JOHN GRIM & MARY EVELYN TUCKER, ECOLOGY AND RELIGION (2014).

¹²⁷ See, e.g., Berry, *supra* note 123; WENDELL BERRY, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE (1996); Aldo Leopold, *The Land Ethic*, in A SAND COUNTY ALMANAC & OTHER WRITINGS ON ECOLOGY AND CONSERVATION 171, 171-190 (Curt Meine ed., The Library of America 2013); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Sax, *supra* note 73; Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Underkuffler, *supra* note 12; see also ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 37—49 (2013 7th ed.) (summarizing ecological understandings of property); Sprankling, *supra* note 2, at 12 (summarizing various alternative theories of property).