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1992

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TAKINGS AND THE POST-MODERN DIALECTIC OF PROPERTY

*Gregory S. Alexander**

In recent years a debate has been going on both in the narrow confines of legal scholarship and in the press concerning constitutional protection of private property. Newspapers regularly include articles, columns, and editorials about government agencies that have extended their regulatory power over some resource—whether wetlands, landmark buildings, or rental apartments—and many property owners are outraged at what they view as a gross intrusion on their private domain. The intrusion seems all the worse to these property owners and their supporters because the government's action with respect to their things is more than an inconvenient bureaucratic requirement like mandatory recycling. It is rather a substantial usurpation of their ownership rights that is unaccompanied by any compensation. In legal argot, it is a "taking" of property that masquerades as mere "regulation."

To make matters worse, American courts, including (or perhaps one should say *especially*) the United States Supreme Court, have been confused and confusing in their attempts to define the scope of legal protection for property under the takings clauses of the federal and state's constitutions. The Supreme Court has applied various tests for determining when a regulation "goes too far," as Justice Holmes put it,¹ and becomes a taking of property. There seems to be little rhyme or reason to the application of these tests, and their collective effect throughout most of this century has been to leave government regulators pretty much unconstrained, at least by the takings clause. More recently, however, the Court appears to have taken a new tack, which might reinvigorate the takings clause as a check on government intervention with the rights of private ownership of property. But the significance of these latest takings decisions has been the subject of almost as much disagreement

* Professor of Law, Cornell University. This paper is a modified version of a lecture delivered as part of Valparaiso University School of Law's Colloquium on the Bill of Rights, October 27, 1991.

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

as was focused on the underlying question of the appropriate scope of government regulation of property rights.

In this brief paper I want to describe a way of understanding the current takings scene. Many people believe that there is a single traditional understanding of what property is and why it is protected in our constitutional scheme. This view is commonly attributed to those on the political Right, but some commentators on the Left have also accepted it, usually as a prelude to attacking the central position that property occupied in the Founders' vision, particularly that of James Madison.² On both ends of the political spectrum, these commentators believe that the takings clause has always been understood according to what I will call the self-regarding vision of property. According to this vision, the crucial fact of political and social life in our political and legal culture is that each person is free to do or say pretty much what he wants, within certain obvious limits. The purpose of property and its constitutional protection, then, is nothing more or less than to create a wall between the individual and the collective that will guarantee the individual the space, literally as well as figuratively, to satisfy his own desires.

I will argue that this picture is radically incomplete. There is in fact a second, competing, vision of the role of property that is present in our political and legal discourse. I will call this alternative vision "communitarian."³ An equally apt label, one that emphasizes its historical and current connection with the civic republican tradition, is "civic." This vision is not, however, strictly republican, for it includes an important element that is not uniquely republican. That element is best expressed by the term "responsibility." The self-regarding vision defines the role of property exclusively in terms of strong individual rights or individual

2. See Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (U. of Chi. Press, 1990) ("Private Property"). Professor Nedelsky's book states an interpretation of American constitutionalism that resembles in certain respects Louis Hartz's thesis that the United States has had a single, continuous political tradition since its founding. Louis Hartz, *The Liberal Tradition in America* (Harcourt, Brace, 1955). That tradition is Lockean liberalism. One of its aspects was a conception of property, usually associated with Locke's name, that C.B. Macpherson called "possessive individualism." C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford U. Press, 1962). Like Hartz, Nedelsky sees just one dominant understanding of politics and property in American history, at least since 1789. She associates that tradition with the name of James Madison, rather than John Locke.

3. In calling this an alternative vision, I do not mean to reduce the dialectic to the stark contrast that is sometimes drawn between "liberalism" and "communitarianism." That contrast is simplistic and misleading. Both visions that I describe here can be considered liberal; they reflect what Nancy Rosenblum has aptly called the "two faces" of liberalism. See Nancy L. Rosenblum, *Introduction*, in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life* 1, 5 (Harv. U. Press, 1989).

expectations. It has nothing to say about the individual property owner's responsibility as a member of the community. The communitarian vision, by contrast, emphasizes the individual property owner's sense of responsibility to his community for the use of his property as central to the owner's fully realizing his individual freedom.⁴

The effect of recognizing the communitarian vision will be to deny that there is a single privileged understanding, conceptual or historical,⁵ of why or when property is or should be constitutionally protected. Neither side in arguments about takings can trump the other by appealing to some mythic understanding of property's role in our political system. Rather than a single understanding, a dialectic between two competing understandings has shaped the takings clause.⁶

I call this dialectic "post-modern" because the present stage of legal discourse about property postdates the era when legal discourse exhibited a widely-shared understanding that property had a single meaning or purpose. Legal discourse during that era, the era of legal modernity, in fact was also dialectical, but the dialectic was not dominantly articulated in terms of a conflict between two contradictory core purposes of property. Post-modernity, which I want to distinguish from post-modernism, is the legal culture that we now inhabit. In post-modern legal culture—our culture—legal discourse no longer can plausibly assume a common, unified political theory of property rights or indeed assume that property rights do

4. For lucid discussions of takings issues from a communitarian perspective, see Mary Ann Glendon, "Absolute" Rights: Property and Privacy, in 1 *The Responsive Community* 12 (Fall 1991) and Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 25-30, 112-14 (Maxwell MacMillan, 1991). For an interesting discussion of water law from a communitarian perspective, see Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 *Stan. L. Rev.* 1529 (1989).

As Professor Glendon's work indicates, the thesis that individual owners owe responsibilities to their communities merely by virtue of their relationships with those communities is not the exclusive property of the radical Left. For a similar expression of the communitarian theme by another distinguished centrist property scholar, see John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 *U. Ill. L. Rev.* 1, 6, 40.

5. For a discussion of legal discourse's ambivalence about the role of property during one stage of our past, the civic republican period, see Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 *N.Y.U. L. Rev.* 273 (1991).

6. In an earlier essay, I argued that conflicting views over the Supreme Court's recent takings cases were best understood as a dialectic between two visions of government, the public-choice theory and the republican theory. See Gregory S. Alexander, *Takings, Narratives, and Power*, 88 *Colum. L. Rev.* 1752 (1988). Carol Rose and Frank Michelman have developed similar dialectical interpretations of takings jurisprudence generally. See Carol Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 *S. Cal. L. Rev.* 561 (1984); Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *Iowa L. Rev.* 1319 (1987).

or should have a central role to play in politics.⁷ Thus, although aspects of both the self-regarding and communitarian visions of property were evident in our prior doctrinal practices, the conflict between them only recently developed into the overriding predicament occupying legal property discourse as part of a broader cultural movement away from totalizing theories and immutable foundations.

This dialectic is post-modern in another sense as well. Unlike classical nineteenth-century dialecticism, the post-modern dialectic of takings discourse does not culminate in any grand synthesis. Post-modern legal culture is characterized by particularity and perspective. There is no neutral ground available to us for reconciling in a conclusive sense the two visions. The dialectic will simply continue. Lest this seem unduly pessimistic, however, I hasten to add that while takings disputes will continue to be shaped by this dialectic, these disputes can be and are resolved through the exercise of practical judgment, rather than through unvarnished political preference.

Legal discourse about takings has neither been static nor undergone linear transformations. Rather, it has been dialectical. The rhetoric of the dialectics has changed over time, but underlying these different rhetorical articulations is a continuous predicament, which I have elsewhere called the "dialectic of sociality."⁸ This predicament concerns the relationship between individuals and the communities to which they belong. Conventional takings analysis creates ample room for asking what responsibilities government regulators owe property owners. But legal discourse, dominated by the rhetoric of rights, rarely directly asks another important question: What is the extent of the responsibilities that individuals owe to their communities, including political communities, as a result of their membership? One can glean from legal discussions of takings issues, however, two quite different responses to this question.

One answer, the self-regarding vision, begins by supposing that the crucial fact of political and social life is that each person be free to do or say what he wants, within certain limits. A person who holds this view says, "I don't owe society or the community anything, except to avoid harming others." This type of person views himself as a Lone Ranger or, better, Natty Bumppo. The Natty Bumppo image is particularly apt because what makes this vision so

7. For statements that property does not or should not have a significant political role, see Nedelsky, *Private Property* (cited in note 2); Thomas C. Grey, *The Disintegration of Property*, in J. Roland Pennock and John W. Chapman, eds., *Nomos XXII: Property 69* (N.Y.U. Press, 1980).

8. Alexander, 66 N.Y.U. L. Rev. at 277 (cited in note 5).

compelling is how it is supported by a mythology that is still deeply embedded in American thought: the myth of the American as westerner—alone, out on the frontier, responsible only for himself, unconstrained by society or government. This is the central image of freedom for many Americans today, despite the fact that it is so wildly at odds with the conditions of modern American life.

Communitarians provide quite a different answer to the question. They regard individuals as inextricably enmeshed within both various communities and the polity as a whole. Because communitarians understand individuals as fundamentally social,⁹ they believe that improving one's own lot is not the only source of human action. Without denying either the fact that humans frequently, indeed usually behave to benefit themselves, or the legitimacy of this motive, communitarians believe that social and moral commitments to communities constitute another source of human action. They reject the view that individuals are primarily responsible to themselves, and only minimally responsible to the various groups in which those individuals participate. They emphasize responsibility to the social and political networks in which individuals are enmeshed because those networks are sources of individual freedom along with rights, that distance individuals from the collectivity. Unlike those who hold the self-regarding vision, communitarians do not understand freedom as pre-social, but as meaningful only within a social context. Robinson Crusoe was not subject to social constraints but neither did he experience human freedom. Natty Bumppo was free precisely because of his relationship with the society from which he seemed to be so distant.

If Natty Bumppo symbolizes the self-regarding vision of the American individual, Thomas Jefferson's citizen-farmer symbolizes the civic American. The citizen-farmer owns his plot of land not just to increase his personal wealth or to satisfy his personal preferences, but to enable him to fulfill responsibilities that he owes to his community, including the uses to which he puts his plot of land.¹⁰ The key civic insight, then, is this: Individuals owe responsibilities to others, and not just to their families and friends but more widely to their political community, merely by virtue of their membership within that community.

It is important to emphasize that this communitarian vision is not merely aspirational, but descriptive. That is, communitarians claim that people do in fact act out of a conviction that they are

9. See Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge U. Press, 1982).

10. See Alexander, 66 N.Y.U. L. Rev. at 273 (cited in note 5).

responsible to social groups and to the community as a whole, in addition to acting to improve their own positions in a narrower sense.¹¹

These two visions—self-regarding and communitarian—lead to two different and incompatible understandings of the role of property rights. These clashing understandings are the basis for the conversational dead-end that now largely characterizes American legal discourse about the takings issue.

The self-regarding vision suggests that the role of property rights is to serve as a basis for *separating* the individual from government and from society generally. According to this understanding, individual freedom means freedom from collective coercion. Being autonomous means being able to opt out of group relations if one objects to a group's actions, to "exit," in the illuminating vocabulary that the economist Albert Hirschman coined several years ago.¹² The purpose of all rights, this view continues, is to give individuals the power to fend off groups, especially the state, and property rights are one source of this defensive power. More than that, property rights are fundamental rights. As a source of authority, they are superior to and take precedence over popular sovereignty. Individuals who hold this view of fundamental rights in general, whom Bruce Ackerman has recently described as "rights foundationalists,"¹³ are not anti-democratic. Rather, they believe that the hierarchy of authority that the Constitution creates subordinates democracy to certain fundamental rights. Which rights hold this privileged position is subject to debate, but those who hold the understanding of the role of property that I am describing here place property rights among the select list.

The claim that property rights are foundational, which I will call the "property rights foundationalist theory," has two versions, one strong and the other somewhat weaker. The strong version contends that individual property rights are not just *a* crucial source of separation but *the preeminent* source of individual autonomy in our political system. This argument recognizes that political rights, including the rights of speech, travel, and privacy, are also important in defining the individual in our society as free and self-regarding, but it contends that political rights are not equal in stature to property rights. Political rights can and often do conflict with prop-

11. See, e.g., Amitai Etzioni, *The Moral Dimension: Toward a New Economics* (Collier MacMillan, 1988).

12. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harv. U. Press, 1970).

13. Bruce A. Ackerman, *We the People: Foundations* 11 (Belknap Press, 1991).

erty rights.¹⁴ To resolve these conflicts, individual rights must be ranked hierarchically, and the self-regarding vision considers it essential to attach the highest priority to property rights.¹⁵ Securing strong individual property rights is the best way to limit government.

This priority for property rights has been defended on a number of bases. James Madison, for example, argued that in a democracy property rights are more vulnerable than political rights.¹⁶ This asymmetry derives from the inevitably unequal distribution of property, he reasoned. The haves share with the have-nots a concern for political rights. But the have-nots cannot be expected to respect property rights.

The weaker version of the property rights foundationalist theory seeks to establish a parity between property and political rights rather than the supremacy of property rights. This version has been one of the constant rallying cries of the Right in the past few decades.¹⁷ Conservatives have argued for parity rather than supremacy because as they see things (with considerable cause), the judicial attitude in the post-*Lochner* era has been strongly tilted in favor of the supremacy of political over property rights. Few economic regulations are struck down under any of the constitutional provisions that appear to protect property and contract. By contrast, regulations encroaching on speech interests are highly vulnerable to judicial review. In the famous *Carolene Products* footnote¹⁸ the Court explicitly stated that property rights are an inferior form of individual rights, less deserving of constitutional protection than political rights. Proponents of the property-as-separation theory seek to end this double standard (as they see it), arguing that property interests are as vital to safeguarding individual liberty as are speech and other non-economic interests.

14. For a recent example of such a conflict, see *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (held no taking where state law prevents shopping center owners from excluding people who are engaged in constitutionally protected speech).

15. Scholars on both the left and the right have argued that the American constitution historically assigned greatest priority to protecting property rights. See Nedelsky, *Private Property* (cited in note 2); Richard Allen Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harv. U. Press, 1985) ("Takings").

16. Madison himself did not consider property rights more important than political rights. His statement that property "embraces everything to which a man may attach a value and have a right" was not intended to reduce all political rights to property rights. Rather, his point was that political rights, as rights, have the same character as property rights. See Alexander, 66 N.Y.U. L. Rev. at 331-32 (cited in note 5).

17. See, e.g., Richard Funston, *The Double Standard of Constitutional Protection in the Era of the Welfare State*, 90 Pol. Sci. Q. 261 (1975). For a sophisticated critique of this argument, see C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741 (1986).

18. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

It is this self-regarding understanding of property that underlies the arguments made in recent years by several commentators, to the effect that virtually all land use regulation and other economic regulations should be held invalid under the takings clause.¹⁹ These commentators view well-established land-use regulations like zoning, not to speak of more exotic forms of regulations like the sort of exaction involved in the recent *Nollan* decision,²⁰ as clear instances of exactly what the takings clause was designed to prevent: collective interference with the private landowner's separate domain. According to this view, the metaphor that best expresses the purpose of the takings clause is a boundary²¹ or wall. The takings clause should be thought of as creating a wall between government and individual in the use of his land. Just as the establishment clause of the First Amendment creates a wall between the government and the individual with respect to religious membership, protecting individuals from state-initiated religious oppression, the takings clause makes property a wall that secures individuals from government depredations against the material conditions of an individual's life.

The communitarian vision, in contrast, sees property as a necessary basis for *belonging* within society and its government. Property rights are protected to enable citizens to participate in public life, rather than merely to satisfy their private preferences. An obvious—perhaps the most obvious—aspect of this understanding is the relationship that classical republicanism defined between property and participation. In its various incarnations, republicanism has consistently identified the central role of property as being to endow citizens with material well-being sufficient to guarantee independence so that they might pursue the common good rather than being distracted by narrowly self-interested concerns. As Frank Michelman has pointed out, this relationship between property and participation leads to an emphasis on distribution.²² Republicans like John Adams were preoccupied with a concern that an unequal distribution of property would undermine the republican polity. Citing the seventeenth-century English theorist James Harrington's dictum that power always follows property,²³ Adams expressed the

19. See, e.g., Epstein, *Takings* (cited in note 15); Ellen Frankel Paul, *Property Rights and Eminent Domain* (Transaction Books, 1987); Bernard H. Siegan, Editor's Introduction: *The Anomaly of Regulation under the Takings Clause*, in Bernard H. Siegan, ed., *Planning Without Prices: The Takings Clause as It Relates to Land Use Regulation Without Compensation* (D.C. Heath, 1977).

20. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

21. For a trenchant critique of the boundary metaphor, see Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in 30 *Representations* 162 (1990).

22. See Michelman, 72 *Iowa L. Rev.* at 1327-29 (cited in note 6).

23. See James Harrington, *The Commonwealth of Oceana*, in Maurice Cowling, et al.,

need to maintain a balance of property in order to maintain a balance of power. He stated:

The only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue is to make the acquisition of land easy to every member of society; to make a division of the land into small quantities, so that the multitude may be possessed of landed estates.²⁴

The traditional republican relationship between property and participation, though, is not the only aspect of the communitarian vision. Equally if not more important, modern communitarianism emphasizes responsibility as a notion that is largely absent from our political vocabulary these days. The communitarian ethic stresses the importance of responsibility to others as well as to oneself. Indeed, it considers that personal and civic responsibility are closely connected. A sense of civic responsibility—responsibility to others and to the polity—grows out of the experience of responsibility to oneself. Living a life in which one feels accountable for one's decisions and actions, rather than passing the buck to someone else, impresses on one an awareness of one's interrelationships with others. Being held accountable for one's actions encourages deliberation about the consequences of those actions on others. A person who has developed a robust sense of personal responsibility feels a greater sense of moral obligation to others. He feels a deep sense of obligation particularly to the communities with which he identifies himself. He feels committed to those communities and realizes that he affects their well-being.

How does this understanding of responsibility affect views about the role of private ownership of property and the question of constitutional protection of property rights? It means that you are not free to use your land or other resources in any way you want simply because you own it. Indeed, private ownership has never been understood to entail complete freedom of use. The common law quite early imposed substantial constraints, through the law of nuisance, on what landowners could do with their property, and these constraints were rooted in the common law judges' recognition that individual owners owe some responsibility to others around them. If you live in a residential neighborhood, for example, you owe members of that community the obligation not to interfere substantially with their opportunity to enjoy their property

eds., *The Political Works of James Harrington* 157, 163-65 (Cambridge U. Press, 1977); James Harrington, *The Prerogative of Popular Government*, in id. at 394, 404-12.

24. Letter from John Adams to James Sullivan (May 26, 1776), in Charles Francis Adams, ed., *9 The Works of John Adams* 376-77 (Little, Brown, 1854).

by putting a factory on your land.²⁵

The communitarian understanding of ownership is also reflected in the long-standing doctrine that government regulations of uses that impose substantial harms on the public do not constitute compensable takings.²⁶ It is implicit in the "noxious use" exception to regulatory takings analysis, which holds that it is not unfair to make an owner whose use substantially threatens some serious injury to the community to which he belongs bear the costs of abating the nuisance; as a member of the community, he is responsible to them and owes them an obligation not unduly to threaten the quality of their lives.

I do not mean to suggest that the communitarian understand-

25. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

26. See *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). The Supreme Court recently reaffirmed this doctrine unanimously in *Keystone Bituminous Coal Industry v. DeBenedictis*, 480 U.S. 470 (1987).

The Supreme Court's analysis in *Keystone* left the parameters of this exception ambiguous in a crucial respect. After affirming the public nuisance exception, the Court went on to analyze whether the regulation in question produced an impact on the individual owner so adverse that the regulation constituted a taking despite its anti-nuisance effect. It is unclear, then, whether categorizing regulations as anti-public nuisance means that they cannot be compensable takings even if they also fall within one of the tradition categories of regulatory takings—permanent physical invasion, deprivation of economic viability, or destruction of investment-baked expectations—or whether an anti-public nuisance regulation may still trigger the compensation requirement if it falls within one of those categories. See Michelman, *Takings*, 1987, 88 Colum L. Rev. 1600, 1603-04 n.19 (1988). Chief Justice Rehnquist, dissenting in *Keystone*, adopted the latter interpretation. 480 U.S. at 513.

The Court is likely to resolve this ambiguity this Term when it reviews the decision of the South Carolina Supreme Court in *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), cert. granted, 60 U.S.L.W. 3371 (Nov. 19, 1991). In *Lucas*, the South Carolina court held that the mandatory setback requirements of the South Carolina Beachfront Management Act did not constitute a compensable taking despite the fact that the effect of the regulation was completely to deprive the individual owner of two vacant beachfront lots of all opportunity to build any permanent structure on his lots other than a small deck or walkway. The court reasoned that the regulation fell within the public nuisance-abatement category, since the setback requirement was designed to prevent erosion of the beach/dune area of South Carolina's coast. It explicitly rejected the owner's argument that by denying him "all economically viable use" of his property, the regulation effected a compensable taking, despite its nuisance-abatement status. The court erroneously assumed that the United States Supreme Court in *Keystone* had concluded that even if they deprive owners of all economic viability, regulations that fall within the public nuisance doctrine cannot constitute compensable takings.

What is at stake in *Lucas* is less whether states will be forced to pay for land that they need to protect than the continued viability of environmental program such as South Carolina's Beach Management Plan. Given the severe budgetary restrictions that states face these days, it seems highly unlikely that South Carolina could afford to pay for the cost of acquiring beachfront property through eminent domain. At the same time, however, the individual landowner has an obvious interest at stake. The communitarian vision recognizes that individual owners must sacrifice some measure of freedom to use their property as they wish, but it does not require them to commit economic hara-kiri. Even under that vision, it is far from clear how the Court should resolve the Hobson's choice that *Lucas* presents.

ing of the takings clause amounts to an expansion of the traditional public nuisance doctrine into a general theory for distinguishing between uncompensable regulations and compensable takings. Frank Michelman pointed out nearly twenty-five years ago that classifying land-use regulations as compensable or not on the basis of whether they prevent harms or extract benefits encounters a "basic difficulty." He articulated that difficulty in this way: "Such a method will not work unless we can establish a benchmark of 'neutral' conduct which enables us to say where refusal to confer benefits . . . slips over into readiness to inflict harms."²⁷ Michelman's point is that whether a regulatory constraint on land use prevents a harm or extracts a benefit all depends on how you look at it. How you look at it will be deeply influenced by which of the two visions in the dialectic I have described you bring to the question. But although neither the public-nuisance test nor any other single test can ever serve as a general theory for what governmental actions constitute a taking, the public-nuisance test reflects the central communitarian insight that property ownership is inevitably social and that the social context within which property exists is itself the source of responsibilities, as well as rights, of ownership.

Let me briefly illustrate the effect of these two visions by applying them to a form of land-use regulation that has been very controversial in recent years, restrictions on the use and disposition of wetlands. The existing state and federal wetlands regulations are quite varied and complex, and I am not concerned here with their details. My interest rather is connecting the discourse about wetlands regulation in general with fundamental images of power and core visions of the relationship between property owners and their communities.

More than half of the wetlands in the United States have been lost to development.²⁸ Wetlands are attractive to developers because they can be purchased cheaply, and when developed for vacation homes or resorts they are worth a great deal more than the acquisition cost. However, once developed, wetlands no longer provide crucial ecological benefits. Wetlands are natural habitats for thousands of organisms; losing wetlands creates a substantial risk of damage to the biodiversity that scientists believe is essential to the region's ecological health. Wetlands serve other functions as well. They filter pollutants, replenish water supplies, and prevent soil erosion. They play a critical role in improving water quality by trap-

27. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1197 (1967).

28. See Jean Seligmann, *What on Earth Is a Wetland?*, Newsweek 48 (Aug. 26, 1991).

ping and filtering sediment, serving as a natural flood control system. Some scientists have referred to wetlands as “nature’s kidneys” because they filter nitrates (produced by nitrogen fertilizers) and toxic materials from water before these materials contaminate ground water, rivers, bays, and oceans. Wetlands also provide an essential habitat for fish and serve as a spawning ground for over 60% of the nation’s commercial fishing catches.

Agricultural interest groups have for years attacked various state and federal wetlands regulations as unduly intrusive of their property rights, and recently they succeeded in convincing the Bush administration (in particular, Vice President Quayle’s Competitiveness Council) to propose new federal regulations exempting large areas from being classified as wetlands. The debates leading up to this decision are revealing because they indicate that the political issue of whether wetlands regulations are rational and the legal issue of whether wetlands regulations constitute takings are framed in precisely the same terms. The agricultural lobby, led by the American Farm Bureau Federation, stated the political issue in populist terms: independent farmer-landowners vs. government regulators.²⁹ The Farm Bureau, for example, circulated a list of 417 cases of “people’s lives being devastated” by overly aggressive federal regulators.³⁰ This discourse frames the legal and political issue in the same terms; both in politics and in law, the takings question is one of power imbalance—powerless individual landowners vs. coercive government regulators.³¹

Depicting wetland regulations in this way creates a strong emotional and political case for using the takings clause in an activist fashion to the redress the power imbalance. The self-regarding vision provides the conceptual foundation for such an activist use of the takings clause to check the excesses of powerful government regulators. But how accurate is this depiction of the power positions of the two sides? Are wetlands regulations the consequence of an imbalance in the distribution of power between owners and regulators, in which government regulators have simply overwhelmed individual farm owners?

One can tell quite a different story³² about the agriculture lobby and wetlands regulation, and this alternative story under-

29. See George Anthon, *Farm Groups Dramatize Impact of Wetlands Issue*, *Ithaca Journal* 7A (Oct. 15, 1991).

30. *Id.*

31. See Alexander, 88 *Colum. L. Rev.* at 1752 (cited in note 6).

32. On storytelling about property generally, see Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *Yale J. L. & Hum.* 37 (1990).

mines the case for using the takings clause in the activist way that opponents of wetlands regulations would like. The 1989 federal regulations hardly devastated the farming plans of individual farmers. The farm lobby produced scant evidence that the existing restrictions prohibited farmers from growing crops on land already in production. Nor was much evidence about such consequences likely to have been available since the 1989 regulations specifically exempted land cropped as of 1985.

If farmers' plans were devastated at all, it was not their plans to cultivate, but their expectations of realizing substantial gains by selling farm acreage containing wetlands to real estate developers or leasing farm land for oil and gas exploration. Looking past the "Farm-Aid" rhetoric that the agriculture lobby deployed against the 1989 regulations, the real beneficiaries of the new wetlands regulations are developers and oil and gas firms. As a columnist who writes on agricultural issues has noted, "The truth is that more wetlands, rather than less, are in agriculture's best interest since wetlands help keep nitrates from reaching ground water."³³

A more compelling argument why wetlands regulations should be compensable is that they single out farmers as the group for carrying a disproportionate share of the burden of protecting parts of our environment.³⁴ This argument raises the equal protection aspect of takings law. Saul Levmore defines the singling-out phenomenon as occurring when "the government's aims could have been achieved in many ways but the means chosen place losses on an individual or on persons who are not part of an existing or easily organized political coalition."³⁵ Persons who are part of a political coalition or who can easily form one have a weaker basis for objecting when regulators place restrictions on them since they can protect their interests through politics.

The takings clause, on this view, functions to protect, through the compensation requirement, those persons who cannot easily protect their interests through the normal processes of interest-group politics. This is not the appropriate occasion for discussing potential objections to this theory, so let us accept it for present purposes. It would be ludicrous to argue that farmers lack the means to protect their special interests through the usual political process.

33. See Anthan, *Ithaca Journal* at 4A (cited in note 29).

34. On the general problem of singling out, see Saul Levmore, *Just Compensation and Just Politics*, 22 *Conn. L. Rev.* 285 (1990).

35. Saul Levmore, *Takings, Torts, and Special Interests*, 77 *Va. L. Rev.* 1333, 1345 (1991).

As the revision of the 1989 federal wetlands regulations indicates, farmers constitute an extremely well-organized and powerful lobby which is quite capable of protecting its interests through political means. There is no reason to believe that the lobby is any less capable of using politics at the state level. Moreover, the coalition opposing wetlands regulations consists of interest groups in addition to farmers. These interest groups, including real estate developers and oil and gas producers, are also highly organized and politically powerful. There is no reason, then, to think that wetlands regulations were enacted because of the monopoly of the political market by one interest group. Nor is there any good reason to consider persons having an economic interest in wetlands as singled out by a distorted political process for special burdens.

At the core of the agricultural lobby's legal-political narrative is the self-regarding conception of property ownership. Opponents of wetlands regulation depict the regulations as burdening their property rights in order to confer an uncompensated benefit on other special interest groups, in particular, environmentalists. The communitarian account of wetlands regulations emphasizes the widespread and long-term public harm that results from loss of wetlands. The relativity of harms and benefits means that regulatory actions like wetlands regulations can just as easily be interpreted as preventing substantial public harms as construed in the benefit-extracting story that regulatory opponents tell. Which story one tells depends on the normative theory of responsibility to the community one applies. Communitarian theory, in describing wetlands regulations as a matter of preventing long-term and widespread public damage, rests on a normative understanding of ownership as entailing wider responsibilities to others than merely avoiding immediate harms of the sort that would be actionable as trespass or common-law nuisance.

It is appropriate to ask, then, how the communitarian vision can be reconciled with the takings clause. Does that vision lead to the conclusion that there is no role for the takings clause to play, that the state should be free to appropriate resources without paying compensation so long as some public-minded justification for the appropriation can be provided? The basic communitarian premise is that justice does not always require that the state compensate an owner for property it has taken from him. This point was effectively made more than half a century ago by Morris Cohen, who stated, "[W]hile this [state compensation for taking an owner's property] is generally advisable in order not to disturb the general feeling of security, no absolute principle of justice requires

it."³⁶

The distribution of property is established by the state, not by appropriations from a state of nature. This does not morally entitle the state to redistribute as it wishes, but it does indicate that any moral obligation to compensate does not exist merely by asserting some pre-political right to property. Private ownership is not only state-created but also conditional. Individual owners are not free to do whatever they wish with or to their property. They owe certain responsibilities to the communities to which they belong, and these civic responsibilities condition individual freedom of ownership.

At the same time, it is equally important to emphasize what it implicit in the first half of Cohen's statement, that the communitarian vision does not represent a dissolution of the line between public and private ownership. Communitarianism should not be understood as abandoning a commitment to individual property rights. The subordination of property rights to human rights *is* a mark of a society's progress, but it is equally true that the replacement of property rights with centralized control over the material conditions of existence is the mark of social regress.

A central purpose of property that the civic and non-civic traditions alike recognize is respecting the individual's sense of dignity. The testimony of the recently liberated citizens of east-central Europe confirms the importance of property rights for individual dignity. Our own personal experiences confirm the need for individuals to feel that they control the concrete, immediate conditions of their existence. A second and, from the perspective of the civic understanding, at least equally important purpose of individual ownership is its role in developing a individual's sense of personal responsibility. The civic vision regards individual property ownership as one of the fundamental social institutions by which individuals develop a sense of responsibility both to themselves and to the communities of which they are a part.

The responsibility function of property overlaps substantially with the dignity rationale. Both a sense of responsibility and a sense of dignity depend upon individuals having the power to make decisions over matters that affect the immediate circumstances of their lives. From the civic point of view, state socialism is offensive precisely because, contrary to its rationale, it stunts the individual's sense of responsibility to the community. It renders citizens passive and powerless. Classical liberal ownership enables individuals to develop a sense of responsibility by vesting final accountability for

36. Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L. Q. 8, 24 (1927).

their actions in themselves rather than in some faceless bureaucracy.³⁷

If the takings clause continues to be a vital source of constitutional protection under the civic vision, but not to implement the self-regarding vision, what scope should it have? To begin with, the takings clause is a collective precommitment device. It is a limitation on democratic power that is necessary because majorities have incentives to sacrifice long-term to short-term objectives. As the Founders realized and emphasized, the threat of destabilizing or ill-considered expropriations of property isn't confined to monarchies but exists in democracies as well. Jon Elster explains the point:

If all issues were subject to simple majority voting, society would lack stability and predictability. A small majority might easily be reversed, by accidents of participation or by a few individuals changing their minds. More important, if the majority followed short-lived passions or short-term expediency, it might act rashly and override individual rights granted by earlier decisions.³⁸

The takings clause adds a degree of stability that would otherwise be absent if the state were free to appropriate property as it wished without compensating the owner. The prohibition against uncompensated takings for public use enables the polity to maximize its welfare over the long run by making it difficult to take steps that are expedient in the short-term.

Preventing majorities from ill-considered actions against property owners does not require immunity from governmental actions. The takings clause implicitly acknowledges that private ownership of property is not absolute vis-à-vis the government; the public use and compensation requirements protect individual owners against government actions more weakly. In the terminology that Calabresi and Melamed coined,³⁹ the Constitution protects private property against government actions through a liability rather than a property rule, that is, through a rule that permits a forced sale to the government. By making legislators put their money where their mouths are, the public use and compensation requirements force legislators to act responsibly in appropriating private property, but

37. This attribute holds for the classical liberal form of ownership but not for all forms of private ownership. The rise of the corporate form of ownership, with its characteristic separation of ownership and control, in this sense represents a regressive form of privatization. See Gregory S. Alexander, *Pension and Passivity: Fiduciary Law and the Limitations of Pension-Fund Socialism*, — L. & Contemp. Prob. — (forthcoming 1992).

38. Jon Elster, *Solomonic Judgements: Studies in the Limitations of Rationality* 196 (Cambridge U. Press, 1989).

39. Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

do not entirely prevent government from appropriating private property. Of course, none of this indicates just exactly which government actions that detrimentally affect private property trigger the compensation requirement. The line between government regulations that are legitimate because they fall within an owner's responsibility to the communities to which he belongs and those that fall outside that realm and thereby interfere with his sense of dignity is contestable and controversial. The important point is to emphasize that some measure of restriction on individual use and enjoyment exists as a consequence of civic responsibility.

I suggested earlier that the civic understanding is partly expressed in the traditional noxious-use test for distinguishing permissible regulations from impermissible takings. The idea of responsibility to the polity goes beyond that relatively narrow idea, however. The broader idea is that the polity cedes a measure of authority to individuals as property owners not only for them to satisfy their own wants but also to promote the community's welfare, and in ceding that authority to the individual, it expects that the individual will at times subordinate the pursuit of his wants for a community welfare interest that is particularly acute or compelling, that is, more than the sort of interest required to satisfy the minimal rationality requirement for exercises of the police power.⁴⁰

In light of this expectation—a condition on all ownership interests—it is not unjust or unfair for the polity to impose some limits on an individual's freedom to use or enjoy his property in some way in the interest of an important collective interest that the polity has identified after deliberate public discussion. The civic responsibility theory explains, for example, why welfare programs, which are obviously redistributive, are not usually considered to constitute unconstitutional takings. The wealthier members of the community owe a responsibility to alleviate the abject poverty that other mem-

40. This distinction is necessary to avoid the problem that confronts the rationale that Justice Brennan introduced in footnote 43 of his majority opinion in the *Penn Central* case. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Referring to noxious-use cases (*Hadacheck*, *Miller v. Shoene*, and *Goldblatt v. Hempstead*), Justice Brennan stated that these cases "are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U.S. at 134 n.30. As stated, Justice Brennan's test hardly serves itself as an adequate justification for why certain land-use regulations enacted through the exercise of the police power do not trigger the takings clause's compensation requirement. To be a valid exercise of the police power, the regulation must be reasonably related to a legitimate governmental objective such as health or safety. As James Krier points out, only by resorting to some concept like noxiousness can non-compensatory public land-use restrictions be distinguished from restrictions that are compensatory. See James E. Krier, *The Regulation Machine*, 1 Sup. Ct. Econ. Rev. 1, 7 (1982).

bers of the community experience because the community has enabled them to own their wealth.⁴¹

The civic vision can be seen as related to another traditional takings test as well. The "reciprocity" test provides that a regulation restricting a property owner's advantage is not an unconstitutional taking if it simultaneously confers roughly reciprocal benefits on the affected owner.⁴² Similarly, the civic vision holds that an owner who apparently loses as a result of a governmental program may in fact be a winner, sufficiently so that additional compensation is not required. This will be the case, for example, when a government regulation prevents an owner from using his property in a way that benefits him in the short run but actually makes him worse off in the long run.

There is no a priori basis for determining the precise scope of an owner's responsibilities to his communities under the civic vision. The problem is not simply that so many factors are involved but that the scope of the responsibility concept itself is politically and morally contestable. The practical judgment required to resolve these political and moral conflicts is intensely context-dependent. To prejudge the extent to which the community responsibilities of private ownership relieve the state from compensating owners for actions taken with respect to their property would cut off deliberative discussion, both within the political process and in takings adjudication. Takings law is now largely characterized by such context-specific adjudication, although critics continue to decry its detrimental effects on process values such as predictability.⁴³

It matters a great deal how these two visions are mediated. The objective ought to be mediating the conflicts in a way that ac-

41. In a very illuminating essay Carol Rose has recently described a similar understanding, which she calls "property-as-propriety." This understanding is closely linked with the idea that individuals own property in trust for the larger community. See Carol M. Rose, *Property as Wealth, Property as Propriety*, in John W. Chapman, ed., *Nomos XXXIII: Compensatory Justice* 223, 237-40 (N.Y.U. Press, 1991).

This idea also resembles the theory that Judge Breitel developed in his opinion for the New York Court of Appeals in the *Penn Central* case, the "social increment" theory. See *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). According to this theory, which derives from Henry George's "single tax" thesis (see Henry George, *Progress and Poverty* (1878)), Grand Central Terminal's rate of return should be discounted by the increment of the building's value attributable to public contributions, by way of subsidies, franchises, tax exemption, and other governmental benefits, and related community growth. The insight is, as Judge Breitel expressed it, that "society is [entitled] to receive its due for its share in the making of a once great railroad." 42 N.Y.2d at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919. The civic vision extends that insight on the ground that the polity effectively enables the private ownership of all property.

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

43. See, e.g., Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697 (1988).

knowledges that neither vision is privileged. Such a method must, in other words, be as open and democratic as possible. A formal takings methodology of the kind urged by several commentators recently⁴⁴ is ill-suited to the open kind of process that I have in mind. As a judicial technique, ad hoc balancing is the only way to assure that the dialectic is not closed by one vision preempting the other through some formal rule that effectively codifies it. Formality is not neutral between these two substantive visions.⁴⁵ A formal takings approach is very apt to enshrine the self-regarding vision rather than the civic vision.

Although recent Supreme Court decisions hint at a growing sense of restiveness toward balancing,⁴⁶ we should not expect any wholesale shift toward greater formality in takings adjudication. While the Court's ideology is probably more favorably tilted toward property rights and the self-regarding vision today than it has been since the beginning of this century, the Court has also recently reaffirmed its conviction that the constitutional validity of regulations under the takings clause is context-dependent.⁴⁷ Moreover, some members of the Court have reaffirmed the continued presence of the civic vision despite the recrudescence of the self-regarding vision, acknowledging, for example, that alleviating the hardship of tenants through price regulation of rent is a legitimate legislative policy and does not generally trigger the compensation requirement.⁴⁸ It seems highly unlikely, then, that the post-modern dialectic will disappear from the Court's takings rhetoric.

44. See Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630 (1988); Rose-Ackerman, 88 Colum. L. Rev. at 1697 (cited in note 43).

45. For a similar argument, see Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319, 1321, 1321 n.10 (1987).

46. See Frank I. Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600 (1988).

47. *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

48. *Id.*