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THE OWNERSHIP SOCIETY AND TAKINGS OF PROPERTY: CASTLES, INVESTMENTS, AND JUST OBLIGATIONS

Joseph William Singer[*]

This Article examines three models of property that can help us make sense of otherwise intractable takings doctrine. The two best understood models are the "castle" model, which conceptualizes owners as having absolute domain over their property as long as they do not use it to harm others, and the "investment" model, which conceptualizes property as a form of investment in a market economy that creates reasonable expectations likely to yield economic rewards. Ultimately rejecting both of these models as incomplete, the author praises the Supreme Court's return in Lingle v. Chevron USA, Inc. *to the* Penn Central *idea that the Takings Clause protects property owners from unjust obligations while rendering them subject to just obligations. The Article argues that the castle and investment models overemphasize individual rights, while the* Penn Central *test's notion that owners have obligations as well as rights rests on a conception of "citizenship." This citizenship model provides a useful framework for analyzing when property rights are subject to regulation to prevent harm and when investment-backed expectations are justified; it can thus help direct our attention to the core question of "justice and fairness" that is at the heart of the Takings Clause as it has been interpreted by the Supreme Court.*

For a man's house is his castle . . . .[1]
—Sir Edward Coke
Third Institute (1644)

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[1] SIR EDWARD COKE, THIRD INSTITUTE OF THE LAWS OF ENGLAND 162 (1644). The complete quotation is: "For a man's house is his castle, *et domus sua cuique tutissimum refugium*." The Latin means: "and his home his safest refuge." *See* Semayne's Case (1603) 77 Eng. Rep. 194 (K.B.) ("[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."), *quoted in* Wilson v. Layne, 526 U.S. 603, 609–10 (1999); Weeks v. United States, 232 U.S. 383, 390 (1914) ("[E]very man's house is his castle." (quoting JUDGE THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299 (1868))); WILLIAM BLACKSTONE, 3 COMMENTARIES 288 (1768) ("[E]very man's house is looked upon by the law to be his castle . . . ."); WILLIAM BLACKSTONE, 4 COMMENTARIES 223 (1765–1769) ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . ."); Miller v. United States, 357 U.S. 301, 307 (1958) (quoting William Pitt's 1763 speech in Parliament: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter—all his force dares not cross the threshold of the ruined tenement!").

> [The takings clause is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[2]
>
> —Justice Hugo Black
> Armstrong v. United States (1960)

I. INTRODUCTION

John Kenneth Galbraith used to tell a story about Robert Montgomery, who was a professor of economics at the University of Texas. Montgomery's liberal views "made him unpopular with the Texas legislature."[3] Politics being what it is, "[a]n investigation was set in motion."[4] Galbraith tells us that "[w]hen he was asked if he favored private property, Montgomery replied, 'I do—so strongly that I want everyone in Texas to have some.'"[5]

Is this a liberal story or a conservative story? On one hand, Galbraith was a famous liberal and clearly meant it to have progressive overtones. The moral of the story would appear to be that government action is needed to regulate the use or distribution of property to ensure that it is not limited to the few.[6] On the other hand, the idea that society should be based on ownership has a conservative ring to it. Protection of the rights of owners suggests limiting government regulation, a favorite conservative pastime.

President Bush has tried valiantly to sell a number of his policies, especially his proposed partial privatization of Social Security, by telling us that he wants to create an "ownership society."[7] This image is cleverly meant

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[2] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[3] THE LITTLE, BROWN BOOK OF ANECDOTES 395 (Clifton Fadiman ed., 1985).

[4] *Id.*

[5] *Id.*

[6] *See* Frank Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 99 (1992):

> In a capitalist order, one person's proprietary value (or power) is obviously relative to other people's. A constitutional system of proprietary liberty is, therefore, incomplete without attending to the configurations of the values of various people's proprietary liberties. The question of distribution is endemic in the very idea of a constitutional scheme of proprietary liberty.

See also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 141 (2000) (arguing that "[w]idespread distribution of property is virtually a defining characteristic of private property systems—or at least the norms that justify such systems"). *See generally* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988) (arguing that if property is useful because of its intimate connection with the ability of the individual to exercise free will, then we cannot remain indifferent to the fact that some people lack property, at least if we intend to treat each individual with equal concern and respect).

[7] *See* Mike Allen & Jonathan Weisman, *Bush to Present His Agenda for a Second Term; President to Tout "Ownership Society,"* WASH. POST, Sept. 2, 2004, at A29; David E. Rosenbaum, *Bush to Return to "Ownership Society" Theme in Push for Social Security*

to appeal to both liberal and conservative impulses. The protection of ownership suggests transferring power from government to individuals, decreasing the size of government and increasing the realm of liberty, while the idea of a society of owners suggests spreading the wealth and promoting equality.[8]

President Bush is taking advantage of the positive associations we have with ownership, of the perception that owners have it better than non-owners.[9] Given the abstract choice between owning property and not owning property, I know what I would choose. Ownership connotes wealth, power, security, freedom from want, and independence; these things, in turn, increase our individual liberty by giving us the space and the resources necessary to lead our lives according to our own design. At the same time, we have some evidence that a market society will leave a lot of people out of the ownership class if it does not use government to mitigate the inequalities it generates. A society based on ownership may therefore be a Jeffersonian utopia of dispersed ownership with equal individuals imbued with the power to live their lives fully. Or, it could be John Edwards's "Two Americas"[10]—divided between rich enclaves, characterized by gated communities, private schools, and private pensions, and poor communities condemned to unsatisfactory schools and wages that are insufficient to sustain a decent life, much less to amass property or to obtain the security and freedom associated with ownership. As Hurricane Katrina highlighted for us, this is the difference between those who have options and those who get left behind.

But Hurricane Katrina showed us something else. All owners depend on government to create the infrastructure necessary to protect our property. This is an easy truth for Americans to forget. In the Social Security context, the privatized ownership image promoted by President Bush ap-

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Changes, N.Y. TIMES, Jan. 16, 2005, at 20; Warren Vieth, *Bush Makes His Pitch for "Ownership Society,"* L.A. TIMES, Sept. 5, 2004, at A25.

[8] *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 138 (2003) ("Property rights, it is argued, provide individual security and (in the process) diffuse political power. They create and protect material wealth and prosperity, necessary preconditions for social civility, social stability, and the maintenance of democratic institutions."); *see also* Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1243 (2005) (proposing an approach to property based on the idea that it is a dynamic social institution that promotes freedom by setting "the terms on which people are able to recruit each other for social cooperation").

[9] On the precarious position of non-owners, see Jane B. Baron, *Property and "No Property,"* 42 HOUS. L. REV. (forthcoming 2006); Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273 (2004); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991); Jane B. Baron, *The "No-Property" Problem: Understanding Poverty by Understanding Wealth*, 102 MICH. L. REV. 1000 (2004) (book review). *See generally* JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000).

[10] *See* Jim Rutenberg, *Edwards Highlights His Theme of "Two Americas,"* N.Y. TIMES, Feb. 7, 2004, at A21.

peals to the sense that an owner is secure in the ability to benefit from funds set aside for retirement; those are your funds and they cannot be taken by others, especially not by the greedy hands of government bureaucrats. An "ownership society" therefore seems to expand ownership and reduce government regulation. From this perspective, the security associated with ownership can be contrasted with the insecurity associated with leaving things in the hands of government. This suggests that government need not provide the infrastructure necessary to create security; the recognition of property rights is enough to accomplish this. The liberal response to President Bush's proposal is that private accounts involve private risk. The security offered by social security came from the "social" part of the equation. In reality, Social Security requires taxpayers to fund benefits for other people, not for themselves. We get security from our willingness to help each other in times of need, and that requires us to be willing to pay taxes and to regulate ourselves to obtain the protections that only collective action can provide. From this perspective, an "ownership society" seems to require significant government support.

What would an "ownership society" look like? The answer to that question depends on what we mean by "ownership." Conservatives tend to view ownership as embodying both expansive rights and strong protections from government interference. The conservative framework sees property and regulation as opposites: broad property rights mean less regulation and more regulation means less protection for property rights. Liberals often adopt a similar model; they simply press for more expansive regulation of property to achieve competing social goals, such as racial equality or environmental protection. Both conservatives and liberals tend to frame the issue as the extent to which government should regulate owners. But this misstates the issue fundamentally. Property is not inimical to regulation. Indeed, as the legal realists taught us long ago, the private property system is a form of regulation. After all, government action is needed to allocate initial entitlements, to define the bundles of rights that accompany ownership, and to adjudicate conflicts among owners and between property rights and other legal entitlements. Moreover, many forms of regulation exist precisely because they protect property rights. Zoning law, for example, is popular in the United States precisely because it protects owners from neighboring uses that would decrease the value of their property or interfere with the use and enjoyment of their land. In fact, traditional nuisance law has always limited the free use of property to protect the security of neighboring owners. Therefore, ownership does not mean, and has never meant, the absolute right to do what one wants on one's own land.

Owners are free to use their property as they wish, but they are not free to use their property to destroy or injure other persons or other persons' property. John Stuart Mill captured this insight in his essay *On Liberty*, when he argued that the state had no business interfering with "self-regard-

ing acts" (those actions that concern oneself alone). The state's only legitimate function was to resolve conflicts among individuals whose actions harm the legitimate interests of others.[11] If we take Mill's approach as a starting place, we might ask whether the exercise of a property right should be understood as a self-regarding act; if so, the state should keep its hands off the owner and the owner's property. On the other hand, acts of ownership that affect others—that cause externalities—come within the realm that is legitimately subject to regulation in the public interest.

Conservatives argue for an expansive interpretation of the rights of owners with correspondingly narrow limits on the powers of government. This means that they have a large vision of which acts of ownership are self-regarding in nature; they view most property rights and their exercise as legitimately concerning the owner alone. If almost every exercise of a property right is viewed as a self-regarding act, then the state has no business interfering with it. Liberals argue for a more expansive realm for government regulation, and in so doing, they by necessity take a narrower view of the range of acts of ownership that are legitimately self-regarding in nature.[12]

How should we think about this issue? Scholars generally approach this question by identifying a decision procedure that provides guidance in choosing between the conflicting interests of the parties. This procedure may be based on balancing interests, comparing the costs and benefits of alternative legal rules, imagining what rules would be adopted in a suitable setting such as a social contract made by free and equal individuals, or by identifying fundamental human interests that should be protected as individual rights. I want to step back and consider how we think about this question before we apply a decision procedure. We approach the question of defining property rights partly by adopting conceptions of what ownership means. These conceptions are embodied in conscious or unconscious images that orient our thinking in particular directions and frame our analysis of the underyling policy question.

We can observe two common models of ownership in legal discussions about property and the relation between property owners and the

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[11] JOHN STUART MILL, ON LIBERTY 141–42 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859):

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself . . . . In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

[12] *See* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1 (exploring the tension between public interests in protecting common resources and public interests in protecting individual expectations).

government. The first image is that of a lord in a castle, and the second is that of an investor in a market economy. These two models of property focus on the rights of the owner, and they define those rights in different ways. I want to argue that there is a third model of property and that this third model is where the Supreme Court ended up this year. The third model of property starts from the idea that owners have obligations as well as rights.[13] The image that supports this notion is that of a citizen in a free and democratic society. This model of property as citizenship adjudicates conflicts that arise between the castle model and the investment model. The first two models are well-known, although their implications are not well-understood. The last model is present in our law and political discussions about property, but it has been marginalized and suppressed.

The most dramatic encounters between owners and the government take place when government seizes property by eminent domain or regulates it so substantially that the property has arguably been "taken" by the government. I will therefore develop these three models of "ownership" by using eminent domain and regulatory takings as a context for exploring them.

II. Two Models of Property: Castles and Investments

The most common image of property is the castle. We have all heard the adage that "a man's house is his castle."[14] This idea is deeply embedded in our consciousness; Sir Edward Coke used it in a book published in 1644.[15] Modern scholarly discussions of property often start by quoting Sir William Blackstone's description of ownership as "sole and despotic dominion."[16] This suggests an image of the feudal lord in his castle, mas-

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[13] *See* Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 Ecology L.Q. 631, 638–39 (1996), *quoted in* Susan Ayres, *The Rhetorics of Takings Cases: It's Mine v. Let's Share*, 5 Nev. L.J. 615, 619 (2005) ("[Owners are] charged with the responsibility for using [property] within the bounds of community norms governing right and wrong land use."); *see also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 387 (2001) (arguing that the legal system places obligations on owners not to deviate from a fixed and limited number of "forms of property" under the "*numerus clausas*" principle in order "to standardize property rights, and thereby reduce the widespread information-gathering and processing costs imposed on third parties by any system of in rem rights").

[14] The masculine pronoun has significance; it suggests a traditional patriarchal image of the family with a single head of household who is the man in his roles as husband, father, and owner. This image also suggests one owner in control of the land and all who enter or live on it; this traditionally included members of the lord's family.

[15] Coke, *supra* note 1.

[16] The fact that Blackstone in no way supported a regime of absolute or even near absolute property rights, that he viewed the law of property as a wholly social creation, with the details of ownership based on positive and not natural law, and that he supported a regime of detailed regulation of estates in land, in no way detracts from the importance of the image of property he propounded. *See* William Blackstone, 2 Commentaries *passim* (U. Chi. Press 1979) (1765–1769); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601 (1998).

ter of all that happens inside. The concept of dominion suggests a useful ambiguity. It refers both to property and sovereignty, management and governance. Duncan Kennedy described this model as the lynchpin of classical legal thought at the time of the *Lochner* era. He described that core idea as "power absolute within its judicially-delimited sphere."[17]

Consider the *Kelo* case.[18] The City of New London decides to take title to an entire neighborhood to facilitate an urban renewal project. The property will be taken from some private owners and sold or leased to other private owners. The Kelos, among others, refuse to sell their home. They like living where they have resided for years, and their feelings in this regard are perfectly reasonable and comprehensible. They concede that the city could take their land to build a road or a public facility, but they object to the use of the eminent domain power if the property is to be transferred to another private entity. What rights do they have?[19]

The first possibility is that the Kelos have the right to veto the transfer of title. Their home is their castle. As owners, they have sole power to determine whether and to whom to sell it. Our federal constitution rejects this extreme libertarian position. Property can be taken for public use upon payment of just compensation. The city, however, was taking the property to be transferred to the use or ownership of another private entity or person. The Kelos argued that they had the power to veto such a transfer of title, and Justice Thomas agreed with them.[20] Nonetheless, the Supreme Court majority of five rejected this position.[21] Your home may be your castle, but there is a higher authority that can take it away using a magical power called "eminent domain," as long as the transfer serves a legitimate public purpose. According to the current Supreme Court doctrine, the promotion of economic development is such a purpose.

The second possibility is that the Kelos do not have veto rights. Rather, the city has the power to take the property as long as it pays fair market value. In this view, the property is worth what it would likely fetch on the open market, no more and no less. Payment of fair market value makes the owners whole; if they are rational investors, they should be indifferent between keeping the house and receiving the money. This view of property as a mere investment is sometimes taken by economists who use market measures to determine the value of property and hence the appropriate rules of property law. Although we have determined that owners are paid no more than fair market value for their land when the government takes it for public needs, almost everyone would agree that the Kelos have a legitimate complaint when they argue that the money is not the same as

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[17] Duncan Kennedy, The Rise and Fall of Classical Legal Thought 31 (1975) (unpublished manuscript, on file with the author).

[18] Kelo v. City of New London, 125 S. Ct. 2655 (2005).

[19] *Id.* at 2661.

[20] *Id.* at 2677–87.

[21] *Id.* at 2658–69.

the house.[22] The value of the house to them is more, perhaps much more, than its fair market value. Their asking price is higher than the fair market value. It may in fact be infinite. Some owners may refuse to sell at any price. We know it is unfair, but we limit owners to fair market value when government takes their property only because the courts cannot figure out an objective way to measure the psychic harm caused by the loss of one's family home or business. This does not mean, however, that the harm does not exist.

The *Kelo* case was hard partly because the castle model and the investment model conflict with each other.[23] Worse still, both models are problematic. The castle model gives owners complete veto power over takings of property even for a public purpose, while the investment model gives owners nothing more than fair market value. The castle model gives the owner too much power, while the investment model gives owners too few rights.[24] They both must be tempered in some way.

III. Tensions Within Our Basic Property Models

A. The Castle Model

I will use the fact setting of the *Lucas* case to illustrate how the castle and investment models of ownership apply to regulatory takings.[25] You may recall that *Lucas* involved an owner who purchased land on the South Carolina coast in an area that had been developed for residential homes in the past. The area was subject to extensive regulation as a fragile coastal

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[22] *See* Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1020 (arguing that uncompensated, nonpecuniary losses, such as destruction of communities, are one justification for banning economic development takings (citing Jane Jacobs, The Death and Life of Great American Cities 5 (1961))).

[23] The contrast between understanding property as a castle and an investment owes much to the prior work of Jeremy Paul who identified modes of analysis in regulatory takings law that distinguished between a model based on "enlightened physicalism" and a "market" model. *See* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393, 1442 (1991).

[24] For other interesting and instructive explorations of competing models of property embedded in takings jurisprudence, see Ayres, *supra* note 13, at 625 (exploring the tension between basing property rights on custom or practical wisdom, past actions or future choices, static or fluid rights); Carol M. Rose, *"Takings" and the Practices of Property: Property as Wealth, Property as "Propriety," in* Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 49, 52 (1994) [hereinafter Rose, Property and Persuasion] (exploring the conflict between a "dominant, preference-satisfying practical understanding of property" and a "traditional, quite divergent understanding of property as 'propriety'").

[25] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). For an excellent analysis of the history of the case and the complexities involved in environmental regulation of the shore, see Carol M. Rose, *The Story of* Lucas*: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, *in* Environmental Law Stories 237 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

area, but the law had drawn a line in a way that allowed Lucas to build on the land he bought. Some time after he purchased the land, the law was changed, prohibiting construction on his land. The parties stipulated that his million dollar investment in the land purchases had been reduced to nothing—a dubious proposition but part of the settled law of the case.[26] Retroactive application of the new regulatory law had therefore taken Lucas's investment just as surely as if the state had excluded him from the land. Not only did Lucas get no return on his investment, but he also lost everything he had invested so far.

The Supreme Court held that deprivation of all economically viable use constituted a *per se* taking of property requiring compensation unless the land use Lucas contemplated would have been impermissible under background principles of property law, such as the law of nuisance, at the time he purchased his land. On remand, the state supreme court held that construction of a house on the beach did not constitute a common law private or public nuisance despite the fact that the cumulative impact of many such constructions might have very harmful effects on the coastline.[27] The fact setting is very similar to that in *Palazzolo*,[28] a case involving development on the coast of Rhode Island, and *Tahoe-Sierra*,[29] a case involving a temporary construction moratorium on land surrounding Lake Tahoe. The question for us is how to conceptualize the property rights at stake in such cases.[30]

According to the castle model of ownership, within the borders of one's land, the owner is supreme and can do whatever he wishes. Outside one's property, one must obtain the consent of other owners to enter their land and have dealings with them.[31] In this model of the lord in his castle, the central question is *what it means to stay within one's own borders.* Another way to put this is: whose castle is it anyway? If an owner's act hurts the property interests of a neighbor, government regulation may be needed to protect the ownership rights of the victim. The castle image suppresses

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[26] *Lucas*, 505 U.S. at 1010, 1015; *see also id.* at 1076 (statement of Souter, J.).

[27] Lucas v. S.C. Coastal Council, 424 S.E.2d 484 (S.C. 1992).

[28] Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (state not immune from a regulatory takings claim just because an owner acquired title after the regulatory law came into effect).

[29] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (a temporary moratorium on construction not a *per se* taking).

[30] *See* ROSE, PROPERTY AND PERSUASION, *supra* note 24, at 50 ("[I]n a very practical way, takings jurisprudence depends on some underlying conception of what your property rights entitle you to have and what they do not.").

[31] It is an issue of contention whether this model includes any public property; traditionally, it does. After all, one might need to travel on a road to get to the neighbor's house or store. Lack of public streets might have the effect of imprisoning an owner in her own home. *See* Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES L. 79 (2001) (explaining the problems caused by excessive privatization); *see also* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (explaining the tragedy of underused private property).

the ways in which one castle can be used to invade another. Consider the case of *State v. Shack*,[32] which involved the question of whether a doctor and a lawyer were committing a trespass by entering a farmer's property without his consent to provide medical and legal services to migrant farm workers employed and housed there. The farmer's view was that they were on his property and he had a right to exclude them or to admit them on conditions that he would set. Moreover, the workers had not bargained for the right to receive such visitors and in the absence of a contract giving them the right to entertain such guests, the control of the property remained in the hands of the owner, who was the farmer. The castle belonged to the farmer and regulation of the terms of the contract would amount to paternalistic regulation.

The defendants in this criminal trespass case argued that they had a right to visit the farm workers in their own homes, and that the workers had a right to welcome visitors in their homes. It has long been part of the law of the United States that tenants have a right to receive visitors, but it was not clear whether the workers counted as tenants under the contractual arrangements regulating their relationship with the farm owner. The Supreme Court of New Jersey had no problem agreeing with the defendants' claim, noting that it was "unthinkable" that the farmer could assert a "right to isolate" the workers from the outside world; such a claim amounted to "paternalistic behavior."[33]

In effect, the court found the farmer's claim to be akin to a claim of the privileges of a feudal lord who had the power to condition entry on his land in any way he wished. The U.S. rejection of feudalism meant that lords could not retain unlimited powers of sovereignty over individuals whom they allowed to come onto their land. Rather, U.S. property law required that power over property be pushed downward to those who actually occupy the land. In this reading of the case, the farmer could choose whether to house migrant farm workers, but once he does so, they have certain rights inhering in their status as employee-residents, including the right to receive visitors. If they have such rights, then it is the workers, not the farmer, who own the castles and have the power to determine whether the doctor and lawyer have rights to enter the land. The question then boils down to the question of whether it was the farmer's land or the workers' homes that constitute the castle.

The castle image plays out a little differently in the context of land use disputes among neighbors. In *Lucas*, for example, the question was whether development of coastal land had negative effects on others that the legislature was empowered to regulate. The most expansive view of the rights of owners would allow them to do anything at all as long as their acts took place within the borders of their own land. This view fo-

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[32] 277 A.2d 369 (N.J. 1971).
[33] *Id.* at 374, 373.

cuses on the place where the conduct occurs and ignores the place where the effects of that conduct are felt. In contrast, the most restrictive view would stop owners from doing anything at all that negatively affects individuals outside the borders of their land. This view defines all actions with external effects as other-regarding acts that are presumptively illegal. Neither of these views is sustainable and neither has actually been seriously proposed by anyone.

It is understood, as the *Lucas* court acknowledged, that the law of nuisance always prevented owners from acting on their own land to unreasonably harm the property rights of their neighbors or the public at large. The judges who developed the common law knew that many exercises of property rights were anything but self-regarding acts. Yet the prohibition of all other-regarding acts would have prevented owners from doing almost anything on their land, interfering both with their liberty and the well-being of society as a whole. The question then became how to identify acts of ownership that were to be considered of legitimate concern to the owner alone. In other words, despite harmful externalities, an act of ownership might be viewed as self-regarding because others have no legitimate interest in stopping the conduct, despite the fact that the act harms them.

The legal realists tried to get beyond the self-regarding/other-regarding dichotomy by defining all acts of property as other-regarding.[34] Libertarians have sought to recreate the distinction.[35] Regardless of one's attitude on the utility of the distinction, it is important to recognize that it is unlikely to be eradicated completely. A society that values individual liberty is almost certain to create and nurture intuitions about the types of actions that are presumptively outside the legitimate realm of government regula-

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[34] *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); *see also* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (detailing the history of legal realist criticism of the "self-regarding acts" theory of John Stuart Mill and the eventual legal realist conception championed by Wesley Hohfeld that defined all legal liberties as correlative with vulnerabilities of others subject to the effects of the exercise of those liberties). On the subject of defining property itself in a realist mode, Hanoch Dagan has asserted that property should be understood as a set of evolving "institutions," not merely "bundles" and "forms." Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1518 (2003). Under this approach, "the forms of property . . . [are] important default frameworks of interpersonal interaction [which] are subject to ongoing normative . . . reevaluation and possible reconfiguration." *Id.* at 1558. Dagan concludes that the "configurations of property rights constitute institutions that facilitate . . . human interaction and thus promote important human values." *Id.* at 1570.

[35] *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (contending that government regulations that reduce the value of owners' property should be compensated, as the government's power to regulate is no greater than citizens' rights to assert common-law remedies against each other); BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION *passim* (1997) (lauding recent takings cases for bolstering individuals' protections in their property as part of a libertarian defense of property rights).

tion. Those intuitions, in turn, affect the way litigants, lawyers, and judges understand land use conflicts and hence the law of regulatory takings.

If we think of property as a castle and the rights of owners as "absolute within their spheres,"[36] we are led to a particular way of thinking about land use disputes. The central question in this model is *what it means to stay within one's own borders*. There are, in turn, two ways of conceptualizing what it means to "stay within one's borders."

First, we might ask whether the owner acted within his borders to create significant harm outside those borders. This view allows owners to cause some harm to others; as noted above, the prohibition of all harm would effectively prevent the emergence of property rights in the first place. The question is whether the harm is *significant*; if it is, it comes within the purview of the legal system. If, however, the harm is not viewed as significant, either in quantity or quality, then the acts can be viewed as legitimately self-regarding.

The second way to conceptualize what it means to "stay within one's borders" is to ask whether the owner has exceeded the scope of the rights traditionally granted to owners by the legal system. This is the approach suggested by Justice Scalia, who poked fun at the distinction between harm-preventing and benefit-conferring laws in his opinion for the Court in *Lucas*.[37] In this view, an owner has stayed within his borders if his actions do not exceed the powers granted owners over their physical land by the common law (defined in some suitably objective way).[38]

Lucas's desire to build a house appeared to most of the Justices on the Supreme Court and the South Carolina Supreme Court, on remand, to be a self-regarding act.[39] Despite the possible negative consequences to neighbors and the public as a whole that might flow from further development of the coastline, both courts viewed those harms as lacking significance—although real, they were necessary consequences of the exercise of property rights. On one reading, those harms were not viewed as substantial; they were harms that neighbors should bear in the interest of living with other owners. On another reading, those harms were not caused by Lucas; they were the effect, not of his development, but only of the cumulative development of many owners. A final view is that those harms would never have been regulated either by the common law of nuisance or by any other traditional background principles of property law. However one

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[36] Kennedy, The Rise and Fall of Classical Legal Thought, *supra* note 17, at 162.

[37] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025–26 & n.12 (1992) ("Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.").

[38] On the problems of defining such rights objectively, see Frank Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993).

[39] *See* Lucas v. S.C. Coastal Council, 424 S.E.2d 484 (S.C. 1992), *on remand from* 505 U.S. 1003 (1992).

understands the legal resolution of the case, the courts appear to have concluded that the construction of a house on one's land is of legitimate concern to the owner alone; it cannot constitute a nuisance even if similar development by many owners in the vicinity would impose significant harm on coastal areas. Lucas was acting within his borders—or within the boundaries of his property rights as an owner—and he had full power to decide to build or not to build. Thus, if others are interested in stopping him from exercising his rights as an owner, they are entitled to do so only if they have a legitimate public purpose and, even then, only by compensating Lucas for the loss of his property.

A conservative answer to the question of staying within one's boundaries suggests that owners have a large realm of freedom and that regulations of property use are presumptively invalid.[40] The conduct of owners should generally be presumed to be self-regarding in nature; the complaints of others in the face of the exercise of property rights are, in general, unjustified and illegitimate. The character of the government action embodied in the regulatory laws in *Lucas* was deprivation of the ability to use the land in any meaningful way when the owner's acts were of no legitimate concern to anyone other than the owner himself.

A liberal answer to the question of what it means to stay within one's borders is that many or even most acts of ownership affect others and that owners have obligations to mitigate those consequences when they are significant. Governments are instituted to regulate conduct that is harmful to others, and the fact that harm is caused by the use of property, rather than by the movement of one's fist, is of no moment.[41] The character of the government action in *Lucas*, according to the liberal view, was regulation designed to prevent an owner from causing grave harm to public interests and to other owners. Ownership never entailed the ability to participate in destroying the coastline, the very boundaries of the state itself. There is no vested right to destroy the very land that is the subject of ownership. Preventing such harms is one of the central reasons for which we created the state in the first place.

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[40] *See* Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988) (arguing for more expansive protection for property rights based on historical and equitable norms associated with traditional nuisance law); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992) (arguing for more expansive protection for property rights by reference to historical norms making individual control of property the rule and government regulation the exception).

[41] *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) (arguing that the Framers' focus on strong individual property rights has cemented inequality in American law and limited democratic political participation by defining rights as limits, although recent takings jurisprudence offers the possibility of reconceiving property as multifaceted and interactive); Laura S. Underkuffler, *When Should Rights "Trump"? An Examination of Speech and Property*, 52 ME. L. REV. 311 (2000) (arguing that property rights require regulation because they involve conflicts over interdependent interests).

Most scholars recognize that a physical model focused on the geographic location of acts and injuries is inadequate to define what it means to stay within the lines. Land use regulation almost always involves conflicting interests. The legal realist answer was to balance competing interests by reference to policy considerations; the efficiency theorists adopt a similar approach, eschewing conceptualistic distinctions between self-regarding and other-regarding acts or formalistic analysis of precedent. As the uproar created by the *Kelo* case shows, however, both judges and the general public remain captive to such conceptual concerns; they often have strong intuitive reactions to particular cases of regulation based on prevailing images of the rights of the owner. Those rights are based on common understanding, tradition, or precedent, and at their core is the issue of what it means to act as an owner within one's borders.

B. The Investment Model

The second image of property is that of an investment in a market economy. In this model, the scope of property rights depends on a theory of legitimacy, such as the desert-oriented rights theory of John Locke or the utilitarian theory of Jeremy Bentham and John Stuart Mill. The Lockean approach focuses on individual desert—one who applies his or her labor to the earth deserves to reap where he or she has sowed. An owner who has invested capital deserves the rewards that accompany the delayed gratification associated with investment.[42] The utilitarian approach justifies an act of ownership to the extent that it promotes the general welfare. An act can thus be regulated or prohibited to the extent that it undermines social utility.[43]

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[42] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 18 (C. B. Macpherson ed., 1980) (1690):

> Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my property, without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.

[43] In fact Thomas Hobbes, properly understood, espoused a version of this model as well. He argued that the very institution of government was created for two purposes: to protect us from violent death and to promote what he called "convenience" (we would call it social welfare or utility). The protection of property is thought to promote investment and thereby increase both the standard of living and the happiness of individuals. THOMAS HOBBES, THE LEVIATHAN 112, 161 (Michael Oakeshott ed., Basil Blackwell 1960) (1651). Although Hobbes thought that the sovereign had the final word on how to achieve these aims, he did not imagine the sovereign to feel free to ignore them, partly because there was a Higher Authority to whom the monarch would eventually have to give account. *See id.* at 275 ("The *word of God*, is then also to be taken for the dictates of reason and equity . . . ."); James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (1987) (arguing that Hobbes tempered positivism with a theory of interpretation of law premised on the purposes he

The castle model judges the legitimacy of both property and regulation by asking whether the owner has spilled over the borders of his land or exceeded the scope of his rights defined by law or tradition. The investment model focuses instead on protecting the *justified expectations of investors.*[44] The models overlap because an owner who is exercising a traditional property right may be said to have justified expectations in the continued exploitation of that right despite the harmful effects on others. The models diverge because the castle model defines the rights of the owner by reference to physicality or tradition; if a right is traditional, then, under the castle model, the owner's justifications are by definition legitimate. The central question in the castle model is one of power; if the power is one of ownership, then it cannot be regulated without compensation. In contrast, the investment model tests the owner's expectations by asking whether they are economically justified. The fact that a right is traditionally legally protected counts in favor of its continued exercise, but it is not a bar to regulation.

The contrast between these two models explains the disagreement between Justices Scalia and Kennedy in the *Lucas* case. Justice Scalia's majority opinion utilized the castle model; he argued that an owner has the right to be free from a regulatory law that reduces his property value to nothing when the use contemplated by the owner would have been within the traditional scope of rights granted owners before the imposition of the regulation.[45] In Justice Scalia's view, owners' rights are absolute within their spheres, at least when confronted with regulations that would destroy them entirely, regardless of the social consequences of their proposed property use. Thus, Justice Scalia suggested that Lucas had legitimate, investment-backed expectations that he would be able to build houses on his two lots. His neighbors had all built homes and at the time Lucas bought his lots, it was lawful for him to do so as well. Construction of his house did not cause any harms traditionally regulated by either common law or statute, and thus his investment-backed expectations were necessarily legitimate.

In contrast, Justice Kennedy argued in his concurring opinion that the fact that an act of ownership has not been proscribed by tradition or law is not an automatic bar to regulation even if the regulation would destroy all economic value of the property.[46] The question in the case was whether

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attributed to the state); CHRISTINE KORSGAARD, THE SOURCES OF NORMATIVITY 23 (1996) ("But Pufendorf and Hobbes thought that the *content* of morality is given by reason independently of the legislative will. They agreed that good and evil, prudence and imprudence, and in a way even justice and injustice, are objectively identifiable attributes of states of affairs and of the actions which produce them.").

[44] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.").

[45] *Lucas*, 505 U.S. at 1006–33.

[46] Kennedy explained:

the owner's investment-backed expectations were reasonable; this required a judgment to be made, not a determination of powers or a definition of borders. Justice Kennedy's view was echoed by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island* and adopted by the full Court in *Tahoe-Sierra* in an opinion authored by Justice Kennedy.

Of course, the fact that the investment model asks whether the investor's expectations were reasonable does not preclude a finding that they were indeed reasonable. So a conservative might argue that Lucas's investment-backed expectations were legitimate and thus protected from *post hoc* alteration by changes in regulatory law. After all, Lucas bought the land for development purposes that the law allowed, and he had the right to a reasonable return on his investment. Of course, Lucas was not allowed to use his land to cause substantial harm to others, but the construction of a home (at least in the abstract) cannot be characterized in this way. Neither prior law nor prior custom ever identified the harms associated with home-building to be of such import as to justify a total prohibition. Regulation, of course, may be allowed. The zoning law upheld in *Village of Euclid v. Ambler Realty Co.* authorized limiting property to residential use when it was associated with an average reciprocity of advantage; restrictions on land use may impose costs, but the restrictions on the neighbors confer benefits that outweigh those costs.[47] In such a regulatory scheme, one can see an advantage for the individual owner (rather than intrusive regulation) because the benefit is greater than the costs. No such reciprocity could be observed in *Lucas*. Lucas was prohibited from doing something all his neighbors were allowed to do.

The liberal version of the *Lucas* case is quite different. Science advances and gives us new knowledge. We now know the importance of wetlands and coastal areas for the environment. We may not have known this in 1789, but the Founding Fathers believed in science and the "progress

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> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

Lucas, 505 U.S. at 1035 (Kennedy, J., concurring) (citation omitted).

[47] 272 U.S. 365, 387–90 (1926) (law limiting land to residential uses does not constitute a regulatory taking).

of the useful arts."[48] They were participants in the Enlightenment. They would not have wanted us to blind ourselves to the effects that unlimited development has on the environment on which all property ultimately depends. We would cut off our noses to spite our faces by allowing development that would lead to the destruction of all our property. It was because of advances in scientific knowledge that coastal regulation and wetlands regulation had begun in the first place. At the time when Lucas bought his land, there had already been more than thirty years of such regulations, and they had become increasingly intrusive over time. Was it reasonable for Lucas to assume that these laws would never change? Was it reasonable for him to invest in coastal land on the assumption that if he got in under the wire, he would have a vested right to build his homes in an area he knew to be environmentally sensitive?

The liberal answer may be that his expectations were unreasonable. He did not deserve complete freedom to build on such land because he knew or should have known that such construction might cause substantial and unreasonable harm to the property of others. Nor is it efficient to encourage investment in such land by insulating owners from the need to consider whether the laws might change to further regulate such property in the public interest. This is the problem of moral hazard. One may have a right to reap what one has sowed, but one cannot reasonably expect that one has a vested right to spew toxic chemicals into the ground just because one hundred years ago we did not know the harm such chemicals could cause.[49] The key issue for property owners is that investments, after all, involve risk, and one risk that investors should be forced to internalize is that of foreseeable new regulations designed to protect the public from the harms attendant on the cumulative effects of individual acts of ownership.

IV. Castles and Investments in Current Regulatory Takings Doctrine

The castle model focuses on allocating power based on a clear definition of the scope of property rights that does not change because of evolving values or social conditions; the goal is to define the borders of ownership and to protect the rights of those who stay within the lines. In the castle model, the rights of investors are defined *ex ante* on the basis of objective rules, traditions, and norms. The investment model, in contrast, focuses on the protection of justified expectations based on possibly shifting judgments of legitimacy that may vary over time as social conditions and values change. This model presumes that owners are subject to a fair amount

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[48] U.S. Const. art. I, § 8, cl. 8.

[49] *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986) (arguing that changes in government policy should be treated like other uncertainties and left to market forces).

of risk, including both the risks associated with new development next door and with new government-imposed limitations on development. Legitimacy of expectations comes partly from custom, tradition, and precedent and also partly from democratic lawmaking and normative judgments about fairness and welfare. The question for the castle model is whether the owner was acting within his rights or whether he slipped over the border. The question for the investment model is whether the owner's expectations are justified, and this question cannot be answered without resort to a normative conception that can distinguish between justified and unjustified expectations.[50]

These first two models are not definitive in solving actual cases. They may lead to different results depending upon the assumptions entered into the model. For example, one might adopt a conservative version of the castle model and conclude that Lucas was acting within the boundaries of traditional ownership rights when he proposed to construct homes on the coast; at the same time, one could adopt a liberal version of the investment model and conclude that his expectations that those rights would continue were unreasonable given the recent history of coastline regulation and the important public interests served by it. Alternatively, one might adopt a liberal version of the castle model and conclude that current scientific understanding teaches that Lucas's proposed construction posed significant risks to his neighbors and the public at large and thus exceeded the scope of his rights as an owner, spilling over the borders; in the same case, one could adopt a conservative version of the investment model and conclude that the regulatory change designed to prevent such clear and present harms was sufficiently abrupt and unpredictable as to render it unfair in the absence of compensation.

Regulatory takings doctrine embodies both the castle and investment models.[51] The standard *Penn Central* test requires considerations of three central factors that derive from the two models—the character of the government action, the economic impact of the regulation, and the extent to which the regulation interferes with reasonable, investment-backed expectations.[52] The castle model suggests that property includes certain core entitlements that cannot be taken or infringed without compensation, regardless of the public interests involved. This model underlies the 1982 *Loretto* decision, which defined the permanent forced invasion of prop-

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[50] For an excellent and fascinating analysis of the difference between these two modes of thought, see Laura S. Underkuffler, Tahoe*'s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. (forthcoming 2006) (Duke Law Sch. Legal Studies Research Paper Series, Research Paper No. 84, 2005), *available at* http://www.ssrn.com/abstract=820266.

[51] *See* ROSE, PROPERTY AND PERSUASION, *supra* note 24, at 65 ("[T]he incompatible elements in our takings law emerge from the oil-and-water mixture of a dominating preference-satisfying conception of property on the one hand, with a weaker but very different conception of property as propriety on the other.").

[52] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

erty by strangers as a *per se* taking of property,[53] and the 1992 *Lucas* case, which defined total deprivation of economic value as a *per se* taking unless the proposed use would have exceeded the traditional scope of the owner's rights prior to the imposition of the regulation.[54] The investment model underlies the vested rights cases such as the 1979 *Kaiser Aetna* case which prevented regulatory agencies from revoking regulatory permissions once an owner has invested in reliance on an existing regulatory scheme.[55] It is also the core of just compensation law which denies owners the actual value of the land to them and limits them to its fair market value even if the cost of replacing what was taken would far exceed the property's fair market value.[56]

The Supreme Court's last term may mark the beginning of a sea change in regulatory takings doctrine. The effort to identify *per se* takings of property, which began in 1982 with the *Loretto* decision, appeared to come to a crashing halt in the 2005 decision in *Lingle v. Chevron*,[57] which limits *per se* takings to forced invasions (as in *Loretto*) and complete deprivations of value (as in *Lucas*). This change was foreshadowed by Justice O'Connor's concurring opinion in *Palazzolo*[58] and seemingly adopted by Justice Kennedy's majority decision in *Tahoe-Sierra.*[59] The *Lingle* decision appears to put the last nail in the coffin; the case-by-case approach favored by Justices O'Connor and Kennedy appears to have won out over Justice Scalia's rules-based approach.[60] The potential roles of Chief Justice Roberts and Justice Alito remain to be seen.

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[53] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[54] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992).

[55] Kaiser Aetna v. United States, 444 U.S. 164, 169, 176 (1979).

[56] *See* United States v. 50 Acres of Land, 469 U.S. 24 (1984) (denying replacement cost for landfill taken through eminent domain and giving only fair market value); *see also* Margaret Jane Radin, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, *in* REINTERPRETING PROPERTY 120, 136 (1993), *originally published in* 88 COLUM. L. REV. 1667, 1686 (1988) ("The notion of eminent domain constitutionalizes fungibility. It constitutionalizes an ethic of exchange value.").

[57] 125 S. Ct. 2074 (2005) (holding that a regulatory taking cannot be established by arguing that a law does not "substantially advance" government interests); *see* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005–2006) (explaining why *Lingle* is so significant).

[58] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[59] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)

[60] *Compare* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1701–02, 1711 (1988) (characterizing regulatory takings law as unpredictable and vague and arguing that "this is one legal area in which almost any consistent, publicly articulated approach is better than none") *with* Eduardo Moises Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 287 (2004) ("Despite frequent pleas by scholars for the introduction of bright line tests into the law of regulatory takings, this is an area of law particularly ill-suited to such inflexible standards."). *See also* Margaret Jane Radin, *Diagnosing the Takings Problem*, *in* REINTERPRETING PROPERTY, *supra* note 60, at 146, 161, *originally published in* COMPENSATORY JUSTICE (John W. Chapman ed., 1991) ("[T]he stubborn rele-

This would suggest that current doctrine has attempted to use the castle model (in cases like *Loretto* and *Lucas*) but confines it to extreme cases. Thus, the heart of regulatory takings law seems to have been taken over by the investment or "justified expectations" model. The investment model immunizes owners from regulation by reference to tradition only in the most extreme cases. Otherwise it subjects those expectations to the crucible of human judgment to determine their reasonableness.

V. A Third Model: Citizenship

How should the courts determine the appropriate realm of the castle model? How should they decide when investment-backed expectations are justified? That is where the third model comes in. The final model of property is based on the notion of obligation associated with the concept of citizenship. What is crucial here is that citizens have obligations as well as rights.[61] Those obligations may be to refrain from exercising power over one's property, such as is asked of us when we limit land use by zoning and environmental laws. But those obligations may also require affirmative action. We may be asked to pay taxes, to share our property with others, to do things on our own land for the express benefit of others, whether or not we receive a like recompense. We may be asked, for example, to provide access to our businesses for those who use wheelchairs. This may require us to spend money even if the increase in business does not fully compensate us for this investment.[62] These legal obligations are routinely im-

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vance of circumstances, and the problem of pluralism in basic liberal values, together account for much of the disarray in takings jurisprudence. They render the takings issue resistant to general solutions."); Carol M. Rose, *Crystals and Mud in Property Law*, *in* Property and Persuasion, *supra* note 24, at 199, *originally published in* 40 Stan. L. Rev. 577 (1988) (outlining some of the reasons why property law cannot be elaborated fully either by a system of formal rules or a regime of ethical standards but requires both to operate fairly and wisely).

[61] *See* William H. Simon, *Social-Republican Property*, 38 UCLA L. Rev. 1335 (1991) (arguing for the conceptualization of social-republican property, where an owner must bear a relation of "potential active participation" in relation to the group constituted by the property and where inequality is limited among members of the group—examples being certain types of cooperatives); Laura S. Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127 (1992) (arguing that property owners have obligations to others because ownership of a specific resource necessarily denies that resource to others, and property rights necessarily affect others by denying them things they need to sustain life); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987) (arguing that a distributive, as well as a possessive, notion of property exists in the discourse of American law and that this should be recognized in a pragmatic, rather than solely rule-based, property law).

[62] For an interesting set of thoughts on the obligations of owners under the public accommodation provisions to provide access to persons with disabilities, even if this imposes financial costs on those owners, see Mark Kelman, *Market Discrimination and Groups*, 53 Stan. L. Rev. 833 (2001). *See also* Mark Kelman, Strategy or Principle?: The Choice Between Regulation and Taxation 53 (1999) [hereinafter Kelman, Strategy or Principle?] ("The argument seems rather compelling that at least a purpose, if not the sole purpose, of regulations mandating access is to avoid the sociopsychological harms that

posed on property owners. What do they teach us about the rights of owners?

The castle and investment models start from the premise of individual rights; they place the burden of persuasion on the state to justify limiting the presumably absolute power of owners. The citizenship model starts from different premises and asks a different question entirely. It starts from the assumption that obligations are inherent in ownership.[63] Part of what it means to be a member of society, to be an owner among owners, is to be part of a real or imagined social contract that limits liberty to enlarge liberty, that limits property to secure property. This does not mean that obligations are justified merely because they are demanded by society; it does mean that the central question is whether the obligation is fair or just. When the state constrains the powers of owners or purports to limit previously recognized property rights, the citizenship model asks whether the obligation is one that "in all fairness and justice, should be borne by the public as a whole,"[64] "rather than remain disproportionately concentrated on a few persons."[65]

The *Lingle* decision makes the *Penn Central* test the core of regulatory takings doctrine. Although that test is designed to determine when government regulations go too far in impinging on property rights, it is premised on the notion that others have substantial obligations, both to other owners and to the public. The *Penn Central* test asks us to evaluate several factors against a bedrock standard. That standard is based on the question of whether the burden on the owner is fair or just. The core of private property, according to the unanimous view of the Supreme Court, is *protection from unjust obligations*.[66]

While this understanding assumes that owners have obligations, as well as rights, we expect owners to be free to look after their own interests. This is, after all, the core principle of the classical liberalism of Hobbes and Locke. According to Michael Walzer, liberalism is the invitation to act in a self-interested manner (within limits designed to ensure that others are similarly free to act in a self-interested manner).[67] This is a phi-

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result from being marked as a social outsider or lacking the sense of belonging that one can get only if integrated into whatever a community's ordinary social life may be.").

[63] *See* Underkuffler, *supra* note 50, at 21–27 (arguing that the Scalian view of property—a variant of what I have called the "castle" view—characterizes property rights in a "one-sided" fashion that gives "no consideration [to] the interests of the state, or [to] those whom it represents").

[64] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[65] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978); *see* Cosim John Sayid, Property and Citizenship: What *Kelo* Leaves Behind (Aug. 2005) (unpublished manuscript, on file with the Harvard Environmental Law Review) (arguing for a citizenship focus in analyzing regulatory takings issues and emphasizing the centrality of issues of distributive justice).

[66] *Penn Central*, 438 U.S. at 123.

[67] I recall this striking phrase from Professor Walzer's lectures on political theory at Harvard University in the late 1970s.

losophy at odds with all others that had preceded it in the history of the world. But this philosophy never amounted to a call to anarchy, and Mill's theory of self-regarding acts sought to bridge the divide between the call to indulge in self-interest and the call to refrain from self-aggrandizement at the cost of harm to others. Liberalism sought, in John Rawls's reformulation of the Kantian view, "the most extensive basic liberty compatible with a similar liberty for others."[68] This means that owners are legitimately subject to just obligations and that such obligations are in no way incompatible with the concept of ownership. The only question is whether a law limiting the rights of the owner is a just obligation.

Obligation is inherent in liberalism, but the castle and market models marginalize it. They seek to suppress consciousness of the obligations inherent in ownership, to draw our attention away from them. They ask us to presume that self-interest is justified both by rights-oriented norms of liberty and utility-oriented goals of welfare. The citizenship model seeks to confer freedom and equality on all persons, spreading rights to all, but it simultaneously places owners in the role of guardians of social order. This position of guardianship entails duties to refrain from actions that endanger the underpinnings of a free and democratic society that treats all individuals with equal concern and respect. Professor Gregory Alexander explains that property was always associated with norms of propriety as well as self-interest.[69] Property serves social as well as individual functions.

A libertarian version of the citizenship model would adopt a user fee model of government. If we think of government as based on a social contract entered into by self-interested individuals, then citizens will only agree to accept obligations if the benefits of those obligations match or outweigh their costs. The lord in the castle will only part with property to a vassal if that vassal confers services on the lord in return—services that the lord views as acceptable compensation for loss of control of the land.

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[68] JOHN RAWLS, A THEORY OF JUSTICE 60 (1971).

[69] GREGORY ALEXANDER, COMMODITY AND PROPRIETY (1997) (arguing that propriety has existed alongside commodity as an understanding of property throughout the history of American law); *see also* Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 701–02 (1998) (examining the historical and theoretical role of property as propriety, that is, acting to further a commonly held notion of the public good, and arguing that much of the takings doctrine can be understood by looking to the Court's application of the concept of property as propriety); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000) (investigating states' land-use regulations during the Revolution—which broadly promoted the public welfare and extracted benefits for the community—and concluding that the Framers intended the takings clause to apply only to appropriations, not to regulations); CAROL M. ROSE, PROPERTY AND PERSUASION, *supra* note 24, at 49 (explaining the seeming muddle of takings law by arguing that property endows owners with both rights and responsibilities because property can be viewed as both a vehicle for preference satisfaction and as propriety, where the purpose of property is to accord to each person what is proper to her); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (explaining that the takings clause partially rested on republican ideas of government).

The market investor similarly expects a return on his investment. Some flexibility may be allowed around the edges; a strict user fee model of government would be unworkable. So we make a concession to practicality by asking for an average reciprocity of advantage—or what Professor Richard Epstein usefully calls "implicit in-kind compensation."[70] The libertarian version of this model suggests, however, that any sacrifice that is disproportionate to the benefit is not one that can be fairly asked of an owner in the absence of compensation.

In contrast, a liberal version of the citizenship model contains a more expansive understanding of "what we owe each other."[71] Liberals are more likely to react with favor to redistributive programs and are less likely to expect a user fee model of government. Liberals worry a great deal about the distribution of property; this includes worry about the unequal distribution of the burdens of ownership, as when polluting factories are located in areas dominated by poor people or disempowered racial groups. This liberal worry about the distribution of the burdens of property explains why many liberals sided with the Kelos to oppose the taking of their house for transfer to a big corporation. They saw themselves as seeking to limit the power of government to oppress the weak in favor of the powerful, to protect small owners from big owners. Of course, this worry about disparate impacts is also a conservative stance when it comes to regulatory takings. The conservative argument for compensation is that it is unfair for the burdens of public programs to be visited on those few property owners whose property is seized for the public good.

This means that there is a crucially important convergence between liberals and conservatives. Both start from the premise that the distribution of the benefits and burdens of property ownership is a topic of fundamental importance. While property burdens are appropriate when they regulate socially destructive conduct or result in an average reciprocity of advantage, they become problematic when they impose a disparate impact on individual owners. How should we think about this distributive question?

I agree with Laura Underkuffler, who argues that the crucial question is not just the rights of the individual owner vis-à-vis the state but the right relationships that must be established between that owner and others in the community. She argues that "the question of justice or fairness in law—on which takings cases are purported to depend—is an inherently *relational* inquiry."[72] It is crucial to remember that assignment of a property

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[70] EPSTEIN, *supra* note 35, at 195.

[71] *See generally* T. M. SCANLON, WHAT WE OWE EACH OTHER (1998). *See also* SINGER, *supra* note 6, at 140–78; UNDERKUFFLER, *supra* note 8, at 158 (explaining that property rights are often allocative decisions); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999) (arguing that "diminution of value" and "reciprocity of advantage" rules should be defined in terms of egalitarian concerns, including the identity and relative power of parties).

[72] Underkuffler, *supra* note 50, at 24.

right to an individual necessarily denies that same right to others.[73] This means that "justice requires consideration of *competing* interests and *competing* claims."[74] Owners do not live alone and when their exercise of property rights affects others, the interests of those others need to be taken into account to determine whether any obligation imposed on a property owner is just or fair.[75]

The common-sense, layperson's idea of property focuses on the castle model. Underkuffler notes that we tend to envision property as "a bulwark surrounding a sphere of individual liberty; it is an absolute and inalienable right, which provides security and protection."[76] However, as the legal realists taught us long ago, rights are correlative; the recognition of a right to exclude implies a duty on others to stay off your land just as the privilege to use property implies that others are vulnerable to the effects of your use of your property.[77] This means that the *idea* of property as a castle conflicts with what Underkuffler calls the "institution" of property. In practice, the relational and necessarily allocative character of property means that "in its institutional form, [it requires] the resolution of conflicting claims and conflicting desires for what are often external, physical, finite goods."[78]

If we start from the premise that owners in a free and democratic society have obligations as well as rights, as the Supreme Court has long reminded us, the citizenship model question for the *Lucas* case is whether the obligation imposed on Lucas by the coastal regulatory commission is just and fair. The conservative answer may be that it was not. The neighbors had all developed their land and Lucas was seeking to do no more than they had done. His planned property use was lawful when he bought the land and he could not have anticipated that he would be prohibited from building a house just as his neighbors had done. In the conservative view, it is just to ask Lucas to sacrifice his investment only if he benefits from that sacrifice. On the user fee model, the benefit must be equal to the sacrifice; on a looser standard, there must be an average reciprocity of advan-

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[73] Laura S. Underkuffler, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038 (1996).

[74] *See* Underkuffler, *supra* note 50, at 26–27, 28 ("[M]ore than other claims that are constitutionally based, property claims are so often—*by their very nature*—unavoidably reciprocal in character.").

[75] *See* SINGER, *supra* note 6, at 6; *see also* KELMAN, STRATEGY OR PRINCIPLE?, *supra* note 62, at 125 & *passim* (arguing that regulations often function in a manner similar to taxation and that there are "no constitutional principles that would regularly force governmental entities to use tax-and-spend programs rather than regulatory ones").

[76] UNDERKUFFLER, *supra* note 8, at 142; *see also* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 15 (1977) (distinguishing between the view of property taken by the Scientific Policymaker and that taken by the Ordinary Observer).

[77] *See* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975; Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[78] UNDERKUFFLER, *supra* note 8, at 143.

tage such that his sacrifice can be justified by a significant benefit to him personally. The conservative (and perhaps the liberal) view of the case is that the harm caused by him individually is minimal and the sacrifice being asked of him great. He is not being treated with "equal concern and respect," as Ronald Dworkin puts it;[79] rather, he is being asked to suffer a disproportionate burden for the good of the community. He is a victim of the disparate impact of a law designed to benefit the whole community, and it is only fair to demand that the general public pay for disproportionate burdens on individuals.

The contrary answer of environmentalists and many liberals might be that the obligation on Lucas was fair indeed.[80] The neighbors were protected by a grandfather clause; there was no need to tear down their homes and requiring them to do so would have caused harm while conferring no significant public benefit.[81] But seeking to prevent further construction to prevent inevitable future harm was legitimate because the effects of Lucas's desired action, if compounded by similar future actions, could generate devastating harms to individuals and to the public as a whole. Moreover, Lucas cannot claim unfair surprise when he purchased a type of land that had long been subject to special regulations to prevent those devastating harms. He can thus be held responsible for preventing the harms that would emerge if everyone acted as he did. This argument appears to be a liberal argument; after all, it justifies government regulation. But of course, an alternative conservative tradition faults judicial activism and counsels deference to the legislature, especially when the legislative act depends on contentious political and normative judgments implicating expert knowledge such as judgments of environmental policy. Judges adhering to this conservative tradition, and intent on applying the law rather than making it, might uphold the regulation as an act of judicial restraint in the face of clear legislative policy.

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[79] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1978).

[80] *See* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988) (arguing that the takings doctrine consists of narratives about social reality—implicitly, this is a conversation about the appropriate political ordering of our society—and therefore formalism should not be used because it privileges existing powers in this debate and locks in their privilege); James R. Gordley, *Takings: What Does Matter?: A Response to Professor Peñalver*, 31 ECOLOGY L.Q. 291 (2004) (arguing that the ultimate purpose of property rights is to promote human flourishing and hence takings cases should be decided on the basis of whether they advance commutative justice); Paul, *supra* note 23, at 1543 (we should "protect the amount and types of property citizens need to participate meaningfully in a self-governing society."); Underkuffler, *supra* note 73, at 1038–40 (arguing that property rights are unique because they are allocative and implicate the right to life—making them the most crucial rights—thus courts should adopt a purposive approach to property rights, relating them to collective goals and the kind of society we are and want to become).

[81] Then again, if those homes were harming the coastline, and the state required their destruction for that reason, Lucas would be treated the same as other owners and subject to the obligation not to use his property so as to harm the public.

It may seem paradoxical to think of property rights as imposing obligations. After all, regulations of property owners appear to be impositions on owners and by their nature coercive and inherently suspect. But, both modern economic analysis of externalities and environmental analysis of ecology teach us about the interconnected nature of individual acts of self-interest.[82] The quest is for a "fair adjustment"[83] of the interests of owners when they conflict with the interests of other owners and society as a whole.[84] Obligation is not inimical to property; indeed, as the Supreme Court has long affirmed, obligation is inherent in property. We can argue about what those obligations can be, but we cannot reasonably argue that they do not exist.

We saw that the castle model offers no clear way to resolve the question of what it means to stay within one's borders. We cannot answer this question in a merely physical sense since we are dealing with an act on one's property that causes harm outside the borders of the land. The investment model may help by suggesting that owners have a right to rely on existing regulatory rules—an owner who invests in reliance on a regime that authorizes the proposed use of property arguably has the right to rely on the rules in place. This approach defines the castle, not by the borders of the land, but by the traditional boundaries of one's legal rights. Such an owner has not exceeded the borders of his land because he has not exceeded the boundaries of his rights. Yet this solution is no better than the physical one. The mere fact that an act is lawful does not mean that the law cannot change. No one has a vested right to ignore new laws, especially when those laws are enacted to prevent social harms, and Justice Scalia is correct that clever lawyers can characterize any regulatory law as one designed to prevent harm. Nor has property traditionally been defined in a rule-like fashion. Owners have always been subject to obligations to act reasonably (the law of nuisance is a central example),[85] and the fact that no clear rule prohibited construction of a house on the coastline, for instance, is no guarantee that such construction might not be found to constitute a public or private nuisance at some point in the future.[86]

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[82] Ecology provides an interesting lens through which to view the consequences of different property law regimes. Ecologists recognize that organisms are linked to each other through complex sets of interactions (which can be both beneficial and detrimental). Similarly, property owners and the public are linked to each other through individual actions and laws affecting the use of property (which can also be both beneficial and detrimental). From this perspective, we could conceive of property as a type of ecosystem, with every private action and legislative mandate potentially affecting the interests of other organisms. For an elaboration of this view, see Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002).

[83] State v. Shack, 277 A.2d 369, 374 (N.J. 1971).

[84] *Id*.

[85] For an explanation of the obligation model of property that uses the nuisance example as a core paradigm, see SINGER, *supra* note 6, at 32–39, 87–94.

[86] *See* Michelman, *supra* note 38, at 316–18 (criticizing Scalia's opinion in *Lucas*).

Most of the Justices on the Supreme Court itself recognize these difficulties. This is why *Lingle* takes us full circle back to *Penn Central*. Many scholars have criticized the *Penn Central* test.[87] They have explained that it is incoherent, that it is not really a test, that it gives no guidance.[88] But I believe the *Penn Central* approach to regulatory takings has much to recommend it.[89] It appears incoherent because it embodies several different models of property—models that have some intuitive claim to our allegiance. When the character of the government action is the "functional equivalent of a practical ouster,"[90] or when the owner is left with no "economically viable use,"[91] then the government action seems functionally equivalent to an actual taking of title. It is hard to reconcile such takings with the idea of ownership. In this sense, the castle model supplies the intuition that may justify finding a regulatory taking. When the government changes rules in midstream, there is reason to find unfair surprise in the face of reasonable, investment-backed expectations.

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[87] *See, e.g.*, Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (arguing that the entirety of the Court's takings jurisprudence has failed); Carol Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (noting that there is no clear takings doctrine); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989) (contending that the takings clause doctrine is in disarray).

[88] *See, e.g.*, J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo, *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 SW. U. L. REV. 351, 398–402 (2005) (noting the *Penn Central* test's continuing inability to determine when just compensation should be granted); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1565–66 (2003) (contending that cases from the nineteenth century, which explain property rights and regulatory takings through "social-compact and natural-right principles," handle "the doctrinal problems that have arisen under *Penn Central* . . . much more cleanly from a doctrinal perspective than do *Penn Central* and its progeny"); Gordley, *supra* note 80, at 291 ("The doctrine is incoherent and the cases conflict. The balancing test of *Penn Central* . . . is not helpful—it is ad hoc and may be meaningless."). *See generally* Peterson, *supra* note 87 (offering an emphatic articulation of the confusion and incoherence in takings doctrine).

[89] *See, e.g.*, STEPHEN R. MUNZER, A THEORY OF PROPERTY 302 (1990) ("[T]here is no objection in principle to employing considered judgments or 'intuitions' in making the decision; . . . one can sometimes properly have more confidence in a discrete intuition than in some antecedent formulation of an abstract principle."); Radin, *supra* note 56, at 1680 ("But is anything wrong with 'essentially ad hoc, factual inquiries?' That is simply one way of expressing a pragmatic approach to decision making."); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004) (arguing that exactions cases illustrate that the Court's push for formalism in takings law prevents individualized, community-based solutions to local government land-use issues and, perversely, limits individual property rights); Paul, *supra* note 23, at 1401 ("[T]here are simply too many compelling and conflicting theories for any to account accurately for American attitudes toward the takings dilemma."); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004) (arguing that takings law is meaningfully muddled, as it differs based on the background state and local property laws upon which owners' expectations operate).

[90] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879)).

[91] *Lucas*, 505 U.S. at 1016.

But, as I argued before, there are counterarguments to these intuitions. Even permanent physical invasions of property may be justified without compensation.[92] Consider the public accommodations and fair housing laws that require owners to rent property or provide services without regard to race.[93] And retroactive changes in law are clearly justified when they are designed to prevent substantial harms to others because owners never had the right to use their property to cause such harms.[94]

Penn Central responds to these dilemmas by asking a simple question. Is the obligation posed by a regulatory law "just and fair"?[95] Of course, it is not as if this question were any easier to answer than questions about borders or justified expectations. The question does, however, focus our attention in the right direction. It invites debate about what obligations we have as citizens in a free and democratic society, bound to laws adopted by elected officials, but protected by certain basic constitutional rights.[96] Further, it asks us to consider what kind of property *regime* we want the law to support.[97] We do not have a clear methodology to answer this question, but that may be a virtue rather than a defect of this way of approaching the problem. The question of justice and fairness does not relieve us of the burden of judgment, and that—perhaps more than any other reason—explains why it is the right question.

We can see the utility of the castle model by revisiting the *Kelo* case. Remember that the Kelos draw our attention to the castle model. This is their home that the city wants to seize, and it had better have a pretty good reason for taking it and kicking them out.[98] Taking their home to

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[92] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (public easement to shopping center to distribute leaflets not a taking).

[93] Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964) (public accommodations law not a taking of a hotel's property despite requiring forced physical invasion by strangers).

[94] Miller v. Schoene, 276 U.S. 272 (1928) (no taking to require destruction of harmful property).

[95] *See* Radin, *supra* note 56, at 137–38 (arguing that the Supreme Court "should drop per se rules [and] continue to ask the traditional pragmatic ethical question: Is it fair to ask this citizen to bear these costs for the benefit of the community?").

[96] *See* Radin, *supra* note 60, at 147 ("[C]oncealed within the takings issue is a problem of corrective justice . . . . The heart of the conceded corrective justice problem is that a takings claim should, at least prima facie, be honored only if the property taken is rightfully held.").

[97] *See* ALEXANDER, *supra* note 69, *passim* (explaining the role property law plays in creating and implementing visions of the proper social order); Gregory Hicks, Memory and Pluralism on a Property Law Frontier (unpublished manuscript, on file with the Harvard Environmental Law Review) (exploring the clash between property regimes in New Mexico after its incorporation into the United States); Rose, *supra* note 12, at 3 ("[T]he origins and maintenance of property regimes are somewhat mysterious.").

[98] *See* Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998) (exploring the ramifications of sexual harassment in the home and arguing that the law should treat harms in the home differently than those in workplace); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. (forthcoming 2006) (manuscript on file with the Harvard Environmental Law Review) (explaining why the home is often granted special protection by the law and criticizing eminent

give it to another owner who will pay higher taxes adds insult to injury. This is an assault that can be understood by both conservatives and liberals. If the goal is economic development and the promotion of tax revenues, there must be another way to do this. By seizing the Kelos' property, the City of New London is using them to promote the well-being of others. In Kant's phrase,[99] they are being used as means to an end rather than as ends in themselves.[100] But they are human beings—they are persons—and it is wrong to use people in this way. There is no justification for promoting social welfare by treating some as if they were not deserving of equal concern and respect.

How does the city respond? First, it says that they are being paid fair market value. This is inadequate, it is true, but this is what the Supreme Court has said they are entitled to receive. If the problem is that fair market value does not compensate them for the psychic harm they suffer because they are losing their house, then that is a problem that would exist even if their house were being taken to build a highway. The remedy for this problem is not to prevent the taking but for the state of Connecticut to pass a law mandating a premium above fair market value to be paid to homeowners who lose their homes for the public good. This will not make the owners whole, but it will at least mark that an injustice is occurring that requires a compensatory remedy of some kind.

Second, it is not clear that the city has any other option to achieve its goal. Remember that we have made a decision all across this country to pay for local services with property taxes. Those services include police, fire, schools, municipal hospitals, and homeland security. Low property values mean low taxes, and low taxes mean bad public services, and bad public services are what make the middle class flee—it is a vicious cycle. It is not clear that cities have many alternatives to raise their property values other than engaging in urban renewal projects like that in New London. It might be better for the state or the federal governments to enact programs to counteract the problems associated with poor local services, perhaps by using taxes other than property taxes to fund them. Absent such changes in our practices, the Kelos' demand that their house not be taken may be a demand that urban renewal not happen. Unless alternative remedies are found, the claim of veto rights is a claim that property owners have the right to stop a local government charged with providing local services from

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domain law for giving the home too little protection); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (distinguishing between personal and fungible property and arguing for qualitatively different protection for personal property such as the family home); Sayid, *supra* note 65 (arguing that homes deserve special protection under the takings clause).

[99] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 41 (Mary Gregor trans., ed., Cambridge Univ. Press, 1997) (1785).

[100] *See* Sayid, *supra* note 65 (arguing that because citizenship requires treating every person as a full and equal member of society, the state may not take people's homes so that more desirable persons may move in).

adopting the only program that seems likely to increase the standard of living of everyone in the community. That's a tremendous power.

There may be alternative ways to achieve these goals. The *Kelo* decision leaves it to the states to limit eminent domain power through state laws or constitutional amendments if they so desire.[101] Many states will clearly do this, but some will not. We will have something that conservatives usually like: federalism and local control.[102]

Where does this leave us? The Kelos have a very strong argument that the obligation demanded of them is unjust. We are asking of them more than we have a right to ask. But the city has an equally strong argument that denying it the power to undertake a project of this sort strips it of the only tool at its disposal to acquire the resources needed for local services. Moreover, the Kelos are being compensated in the same way and in the same amount as any owner whose property is taken for public purposes—the pain of a family whose house becomes a reservoir or a city hall is no less than theirs.

The citizenship model does not provide us with a formula to erase doubt, nor does it erase "the riddles posed by our allegiance to conflicting views of property."[103] Rather, it merely frames the question and asks us to consider what really matters. The central question of takings law is whether the obligations imposed on an owner by a property law rule are just and fair. However you come out on this issue in a particular case, I submit to you that this is the right question.

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[101] Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005).

[102] *See* Sterk, *supra* note 89 (showing how federalist concerns have shaped regulatory takings jurisprudence).

[103] Paul, *supra* note 23, at 1542.