PROPERTY-AS-SOCIETY

TIMOTHY M. MULVANEY*

Modern regulatory takings disputes present a key battleground for competing conceptions of property. This Article offers the following account of the three leading theories: a libertarian view sees property as creating a sphere of individual freedom and control (property-as-liberty); a pecuniary view sees property as a tool of economic investment (property-as-investment); and a progressive view sees property as serving a wide range of evolving communal values that include, but are not limited to, those advanced under both the libertarian and pecuniary conceptions (property-as-society). Against this backdrop, the Article offers two contentions. First, on normative grounds, it asserts that the conception of property-as-society presents a more useful structure for assessing whether an allocative choice is fair and just absent compensation than the conceptions of property-as-liberty and property-as-investment. Second, on doctrinal grounds, it suggests that the property-as-liberty conception has fallen from grace in takings jurisprudence since its peak in *Lucas v. South Carolina Coastal Council* in 1992; moreover, while the property-as-investment understanding remains of some force, the property-as-society conception has ascended to a position of jurisprudential prominence, as most recently evidenced in both the majority and the dissenting opinions in the 2017 matter of *Murr v. Wisconsin*.

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INTRODUCTION

According to the prevailing judicial interpretation of the Fifth Amendment's "Takings Clause," the state is liable where a regulatory decision reallocates property interests in a manner that is markedly unfair and unjust to an individual property owner absent compensation.[1] There is general agreement that the unfairness or injustice of such a decision ordinarily is tied to the extent to which that decision reasonably should have been expected by the takings claimant. Just how an owner's expectations are to be evaluated, though, is a contested matter of seminal importance in more global discussions surrounding the very meaning of the institution of property. It is thus unsurprising that, since its reemergence in the late 1970s, regulatory takings law has served not only as a forum for case-by-case wrangling between individual owners and state entities but a key battleground for competing libertarian, pecuniary, and progressive conceptions of property itself.

While these varying conceptions of property often overlap and are best considered as existing along a spectrum rather than in isolation, they roughly can be summarized as follows: a libertarian view sees property as creating a sphere of individual freedom and control (property-as-liberty); a pecuniary view sees property as a tool of economic investment (property-as-investment); and a progressive view sees property as serving a whole host of evolving social goals including, but not limited to, the aforementioned goals of promoting freedom and encouraging economic investment (property-as-society).

1. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978).

Beginning with its well-known 1978 opinion in *Penn Central Transportation Co. v. New York City*,[2] the Supreme Court weaved and winded through these competing conceptions in takings cases for the better part of fifteen years.[3] Yet, in 1992, a majority of the Court in *Lucas v. South Carolina Coastal Council*,[4] in an opinion authored by Justice Antonin Scalia, pushed takings jurisprudence firmly towards conceiving of property in decidedly libertarian terms. Justice Anthony Kennedy's opinion[5] concurring only in the judgment rested on the property-as-investment view, while separate dissents by Justices Harry Blackmun[6] and John Paul Stevens[7] depended on the property-as-society view.

As Part I below sets out, the splintered nature of the *Lucas* decision presents both an effective platform for evaluating the normative force of these competing conceptions and a useful baseline against which one can gauge these conceptions' doctrinal influence a quarter-century later. Parts II through IV delineate and offer a normative critique of, in turn, the property-as-liberty, property-as-investment, and property-as-society conceptions. Part V moves from theory to the extant jurisprudence, with a special emphasis on the Court's 2017 decision in *Murr v. Wisconsin*.[8] In the course thereof, this Article makes two principal claims.

The first claim rests on normative grounds: Property, as an institution crafted to benefit the public interest, necessarily must be accountable to the plural values that characterize the nation's democratic culture. To maintain such accountability, the state should make allocative adjustments as social, economic, and moral perspectives on the content of these values—and perspectives on what might harm these values—evolve over time. The pluralistic property-as-society view underlying Justice Blackmun's and Justice Stevens's *Lucas*

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2. 438 U.S. 104 (1978).

3. For holdings supportive of the property-as-liberty view, see, for example, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). For holdings supportive of the property-as-investment view, see, for example, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). For holdings supportive of the property-as-society view, see, for example, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

4. 505 U.S. 1003 (1992).

5. *Id.* at 1032–36 (Kennedy, J., concurring).

6. *Id.* at 1036–61 (Blackmun, J., dissenting).

7. *Id.* at 1061–78 (Stevens, J., dissenting).

8. 137 S. Ct. 1933 (2017).

dissents, therefore, presents the most helpful structure for assessing the justificatory nature of a state re-allocative choice absent compensation.

The second claim is doctrinal in character: The libertarian understanding of property supported by the *Lucas* majority opinion largely has faded from view in regulatory takings law. Moreover, while the property-as-investment understanding outlined in Justice Kennedy's *Lucas* concurrence remains of some force in takings jurisprudence, both the majority and dissenting opinions in *Murr* demonstrate that this understanding has given way in several important respects to the property-as-society view. This Article concludes, therefore, that, twenty-five years on, the lasting legacy of *Lucas*, both normatively and doctrinally, lies in its dissents.

I. *LUCAS* REVISITED

In its 1978 decision in *Penn Central Transportation Co. v. New York City*, the Supreme Court identified a non-exclusive list of considerations that are relevant to a court's determining in an individual takings case whether an imposition stemming from a new regulatory safeguard or obligation is fair and just absent compensation.[9] To decide when "fairness and justice" require that "economic injuries caused by public action be compensated by the government, rather than remain concentrated on a few persons," the Justices instructed lower courts to "engag[e] in . . . *ad hoc*, factual inquiries" that include contemplating (1) "[t]he economic impact of the regulation on the claimant;" (2) the "nature" and "extent" to which the regulation has interfered with the claimant's reasonable "investment-backed expectations;" and (3) the "character of the governmental action."[10] Proponents of a libertarian

9. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24, 130–31 (1978); *see also Lucas*, 505 U.S. at 1019 n.8 (describing the considerations explicitly referenced in *Penn Central* as "keenly relevant"); *Herzberg v. County of Plumas*, 34 Cal. Rptr. 3d 588, 597–98 (Ct. App. 2005) (remarking on the non-exclusivity of the considerations explicitly identified in *Penn Central* as relevant to regulatory takings claims); *Shaw v. County of Santa Cruz*, 88 Cal. Rptr. 3d 186, 214 n.38 (Ct. App. 2008) (describing the three considerations documented in *Penn Central* as the "principle guidelines" but explaining how the California courts have "identified from United States Supreme Court cases . . . a number of additional, nonexclusive factors that might be relevant considerations in a particular case of an alleged *Penn Central* regulatory taking") (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). The Supreme Court's June 2017 opinion in *Murr v. Wisconsin* includes language supportive of non-exclusivity. *See, e.g.*, *Murr*, 137 S. Ct. at 1943 ("A central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility."); *id.* at 1954 (referring to "a complex of factors" relevant to the regulatory takings analysis) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

10. *Penn Cent.*, 438 U.S. at 124, 130–31 (emphasis added).

conception of property lamented *Penn Central*'s "ad hocery"[11] and saw in the case of one David Lucas an opportunity to push takings law in a new direction.[12] In outlining Mr. Lucas's claim and the Court's basic reaction thereto, this abbreviated Part positions the *Lucas* case as a platform for the theoretical and doctrinal discussion in the Parts that follow.

A. The Claim

In 1986, after reaping significant returns through his development company's sale of more than 1000 lots on a narrow barrier island in South Carolina, Mr. Lucas purchased from the company two such lots for himself.[13] Though the state's coastal zone had been subject to extensive regulation for some time, these lots were considered buildable when Mr. Lucas acquired them even though, apparently, similarly situated lots in all other east coast states were not.[14] Soon after Mr. Lucas's acquisition, the state legislature passed the 1988 South Carolina Beachfront Management Act.[15] Relying on a wealth of new scientific evidence highlighting the impacts of erosion emanating from the type of development that was already proliferating on the state's shores, this legislation served in many respects as a last ditch measure to preserve the natural features of a beach and dune system that protects the public and property from harm.[16] The Act established a coastal setback line

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11. *See* Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

12. *See, e.g.*, Marcia Coyle, *Property Revival; Economic Rights Gurus Look to High Court*, NAT'L L.J., Jan. 27, 1992, at 44, LEXIS ("This term could be a dream come true for property owners fuming over regulations restricting the use of their land and for conservative legal strategists longing for an economic rights revival."). The label "dream come true" is apt, for just several years prior leading takings scholar Professor Joseph Sax had asserted that "the path of noncompensation seems rather clearly set" and he saw "no evidence . . . [it] will not continue." *See* Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 495–96 (1983).

13. *See* Vicki Been, Lucas *v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, *in* PROPERTY STORIES 299, 304 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

14. *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).

15. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008–09 (1992).

16. *Id.* at 1007–08. In the words of Professor Richard Lazarus, "[t]he Beachfront Management Act sought to put an end to the human folly of placing people, lives, livelihoods, and homes in those places most exposed to the destructive forces of nature." Richard J. Lazarus, Lucas *Unspun*, 16 SOUTHEASTERN ENVTL. L.J. 13, 29 (2007). *See also* John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 4 n.18 (1993) (explaining how oceanfront development interrupts the natural migration of protective sand dunes and consists of

based on historic high water events of the prior forty years and prohibited development or reconstruction on any lots—including the two recently purchased by Mr. Lucas—seaward of that line.[17]

Mr. Lucas filed suit seeking compensation for the alleged unconstitutional regulatory taking of his properties.[18] He advocated a new, *per se* rule by which the sheer weight of the economic impact resulting from a land use restriction of this nature automatically triggers takings liability regardless of whether it mirrors a common law restriction or otherwise serves an important public interest, such as health and safety or environmental preservation.[19]

B. The Platform

The trial court found that the Act made the two parcels—which Mr. Lucas together had purchased for upwards of $1,000,000—economically worthless, and, obliging the theory advanced by Mr. Lucas, ordered the state to pay takings compensation.[20] The South Carolina Supreme Court reversed, asserting that legislative restrictions on land uses that seek to prevent harm do not give rise to takings liability even where they render a property interest devoid of all economic value.[21] In a dramatic move just days after the controversial

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materials that in major storms are converted to debris that become "windborne missiles that endanger the lives and property of others"). *But see* Brief for Institute of Justice as Amicus Curiae Supporting Petitioner, *Lucas*, 505 U.S. 1006 (No. 91-453), *reprinted in* Richard A. Epstein, Lucas v. South Carolina Coastal Council*: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner*, 25 LOY. L.A. L. REV. 1225, 1248–49 (1992) (conceding that anti-armoring provisions along the coast protect the public from nuisance-like-harm and are appropriate without compensation, but asserting that South Carolina did not "show[] that the construction of a house on a beachfront lot . . . will affect the stability of the land on which neighbors have constructed their own houses"). The state legislature also cited the Act's benefits to the tourism industry and plant and animal habitat preservation. *See* S.C. CODE ANN. § 48-39-250 (Law Co-op. Supp. 1992).

17. *Lucas*, 505 U.S. at 1007.

18. *Id.* at 1009.

19. *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992) ("Lucas maintains that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration."); Transcript of Oral Argument at 25–26, *Lucas*, 505 U.S. 1003 (No. 91-453) ("QUESTION: You want the per se rule, and you argued it below. If it takes away all the economic value, it is a taking that has to be compensated. [The state and its amici] are saying that is so sometimes but not all the time, that if there is a nuisance, if it is threatening the public safety, you can take it all away without paying and you deny that. [COUNSEL FOR MR. LUCAS]: I deny that, yes, sir.").

20. *Lucas*, 505 U.S. at 1007–09.

21. *S.C. Coastal Council*, 404 S.E.2d at 901–02 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

confirmation of Justice Clarence Thomas—a noted opponent of the state's imposing on traditionally-recognized property rights via new regulations—the U.S. Supreme Court granted Mr. Lucas's petition for certiorari.[22]

The *Lucas* Court decided 6-3 to reverse the South Carolina Supreme Court and remand the case for application of the "test" the Court fashioned. Only four Justices, though, joined Justice Antonin Scalia in the majority opinion, which in several ways reflected a strong libertarian understanding of property.[23] Justice Kennedy concurred only in the judgment and rested his view of the case on the theory that property amounts to a tool of economic investment.[24] Justice Blackmun and Justice Stevens issued separate, piercing dissents, both of which reflected more progressive, socially-oriented conceptions of property than those advanced by Justices Scalia and Kennedy. Using the *Lucas* case as a platform, the next three Parts both outline and critically assess these varying conceptions of property in turn. Thereafter, the fifth and final Part examines the doctrinal influence of these conceptions in regulatory takings law twenty-five years after the Court issued its decision in *Lucas*.

II. PROPERTY-AS-LIBERTY

Justice Scalia's opinion for the Court in *Lucas* rested in several respects on the decidedly libertarian view that property is one's castle, and that owners generally are immunized from the burdens of government regulation so long as they keep their activities within the castle's bounds. Drawing on Justice Scalia's opinion for illustrative purposes, the first section of this Part explains the basic contours of this conception of property. The second section, in subjecting this

22. Justice Thomas previously had delivered lectures advocating "aggressive protection of property rights under the federal Constitution." Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 797–98 (2006).

23. After initially indicating that he would join the majority opinion, *id.* at 806, Justice David Souter simply authored a statement outlining his position that the case should be dismissed as improvidently granted in light of the implausible factual conclusion on which the plaintiff's entire claim was based: that a regulation had deprived an oceanfront lot as devoid of *all* value simply because its owner could no longer build a permanent, occupiable structure upon it. *See Lucas*, 505 U.S. at 1076 (statement of Souter, J.). Other Justices questioned this finding, too. *See, e.g.*, *id.* at 1033–34 (Kennedy, J., concurring); *id.* at 1044–45 (Blackmun, J., dissenting); *id.* at 1065 n.3 (Stevens J., dissenting). Such skepticism proved worthy when it later became known that an inland neighbor was willing to buy one of the parcels subject to a restrictive covenant precluding development for $315,000 to ensure the preservation of her ocean view. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 7-3(b)(2) (5th ed. 2012).

24. *Lucas*, 505 U.S. at 1035–36 (Kennedy, J., concurring).

conception to normative critique, contends that the property-as-liberty view is not especially constructive in resolving takings disputes given that it both largely neglects the liberty interests of non-claimants and fails to appreciate those democratic values beyond liberty that property serves.

A. Conceiving of Property as Liberty

Citing favorably to Professor Richard Epstein's famous, strident critique of the Court's "eschew[al]" of any "set formula" in *Penn Central*,[25] Justice Scalia's majority opinion in *Lucas* announced what it deemed a "categorical formulation."[26] In accord with this formulation, the state must pay takings compensation, without "inquiry into the public interest advanced," where—on the Court's various phrasings that it presumably deemed synonymous—a regulation amounts to a "total taking" or a "total deprivation of beneficial" or "feasible" use of property, eliminates "all economically productive or beneficial uses" of property, or requires that property "be left substantially in its natural state" or "economically idle."[27]

Rejecting Mr. Lucas's unconditional theory, though, the Court conceded that common law tort and property doctrines limit the liberty of an owner to use her land as she pleases so as to protect the liberty of others to put their lands to their desired uses. Takings liability, according to the Court, does not attach where a regulation merely restates "background principles" of the common law "of property and nuisance" that, for example, "forestall . . . grave threats to the lives and property of others."[28] However, if a regulation supplements the class of uses deemed harmful under these common law principles and the only economically valuable uses of the claimant's property are those the regulation now prohibits, the state must purchase that property—or the owner's liberty to use that property—to prevent what it newly has concluded are harmful activities.[29]

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25. *See id.* at 1015 (citing Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4 (1987)). At the cited page, Professor Epstein referred to *Penn Central* and its progeny as "confused, and often contradictory" and as an illustration of "intellectual disarray." *See* Epstein, *supra*, at 4.

26. *See Lucas*, 505 U.S. at 1019 n.8.

27. *Id.* at 1015–20, 1030, 1034. *See* John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 VT. L. REV. 689, 711 n.151 (2017) (asserting that *Palazzolo* and *Tahoe-Sierra* gave conflicting guidance on how to interpret *Lucas* on this point).

28. *Lucas*, 505 U.S. at 1029 n.16, 1030.

29. *See* Humbach, *supra* note 16, at 3 ("[F]uture legislative efforts to remedy deficiencies in the common law of nuisance can now be overturned precisely *because* the common law fails to protect people from the particular harm in question.").

The Court initially acknowledged that "background principles" of the common law evolve in the sense that "changed circumstances or new knowledge may make what was previously permissible no longer so."[30] For instance, the Court explained that regulatory safeguards that prohibit landfilling where changing hydrological conditions indicate such an act would flood a neighbor's land or that preclude the operation of a nuclear plant when new information reveals that it sits astride an earthquake fault would not be compensable.[31] In its next breath, though, the Court cheapened its own acknowledgement that changing conditions and new knowledge matter. The South Carolina legislature had voted to institute the enhanced regulatory safeguards at issue in *Lucas* as a result, in part, of its improving understanding of the significant threat that new and existing coastal development posed to coastal residents and the public more generally.[32] Yet, in remanding the case to the state courts for the "background principles" determination,[33] Justice Scalia's opinion expressed considerable skepticism that such principles, as traditionally construed at common law, would have precluded Mr. Lucas's development of single family homes on these two lots, particularly when his immediate neighbors already had constructed homes.[34] Common law principles, wrote Justice Scalia, "rarely support prohibition of [this] 'essential use' of land."[35]

The *Lucas* majority thus operated on the assumption that the common law of property creates a pre-political, formally defined, and static sphere of individual liberty that is legally resistant to the government's interference through the enactment and enforcement of new limitations on possession, transfer, and use.[36] While the Court

30. *Lucas*, 505 U.S. at 1031 (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g (AM. LAW INST. 1979)).

31. *Id*. at 1029.

32. *Id.* at 1007–08.

33. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 314 (1993) (stating the question on remand as follows: "Did [the Beachfront Management Act], or did it not, contain a norm—a rule or principle—whose effect is to deny to owners of land (situated as Lucas' was) a secure freedom to build (as Lucas proposed to build)?").

34. Professor Michelman noted a series of "other pertinent and, it seems, equally plausible traditions," including, for example, the public's ability to access and use the beaches of tidal waters, that the *Lucas* majority disregards. *See id.* at 323.

35. *Lucas*, 505 U.S. at 1031 (quoting *Curtin v. Benson*, 222 US 78, 86 (1911)); *see also* J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 399 (2010) (asserting that any reading of Justice Scalia's opinion in *Lucas* as suggesting "that, over time, what was once allowed under common law no longer [may be]" is "[n]o doubt . . . not what [Justice Scalia] intended").

36. LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY 142 (2003) (describing the lay tendency to view property as "a bulwark surrounding a sphere of individual

uneasily intimated that this property-as-liberty theory applied only in those highly unusual cases where a regulation deprives property of all value, it did not attempt to justify why the theory is or should be inapt when the loss in value is not complete.[37] Rather than address this inconsistency head on, the Court simply asserted that it was inappropriate for the South Carolina Supreme Court to reject Mr. Lucas's claim merely in light of the state legislature's recent assertion that his constructing a home would harm the public. The Court explained that, to reject Mr. Lucas's claim on remand, the state courts needed to find that the proposed development "*always*" had been "unlawful" and the new restriction simply made this implicit eternal "dictate" explicit.[38] Unless there is an especially clear historical application of a common law rule—a rule akin, as one scholar explained, to "building houses in dunelands is forbidden"[39]—the South Carolina state courts not-so-subtly were instructed to conclude that property owners in Mr. Lucas's shoes can develop their property for residential purposes as they choose.[40]

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liberty . . . [as] an absolute and inalienable right, which provides security and protection"). The goal of takings law, as one scholar describes this perspective, involves identifying "the borders of ownership and . . . protect[ing] . . . those who stay within the lines" by assuring that the state does not bypass the payment requirement for condemnatory acts. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 325 (2006); *see also* Stewart E. Sterk, *Dueling Denominators and the Demise of* Lucas, 60 ARIZ. L. REV. 67, 87 (2018) (referring to conceiving of the Takings Clause as protecting against "condemnation bypass").

37. *See* Richard Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 183–84 (2017) ("[T]here is something obviously jarring about a rule that allows a land-use regulation to impair sixty, seventy, or eighty percent of the value of any given piece of property without compensation. . . . [T]here is no obvious tipping point along that continuum where compensation is suddenly required.").

38. *Lucas*, 505 U.S. at 1030. As one insightful student noted soon after the decision, legal "principles" do not usually "dictate;" "[t]hat is, after all, what makes them principles rather than rules." Michelman, *supra* note 33, at 326 (quoting Michael E. Wall, (Im)possible Justifications of *Lucas* 6 (Apr. 28, 1993) (unpublished student paper) (on file with the William & Mary Law Review)); *see also* Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011), https://www.yalelawjournal.org/forum/the-new-judicial-takings-construct [https://perma.cc/JN95-Z86J] (concluding that constricting the common law to its early moorings would unduly hinder property law's ability to conform with changes in economics, society, technology, and the environment).

39. Michelman, *supra* note 33, at 315.

40. Without the benefit of detailed supplementary briefing on the potentially applicable "background principles" of South Carolina common law, the South Carolina Supreme Court quickly held that no inherent common law limitation in Mr. Lucas's title precluded his proposed use. *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 485 (1992).

The implicit direction to South Carolina's state courts, then, was that restrictions on the development of a confined parcel of privately-owned land designed to maintain that land in its natural state are presumptively proscribed absent compensation, at least where the parcel is deemed economically worthless. To the *Lucas* majority, Mr. Lucas had the liberty to determine whether or not to build *something*; should his neighbors collectively have desired to deprive him of this liberty through regulation, they had to both demonstrate a legitimate public purpose for preventing any economically viable development and pay Mr. Lucas for his loss. South Carolina's Beachfront Management Act may well have served such a legitimate public purpose,[41] but it came at the expense of depriving Mr. Lucas of any meaningful land use choices. Regardless of the social consequences, these choices are not of legitimate concern to anyone but Mr. Lucas himself.[42]

From this vantage point, most decisions by a property owner concern that owner alone. Property is not conceived in terms of what owners are obligated to do or avoid for the benefit and protection of others—including the obligation to avoid perpetrating harm through the destruction of important ecological services—but instead in terms of what owners can do for themselves to avoid a substantial personal economic blow.[43] While the *Lucas* Court concedes that many exercises of property rights impact others,[44] its view is that it is only the rare instance where such an exercise *illegitimately* does so.[45] It follows that,

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41. Michelman, *supra* note 33, at 311 ("Lucas himself agreed (as did all of the Justices of the U.S. Supreme Court) that South Carolina's goal of preventing beach erosion fell easily within the range of the state's proper governmental concerns and that prohibiting construction on land in the coastal zone was a reasonable way of pursuing that goal.").

42. *See* Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in* Murr v. Wisconsin*?*, UMKC L. REV. (forthcoming) (July 14, 2018), https://ssrn.com/abstract=3007166 [https://perma.cc/LKS3-5G2S] (asserting that, in these circumstances, *Lucas* instructs that "it isn't necessary to look at [the claimant's] expectations or the nature of the government action or the reasons for it").

43. *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1441 (1993) (explaining that, on this view of property, "[o]wnership . . . means at least that the owner has some right to employ the property for personal benefit, even if it thereby eliminates 'benefits' that land provides in its natural state"); John D. Echeverria, *Making Sense of* Penn Central, 39 ENVTL. L. REP. 10,471, 10,474 (2009) ("[A]pparently, an actual economic wipeout is sufficient by itself to establish a taking . . . .").

44. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 (1992) ("Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference.") (quoting RESTATEMENT (SECOND) OF TORTS § 822, cmt. g (AM. LAW INST. 1979)).

45. To one prominent critic, the *Lucas* Court's perspective "suppresses the ways in which one castle can be used to invade another." Singer, *supra* note 36, at 317–18; *cf.* JOHN STUART MILL, ON LIBERTY 142 (David Bromwich & George Kateb

from the majority's perspective, the liberty of the claimant is pitted against the anti-liberty exploits of the state. According to the *Lucas* majority's understanding of property-as-liberty, at least where an owner's options are curtailed in their entirety by the state absent compensation, the owner often is the victimized transferee of wealth and the state is the antagonistic transferor.[46] On this view, the more the legal system protects property from the state's regulatory exploits, the freer individuals will be. Liberty thus serves as the starting point for crafting and maintaining a fair and just property regime. In those exceptional cases where regulation proves unavoidable for pragmatic purposes, liberty can be respected (albeit in a second-best sort of way) through the payment of compensation to those owners whose liberty is curtailed as a result of that regulation.

B. Property-as-Liberty: A Critical Normative Assessment

Many individual constitutional rights—such as speech, association, religious exercise, and equal protection—can be considered "public goods" in the sense that (i) one person's "consumption" of those "goods" (i.e., exercise of those rights) generally does not detract from consumption by others, and (ii) no person can be easily prevented from enjoying them.[47] As constitutional public goods, these rights generally can be protected against interference by the state.[48] The conception of property underlying the *Lucas* majority opinion rests on the assumption that property rights are among these constitutional public goods in providing a barrier of protection against the government's wishes.[49]

Conceiving of property as a constitutional public good is what Professor Jennifer Nedelsky has described as a powerful and quite

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eds., Yale Univ. Press 2003) (1859) (distinguishing between self-regarding and other-regarding acts in asserting that "[e]ncroachment on [others'] rights; infliction on them of any loss or damage not justified by his own rights . . . are fit objects of moral reprobation, and, in grave cases, of moral retribution and punishment").

46. Laura S. Underkuffler, Tahoe*'s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 749–50 (2004).

47. Of course, scholars have raised the prospect of critical exceptions. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 447, 452, 470 (suggesting that, given hate-speech's propensity to silence its critics, the government's non-interference with one's claim to freely speak hate interferes with another's claim to free speech).

48. *See, e.g.*, Laura S. Underkuffler-Freund*, Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039 (1996) [hereinafter Underkuffler-Freund, *Special Right*] ("[U]pon granting one person the right to speak, there is no *necessary* taking of that same right from another."); Laura S. Underkuffler, *When Should Rights "Trump?" An Examination of Speech and Property*, 52 ME. L. REV. 311, 316 (2000).

49. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992) (referring to "a rich tradition of protection [of property] at common law").

commonplace "psychological experience."[50] In actuality, though, property rights are distinct from constitutional public goods in several important respects.[51] Unlike the subjects of these other rights, the resources to which property is directed are limited and often cannot readily be shared.[52] If the state allocates to one party a right, for example, to control the use of land, that right (and those attendant to it) is denied to all others. Though possible in the context of constitutional public goods, it is not possible in the property context to distinguish between protection against government interference and government obligations to interfere.[53] Not only is there no right to be left alone when it comes to property but there is *no way* to be left alone. Recognizing one person's claim to a limited, non-shareable resource

50. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 250 (1990); *see also* John Humbach, *What is Behind the "Property Rights" Debate?*, 10 PACE ENVTL. L. REV. 21, 23 (1993) ("The basic claim of the property-rights advocates . . . is a claim founded on deeply rooted ideas ringing of basic fairness: 'What's mine is mine.'"). Kevin Gray suggests that lawmakers often perpetuate this mythical idea by obscuring the reality of property's contingent nature. Kevin Gray, *Equitable Property, in* 47 CURRENT LEGAL PROBLEMS 157, 159 (M.D.A. Freeman & R. Halson eds., 1994) ("property is not theft but fraud").

51. The next several paragraphs draw in significant part from one of the author's recent articles. *See* Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145 (2018).

52. *See, e.g.*, Underkuffler-Freund, *Special Right*, *supra* note 48, at 1039; Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1928). Property's rivalrous nature helps explain John Locke's struggling to justify individual appropriations of nature's commons, for such appropriations would deprive all others of their pre-existing rights to those commons. *See* Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIRCUIT 349, 360 n.47 (2014).

53. Property is, in this way, paradoxical: Many Americans have a deep personal feeling that property *should* be very strongly protected, but there is *no way that it can be*. *See, e.g.*, Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363, 370 (2010) ("No societally recognized and enforced property right, which is 'normatively neutral,' actually exists."); Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, *in* PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 417, 427 (G.E. van Maanen & A.J. van der Walt eds., 1996) ("[P]roperty implicates the very core issues of politics: distributive justice and the allocation of power."); Eduardo M. Peñalver, *Property Metaphors and* Kelo v. New London*: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2974 (2006) ("When owners prove unwilling or unable to sort out disagreements about . . . spillover effects on their own, the state [has] to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take . . . ."). *But see* Eric R. Claeys, Kelo, *The Castle, and Natural Property Rights*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 35, 47 (Robin Paul Malloy ed., 2008) ("In all but the most extreme cases, . . . the natural law refrains from picking and choosing among owners or land uses.").

unavoidably detracts from—and thus unavoidably interferes with—consumption of that resource by others.[54]

Concentrating on the liberty of the claimant owner thus directs attention to just one side of the coin. While it is certainly the case that property can enhance specific varieties of liberty, it can do so *only upon* the sacrifice of other varieties.[55] Some varieties are specific, while others are general. For an example of a specific variety of liberty, recognizing a property right to intensive use of sensitive oceanfront lands in South Carolina clearly advances Mr. Lucas's liberty. However, this effort comes at the expense of curtailing the liberty interests of the many others who will be directly and indirectly impacted by this choice. In advancing Mr. Lucas's liberty, the liberty of those owners and non-owners reliant on land, personal, and infrastructural resources that Mr. Lucas's development will put at risk is sacrificed.[56] Of the more general varieties of liberty, advancing Mr. Lucas's liberty comes at the expense of the collective's affirmative liberty to engage with each other in self-governance to preserve sensitive lands for the protection of both present and future generations. If collective action restricting coastal development is authorized but only upon the payment of compensation, the collective's liberty in doing what it will with its money is infringed, given that the taxes used to make such a payment generally are paid involuntarily.[57] In distilled form, and distinct from a

54. *See* ERIC T. FREYFOGLE, A GOOD THAT TRANSCENDS: HOW U.S. CULTURE UNDERMINES ENVIRONMENTAL REFORM 112–34 (2017) (explaining that, in such an instance, property rights do not increase overall but rather are "simply reconfigured").

55. *See, e.g.*, Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 84–91 (2010). It is conceivable that one's property claim would not necessarily interfere with another's claim if land were infinitely abundant and there were no barriers to entry to property ownership, as John Locke once famously if inaccurately imagined the American West. For a critique of Locke's assumptions about there being "enough, and as good" common land left for others, see, for example, Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996). Then again, if land were infinitely abundant and there were no barriers to entry to property ownership, the social benefits of fashioning and administering a property regime in land are not altogether obvious.

56. The point is even clearer on the unusual facts of a well-known Iowa case. In *Bormann v. Board of Supervisors*, the Iowa Supreme Court held that a statute that immunized from nuisance suits those property owners who put their land to use as controlled animal feeding operations unjustly and unfairly deprived these owners' neighbors of property absent compensation. 584 N.W.2d 309, 319–22 (Iowa 1998). To would-be controlled animal feeding operators, the statute removed a substantial restriction infringing upon a use to which they *sought* to put their land. Yet to the neighbors the statute imposed a substantial restriction upon a non-harmful use to which they already had put their land. *See* Mulvaney, *supra* note 51, at 176–77.

57. *See, e.g.*, Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 5 (1993).

world in which the might of physical power rules the day, property represents the *legal power* to constrain the liberties of others regardless of their physical prowess.[58] Respecting Mr. Lucas's liberty by arming him with the power to halt interferences with his preferred land use has adverse consequences for the liberty of those who favor competing uses, just as arming others with the power to halt Mr. Lucas's favored uses would have adverse consequences for Mr. Lucas's liberty.

Given that there are liberties on both sides of the coin, *someone* must choose which varieties of liberty to enhance and which to restrain. Who decides whether the law protects sensitive uses or authorizes intensive ones?[59] Who decides whether the law protects against flooding or authorizes the filling of wetlands?[60] Who decides whether the law requires that a landlord mitigate her damages when a tenant walks out on a lease or allows that landlord to sit idly by and later sue for all back rent?[61] In our constitutional democracy, individuals have exercised their affirmative liberty to organize and cooperate in pursuit of mutually shared goals on these and myriad other topics. In so doing, they have vested the authority to make these choices about which varieties of liberty to enhance and which to restrain in the hands of their political representatives (i.e., the state). Property, therefore, is not inimical to state decision-making, as the *Lucas* majority insinuated—it is the *product* of it. State decisions necessarily will respect certain liberties and simultaneously constrain others over time. Contrary to a major assumption of the majority's property-as-liberty view, all key issues of property law have not already been decided in perpetuity. Respected liberties are not a pre-established and immutable touchstone of defining and allocating property interests; rather, they are an *outcome* of this democratic process of making policy choices among the varying potential answers to difficult questions through the formulation of property laws in the face of new circumstances and information.[62]

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58. *Cf.* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373 (1954) ("[P]roperty is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case *secure the assistance of the law in carrying out his decision*.") (emphasis added).

59. *Compare Just v. Marinette County*, 201 N.W.2d 761 (1972), *with Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (1970).

60. *Compare Palazzolo v. Rhode Island* ex rel. *Tavares*, 785 A.2d 561 (R.I. 2001) (mem.), *with Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), *abrogated by Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

61. *Compare Wright v. Bauman*, 398 P.2d 119 (Or. 1965), *with Somer v. Kridel*, 378 A.2d 767 (N.J. 1977).

62. *See, e.g.*, Jeremy Bentham, *Security and Equality of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 39, 52 (C.B. MacPherson ed., Univ. of Toronto Press 1978) (1802) ("Property and law are born together, and die together.

These policy choices of state decision-makers are, in a democracy, tied on the whole to the electorate's predilections.[63] Naturally, these predilections vary over time and from one generation to the next.[64] American history, though spanning less than 250 years, is rife with examples of marked shifts in the collective's predilections. For instance, prior to the Industrial Revolution, a sensitive land user's liberty outweighed the liberty of one who later came along seeking to intensify her land use in a manner that would interrupt her neighbor's tranquility; as industrialization gained momentum, however, the liberty of the intensive user came to trump the quiet enjoyment of her neighbors.[65] Reflecting this trend, the Oregon Supreme Court described wetlands in 1922 in the following terms: "The interest of the people of this state demands that as far as possible all of the swamps, marshes, swales, and wet land that can be successfully and conveniently drained and reclaimed should be permitted so to be treated . . . ."[66] Not fifty

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Before laws were made there was no property; take away laws, and property ceases."). *But see* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007) (suggesting that, contra Bentham, a property regime cannot operate without a moral grounding that is disconnected from law, though without explaining what a "widely accepted," "simple," and "robust" underlying morality is or how it might be identified without tending to the impacts that one's use of property has on others).

63. Freyfogle, *supra* note 55, at 103 ("[W]e cannot even take a single step in the direction of constructing a property rights scheme based on the idea of property without immediately having to make policy choices."). It would be peculiar, then, to task the judiciary, through the Takings Clause, with conducting a probing review of every such policy choice made by the political body tasked with making those choices. *See* Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 196 (1995).

64. *Id.* ("[P]roperty ought to be defined in ways that will produce the kind of society we want.").

65. Freyfogle, *supra* note 55, at 87. Professor Freyfogle offers a number of additional examples. *See, e.g.*, *id.* at 88–90 (discussing a nineteenth century shift in some jurisdictions away from protecting the liberty of hunters to enter unenclosed private lands and toward a private right to exclude); *id.* at 91–95 (outlining the principles that drove Irish land law in the twelfth century to demonstrate the range of choices lawmakers have in deciding whose liberty to protect and whose liberty to constrain).

66. *Harbison v. City of Hillsboro*, 204 P. 613, 618 (Or. 1922); *see also* H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 505 (San Francisco, Bancroft-Whitney Co. 3d ed. 1893) (observing in the late 1800s that "[w]here water lies upon the surface of the ground in wet, swampy places, and extends even over the lands of several proprietors, but has not taken to itself the qualities of a stream so as to become a water-course, any owner of such lands may, by drains or other artificial means, exhaust the water and redeem his land from its swampy condition"); William B. Meyer, *When Dismal Swamps Became Priceless Wetlands*, AM. HERITAGE, May–June 1994, http://www.americanheritage.com/content/when-dismal-swamps-became-priceless-wetlands [https://perma.cc/2883-HB33].

years later, however, the pendulum swung back when, by a vote of 247-23, the U.S. House of Representatives overrode President Nixon's veto to pass federal legislation strongly protective of wetlands, casting aside builders' once-respected liberty to obliterate what had come to be recognized as precious natural resources.[67] This legislation, known colloquially as the Clean Water Act, remains in force today,[68] alongside air quality, zoning, banking, leasing, antidiscrimination, and countless other property regulations that deprive some parties of liberty.[69]

If property creates a pre-political, formally defined, and static sphere of individual liberty that generally should be deemed legally resistant to the government's interference through the enactment and enforcement of limitations on possession, transfer, and use, why do all of these regulations reflecting the evolving choices of modern society exist? Their existence sheds light on how property law operates in real terms, and simultaneously reveals the chinks in the armor of the property-as-liberty view underlying the *Lucas* majority opinion. These regulations are not, in fact, exclusively pro-liberty or anti-liberty. Rather, they are *extensions of* individual owners' liberties. They protect certain individuals' liberties against new and undesirable uses of property that would infringe on those liberties, though necessarily at the weighty expense of the liberty of others.[70] There is absolutely no system of private property that could avoid all such sacrifices.

Property consists of a body of laws—constitutional provisions, statutes, administrative rules and standards, local ordinances, and common law—that (i) instruct people on how they can use resources and on the types of resource-related relationships that are consistent with a free and democratic society, and (ii) inform owners which governmental decisions among those they perceive as interferences with their ownership they can complain about in a legal proceeding and which they cannot. These laws—these *regulations*—decide which liberties will be protected and which liberties will be sacrificed. Property, without law, cannot tell a hiker that she is at liberty to traverse undeveloped, privately-owned countryside or, instead, that the

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67. *See* Annie Snider, *Clean Water Act: Vetoes by Eisenhower, Nixon Presaged Today's Partisan Divide*, E&E NEWS (October 18, 2012), https://www.eenews.net/stories/1059971457 [https://perma.cc/3KJH-EXXC].

68. *See* Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012). Debate around the law's jurisdictional reach no doubt continues, but that debate centers not on obviously ecologically valuable wetlands adjacent to waters that are navigable in fact but instead on whether the law's protections are applicable to hydrologically isolated sloughs, prairie potholes, and the like. *See, e.g., Rapanos v. United States*, 547 U.S. 715 (2006).

69. *See* Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 605 (2015).

70. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

private owner of that countryside is at liberty to exclude that hiker without the trouble of justifying it.[71] Property, without law, cannot tell a long-time resident that she is at liberty to curb the fumes emanating from a new neighboring factory or, instead, that the private owner of that factory is at liberty to emit those fumes.[72] There is, to crib from the title of a recent provocative book on the subject, "no freedom without regulation."[73] Property law undoubtedly will protect liberty, but *which varieties* of liberty it will protect are not self-evident.

The property-as-liberty view espoused in *Lucas*, therefore, is not in actuality reliant on liberty as a defining principle, for this principle does not explain whose liberty to promote and whose liberty to curtail. Instead, the property-as-liberty view packages within the ideal of "liberty" at least two substantive assumptions. *First*, this view gives a specific, constricting content to liberty. It exalts the negative liberty to be free from the collective governance of others and derides the positive liberty to freely engage in such governance. Moreover, and relatedly, it conceives of this negative liberty as freedom from the state itself, but not from individuals. Thus, Mr. Lucas's liberty to be free from the collective governance of others via the state legislature's Beachfront Management Act features prominently in the Court's opinion, while there is nary a mention of the others whose liberty to engage in their preferred land uses or cooperate in an effort to promote a safe and secure place in which to live, work, and recreate Mr. Lucas's development activities will constrain. The property-as-liberty view overlooks the reality that disregarding the liberty of others is not a neutral stance but instead a choice that confers on Mr. Lucas substantial state power. A legal interpretation that confers this power on Mr. Lucas amounts to a state decision that allocates property interests just as would a legal interpretation that conferred power on others to halt Mr. Lucas's planned development.

Second, the property-as-liberty view underlying the majority opinion in *Lucas* rested on the assumption that nature is the exclusive subject of the current inhabitants' authority.[74] In the process, it

71. *E.g.*, Land Reform (Scotland) Act 2016, http://www.legislation.gov.uk/asp/2016/18/pdfs/asp_20160018_en.pdf [https://perma.cc/6HCQ-WDGQ] (colloquially known as the Scotland Right-To-Roam Act). For an especially thoughtful exposition on shifting attitudes surrounding landowners' exclusionary interests, see ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 29–61 (2007).

72. *E.g.*, Clean Air Act, 42 U.S.C. § 7401 (2012).

73. JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (2015); *see also* Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 950 (2015) ("Markets are free not because they are unregulated but because they are open to all.").

74. *See* Sax, *supra* note 43.

eschewed nature's ecological and generational—and thus *property's*—interconnectedness. This eschewal allowed the Court to understand nuisance law as limiting only those activities that present especially significant and overtly visible harms or, in the Court's words, "grave threats" to other owners' liberty.[75] Any more expansive conception of nuisance law would be an affront to the property-as-liberty view because it would limit the liberty of a current owner to intensively develop her land.[76] Only by disregarding both those other current owners and non-owners who suffer less obvious harms and the future generations that will inherit the landscape—two groups that the common law of nuisance in actuality has served for centuries—can a system of private property be deemed an automatic net gain for liberty.[77] Were nuisance law—and property law more generally—understood instead as involving a choice among competing claims to liberty, a party's plea to liberty alone would not dictate whether that party's liberty should be curtailed or enhanced. The *Lucas* majority's view ignores the reality that, in most every property dispute, the liberty of some disputants will be respected to the detriment of the liberty of others.

The property-as-liberty theory underlying the *Lucas* majority opinion is commendable for recognizing that, in a constitutional democracy, property serves the democratic value of individual freedom. As applied in *Lucas*, it helpfully highlights several ways in which property significantly enhances an owner's liberty by creating and protecting the subject of her ownership. However, this theory conceives of liberty far too narrowly. The *Lucas* Court understood the only liberty at stake in assessing the state's coastal protection legislation as that of Mr. Lucas. Yet private property protection, in operation, imposes a colossal restriction on the liberty of the many others with legitimate interests that would be impacted by Mr. Lucas's development. The *Lucas* opinion fails to grapple with the wide-ranging consequences for the liberty of all parties that result from the state's allocation of property interests. More broadly, it brushes aside democratic values beyond liberty that our property system serves. As the next Part explains, Justice Kennedy's concurrence in the *Lucas* judgment similarly rests on a conception of property centered on a singular value.

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75. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992).

76. Admittedly, the Court did not conceive of nuisance law as narrowly as others had advocated. *See, e.g.,* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 120–25, 230–38 (1985).

77. Freyfogle, *supra* note 55, at 102.

III. PROPERTY-AS-INVESTMENT

Justice Kennedy's concurrence in the *Lucas* judgment is grounded in the view that the institution of property exists not to serve the value of liberty but instead that of industry. The first section below outlines this property-as-investment conception through the lens of Justice Kennedy's concurrence. The second section exposes this conception of property to normative critique. It concludes that, like the property-as-liberty conception, the property-as-investment conception fails to wrestle with the plurality of what are at times incommensurable values with which law-makers ought to be concerned in attempting to allocate property interests in a manner that is fair and just absent compensation.

A. Conceiving of Property as Investment

Justice Kennedy concurred only in the *Lucas* judgment that, as he described it, the Beachfront Management Act "may have deprived [Mr. Lucas] of the use of his land in an interim period."[78] In lieu of the libertarian conception of property underlying Justice Scalia's majority opinion, Justice Kennedy's concurrence rests on a utilitarian approach to property. Under Justice Scalia's approach, decisions surrounding the use of property are not the prerogative of the regulatory state except in those narrow instances in which such decisions traditionally have been considered by the common law to negatively and substantially impact the liberty of others to do what they will with their property; at least where a regulation deprives property of all economically viable uses, the state's police power to limit property uses to prevent harm or otherwise promote the public welfare is relinquished.[79] To the contrary, under Justice Kennedy's approach, decisions surrounding the use of property *are* the prerogative of the regulatory state when justified based on the extent to which they advance the public welfare.[80] To Justice Kennedy, the extent to which a regulation advances the public welfare is largely dependent on its aligning with the affected owners' legitimate economic expectations that relate to and inform financial outlay decisions. He wrote that the Takings Clause "protects private expectations to *ensure private investment*."[81]

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78. *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring).

79. *See supra* notes 28–32 and accompanying text.

80. *Lucas*, 505 U.S. at 1034–35 (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations. . . . 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.").

81. *Id*. at 1035 (Kennedy, J., concurring) (emphasis added).

While facilitating investment and the resulting productivity is at most an incidental byproduct of the property-as-liberty conception, it is the guiding light of the property-as-investment conception. The root of this economic claim is a familiar one: A private property system incentivizes behavior that both diversifies and enlarges the amount of resources available for consumption and increases the value of those resources. In turn, more and more valuable resources are available to satisfy individuals' consumption preferences in the aggregate. Justice Kennedy's approach bears markers of Professor Frank Michelman's famous "demoralization" theory of takings, which focuses on the impact of the state's failure to compensate on the investment decisions of non-compensated owners and their sympathizers.[82] Professor Michelman's theory—and, in turn, that underlying Justice Kennedy's concurrence in the *Lucas* judgment—can be traced to Jeremy Bentham, who included among the various "evils" of assaults on property rights the "deadening of industry."[83] The property-as-investment view suggests that takings compensation should be due when a claimant sustains significant losses via regulation to avoid dis-incentivizing the pursuit of economic investments and the productivity of in-demand goods and services that results therefrom.

This property-as-investment conception leaves the state's enacting and enforcing regulatory safeguards that do not necessarily mirror traditional common law principles free from constitutional takings liability so long as they do not disrupt those reasonable and justified economic investments of the individually affected owner. While Justice Scalia's opinion expressed confidence that owners traditionally have the freedom to determine whether to build a home on a single lot, Justice Kennedy's approach requires an exercise in judgment by asking whether this *particular owner* was justified in the expectation that she could build a home on this *particular lot* in these *particular circumstances*.[84] On this latter view, many regulatory reallocations of property are appropriate. However, where such a reallocation of

82. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214–15 (1967). Professor Michelman advocated limiting takings liability to situations in which the costs of the state's paying compensation to offset "demoralization" are not outweighed by the costs of identifying the affected parties, a point on which Justice Kennedy did not opine. *See id*., at 1215.

83. *See* Jeremy Bentham, *Principles of the Civil Code*, *in* THEORY OF LEGISLATION 70–73 (Richard Hildreth ed. & trans., N.M. Tripathi Private Ltd. & Oceana Publ'ns, Inc. 1975) (1802).

84. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property.").

property interests unduly impedes the assumed purposes of a property regime—investment and the resulting production—compensation is appropriate.

More faithfully than the majority, Justice Kennedy left open the ultimate question of whether a taking occurred in *Lucas*. On the property-as-investment conception underlying Justice Kennedy's concurrence, one might well contend that Mr. Lucas's expectation to build a home on his two lots in these circumstances was justified on the following grounds: Mr. Lucas bought the land when the law allowed such development; the construction of a home would not by itself cause a customarily significant harm to others; and, unlike ordinary zoning rules,[85] the legislation here did not generate any meaningful reciprocal benefits for Mr. Lucas given that his neighbors all already were allowed to do what is suddenly now, to him, proscribed. In this sense, the prohibition on development unjustifiably caught Mr. Lucas by surprise, and to allow it to go uncompensated would chill investment and productivity moving forward.

However, a strong case could be made for just the opposite conclusion on the property-as-investment conception. Perhaps Mr. Lucas's expectation to build a home on these lots in these circumstances was unreasonable, given that, considering new knowledge surrounding the coastal environment, it is evident that Mr. Lucas's situation was distinct from that of his neighbors who already had developed their lands. While construction of a home may well have been an innocent use in such an erosion-prone coastal zone in a prior or even recent age, today such an act has come to resemble an unjustifiable and, indeed, irresponsible intrusion into the previous investments by Mr. Lucas's neighbors. This claim is all the more powerful when one considers that, according to one prominent coastal lands expert, Mr. Lucas's lots were at the time of the case two of just six lots among the hundreds of oceanfront lots along the barrier island where erosion was especially severe.[86]

In further support of rejecting Mr. Lucas's takings claim on the property-as-investment view, South Carolina's coastline had been subjected to extensive regulation for more than thirty years when Mr. Lucas acquired his lots.[87] Perhaps he should have forecasted the possibility of new, more stringent regulations, rather than relying blindly on the view that, having purchased the lots prior to the formal promulgation of these more stringent regulations, he was immune from

85. *Village of Euclid v. Ambler Realty Co.*, 272 US 365, 387–90 (1926).

86. *See* Professor Josh Eagle, Panel Speaker at the University of South Carolina School of Law Conference on Takings and Coastal Management: Coastal Management after *Lucas* (Nov. 3, 2017).

87. Sax, *supra* note 43, at 1434.

their application for all time absent compensation.[88] On this view, it is not welfare enhancing to encourage investments in property without concern for the possibility that scientific advancements, and the laws based on the revelations of those advancements, might change. South Carolina made no promises to Mr. Lucas (or anyone else) that he could construct a home on privately-owned property *in perpetuity*. This risk—the possibility that reasonably foreseeable regulations will be adopted to protect the public from direct or cumulative harms—is part and parcel of the very idea of investment.

B. Property-as-Investment: A Critical Normative Assessment

The preceding section explains that Justice Kennedy's concurrence in the *Lucas* judgment centers on a value that is only tangential to the conception of property underlying the majority opinion—the value of industry—by conceiving of property as a tool of economic investment. The benefits of property's incentivizing, or, perhaps more directly, rewarding, behavior that enlarges the amount and value of resources available for consumption can be distilled into the simple and undeniable assertion that human survival—let alone human flourishing—depends on the production of such resources. However, the mere investment and production of resources available for consumption does not alone serve the end of promoting human survival. Serving this end also requires concern for the distribution of these resources.

Like the property-as-liberty view, conceiving of property-as-investment emphasizes the self-interested nature of property and conceives of the relevant interests of others in narrow terms. On the property-as-investment view, there is limited regard for the extent to which property owners, in light of their status as owners, owe responsibilities to their communities to keep those communities alive and functioning in a decent and just order.[89] While the property-as-investment view does not mandate an immediate and strict reciprocity of advantage on each party negatively impacted by a new regulatory safeguard (which, in the words of Professor Richard Epstein, amounts

88. Even if South Carolina nuisance and property law, as historically construed, did not explicitly prohibit Mr. Lucas's proposed construction, they did not explicitly authorize it, either. *See* Michelman, *supra* note 33, at 316–18.

89. *See* Lynda L. Butler, *Property as a Management Institution*, 82 BROOK. L. REV. 1215, 1220–21 (2017) (critiquing conceptions of property that lack "an outward-regarding perspective that encompasses a broader sense of responsibility for the impacts of property use on society and nature, and that recognizes the role of collective action in managing the exercise of property rights").

to proper "implicit in-kind compensation"),[90] it requires a still-demanding version of an "average" reciprocity of advantage.[91] To proponents of the property-as-investment view, determining whether such an average reciprocity of advantage exists requires an economic comparison of the disparity between the pre-regulation economic burden distribution and the post-regulation economic burden distribution through the claimant investor's eyes.[92] The property-as-investment theory does not leave space to rationalize reallocations that depress investment without compensation on the grounds that the less fortunate in our communities deserve the economic means to improve their circumstances and that the more fortunate among us have an obligation to alleviate our neighbors' suffering by providing such means.[93] Only those reallocations that do not unduly discourage investment into the production of goods and services that people who already have spending power want to purchase are immunized from takings law's compensation principle.

According to the property-as-investment conception, industry is not one of a plurality of values that at times might give way to other values. Instead, it is *the driving value* with which law-makers ought to be concerned in considering whether contemplated allocations of

90. EPSTEIN, *supra* note 76, at 195. The author of the *Lucas* opinion, Justice Scalia, has echoed Professor Epstein's call for a narrow understanding of reciprocal advantages in numerous takings opinions. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 18–24 (1988) (Scalia, J., concurring in part and dissenting in part); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (preventing the state from imposing permit conditions that do not offset a harm directly attributable to the development authorized by the permit). Professor Peter Byrne insightfully illuminates this aspect of Justice Scalia's takings jurisprudence in a recent article. *See* J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 754 (2017) ("Property rules are frequently tempered by equity, which may generously consider the circumstances of the parties. Statutory eviction rules contain protections for elderly people and people subject to cold weather. Scalia's concept of property would render anything of this nature unconstitutional because it imposes duties on lessors for tenant problems not caused by the lessor.") (citation omitted). Of course, a stronger libertarian perspective would preclude the state from appropriating property for public uses even upon the payment of just compensation.

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

92. Most modern discussions on reciprocal advantages in takings cases rely, if implicitly, on several opinions of Supreme Court Justice Oliver Wendell Holmes. *See, e.g.*, *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. at 544–45 (1914) (finding a Pennsylvania statute prohibiting the extraction of coal along property boundaries did not amount to a compensable taking because all affected mine owners would be reciprocally benefitted); *Mahon*, 260 U.S. at 415 (concluding that a Pennsylvania statute requiring mine owners to keep coal in place to prevent surface subsidence did not secure the mine owners an "average reciprocity of advantage" but rather redistributed value from the mine owners to the surface owners).

93. *See* Carol M. Rose, *Property as Wealth, Property as Propriety*, *in* COMPENSATORY JUSTICE 223, 238–39 (John W. Chapman ed., Nomos Ser. No. 33, 1991).

property interests are fair and just absent compensation. As explained in the next Part, the property-as-society conception underlying the dissenting opinions of Justices Blackmun and Stevens in *Lucas* does not dismiss the type of inquiry regarding the legitimacy of one's expectations respecting economic investments that Justice Kennedy's approach highlights. Instead, the property-as-society view clarifies and pluralizes that inquiry's focus from one centered on promoting economic investment to one appreciative of a full range of democratic values.

IV. PROPERTY-AS-SOCIETY

In separate though complementary dissents in *Lucas*, Justices Blackmun and Stevens rely, if tacitly, on a social understanding of property as serving a plurality of democratic values, including, but not limited to, liberty and industry. The first section below draws on these dissenting opinions to articulate this property-as-society conception. The second section makes the normative case that the property-as-society view provides an appropriately comprehensive framework for evaluating takings cases that is superior to that of the property-as-liberty and property-as-investment conceptions.

A. Conceiving of Property as Society

Justices Blackmun and Stevens chastised the majority for asserting that circumstances exist in which public interests are irrelevant to the question of whether private property deserves constitutional protection from state adjustment.[94] They read Justice Scalia's opinion to disregard a premise that, in the words of Justice Blackmun, "until today [was] unassailable—that the state has the power to prevent any use of property it finds to be harmful to its citizens."[95] The dissenters highlighted the

94. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1047 (1992) (Blackmun J., dissenting). Though they had vastly different perspectives on how the case should be resolved, Professor Epstein agreed with Justice Blackmun on this basic point. *See* Epstein, *supra* note 16, at 1249 ("Lucas argues that as long as the taking is total, the question of justification need not be considered at all. Yet no balanced theory of takings could be that protective of private property against the legitimate claims of the state.").

95. *Lucas*, 505 U.S. at 1039, 1047–49 (Blackmun, J., dissenting) (citing a long line of Supreme Court cases upholding regulations designed to prevent harm despite those regulations' destroying or adversely affecting private property interests, including *Mugler v. Kansas*, 123 U.S. 623 (1887); *Powell v. Pennsylvania*, 127 U.S. 678 (1888); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987)); *see also id.* at 1064 (Stevens J., dissenting) (asserting, with citations to many

fact that the statute at issue included procedures through which Mr. Lucas could challenge the location of the setback line. Had he proven through this process that development of his land would not cause harm, it would have been appropriate for the state to adjust the line and, therefore, eliminate the development prohibition's applicability to Mr. Lucas.[96] Yet Mr. Lucas did not pursue such a challenge and, thus, to Justices Blackmun and Stevens, did not meet his burden of proof.[97] According to the dissenters, the majority inexplicably shifted the burden to the state to convince the courts that the legislature's findings—here, that "serious harm to life and property" was likely to result if permanent structures were erected on Mr. Lucas's oceanfront lots—were both correct and consistent with the principles of common law nuisance as traditionally construed.[98]

The dissents disputed the Court's perspective that the worth of the state's claim on remand—that its regulation will prevent harmful uses traditionally proscribed by the common law—can be evaluated on a "value-free basis."[99] To Justices Blackmun and Stevens, there is no single principle of nuisance or any other law that mechanically classifies uses of property as harmful or not for all time. Property, instead, is a social craft that serves social ends. On this property-as-society view, property is composed of an adaptive *body* of principles—"background" principles *and* foreground principles—that exists in service of the common needs and interests of the collective, as those needs and interests evolve over time.[100]

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of the cases to which Justice Blackmun referred, that "[w]e have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking").

96. *Id.* at 1042–43 (Blackmun J., dissenting).

97. *Id.* at 1042 (Blackmun, J., dissenting).

98. *Id*. at 1046 (Blackmun, J., dissenting).

99. *Id.* at 1053–55 (Blackmun, J., dissenting) (quoting *id.* at 1026 (majority opinion)).

100. *See id.* at 1070 (Stevens, J. dissenting) (calling, in takings cases, for a "focus on the future, not the past"); *id.* at 1037 n.1 (Blackmun, J., dissenting) ("The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. . . . [B]eachfront buildings are not only themselves destroyed [in major coastal storms], but they are often driven, like battering rams, into adjacent inland homes. Moreover, the development often destroys natural sand dune barriers that provide storm breaks." (internal citations and quotations omitted)); *see also* Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837 (2013). At the time of the *Lucas* decision in 1992, South Carolina had been a U.S. state for over 200 years and thus had a fairly developed body of common law. It is unclear whether the *Lucas* majority would have advocated its constrictive "background principles" distinction had the dispute arisen in, say, Hawaii or Alaska, which were granted statehood just three decades prior and thus had very embryonic bodies of common law.

Property is, in Justice Stevens's words, "elastic."[101] Its elasticity stems from the institution's status as an endlessly developing product of education. Wrote Justice Stevens: "The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners."[102] To the dissenters, where there is a plausible justification for a generally applicable revision of property rights that results from such "constant learning," compensation is inapposite.[103] Justice Stevens pointed to perhaps the most obvious instantiation of this tenet: That state, and later federal, prohibitions on slavery appropriated from slave holders property of immense market value without compensation did not signify a disregard for property rights; instead, it reflected the collective view that a master's holding power over fellow human beings in such a regard had become immoral and that such relations therefore would no longer be legally recognized.[104] He noted that, "[o]n a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species; the importance of wetlands; and the vulnerability of coastal lands shapes our evolving understandings of property rights."[105] Fairness and justice necessarily require not a value-*free* conclusion, as the *Lucas* majority suggested, but value-*laden* judgment in allocating resources in the face of competing claims.

B. Property-as-Society: A Critical Normative Assessment

The property-as-society view underlying the complementary dissents of Justices Blackmun and Stevens does not reject the promise

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101. *Lucas*, 505 U.S. at 1065 (Stevens, J., dissenting).

102. *Id.* at 1069 (Stevens, J., dissenting).

103. *Id.* at 1072 n.7 (Stevens, J., dissenting); *see also* Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573, 602 ("to protect individuals against government oppression, it is necessary to provide that an individual cannot be harmed unless the political process has determined that a larger group should be subject to such treatment and that the particular individual belongs to the group").

104. *Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting); *see also* Eric T. Freyfogle, *Property Law in a Time of Transformation: The Record of the United States*, S. AFR. L.J. 883, 913 (2014) (explaining the lack of compensation to former slaveholders by noting that, on an instrumentalist view of property law, "it made no sense to pay to halt immorality"); J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 248 (1990) (asking, rhetorically, in 1990, "should the Czechs purchase the right to free elections from the Communist Party?"); Sax, *supra* note 43, at 1446 ("Historically, property definitions have continuously adjusted to reflect new economic and social structures, often to the disadvantage of existing owners . . . .").

105. *Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting) (internal citations omitted).

of liberalism, be it grounded in liberty simply for liberty's sake or out of concern for promoting investment. Yet while the dissenters interpret that promise to allow owners to act self-interestedly, they also understand it to disallow owners from acting in ways that the collective now views as anarchic.[106] This view shifts the emphasis in resolving property disputes from the accommodation of self-interest (as the property-as-liberty and property-as-investment views would have it) to the proscription against acting anarchically in the sense that it sees the prospect of subjecting owners to fair and just responsibilities toward their fellow citizens as perfectly compatible with—indeed, as an essential element of—a property system in a democracy. Owners of the resources on which humans rely are not merely individualistic decision-makers or investors. They also are trustees of those resources essential for humankind's survival and flourishment in the years, decades, and centuries ahead.[107]

The property-as-society view transparently recognizes that it is not possible to protect the claimed entitlements or expectations of everyone. Property (most notably land) is interdependent, and the uses of it necessarily and directly, if at times only cumulatively, harm or displease others. Whether lawmakers' allocative choices in the face of this interdependence are "fair" and "just" absent compensation—the ultimate question in a takings case—thus cannot be assessed through the lens of a hypothetical self-regarding individual claimant but instead must be accomplished via a relational analysis. *Lucas* necessarily involved not solely a democratic choice regarding the landowner's interest in developing two parcels but also the important competing interests of those owners and non-owners who would be harmed by that choice. Conceived in this way, a land use regulation of the sort at issue in *Lucas* can well be understood as a choice that takes away Mr. Lucas's development "rights" or as one that deprives Mr. Lucas and other similarly situated persons of the "rights" they previously had to harm others.[108] The state cannot extract itself from making an allocative choice that either Mr. Lucas's interest and that of similarly situated owners includes the liberty to put his neighbors and the public at risk of

106. Singer, *supra* note 36, at 329–30; *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.").

107. *See* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 876 (2009) ("Because humans are physical beings, land is an essential component of virtually every human activity."). While Dean Peñalver made this claim in writing exclusively about land, the same claim naturally applies to myriad other resources, too.

108. *See* Humbach, *supra* note 50, at 25.

harm or that the neighbors' and the public's interests include security against such harm.[109]

Society, of course, cannot impose any old responsibilities on property owners—for harm-prevention or otherwise—that it chooses. Rather, as noted, the Takings Clause requires that the imposition of those responsibilities occur in a fair and just manner absent compensation. Precedent suggests that the imposition of some responsibilities that are fair and just absent compensation involve the owner's exercise of restraint. For instance, an owner should avoid using her land in ways that unjustifiably debase others' use and enjoyment of their lands.[110] Others, though, involve affirmative requirements.[111] For instance, a coastal landowner may be asked, without the promise of compensation, to provide the state access to her land to conduct dune maintenance or to the public to facilitate their use and enjoyment of the water and the foreshore that the state holds in trust for, among other values, its recreational significance.[112] These types of responsibilities are not secondary to an owner's property rights but instead are an intrinsic characteristic of the very concept of ownership. Property's offering legal protection against impediments to

109. *See* Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action and Private Property*, 5 TEX. A&M L. REV. 439, 487–88 (2018) ("Either an owner has the right to eject a homeless person from his property or the homeless person has a right to enter the property to save his life. The state cannot fail to act in cases like this; it must allocate the entitlement to someone and deny it to others; *there is simply no space within which the state can be said to not be acting*."). *But see Woods v. Mass. Dep't of Envtl. Prot.*, No. BACV200700099A, 2011 WL 7788022, at *6 (Mass. Super. Jan. 7, 2011) ("The Woodses do not allege that [the state's] shoreline protection measures caused increased erosion of the Woodses' property . . . . The Woodses contend that [the state] effected a taking by issuing permits . . . to private owners . . . to defend their properties from wave action and by failing to enforce certain conditions associated with these permits. As such, the allegations . . . fail to state a claim under current law. . . . This case is best viewed as a dispute between private parties.").

110. *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rpt. 893, 894 (Ct. App. 1989).

111. *See* GREGORY ALEXANDER, PROPERTY AND HUMAN FLOURISHING 247 (2018).

112. *See, e.g.*, *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). For detailed discussions of these beach access cases, see, for example, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 801–10 (2009); Timothy M. Mulvaney & Brian Weeks, *Waterlocked: Public Access to New Jersey's Coastline*, 34 ECOLOGY L.Q. 579 (2007).

possession, transfer, and use is not absolute but instead is attentive to the counterpoising societal interests of citizenship and neighborliness.[113]

Because allocative choices must be made with societal interests in mind,[114] property cannot solely be defined in terms of an owner's rights to liberty or to a return on economic investments without considering an owner's responsibilities to, for example, consider the liberty and economic investments of others.[115] Property surely offers private advantages, but those private advantages must be compatible with the public's advantage.[116] The benefits of laws like those at issue in *Lucas* that preserve the coastal zone through development restrictions are not, as Justice Scalia once described them, "profits to [a] thief,"[117] but, instead, are consequential effects that must be part of the decision-making process when the state is allocating property rights in the face of changing conditions. The *Lucas* majority confusingly feared the possibility of "private property . . . being pressed into some form of public service"[118] when responsibly serving the public is precisely what the institution of property is designed to do.[119] As the California Supreme Court would state it a decade after *Lucas*, reciprocity of advantage lies

> not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being

113. Underkuffler, *supra* note 46, at 729; *see also* ERIC T. FREYFOGLE, THE LAND WE SHARE (2003); Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 LOY. L. REV. 243 (2006).

114. *See, e.g.*, C.B. Macpherson, *The Meaning of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 11–12 (C.B. Macpherson ed., 1978) (asserting that property "is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right," such that "if it is not so justified, it does not for long remain"); André van der Walt, *Property Theory and the Transformation of Property Law*, *in* 3 MODERN STUDIES IN PROPERTY LAW 361, 376 (Elizabeth Cooke ed., 2005) ("[A] transformative property theory has to be a normative theory that justifies the balance between stability and change, in every individual context, on consideration of human values.").

115. *See, e.g.*, Laura S. Underkuffler, *What Does the Constitutional Protection of Property Mean?*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 109, 114–15 (2016).

116. Sax, *supra* note 43, at 1453.

117. *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring) (emphasis omitted).

118. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

119. *See* Sax, *supra* note 43, at 1446 ("[T]he Court fails to recognize that lands in a state of nature are already in public service . . . .").

> called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.[120]

The foregoing suggests that takings adjudications should be concerned not with whether a state decision presses property into public service but rather the extent to which it applies that pressure in a way that unfairly and unjustly isolates and sacrifices an individual owner's property interest.[121] State decisions routinely allocate contested property interests. At a basic level, someone will win and someone will lose when the state, as it must, makes such decisions.[122] In light of property's allocative nature, asking someone to comply with generally-applicable laws designed to promote the public interest through reallocating the benefits and burdens of property ownership ordinarily should not require compensation.[123] In a democratic system, the institution of property usually can demand only that the loser be offered a justification that, however hard to swallow, should be accepted without such payment by reasonable persons in her shoes under the circumstances. Only when no such justification is available is affording takings compensation to an individual property owner who has been singled out appropriate.

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This Part has presented a normative case that the conception of property-as-society underlying Justices Blackmun's and Stevens's *Lucas* dissents presents a more helpful structure for assessing the justificatory nature of an allocative choice absent compensation than the property-as-liberty and property-as-investment conceptions underlying, respectively, Justice Scalia's majority opinion and Justice Kennedy's concurrence in the judgment. This conception suggests that the appropriate question in a case such as *Lucas* is not exclusively whether the claimant, Mr. Lucas, was acting outside his broad realm of personal concern in constructing a home (the property-as-liberty view) or whether the state's failing to provide compensation to Mr. Lucas would

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120. *See San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 108–10 (Cal. 2002).

121. *Lucas*, 505 U.S. at 1067, 1071–74 (Stevens, J., dissenting). "What matters [in takings cases] is not the degree of diminution of value, but rather the specificity of the expropriating act." *Id.*

122. *See, e.g.*, Byrne, *supra* note 90, at 758 ("No property rule can be changed without eliminating somebody's established right."); Sax, *supra* note 43, at 1451 (1993) ("Certain individuals will inevitably be caught up in the transitional moment" of "new legal regimes."); Rubin, *supra* note 103, at 601 (suggesting that, in a system where "representatives are empowered to enact general rules governing the society," such "rules will advantage some people at the expense of others").

123. The general applicability of the statute at issue in *Lucas* stems from its restricting not only new development but also re-construction of existing development. *See Lucas*, 505 U.S. at 1007–08.

chill economic investment moving forward (the property-as-investment view). Instead, on the property-as-society view, the appropriate question is whether the state's tasking Mr. Lucas with the responsibility to refrain from putting the public, others' property, and the natural environment at risk is fair and just absent compensation in an evolving world of competing claims that serve competing values in which the state has no option but to choose among them. The point of conceiving of property on the terms outlined here is not to offer a definitive and mechanical answer to this question on the facts of *Lucas*, but, rather, to suggest that siding with Mr. Lucas requires sound and transparent reasoning for rejecting the neighbors' and the greater public's competing interests in the same way that siding with these competing interests requires sound and transparent reasoning for siding against Mr. Lucas's alleged interests. The next Part surveys the doctrinal import of these competing conceptions in the twenty-five years since *Lucas* was handed down, with a particular emphasis on the Court's most recent takings opinion in *Murr v. Wisconsin*.

V. THE JURISPRUDENCE: COMPETING CONCEPTIONS OF PROPERTY

The preceding pages have staked the following claims. First, the property-as-liberty view underlying Justice Scalia's opinion for the Court in *Lucas* conceives of liberty through the narrow lens of the takings claimant without sufficiently appreciating the extraordinary impact that protection of claimed property rights can have on the liberty of others. Second, the property-as-investment view underlying Justice Kennedy's concurrence in the *Lucas* judgment, while offering a broader outlook than that of the majority, is similarly concentrated on the claimant's self-interest, not in liberty but industry. Third, the more pluralistic property-as-society view underlying the respective dissents of Justices Blackmun and Stevens in *Lucas* recognizes that property allocations implicate a range of evolving and, at times, conflicting democratic values, and thus offers the most useful framework and vocabulary of the three for fairly and justly evaluating the competing claims at stake in takings disputes.

This Part surveys the extent to which these competing conceptions of property have been reflected in takings jurisprudence since the Court issued its decision in *Lucas* in 1992, with special emphasis on the Court's most recent takings decision in *Murr v. Wisconsin*. The admittedly concise first section asserts that while the conception of property-as-liberty enjoyed a welcome reception in several takings cases in the decade immediately following *Lucas*, its influence has waned in the past fifteen years. The lengthier second section suggests that the remaining influence of this conception of property has been checked significantly by the Court's sparsely veiled critique in its 2017

decision in *Murr*. Indeed, in the course of engaging with the initial scholarly reactions to *Murr*, the section contends that even the *dissenting* opinion took issue with the rigidity of the property-as-liberty view and, indeed, offered some doctrinal ammunition for defending against takings claims that in several ways mirrors the property-as-society view. Together, this Part concludes, the majority and dissenting opinions in *Murr* illuminate the ascendance since *Lucas* of the property-as-society view to a position of prominence in takings jurisprudence.

A. The Fading Influence of the Property-as-Liberty View

Prior to *Lucas,* the property-as-liberty view arguably played its most prominent role in takings law in the matter of *Loretto v. Teleprompter Manhattan CATV Corp*.[124] There, the Court held that takings liability attaches where a regulation results in a forced, permanent physical occupation of land by a stranger, regardless of the public interests at stake.[125] Justice Thurgood Marshall wrote for the Court that "permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[126] On its face, the holding could be construed as suggesting that an owner's freedom to reject even the slightest permanent physical occupation of her land by a stranger is a principal interest so respected that it cannot ever be altered, even for an exceedingly important public purpose, absent compensation.[127]

In time, though, *Loretto* has been exposed as a mere application of *Penn Central* in cases in which one consideration—the forced, permanent physical character of the third-party invasion required by the state—weighs especially heavily in favor of the takings claimant. Myriad examples indicate that, despite this heavy weight, the importance of the public interest in the challenged regulation still

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124. 458 U.S. 419 (1982).

125. *Id.* at 432 (deeming "permanent physical occupation[s] . . . taking[s] without regard to other factors that a court might ordinarily examine").

126. *Id.* at 430.

127. It is possible to construe several of the Court's takings precedents as recognizing other principal interests, including *Babbitt v. Youpee*, 519 U.S. 234 (1997) (the right to pass property to others upon one's death); *Hodel v. Irving*, 481 U.S. 704 (1987) (also discussing the right to pass property to others upon one's death); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (holding in a narrow circumstance that the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth Amendment); *Armstrong v. United States*, 364 U.S. 40 (1960) (holding that the government's complete destruction of a materialman's lien in certain property constituted a "taking"), though the Court has not stated as much. *See* Singer, *supra* note 69, at 644–47.

matters in applying *Loretto*, and, in some instances, is sufficient to override any claim for compensation. For instance, *Loretto* did nothing to disturb the Court's previously deeming justified without the provision of compensation leaf-letting and public accommodations laws establishing permanent public access easements.[128] Simply describing *Loretto* as advancing a broad categorical rule—in a case, no less, involving the extremely rare instance of a regulation that not only authorized strangers to use the titleholder's property but also precluded the titleholder from using that property herself—can be somewhat misleading.

To some, though, *Lucas* held the prospect of a more lasting impact. According to two commentators remarking on the case shortly after its release, *Lucas* laid the groundwork for the Court to deem in a future case that "partial takings should be compensated no matter how small."[129] Another explained that *Lucas* not only "enhanced the cause of private property rights against oppressive regulatory actions" in several ways but "may foretell yet additional advances for landowners' rights" down the road.[130] To yet another, *Lucas* suggested that the nation was "en route to a new takings jurisprudence" in which the state "would lose its power to regulate without counting its resources available to pay compensation, even when it genuinely seeks to prevent harm to life or property."[131]

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128. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

129. *See* James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings After* Lucas, 70 DENV. U. L. REV. 497, 507 (1993); *see also id.* at 510 (describing *Lucas* as issuing to lower courts a "mandate to continue issuing decisions that take less account of legitimate state interests in regulating and more account of a loss in an owner's property value resulting from that regulation"); Paul M. Barrett, *Supreme Court Supports Rights of Landowners*, WALL ST. J., June 30, 1992, at A3; *Commentary: No More 'Takings,' Please*, ROCKY MOUNTAIN NEWS, July 2, 1992, at 70; Don Elliott, *Property Rights Ruling Recasts Land-Use Law*, THE DENV. POST, July 18, 1992; Catherine Yang & Peter Hong, *The Grass is Looking Greener for Landowners*, BUS. WK., July 13, 1992, at 31, 31 (asserting that *Lucas* "may be ammunition for a new generation of regulation-fighting lawsuits that aim to push beyond [this] Supreme Court ruling").

130. *See* John J. Delaney, *Advancing Private Property Rights: The Lessons of* Lucas, 22 STETSON L. REV. 395, 395–96 (1993); *see also* John M. Groen & Richard M. Stephens, *Takings Law,* Lucas*, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1300 (1993) (interpreting *Lucas* as portending "potential takings resulting from Washington's Growth Management Act").

131. Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of A Takings Clause Reconstellation*, 72 OR. L. REV. 603, 604–06, 656 (1993); *see also* Robert V. Percival, Murr v. Wisconsin *and the Supreme Court's Regulatory Takings Jurisprudence* 4–5 (Univ. of Md. Legal Studies Research Paper No. 2018-04, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135424 [https://perma.cc/S2L5-E96H] (noting that, upon its release, "*Lucas* seemed to signal an aggressive new posture for the Court's regulatory takings jurisprudence that was

For several years, there was some evidence that the Court ultimately would prove these forecasts accurate by continuing to expand the category of undeviating principal interests that cannot be impaired absent compensation, irrespective of the public interest at stake. In 1997, the Court in *Babbitt v. Youpee*[132] found a restriction on the right to pass property to others upon one's death in an effort to consolidate splintered tribal allotments categorically amounted to a taking even where the income generated from that property was de minimis.[133] Though not in terms as explicit as the *Babbitt* opinion, several other takings decisions in the 1990s rested on assumptions about property's concrete and static nature, including *Dolan v. City of Tigard*,[134] *Phillips v. Washington Legal Foundation*,[135] *Eastern Enterprises v. Apfel*,[136] and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[137]

As recently as 2000, one commentator reflecting on post-*Lucas* caselaw described the Court's opinion in *Lucas* as having "sent a clear message that the Constitution provided for nothing less than just compensation whenever government action deprives owners of their beneficial use of their private property."[138] Since 2001, though, the Court's takings jurisprudence generally has moved away from the rigid conception of property-as-liberty underlying the *Lucas* majority opinion. The Court's disinclination toward categorical and principal interest rules in the takings context is illustrated in the oft-cited decisions of *Palazzolo v. Rhode Island,*[139] *Tahoe-Sierra Preservation*

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eager to embrace claims by property owners while dismissing rationales for regulation proffered by state and local governments"); Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as a Categorical Takings Defense*, 29 HARV. ENVTL. L. REV. 321, 321 (2005) ("Advocates for expanded property rights heralded the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Commission* [sic] as the dawn of a new era . . . .").

132. 519 U.S. 234 (1997).

133. *See id.* at 244–45.

134. 512 U.S. 374, 384 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.").

135. 524 U.S. 156, 162, 164 n.4 (1998) (holding that "interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client" that is "cognizable under the . . . Fifth Amendmen[t]" even where any interest the client could have earned on those funds was "not likely to be sufficient to offset the cost of establishing and maintaining" a private, interest-bearing account (alterations in original)).

136. 524 U.S. 498 (1998).

137. 526 U.S. 687 (1999).

138. Nancie G. Marzulla, *Clarence Thomas and the Fifth Amendment: His Philosophy and Adherence to Protecting Property Rights*, 12 REGENT U. L. REV. 549, 559 (2000).

139. 533 U.S. 606 (2001).

Council, Inc. v. Tahoe Regional Planning Agency,[140] and *Arkansas Game & Fish Commission v. United States*.[141]

In *Palazzolo*, the Court held that a claimant who purchases property after a certain regulation is adopted is not automatically precluded from later challenging that regulation as a taking.[142] In isolation, this holding seems but the latest in the line of cases advancing the property-as-liberty premise of *Lucas* that property interests are abstract and rigidly defined, and thereby protected against government interference. However, the Court explained that, on remand, the state court should address "the merits of petitioner's takings claim under *Penn Central*" to determine whether the imposition "is so unreasonable or onerous as to compel compensation."[143] "The right to improve property," said the Court, "of course[] is subject to the reasonable exercise of state [regulatory] authority, including the enforcement of valid zoning and land-use restrictions."[144]

Palazzolo produced dueling concurrences from Justices O'Connor and Scalia on whether the Court had walked back from the property-as-liberty conception advanced in the *Lucas* majority opinion. Justice O'Connor asserted that whether the claimant knew or should have known about the challenged regulation's existence, as well as the "purposes served" by that regulation and the "effects produced" by it, all matter in the takings calculus.[145] Justice Scalia, meanwhile, insisted that takings analyses concentrate on what within the claimant owner's borders has been lost; on his view, the fact that a claimant may have acquired property after the enactment of the challenged restriction is, like the purposes and effects of the restriction, not relevant at all.[146]

In *Tahoe-Sierra* in 2006, the Court resolved this debate in Justice O'Connor's favor. A six-Justice majority rejected the claimant's contention that a development moratorium categorically should be deemed a taking of all economically viable uses regardless of any public interests advanced by the moratorium.[147] Instead, the Court held that "[t]he Takings Clause requires careful examination and weighing *of*

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140. 535 U.S. 302 (2002).

141. 568 U.S. 23 (2012).

142. *Palazzolo*, 533 U.S. at 636.

143. *Id.* at 627–28. On remand, a Rhode Island trial court judge rejected the landowner's regulatory takings claim on the grounds that it was unreasonable for one to expect to be able to fill and develop a saltwater pond and the adjacent marshlands. *See Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at *14 (R.I. Super. Ct. July 5, 2005).

144. *Palazzolo*, 533 U.S. at 627.

145. *Id.* at 633–34 (O'Connor, J., concurring).

146. *Id.* at 637 (Scalia, J., concurring).

147. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002).

all the relevant circumstances" via the "*Penn Central* inquiry."[148] Similarly, a unanimous Court in its 2012 decision in *Arkansas Game* declined to adopt a categorical rule deeming state-induced temporary flooding either an automatic taking or, alternatively, wholly immune from takings liability.[149] The Court held instead that such takings disputes must be the subject of "case-specific factual inquiry" regarding the duration and severity of the flooding, the state's intent, the foreseeability of the result, the causal relationship between the state's decision and the alleged injury, and the "character of the land at issue."[150]

There admittedly have been select recent takings decisions—namely, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[151] *Koontz v. St. John's River Water Management District*,[152] and *Horne v. Department of Agriculture*[153]—in which several Justices lent some continued support to the property-as-liberty ideal. However, these decisions came not at the core of regulatory takings law but instead at its margins.

At least at first glance, perhaps the strongest link to the *Lucas* majority's property-as-liberty view came in the 2010 matter of *Stop the Beach*. In dicta, Justice Scalia stated for a four-Justice plurality that takings liability is appropriate where a court newly declares that "what was once an established right of private property no longer exists."[154] Categorically objecting to regulations as a result of their interference with "established" property rights amounts to what one scholar has declared a "discussion stopper."[155] If the sole issue in a takings case is simply whether the claimant owner has been deprived of an "established" property right recognized at common law,[156] is it unfair absent compensation for society to alter a prior course and decide, for example, not to expose residents to the undesirable fumes emanating from industrial plants, not to destroy the environment, not to subject vulnerable parties to unconscionable loan terms, not to discriminate in places of public accommodation, not to favor husbands over wives in

148. *Id.* at 327 n.23 (emphasis added) (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)); *id.* at 334.

149. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 34 (2012) (stating "government-induced flooding of limited duration *may be* compensable" (emphasis added)).

150. *Id.* at 38–39.

151. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010).

152. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

153. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

154. *Stop the Beach*, 560 U.S. at 715.

155. *See* Humbach, *supra* note 50, at 23.

156. *Id.* at 24.

distributing property upon divorce? No Justice, in actuality, has ever even intimated as much. Indeed, each member of the Court who signed on to the plurality opinion in *Stop the Beach* has joined other majority opinions that deem the types of "character of the burden" questions posed above—whether it is legitimate for a property owner to expose others to pollution, to destroy the environment, to issue predatory sub-prime loans, to discriminate among customers, or to refuse to separate marital property upon divorce—of relevance and import in takings cases.[157] Were it the *Stop the Beach* plurality's preference to keep the many existing regulations that prohibit these types of acts of property owners in place without compensation and to require compensation only for those future regulations, it is not evident how—on the property-as-liberty argument on which the *Stop the Beach* plurality's assertion rests—these Justices might justify requiring compensation for new takings but not old ones.[158] Ultimately, the bark of the "established" language in the *Stop the Beach* plurality is far larger than its bite.

While Justices Kennedy and Sotomayor in concurrence rejected the plurality's advocating for the creation of a "judicial takings" doctrine, they suggested that the Due Process Clause "could" limit the power of courts to "change established property rights."[159] However, Justice Kennedy's and Sotomayor's later explanation in *Murr* that property rights are not "established" in the many instances in which they come into conflict with the "whole of our legal tradition"—a tradition that necessarily includes the state's pursuit of myriad public health, safety, and welfare ends—marginalizes the value of *Stop the Beach* for libertarian-minded takings claimants. Moreover, as explained below, the *Murr* dissent offers little more doctrinal support for the *Stop the Beach* plurality's "established rights" idea.

In 2013, the Court in *Koontz* slightly expanded the "special"[160] universe of land use permit conditions that the state, as the defendant in a takings case, peculiarly shoulders the burden of proving bear an "essential nexus" to and are in "rough proportionality" with the proposed development's impacts.[161] However, the prediction by many scholars upon the decision's release that *Koontz* would herald a far greater expansion of that universe of takings cases to which such

157. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (emphasis omitted); *Koontz*, 133 S. Ct. at 2604.

158. Arizona legislation, without justification, seemingly follows this course. *See* Jeffrey L. Sparks, Comment, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 ARIZ. L. REV. 211 (2009).

159. *Stop the Beach*, 560 U.S. at 733–37 (Kennedy, J., concurring in part).

160. *Lingle*, 544 U.S. at 538.

161. *See Koontz*, 133 S. Ct. at 2599.

heightened judicial scrutiny applies has not come to pass to date in the lower courts.[162]

In 2015, *Horne* described *Loretto* as "reaffirm[ing] the rule that a physical appropriation of property [gives] rise to a *per se* taking" and extended that *per se* rule from the land context (as was the case in *Loretto*) to the personal property context "without regard to other factors."[163] Yet the Court simultaneously recognized a limitation to this rule when the state deems possession or use of a certain item of personal property "dangerous," which, for those rare future cases involving outright physical appropriations of personal property, necessarily reflects not a categorical form of analysis but instead one that takes into account the implications for and harm to the public.[164]

This very brief survey illustrates that the libertarian understanding of property underlying the *Lucas* majority opinion slowly had been fading from view in terms of the core of regulatory takings law for some time leading up to the 2017 case of *Murr v. Wisconsin*.[165] In *Murr*, though, the Court subjected the property-as-liberty understanding to an especially damning critique.

B. The Mounting Influence of the Property-as-Society View

Lucas had left unanswered what came to be known as the "denominator" question of how a jurist is to determine the nature of the property interest against which the now restricted interest—the "numerator"—should be compared.[166] For example, were a new wetlands regulation to prohibit development on 90 of a claimant's 100 acres, Justice Scalia wrote in *Lucas* that

> it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically

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162. *See* Timothy M. Mulvaney, *The State of Exactions,* 60 WM. & MARY L. REV. (forthcoming 2019). The author has discussed *Koontz* and its place amidst what is known as "exaction" takings law in some detail in prior work. *See, e.g.,* Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137 (2016); Timothy M. Mulvaney, *On Bargaining for Development*, 67 FLA. L. REV. F. 66 (2015); Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511 (2012); Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277 (2011); Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVTL. L. & POL'Y J. 189 (2010).

163. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (emphasis omitted).

164. *Id.* at 2430–31.

165. 137 S. Ct. 1933 (2017).

166. Professor Frank Michelman coined the "denominator" term in this context in a still-celebrated article fifty years ago. *See* Michelman, *supra* note 82, at 1192.

> beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[167]

After denying numerous petitions for certiorari in cases involving the issue,[168] the Court agreed during its 2016–17 term to take it up in *Murr*.

The Murr siblings accepted a developed parcel known as "Lot F" as a gift from their parents in 1994 and the adjacent undeveloped parcel, "Lot E," as a gift from their parent's corporation one year later.[169] Both lots fronted a nationally designated "Wild and Scenic River."[170] In accord with state regulations and a parallel local ordinance enacted in the 1970s to "guarantee the protection of the wild, scenic, and recreational qualities of the river for present and future generations," neither lot in isolation had a sufficiently large area on which to erect an occupied structure.[171] However, to the extent the lots remained in separate ownership, they could be developed under the ordinance's hardship exemption.[172] Once they came into common ownership, though, the hardship was alleviated because the Murrs at that point had options for development of, if they so chose, an especially large home spanning the two lots. Therefore, the exemption no longer applied, such that Lots E and F were now "merged" and could not be "sold or developed as separate lots."[173] The Murrs—allegedly unaware of this merger ordinance when they acquired Lot E and frustrated that they were prohibited from moving forward with their plan to sell it to fund improvements to the home on Lot F (which had been the victim of repeated riverine flooding events)—filed a takings suit against the State of Wisconsin and St. Croix County.[174]

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167. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992).

168. *See, e.g.*, Petition for Writ of Certiorari, *Harris v. Miss. Dep't of Conservation*, 516 U.S. 930 (1995) (No. 95-142); Petition for Writ of Certiorari, *K & K Constr., Inc. v. Mich. Dep't of Nat. Res.*, 525 U.S. 819 (1998) (No. 97-1957); Petition for Writ of Certiorari, *Karem v. N.J. Dep't of Envtl. Prot.*, 528 U.S. 814 (1999) (No. 98-1866); Petition for Writ of Certiorari, *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 531 U.S. 812 (2000) (No. 99-1663); Petition for Writ of Certiorari, *Machipongo Land & Coal Co. v. Pennsylvania*, 537 U.S. 1002 (2002) (No. 02-321); Petition for Writ of Certiorari, *Giovanella v. Town of Ashland Conservation Comm'n*, 549 U.S. 1280 (2007) (No. 06-927); Petition for Writ of Certiorari, *Rose Acre Farms, Inc. v. United States*, 559 U.S. 935 (2010) (No. 09-342).

169. *Murr*, 137 S. Ct. at 1956.

170. *See* 16 U.S.C. §§ 1274(a)(6), (a)(9) (2012).

171. *Murr*, 137 S. Ct. at 1940 (quoting WIS. STAT. § 30.27 (1973)).

172. *Id.* at 1940–41.

173. *Id.*

174. *Id.* at 1941.

The Murrs contended that lot lines presumptively should determine the relevant "parcel" in takings cases.[175] In their view, lot lines serve as the boundaries of one's ownership and, if the owner stays within them—both literally and figuratively—her desire to put the land to a particular use generally should be respected and protected.[176] The Murrs claimed that they were acting within their boundaries in attempting to sell Lot E as an individually developable piece of land, such that the ordinance resulted in an unconstitutional total taking of that lot under *Lucas's* categorical formulation.[177]

In defense, the State of Wisconsin asserted that the two lots collectively should be considered the relevant "parcel" for takings analysis purposes on the positivist grounds that the state's laws say the two lots are merged.[178] This position effectively would immunize the state from regulatory takings liability here and in most any other case, but leave open the prospect of Wisconsin residents' succeeding in takings claims against the federal government.[179] Meanwhile, the County contended that a series of considerations are at play in determining the relevant parcel, including state law (as the state had advocated) but also the reality of the economic impact of construing these multiple lots as one and "the physical and geographic characteristics of the property."[180] The County believed that, on these considerations, no taking occurred because the merger clause was a reasonable land use regulation under which Lots E and F, in light of their character, together held numerous residual developmental uses.[181]

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175. *Id.* at 1947; *see also* Transcript of Oral Argument at 17:12–14, *Murr*, 137 S. Ct. 1933 (No. 15-214) (Counsel for the Murrs: "[Y]ou look to the State law, not the whole body of State law, you look to the State law that governs the creation that's the legal recognition of lots . . . .").

176. Petitioner's Reply Brief on the Merits at 12–18, *Murr*, 137 S. Ct. 1933 (No. 15-214).

177. *See* Transcript of Oral Argument, *supra* note 175, at 69:18–22 ("[W]hen the regulations redefine and impose a new definition, the reliance that previously existed is undermined. And that is the gravamen of the takings claim.").

178. *Murr*, 137 S. Ct. at 1946. In the words of one commentator, the State of Wisconsin advocated for a "categorical rule in which state law, both the bitter and the sweet, controlled." *See* Thomas, *supra* note 42, at 8.

179. Chief Justice Roberts critiqued the State's contention at oral argument. *See* Transcript of Oral Argument, *supra* note 175, at 32:18–21 ("You can't sort of preempt the takings analysis by saying we're only going to look at this aspect under which, of course, we win."); *see also* Underkuffler, *supra* note 115, at 114 ("If 'property'—the core material of the constitutional right—is a matter of state law . . . there is often not much left for the exercise of federal power.").

180. Transcript of Oral Argument, *supra* note 175, at 51:9–52:10.

181. Brief for Respondent St. Croix County at 55–56, *Murr*, 137 S. Ct. 1933 (No. 15-214). The federal government agreed with the overall framework of the County's position, if not the specific considerations the County deemed relevant. *See, e.g.,* Transcript of Oral Argument, *supra* note 175, at 59:17–22.

It placed particular emphasis on the fact that the assessed value of Lots E and F together for one home was $698,000, while the assessed value of Lots E and F with individual homes on each totaled just nine percent more, or $771,000.[182]

In an opinion authored by Justice Kennedy, a majority of the Court's members rejected the Murrs' position as "flawed," "ignor[ant]," and an unsoundly self-serving concentration on one strand of state law—the original lot line demarcations—to the disregard of all others.[183] Lot lines, the Court insinuated, are made to serve technical and administrative objectives that are far distinct from the federal constitutional objective of assuring fairness and justice in the allocation of property interests.[184] The Court found that the State's position was imprecise, too, for it merely and "formalistic[ly]" identified one consideration—the bulk of state positive law, including the challenged merger ordinance—among a series of considerations that are pertinent to determine whether the state has taken a property interest for federal constitutional purposes.[185] Without suggesting they are exclusive,[186] the Court identified three such considerations that bore great similarity to those the County had proposed: (1) how the land is treated under the myriad applicable state and local laws, including those regarding lot lines and all other reasonable provisions affecting use and transfer; (2) the actual prospective value of the land; and (3) the extent to which the land's physical characteristics indicated that its available uses might be limited in the future.[187]

Upon an application of the totality of these considerations to the facts of *Murr*, the Court deemed Lots E and F to bear a "special relationship" that counseled in favor of deeming them a single parcel for federal takings purposes.[188] The Court pointed to the fact that the

182. Transcript of Oral Argument, *supra* note 175, at 50:9–52:24 (discussing the complementarity principle).

183. *Murr*, 137 S. Ct. at 1947 ("[P]etitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).").

184. *See id.*

185. *Id.* at 1946.

186. Mulvaney, *supra* note 51, at 152 n.23; John Echeverria, *Big Victory for State and Local Governments in* Murr, TAKINGS LITIG. (June 26, 2017), https://takingslitigation.com/2017/06/ [https://perma.cc/D3GJ-DUTQ].

187. *Murr*, 137 S. Ct. at 1945 ("[N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.").

188. *Id.* at 1949.

lots had merged under the ordinance; the restrictions on Lot E contributed to the value of Lot F's development potential; and the Murrs should have known that their lands might be subject to significant development restrictions because they bordered a national Scenic River.[189] On this understanding, the Court found no partial regulatory taking, for the state had fulfilled "its responsibility to justify [the merger] regulation in light of legitimate property expectations" and the Murrs' merged lot retained significant value and use potential.[190]

The first section below suggests that Justice Kennedy's opinion for the Court in *Murr* demonstrates that the property-as-liberty view supported by the *Lucas* majority is of scant remaining jurisprudential impact and the property-as-society view endorsed by the *Lucas* dissents is now quite influential in regulatory takings law. The second section explains that, while the Chief Justice's *Murr* dissent includes an initial passage that leans on the property-as-liberty idea, his opinion on the whole includes a number of assertions to which supporters of the property-as-society conception might cite for support in future cases.

1. THE *MURR* MAJORITY AND THE PROPERTY-AS-SOCIETY VIEW

This section is divided into three parts. The first outlines the *Murr* majority's opposition to the property-as-liberty view, the second highlights the majority's support for the property-as-society view, and the third engages with the early academic commentary critical of the holding.

a. Murr*'s Eschewal of the Property-as-Liberty View*

The majority opinion in *Murr* marginalizes the property-as-liberty view underlying *Lucas* at most every turn. Its first affront to the contention that property creates a sphere of individual liberty that is immunized from state interference comes just four lines into the decision, where the Court suggests that "the background justifications for the challenged restrictions" are a relevant consideration in regulatory takings cases.[191] Far from Justice Scalia's contention that

189. *Id.* at 1948–49.

190. *Id.* at 1946, 1949. The Court explained that, under the challenged regulation, the Murrs "could preserve the existing cabin [on Lot F], or eliminate the cabin and build a new residence on Lot E, on Lot F, or across both lots." *Id.* at 1941.

191. *Id.* at 1939; *see also* Daniel A. Farber, Murr v. Wisconsin *and the Future of Takings Law*, 2017 SUP. CT. REV. 115, 142–44. The *Murr* Court's initial cite to *Lucas* refers to Justice's Scalia's sheepish acknowledgement that an originalist view of the Constitution does not support the very notion of a regulatory takings doctrine. *Murr*, 137 S. Ct. at 1943. *Murr* is distinct from *Lucas* in a more pragmatic way, too. While *Lucas* left undisturbed Mr. Lucas's implausible factual claim that his property had been deprived of the entirety of its economic value, *Lucas v. S.C. Coastal Council*,

Lucas established a "categorical" rule that disregards regulatory justifications, the *Murr* Court described *Lucas* as merely offering "guidelines" relevant to "determining when government regulation is so onerous that it constitutes a taking."[192] Indeed, *Murr* almost seems to mock *Lucas*'s describing its holding as setting out a "categorical formulation" by noting its many necessary "caveat(s)"[193] and characterizing *Lucas*'s "nuisance exception" as comprehensively "recognizing the relevance of [presumably, *all*] state law and land-use customs."[194] "A central dynamic of the Court's regulatory takings jurisprudence," wrote Justice Kennedy in *Murr*, "is its flexibility."[195]

The *Murr* Court did quote the following assertion from *Lucas*: "[T]he notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[196] However, it did so only to pitch this assertion not as *the* objective of regulatory takings law but as one of two *competing* objectives. "The other persisting interest," said the *Murr* Court, "is the government's well-established power to 'adjus[t] rights for the public good.'"[197] It described takings law as a "means to reconcile" these competing objectives, not to serve the former at the expense of the latter.[198] There is no "simple test;"[199] rather, such reconciliation can only occur through "careful inquiry informed by the specifics of the case."[200] While *Lucas* castigated approaches to takings cases that cannot be employed on a "value-free basis," *Murr* asserts—echoing the *Lucas* dissents of Justices Blackmun and Stevens—that takings analyses must be "driven" by considered judgments surrounding the principles of "fairness and justice."[201]

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505 U.S. 1003, 1018 (1992), *Murr* called into question the Murrs' implausible claim that, under the challenged regulation, Lot E would be worth $40,000 if sold as an undevelopable individual parcel when, in fact, the regulation precluded the sale of Lot E as an individual parcel. *Murr*, 137 S. Ct. at 1943.

192. *Murr*, 137 S. Ct. at 1942.

193. *Id.* at 1943.

194. *Id.*

195. *Id.*

196. *Id.* (quoting *Lucas*, 505 U.S. at 1028).

197. *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)) (alteration in original).

198. *Id.*

199. *Id.* at 1950.

200. *Id.* at 1943.

201. *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001)). Confusingly, *Murr* refers to its approach as "objective," but the bulk of the opinion otherwise suggests that judgment cannot be avoided. *Id.* at 1945. As Professor Peter Byrne notes in a recent article, "[e]ven if the determination needs to be one based on

Indeed, in *Murr,* Justice Kennedy goes so far as to quote a line from his *Lucas* opinion—in which he concurred *only in the Court's judgment*—that cuts at the heart of *Lucas's* categorical approach: "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."[202] In other words, not all property is the same. That the Murrs' land sits "along the river," coupled with its "rough terrain" and "narrow shape," made it especially unreasonable for the Murrs to expect that their "range of potential uses" would never by limited.[203] Landowners, wrote Justice Kennedy for the Court, must "acknowledge legitimate restrictions."[204] The Court concluded that this "reasonable land-use regulation [requiring the merger of substandard lots] enacted . . . to preserve the river and surrounding land" does not "work a taking."[205] Thus, according to the Court, preserving the river and surrounding lands are legitimate goals that are properly understood not as something owners can ignore but instead as something that affects their expectations about the use of their property.

b. Murr*'s Support for the Property-as-Society View*

The *Murr* decision technically continues to treat the inquiry surrounding how to define the regulated property as a precursor to the inquiry surrounding whether or not that definition triggers takings liability. However, it appears that, at least on a certain level of generality, the two inquiries have been—ironically, like the Murrs' two lots—merged.[206] "What, precisely, is the property at issue,"[207] under the Court's framework, is the driving question in a takings case.[208] If,

objective factual analysis, the judgment regarding the regulation of uses that harm the public must be normative." *See* J. Peter Byrne, *A Fixed Rule for a Changing World: The Legacy of* Lucas v. South Carolina Coastal Council*,* 53 REAL PROP., TR. & EST. L.J. 1, 17 (2018).

202. *Id.* at 1946 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J. concurring)).

203. *Murr*, 137 S. Ct. at 1948.

204. *Id.* at 1945.

205. *Id.* at 1947, 1949–50.

206. This issue served as a source of contention at oral argument. *See, e.g.*, Transcript of Oral Argument, *supra* note 175, at 15:14–24; 20:13–21:11; 46:2–18; 48:8–49:20; 54:6–17; 60:19–61:6.

207. *Murr*, 137 S. Ct. at 1941 (internal citation omitted).

208. This point is especially clear in a case like *Murr*, where the challenged regulation's sole purpose is to define the denominator. *See, e.g.*, Farber, *supra* note 191, at 132 ("[I]n cases like *Murr*, where the challenged regulation effectively merges lots into a single whole, it is hard to see how the definition of the denominator can avoid considering the legitimacy of the state's merger rule, which necessarily overlaps with the test for whether a taking has actually occurred."); Nicole Stelle Garnett, *From*

based on what the Court referred to as a "complex of factors," property is defined in a manner that is fair and just absent compensation, there is no takings liability; if the definition is unfair and unjust absent compensation, there is. On these terms, *Murr* moves takings law closer to the understanding of property underlying the dissenting opinions of Justices Blackmun and Stevens in *Lucas*. Consider, for example, an environmental regulation that prohibits development on a claimant's ten-acre wetland property. A wetlands preservation law's ability to protect neighboring uplands and their inhabitants is not reliant on who owns those uplands.[209] To the *Murr* Court, liability is not automatically and definitively determined based on whether the claimant happens to own additional lands that are not subject to the development prohibition.[210] The claimant's additional lands are highly relevant, though, in those many instances where the regulation is *based upon* the larger parcel.[211]

The considerations identified in *Murr*—to repeat, how the land is treated under current law, the actual prospective value of the land, and the extent to which the land's physical characteristics and surroundings indicated its available uses might be limited in the future—are of the

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a Muddle to a Mudslide: Murr v. Wisconsin, 2017 CATO SUP. CT. REV. 131, 138 (suggesting that the "relevant 'parcel'" issue in *Murr* centered on a situation in which "the government *changed* parcel boundaries").

209. Similarly, for example, a sub-surface extraction limitation's ability to protect nearby surface lands and their inhabitants is not dependent on who owns those surface lands. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting) ("[W]hy should a sale of underground rights bar the State's power?").

210. *See* Humbach, *supra* note 16, at 22 (lamenting the supposition that, "[a]fter *Lucas*, regulatory protection of . . . vulnerable portions of our national landbase depends on their being joined in larger parcels that have substantial value 'as a whole'").

211. A regulation that is not based upon the larger parcel—a situation to which the *Murr* Court refers as "[t]he absence of a special relationship between . . . holdings"—may be more susceptible to taking's law's protections. *Murr*, 137 S. Ct. at 1945–46 ("[A] State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim . . . ."). Were the extent to which the challenged regulation was based upon the larger parcel not relevant, it would seem that the Murr siblings' parents simply erred in failing either to transfer their corporation (which owned Lot F) to their children or to convey one of the lots to a newly created corporation held by their children. Such an error hardly seems worthy of driving constitutional doctrine. Professor Eric Freyfogle demonstrated prescience on this issue some time ago. *See* Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L. REP. 10,313, 10,318 (2001) ("[I]t could well be unfair for an owner of 10 acres, all wetland, to receive more favorable treatment [through, for instance, application of *Lucas's* "categorical" rule] than the owner of a similar wetland included in a larger tract. . . . [A] ban on mining in an area, if lawful generally, would not require special treatment of a person who owned only the right to mine (and, again, special treatment itself would raise fairness concerns).").

sort that judges might draw on to determine whether a regulation is based upon the larger parcel. These considerations might be best understood not as a precursor to but rather as supplementing and shedding light on each of the three broad considerations identified in *Penn Central*.

First, prior jurisprudence on the "character of the governmental action" demonstrates that regulatory takings claims generally succeed only when the state cannot justify an imposition that is "functionally equivalent" to that borne in an ordinary instance of eminent domain without providing compensation.[212] In the main, claimants are not constitutionally entitled to compensation for abiding by democratically-enacted and generally-applicable regulatory safeguards and obligations that advance public interests,[213] prevent owners from engaging in activities that cause harm,[214] or establish baseline standards for social and market relations by, for example, shielding consumers from merchants' deceptive practices.[215] Takings compensation is more likely, though, where a regulatory decision produces an unjustifiable confiscation of property that is not (and is not likely to) cause harm[216] or isolates

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

213. *See, e.g.*, *Gorieb v. Fox*, 274 U.S. 603, 609–10 (1927) (holding that a setback requirement did not constitute a taking); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395–97 (1926) (holding that a zoning scheme did not constitute a taking); *Welch v. Swasey*, 214 U.S. 91, 107–08 (1909) (holding that a statutory building height limit did not constitute a taking).

214. *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500–02 (1987) (upholding a Pennsylvania regulation that limited how much subsurface coal could be mined in order to protect surface structures); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595–96 (1962) (upholding a town regulation that prohibited excavation below the water table, which in turn rendered petitioner's quarry effectively useless); *Walls v. Midland Carbon Co.*, 254 U.S. 300, 325 (1920) (upholding a statute conditioning the burning of natural gas); *Hadacheck v. Sebastian*, 239 U.S. 394, 409–11 (1915) (upholding a regulation that banned the operation of brick factories within Los Angeles' city limits); *Reinman v. City of Little Rock*, 237 U.S. 171, 176–77 (1915) (upholding a regulation banning livery stables from certain areas in the community); *Mugler v. Kansas*, 123 U.S. 623, 675 (1887) (upholding a regulation that banned the production of alcohol for recreational purposes); *Powell v. Commonwealth*, 7 A. 913, 915–17 (Pa. 1887) (upholding a law that outlawed the production of oleomargarine).

215. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445–48 (1934) (upholding the constitutionality of a state mortgage moratorium law, which allowed courts to extend the period of redemption for foreclosure sales); *Block v. Hirsh*, 256 U.S. 135, 156–58 (1921) (holding that a rent control law, which regulated rent prices and allowed tenants to stay in their apartments so long as they paid on time and satisfied any other conditions of the lease, was not a taking).

216. *See, e.g.*, *United States v. Causby*, 328 U.S. 256, 266–68 (1946) (holding that the continued low-lying air flight of United States Army bombers above the respondent's land constituted a taking); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 182 (1871) (holding that the flooding of petitioner's land as a result of the state's decision to dam a river was a compensable taking).

individuals among similarly situated persons to shoulder a wholly disproportionate weight of that decision.[217] *Murr* expands the inquiry into the "character of the governmental action" by highlighting the importance of the state's regulatory goal of environmental protection.[218] Determining whether the state is defining property in a manner that is fair and just absent compensation is not based on the mere contiguity of the regulated lot and other lots or the legal boundary delineated by local governments for purposes unrelated to federal takings law's fairness and justice inquiry, such as assessing taxes. Instead, says the Court, this definitional process must account for "the surrounding human and ecological environment."[219]

Second, precedent focused on considering the extent to which a regulation disturbs a takings claimant's reasonable "investment-backed expectations" indicates that liability usually attaches, if at all, only when uncompensated changes in the applicable standards retroactively impede existing, non-harmful uses absent substantial justification.[220] The more

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217. *See, e.g.*, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 37–40 (2012) (holding that the temporary nature of government-caused floods did not automatically preclude such floods from constituting a taking); *Pumpelly*, 80 U.S. at 182. For a fuller discussion of *Arkansas Game* within the larger picture of temporary takings jurisprudence, see Timothy M. Mulvaney, *Temporary Takings, More or Less*, *in* CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES 461, 465–72 (R. Abate ed., 2015).

218. It remains to be seen whether the Court will endeavor to explicitly square this position in *Murr* with the Court's 2005 holding in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). Dicta in the Court's 1980 decision in *Agins v. Tiburon* suggested that a regulation that does not "substantially advance a legitimate government interest" amounts to a compensable taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by Lingle*, 544 U.S. 528. Twenty-five years later, though, the Court in *Lingle* disavowed the "substantially advance" test as singlehandedly determinative of a regulatory taking. *Lingle*, 544 U.S. at 548. The Court asserted that this test authorized a substantive review of the relationship between a regulation's design and the public goals in adopting it, which is a traditional due process question. *Id.* at 543 ("The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."). Perhaps *Murr* is suggesting that the state's regulatory goal—rather than the extent to which that goal is advanced, as the *Agins* dicta suggested—is fodder for consideration in takings cases. Alternatively, *Murr* may be suggesting that the extent to which a regulation advances legitimate state interests is relevant to the takings calculus, though it is not subject to the *Lochner*-like judicial probing that the *Agins* dicta seemingly indicated. A third possibility is that, while the *Murr* Court's approach may not allow for consideration of the wrongfulness of a regulation in takings cases, it is open to consideration of the *rightfulness*—the public interest and purpose behind—the regulation. Regardless of whether the Court ultimately explicitly adopts one or more of these courses, though, *Murr* makes it plain enough that avoiding a due process analysis in takings cases does not mean wholly disregarding the public interest the challenged regulation seeks to further.

219. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

220. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127, 136 (1978).

common uncompensated changes that impact prospective uses generally do not trigger takings liability. The considerations referenced in *Murr* inform this inquiry by counseling courts to evaluate the reasonableness of a claimant's "investment-backed expectations" not through the lens of the claimant at the moment of her purchase but instead through the lens of what a prudent investor has *a right to expect*. The inquiry, explained the Court, is not tied to expectations commensurate with background principles of the common law but instead with "background customs and the whole of our legal tradition."[221]

Third, takings precedent has suggested that where a prior non-conforming use or similarly "vested" right is at stake, a regulation that produces a substantial "economic impact" potentially could be considered unfair absent the payment of compensation. However, acquiring vacant land does not alone give rise to a vested right; a regulatory safeguard enacted post-acquisition that prevents some future land uses ordinarily is considered to result merely in a non-compensable lost opportunity.[222] *Murr*, though, goes further in clarifying the import of the "economic impact" of the challenged regulation. Particularly through its acknowledging more forcefully than prior takings opinions the benefits that regulations confer on landowners, the Court suggests that the economic impact should be measured not from a baseline unfettered by regulation (value-with-this-illegitimate-regulation versus value-without-this-regulation) but instead from *a baseline of legitimate regulation* (value-with-this-illegitimate-regulation versus value-with-legitimate-regulation). Here, the state's regulation of land uses along the riverine corridor actually may well have *increased* the value of the Murrs' lots and those of their riverfront neighbors in the long run.[223]

Together, contemplating these refined considerations on the facts of *Murr* produced a rather obvious result for the Court: Application of Wisconsin's merger rule to "ensure the continued eligibility of the Lower St. Croix for inclusion in the national wild and scenic rivers system" by "reduc[ing] the adverse effects of overcrowding and poorly planned . . . shoreline development"[224] without compensation is a

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

222. *Penn Cent.*, 438 U.S. at 135–36 (stating that the regulation in question will not affect the uses to which petitioner had put its property in the sixty-five years prior to the case); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (noting that the parcel of land in question had been vacant for years).

223. *See* Farber, *supra* note 191, at 131; *see also* Steven J. Eagle, *Property Rights and Takings Burdens*, PROP. RTS. CONF. J. (forthcoming 2018) (manuscript at 30–31), https://ssrn.com/abstract=3071021 [https://perma.cc/6U8G-NSVQ] (querying whether "the value of enjoyment of land that results only from the imposition of a severe government restriction [should] be deemed an 'economic use' for purposes of takings law").

224. *See* WIS. STAT. § 30.27(1) (1973–74); WIS. ADMIN. CODE NR § 118.01 (2017).

property allocation of a character that reasonably should have been expected by the Murrs as an obligation of citizenship in these circumstances, particularly in light of the marginal economic impact on the Murrs' holdings.[225] At bottom, then, *Murr* reflects a heavily moderated version of the property-as-investment conception underpinning Justice Kennedy's *Lucas* concurrence in the sense that it is heavily infused with the property-as-society vision set out by Justice Blackmun's and Justice Stevens's *Lucas* dissents. According to the *Murr* Court, economic analysis of the claimant's initial investment does not definitively reveal the fairness and justice of lawmakers' decisions about the scope and protection of property. Incentivizing investment surely is *one* relevant variable, and economic analysis can provide information on the costs of the available choices for allocating property interests that help lawmakers decide how to serve the many democratic values that are property's aim. Liberty also is highly relevant, but it must be evaluated in context and relative to those same interests of others. Reminiscent of the dissents of Justices Blackmun and Stevens in *Lucas, Murr* conceives of property as serving a whole host of evolving social goals, including, here, the preservation of the river's ecological functioning. The decision respects what Professor Joseph Sax called the "economy of nature," where "connections dominate."[226]

c. Initial Critiques of Murr *as Takings Doctrine*

While the academic response to *Murr* is just beginning to materialize, the limited writing to date consists primarily of dissatisfaction from scholars generally amenable to the conception of property-as-liberty.[227] Professor Maureen Brady issued the first such cutting critique. She described the Court's approach as a "careless" extension of the "maligned" *Penn Central* framework that "gives individual states' positive law of property short shrift" and undermines

225. *See Murr*, 137 S. Ct. at 1949–50.

226. Sax, *supra* note 43, at 1445 (asserting that "single ownership of an ecological service unit is rare"); *see also* Byrne, *supra* note 104 at 241–47 (advocating an orientation of property that tends to land's interconnected natural functions).

227. *See, e.g.*, Maureen E. Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PENN. L. REV. ONLINE 53 (2017); Garnett, *supra* note 208; Thomas, *supra* note 42; Eagle, *supra* note 223; James W. Ely, *David Callies and the Future of Land Use Regulations*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. (forthcoming 2018), https://ssrn.com/abstract=3109942 [https://perma.cc/RJ2S-S2DS]; Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 GEO. MASON U. C.R.L.J. 1, 24 (2017). Exceptions include Farber, *supra* note 191; Sterk, *supra* note 36; Elisabeth H. Carter, Murr v. Wisconsin*: A Victory for "Fairness and Justice" in the Regulatory Takings Denominator Analysis*, 42 HARV. ENVTL. L. REV. 287 (2018).

"the federalist structure of constitutional property law."[228] Professor Brady suggests that courts who share her concerns about "property federalism" might consider "establish[ing] evidentiary hierarchies within the *Murr* factors [that] giv[e] greater weight to the state's common law of property than to recently enacted land use regulation."[229]

On Professor Brady's view, that a state may recognize "flatly undesirable forms of property" is not reason to reject federal takings liability in the face of new regulation but instead only reason to make "persuasive arguments" about what the state does and does not recognize as property in the first place.[230] She argues that "one of the virtues of the Takings Clause is the flexibility it gives governments to shift and redraw entitlements" upon the payment of compensation, in lieu of what she sees as the lone alternative of precluding any such shifting and redrawing at all.[231] Indeed, she describes "the compensation mechanism" as "a built-in safety valve for eliminating [via regulations] property interests later determined to be undesirable."[232] Professor Brady objects to the fact that, after *Murr*, state defendants in takings cases will "marshal evidence from across time and space to make [such] new regulation seem reasonable" absent compensation.[233] She describes "*Murrs'* resort to various forms of 'reasonableness'"—especially those that are disconnected from the specific existing regulatory regime in the locus of the dispute—as "weaken[ing] constitutional protections for varied state property interests."[234]

Professor Brady does acknowledge that new legislation, like the common law, can "confer[] rights or creat[e] relationships,"[235] and she lauds the ability of states to "compet[e] and innovate[e]" through

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228. *See* Brady, *supra* note 227, at 53–54, 56.

229. *Id.* at 70 n.102.

230. *Id.* at 62 ("[S]tates may recognize flatly undesirable forms of property that seem unworthy of federal protection, like the extreme example of property in slaves. . . . Of course, [this] problem[] might be better addressed by making persuasive arguments about what limits constitutional property should have, rather than calling for the elimination of constitutional property federalism.").

231. *Id.* at 64.

232. *Id.*; *see also* Epstein, *supra* note 37, at 184 (describing the just compensation requirement as "an intermediate position between two unpalatable extremes").

233. Brady, *supra* note 227, at 68.

234. *Id.* at 70; *see also id.* at 56 (opposing what she sees as the Court's "replacing the inquiry into the form and content of property within a single jurisdiction with an analysis of reasonable property rules and expectations that is divorced from jurisdictional boundaries").

235. *Id.* at 59.

"property forms."[236] "[C]onstituents of a jurisdiction," she writes, "can use political control mechanisms to obtain forms of property reflecting their preferences," and "[i]f a unique property form in one state carries with it significant benefits, other states can follow on and adopt it."[237] For example, she praises those states who, late in the nineteenth century, "began recognizing new forms of 'easement[s] of access' through common law *and statutory law* in order to protect property owners from local government actions [namely, street re-gradings] harming their interests."[238]

While Professor Brady makes these assertions to support her view that the "guarantee of constitutional protection is a mechanism by which new property rights are stabilized,"[239] they instead serve to expose the tension within property that the property-as-liberty conception does not fully appreciate. How can constituents use political control mechanisms to obtain forms of property reflecting their preferences if their preferences conflict with a prior generation's preferences that already had been reflected in property laws? How can the citizens of one state follow on and adopt a unique property form that proved desirable for some owners in another state without negatively affecting the interests of others that were secured prior to this property form's adoption? To draw on her own example, property owners opposed to those easements of access—for example, presumably those benefitting from the improved access to their properties resulting from the road regrades—might well have had a claim in the late nineteenth century that the easements interrupted one of *their* previously recognized rights or relationships. "Liberty" exists on both sides of these property debates, and thus sheds little light, in and of itself, on the fairness and justice of constituents using "political control mechanisms" to reflect their preferences or mirror laws in other jurisdictions absent compensation.

Professor Nicole Garnett is more circumspect than Professor Brady in her appraisal of *Murr*. Similar to Professor Brady, though, and in concert with critiques penned by Professor James Ely and others, she disapproves of the Court's defining property for federal constitutional purposes through reliance on what she deems "subjective and malleable" considerations that are "decidedly pro-government."[240]

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236. *Id.* at 63.

237. *Id.*

238. *Id.* at 60 (emphasis added).

239. *Id.* at 63.

240. Garnett, *supra* note 208, at 133; *see also id.* at 142 (describing the considerations identified in *Murr* as "an entirely new laundry list of inchoate, vague factors"); Ely, *supra* note 227, at *7 ("Kennedy offers an amorphous multi-factor balancing test that is virtually worthless and is likely to disadvantage individual owners."); Thomas, *supra* note 42, at 25 ("*Murr* created a metaphysical, social justice

At the same time, though, Professor Garnett acknowledges the difficulty in asserting simultaneously that (i) state law alone defines the contours of property and (ii) the federal constitution prohibits a state from defining property in a manner that is unfair and unjust absent compensation.[241] She writes: "[I]f states have the power to define what property *is*, why can't they *redefine* what it is without compensating property owners? Conversely, giving states *carte blanche* to regulate away all the value of private property would render the protection provided by the Fifth Amendment's Takings Clause a dead letter."[242]

Professor Garnett's critique, therefore, does not endorse in absolute terms the property-as-liberty conception. But where the critique settles is not altogether clear. *On one hand*, Professor Garnett seems merely to challenge *Murr*'s expression of what she concedes must be a pluralistic process of defining property for "tip[ping] the scales" too far in the government's favor.[243] Indeed, *contra* Professor Brady, Professor Garnett cites approvingly to the Court's assertion in *Palazzolo* that the state has an "obligation" to avoid "unreasonable" definitions of property rights absent compensation.[244] Likewise, she concedes that there are no immutable "ordinary principles" of state property law to "resolve contested questions about the nature and extent of property rights affected by a challenged regulation."[245] Takings law, suggests Professor Garnett, should rely on "reasoned analysis."[246] *But on the other hand*, she excoriates the *Murr* majority for "emphasiz[ing] the reasonableness of the merger provision" and "import[ing] public policy considerations into the definition of private property itself."[247] This course, decries Professor Garnett, turns takings law's promise of "fairness and justice" into "mere hortatory fluff."[248]

Professor Garnett does not ultimately set out a preferred methodology by which takings law might approach this tension.[249] Yet she nonetheless concludes that, echoing Professor Brady, "*all* property

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warrior test for property . . . ."); Roger Bernhardt, *The New Mathematics of Takings Cases*, 40 REAL PROP. L. REP. 108 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072759 [https://perma.cc/F9HP-KE2V] (expressing concern that *Murr* does not provide "much clarity or predictability").

241. Garnett, *supra* note 208, at 132–33.

242. *Id.* at 133.

243. *Id.* at 139.

244. *Id.* at 141 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001)).

245. *Id.* at 148.

246. *Id.* at 149.

247. *Id.* at 143, 148.

248. *Id.* at 148 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

249. *Id.* at 149 ("In my view, Justice Thomas [in a separate dissent in *Murr*] is correct that a historically grounded 'fresh look' is the only principled way to clear the takings muddle.").

owners, not just the members of the Murr family, lost in *Murr*."[250] This conclusion does not sufficiently account for the reality that democratic lawmakers, when facing any conceived property dispute, must ask what values recognizing the *competing claims* serve. In the course thereof, these lawmakers must identify the reasons why our society might wish to preserve or advance—or, contrarily, renounce or suppress—those values.[251] As the property-as-society view underlying *Murr* appreciates, a court adjudicating a takings case thus cannot avoid exercising its judgment in evaluating the fairness and justice of such reasoning in the face of a claim for compensation by one of the competing claimants.

2. THE *MURR* DISSENT AND THE PROPERTY-AS-SOCIETY VIEW

In dissent, Chief Justice Roberts, joined by Justices Alito and Thomas, initially advocated an approach that could be considered a hybrid of the approaches advanced by the Murrs and the State of Wisconsin. On the whole, though, the dissent is riddled with language to which those who favor the property-as-society view might turn for support.

The Chief Justice wrote that "state law" both "define[s] the boundaries of distinct units of land" and "the interests that come along with owning a particular parcel."[252] He referenced the State's drafting of lot lines as one especially relevant state law that defines boundaries, but did not, as the Murrs had pitched, go so far as to describe those lot lines alone as presumptively determinative of the relevant "parcel" in takings cases.[253] Though stopping short of the rule advocated by the Murrs, the dissent contended that the majority's "malleable," multi-consideration approach to identifying the denominator results in "the government's goals shap[ing] the playing field before the contest over whether the challenged regulation goes 'too far' even gets underway."[254] Takings law, wrote Chief Justice Roberts, should "protect[] property rights *as they exist* under state law."[255] From these

250. *Id.* at 147 (emphasis added).

251. *See generally* Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy*, *in* TRANSFORMATIVE PROPERTY LAW: FESTSCHRIFT IN HONOUR OF AJ VAN DER WALT 1 (G. Muller et al. eds., 2018).

252. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1953 (2017) (Roberts, C.J., dissenting).

253. *Id.* (Roberts, C.J., dissenting).

254. *Id.* at 1950, 1955 (Roberts, C.J., dissenting) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). This position echoed the Chief Justice's assertion at oral argument that "I didn't think [justice] was applied to defining what the property was because then you really do get . . . *Penn Central* squared." Transcript of Oral Argument, *supra* note 175, at 48:16–18.

255. *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting) (emphasis added).

assertions, one could summarize the dissent's position in the following terms: The State can define the boundaries of and interests associated with property; however, once it does so, ownership and regulation are divorced, such that any definitional adjustments implicate takings protections.[256]

However, the dissent quickly diluted the import of this position in two ways. First, it noted that looking to state law to "define the boundaries of distinct units of land" is not sufficient in "*exceptional circumstances*."[257] While the dissent did not elaborate on what considerations might be relevant in determining whether these circumstances are present, the mere reference to such circumstances is itself a significant compliment to the majority's view that "indicia" in addition to state law help shape the claimant's reasonable expectations about property.[258] Second, and more significantly, Chief Justice Roberts's dissent asserted that the Murrs' ownership of the contiguous parcel and their constructive knowledge of the merger rule at the time they acquired that parcel both would weigh significantly against their takings claim.[259]

The assertion by the dissent regarding the numerator in the takings fraction—a fraction that is intended to represent the percentage of pre-regulation value retained by the claimant post-regulation—effectively negates any significance of the dissent's position on the denominator. To the majority, Lots E and F both should be included in the numerator and the denominator. On the majority's view, drawing on the figures reported in the record, the numerator (the value of the lots merged) was $698,000, and the denominator (the value of both lots if developable individually) was $771,000, such that Murrs' total holdings diminished in value by approximately nine percent as a result of the regulation.[260] On the dissent's view, the numerator (the increase in the value of Lot F after the regulation) was $325,000, and the denominator (the value of Lot E absent the regulation) was $398,000, such that the Murrs' relevant holdings diminished in value by approximately eighteen

256. *See* Brady, *supra* note 227, at 58; *see also* Eagle, *supra* note 223, at 26–28 (criticizing *Murr* for "[c]onflat[ing] [o]wnership and [r]egulation").

257. *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting) (emphasis added).

258. *Id.* at 1947. On the argument that the mere existence of exceptions requires a contextual analysis in each case to determine whether those exceptions should apply, see, for example, GREGORY ALEXANDER, PROPERTY AND HUMAN FLOURISHING 185–86 (2018).

259. *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting). Among other amici, the federal government pressed this point during briefing. *E.g.*, Brief of the United States as Amicus Curiae Supporting Respondents at 26–27, *Murr*, 137 S. Ct. 1933 (No. 15-214).

260. *Murr*, 137 S. Ct. at 1941.

percent.[261] Unsurprisingly, given the valuable uses that remain for the Murrs under either approach, the Chief Justice explained that the majority's conclusion that the merger ordinance did not effect a compensable taking "d[id] not trouble [him]."[262] The majority, noted Chief Justice Roberts, "presents a fair case that the Murrs can still make good use of both lots," for Lot E still could be used "as 'recreational space,' as 'the location of any improvements' [on the lots as merged], and as a valuable addition to Lot F."[263] The dissent further aligned with the majority in asserting that whether the Murrs "could have predicted Lot E would be regulated" is relevant in a takings case, for it "speak[s] to . . . interference with 'investment-backed expectations.'"[264]

The Chief Justice's dissent went on to describe regulatory takings law not as a one-sided doctrine that positions property as legally resistant to the government's interference—the property-as-liberty view—but instead as "strik[ing] a balance between property owners' rights and the government's authority to advance the common good."[265] Regulatory takings law, wrote Chief Justice Roberts, promises compensation only for "particularly onerous regulatory actions."[266] Absent the "extreme" instance in which a regulation "denies all economically beneficial or productive use of land," the dissent explained that "a flexible approach is more fitting."[267] On this flexible approach, the appropriate considerations to determine what the Chief Justice called takings law's "traditional touchstone"—whether a regulation, "in all fairness and justice," is enforceable absent compensation—are "wide ranging."[268] Apparently among many others, these considerations include the "importance" and "reasonableness" of the regulatory safeguard or obligation at issue,[269] the extent to which the claimant property owner "may have been especially surprised, or

261. *See* Farber, *supra* note 191, at 20–21.

262. *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).

263. *Id.* at 1950, 1957 (Roberts, C.J., dissenting).

264. *Id.* at 1957 (Roberts, C.J., dissenting) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

265. *Id.* at 1951 (Roberts, C.J., dissenting).

266. *Id.* (Roberts, C.J., dissenting) ("Owners can rest assured that they will be compensated for particularly onerous regulatory actions, while governments maintain the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration.").

267. *Id.* at 1951–52 (Roberts, C.J., dissenting) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). *See* Epstein, *supra* note 37, at 155, 179 ("The dissent . . . did not at any point question the soundness of [the *Penn Central*] framework.").

268. *Murr*, 137 S. Ct. at 1954, 1956 (Roberts, C.J., dissenting).

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

unduly harmed,"[270] and whether the regulation "load[s] upon one individual more than his just share of the burdens of government."[271] Regulatory takings law, suggests Chief Justice Roberts, does not consist of the mechanical application of rigid rules but instead requires a "fact-intensive" inquiry that necessarily involves "'the exercise of judgment.'"[272]

While the foregoing assessment has contended that the dissent includes ample doctrinal fodder for those sympathetic to the property-as-society view, Professor Steven Eagle interpreted the Chief Justice's *Murr* dissent as signaling an "*unarticulated*" fear that "the majority's opinion reflects a movement from Lockean property towards governance property, which attenuates traditional notions of owners' rights."[273] However, if the phrase "traditional notions of owners' rights" is intended to mirror the property-as-liberty conception, pointing to John Locke for support is only possible if one "excis[es] from [Locke's] theory several of its foundational elements."[274]

Locke's chief writings on property considered the problem of justifying individuals' appropriation of resources endowed to all in common. He posited that one who "hath mixed his Labour with, and joined to it something that is his own, . . . makes it his Property."[275] However, Locke subjected this labor theory to three significant constraints. First, the "waste" restraint demands that no individual appropriate so much of a resource that some of that resource might go unused.[276] Second, the "sufficiency" constraint suggests that appropriations are proper only so long as "there is enough and as good left in common for others."[277] Finally, the "charity" constraint suggests that, so long as the waste and sufficiency constraints are heeded, the

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270. *Id.* at 1954 (Roberts, C.J., dissenting).

271. *Id.* at 1955 (Roberts, C.J., dissenting) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893)).

272. *Id.* at 1957 (Roberts, C.J., dissenting) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986)). As one prominent property and environmental scholar described it, "the divide between the majority and dissent in *Murr* is not that substantial." Percival, *supra* note 131, at 17. The Chief Justice evidently sees the distinction between regulatory and physical takings as valuable doctrinally, for he recently supported a categorical approach in writing for the court that a price-control regulation requiring raisin growers to turn over a percentage of their raisins to the government each year amounted to a taking under *Loretto*. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015).

273. *See* Eagle, *supra* note 223, at 32 (emphasis added).

274. GREGORY ALEXANDER & EDUARDO PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 35 (2012).

275. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Mark Goldie ed., Everyman's Library 1993) (1690).

276. *Id.* at 31.

277. *Id.* at 27.

community must acquiescence and defer to appropriations by those who need the resources they intend to appropriate to survive.[278] Taking these restraints into full account, the effects of scarcity, in the words of one prominent scholar, "defeat most of the point of Locke's arguments" and, indeed, more persuasively provide "a foundation for socialism rather than 'possessive individualism.'"[279] It follows that Lockean property and what Professor Eagle refers to as "governance property" are not all that dissimilar. Between the *counter*-Lockean view that rights to all resources are pre-political and immunized from government interference and the *actual* Lockean view that rights to resources, when scarce, necessarily must be subject to collective governance, the *Murr* dissent includes more passages than not that seemingly side with Locke.

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Parts II through IV of this Article contended that, on normative grounds, the conception of property-as-society underlying Justices Blackmun's and Stevens's *Lucas* dissents presents a more helpful structure for assessing the justificatory nature of an allocative choice absent compensation than the property-as-liberty and property-as-investment conceptions underlying, respectively, Justice Scalia's majority opinion in *Lucas* and Justice Kennedy's concurrence in the judgment. The Part just concluded here—Part V—has maintained that, on doctrinal grounds, the property-as-liberty conception welcomingly has fallen from grace in takings jurisprudence and the property-as-society conception, as evidenced in both the majority and the dissent in *Murr,* has ascended to a position of jurisprudential prominence.[280]

CONCLUSION

Modern regulatory takings disputes present a key battleground for competing conceptions of property. The Supreme Court's splintered 1992 opinion in *Lucas v. South Carolina Coastal Council* elicited three leading theories: Justice Scalia's opinion for the Court rested on the libertarian view that property creates a bulwark of freedom against state interference; Justice Kennedy's concurrence in the judgment saw

278. *See, e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 148–57 (1988).

279. *See* LAWRENCE BECKER, PRIVATE PROPERTY: PHILOSOPHICAL FOUNDATIONS 36-43 (1977); *see also* T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1723–34 (1988).

280. During the editorial stage of the publication of this article, Justice Kennedy announced his retirement from the Court. Now-Justice Brett Kavanaugh has been confirmed to replace him. The fact that Justice Kennedy was in the majority in all ten of the regulatory takings cases in which he participated suggests that Justice Kavanaugh may have an opportunity to reorient takings jurisprudence in some respects, if he is so inclined. *See* Percival, *supra* note 131, at 17–18.

property as a tool of economic investment; and the complementary dissents of Justices Blackmun and Stevens rejected these property-as-liberty and property-as-investment views in favor of a more progressive property-as-society view that sees property as serving a host of evolving communal goals.

The property-as-liberty view underlying the *Lucas* majority is valuable to the extent that it illustrates how property can enhance liberty. However, it fails to appreciate that property can enhance the liberty of some only at the expense of the liberty of others. Therefore, this conception of property is not in and of itself useful in determining, as the Takings Clause demands, which varieties of liberty are fair and just to constrain absent compensation and which ones are not. Similarly, the property-as-investment view on which Justice Kennedy's concurrence in the judgment rested concentrates on the investment-backed interests of the claimant while paying short shrift to those competing investment-backed interests of others. Moreover, both the property-as-liberty view and the property-as-investment view suffer from the fact that they focus on a single democratic value—freedom and industry, respectively—when, in actuality, property exists in service of plural democratic values.

The property-as-society conception underpinning the *Lucas* dissents of Justices Blackmun and Stevens appreciates the plural nature of the values that property serves. Liberty and economic investment surely are among these values, though they rest alongside other moral and practical democratic values, such as human dignity, equality, and ecological preservation for future generations. Property disputes involve competing claims that serve these various values in various degrees. In a constitutional democracy, the state has no escape where, as is often the case, resources cannot readily be shared—it must choose among these competing claims and the values that these claims serve by defining and enforcing property rights. In choosing among these competing claims, the state is tasked with deciding what property rights are legitimate given their effects on other individuals and the community at large. This state decision-making process does not occur in a single moment, at which point "established" property rights vest and the state is forever disabled from altering those rights absent compensation.[281] Rather, this process is a democratic one that requires accounting for the reality that social, economic, and moral perspectives

281. *See, e.g.*, Tideman, *supra* note 279, at 1715–22 ("The idea of justice evolves as we become aware that our definitions and presuppositions lead to difficulties that can be avoided by an alternative framework."); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938) ("[T]he concept of property never has been, is not, and never can be of definite content. . . . Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolescence others.").

on both the content of the values that property serves and what might harm these values evolve in the face of changing times and conditions.

Property is society. There is no mechanical or "simple test" to determine whether or not regulatory takings liability should attach in a given case.[282] Instead, there are only all-things-considered exercises in moral and political judgment, with the benefit of takings precedents that shed light on what is contemporarily fair and just absent compensation in hand. The Court's 2017 decision in *Murr v. Wisconsin* suggests that it is this lesson—a lesson underlying the dissents of Justices Blackmun and Stevens of some twenty-five years ago—that most powerfully serves as *Lucas*'s legacy.

282. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017).