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# The Takings Clause and Human Nature: A Historical Perspective on the Present

by Francisco Benzoni

*Editors' Summary: In the United States, property has been viewed as a safeguard on individual autonomy and a necessity for personal freedom. It is therefore no surprise that property rights issues have increasingly become the center of debate, with concerns over environmental protection conflicting with economically self-interested land uses. Yet, as Prof. Francisco Benzoni explains in this Article, understandings of property often grow out of more fundamental conceptions of human nature. While the takings debate seemingly revolves around the proper interpretation of the Takings Clause of the Fifth Amendment of the U.S. Constitution, the core of the conflict lies in divergent understandings of human nature. This Article traces the two dominant understandings of human nature, the liberal and the republican, from the Founding Era through the present U.S. Supreme Court, and argues that the republican social understanding of the human as part of a broader community both clarifies the takings debate and offers a better lens through which to understand the relationship of humans and their environment.*

## I. Introduction

Property is a potent concept, and its power extends far beyond symbolism. At least in the American context, property has been viewed as a safeguard on individual autonomy and a necessity for personal freedom.[1] The concept of property is often the medium through which conflicts between individual and community goals are refracted.[2] Given the centrality of this concept in the American psyche, it is small wonder that recent conflicts over the issue of property rights have become the focus of tremendous energy, as concerns over the protection of the natural environment have increasingly clashed with economically self-interested land uses.

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1. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821 (1995).

2. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128 (1990).

The premise of this Article is that understandings of property often grow out of more fundamental conceptions of human nature. While recent takings debate ostensibly revolves around the proper interpretation of the Takings Clause of the Fifth Amendment of the U.S. Constitution,[3] the more fundamental conflict concerns divergent understandings of human nature, which, in turn, lead to different understandings of property. Judicial deliberation, where much of the recent debate has been carried on, rarely considers these deep, underlying assumptions. These unarticulated, unthematized, and conflicting assumptions about the nature of the human may help explain why the U.S. Supreme Court has proven ineffective in developing clear, cogent guidelines on the takings issue. Its takings jurisprudence has been described as a "mess"[4] and a "muddle."[5] Prof. Andrea Peterson maintains that "it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray."[6]

In order to trace and give context to the anthropological assumptions underlying the current takings debate, this Article first lays out two prominent understandings of human

3. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992).

5. Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

6. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1304 (1989).

nature and property during the Founding Era. Next, the Article discusses the historical context of the regulatory takings issue by analyzing the seminal cases, especially *Pennsylvania Coal v. Mahon*,[7] that initially defined the issue. This discussion examines briefly the anthropological assumptions of the primary players in *Pennsylvania Coal*. The Article then analyzes the anthropological assumptions of the Court through an examination of its decision in *Lucas v. South Carolina Coastal Council*.[8] Finally, the Article offers a critique of the individualistic view of human nature and illustrates how a more relational understanding of the human could lend clarity to the takings issue.

## II. The Founding Era

In the 1780s and 1790s, both liberal and republican ideas powerfully influenced American politics.[9] Liberalism and republicanism differed most profoundly in their understandings of the role of property in politics and the nature of rights, and, finally, in their understandings of human nature.

> Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by common interest.[10]

In liberalism, the individual is understood as separate from, and without constitutive ties to, the larger community. That is, individuals are not constituted by their relations with others, but come together in associations to further their own separately formed interests. The collective (including especially government) exists to serve individuals' interests and to coordinate these possibly conflicting interests. Society is a collection of competing interests and private goods without any overarching common good (save, perhaps, the common good of ensuring that each individual can pursue her or his private good). "Communal" interests, interests that cannot be disaggregated to specifiable individuals, are viewed with the suspicion that they are merely cloaks for some individuals to enforce their own interests at the expense of other individuals. Rights, as prepolitical and inhering in the solitary individual (the sole locus of value), are meant to guard against such infringement.

In republicanism, the good of the community is an important value that conditions an individual's pursuit of self-interested goals. On this understanding, the richness of an individual's experience cannot be understood apart from the richness of the community of which he or she is a part. Republicanism insists on a tensive relationship between the private good and the common good. The individual is to participate in procuring the common good even while individual autonomy is a prerequisite for this participation. Such autonomy is enhanced by communal relations. Rights are created by, and can be limited by, the polity. Government is to protect these rights in order to promote the common good—that good (or goods) to which all have equal access and which enhance the well-being and autonomy of each.

Although these differences in attitudes about human nature are relatively clear in theory, generally such absolute lines are difficult to glean from historical or legal analysis. It may be difficult to distinguish conditions that promote the common good from conditions that ensure the ability of individuals to pursue private interests. The republican idea of human nature allows that humans act in self-interested manners (though it refuses to make this normative), and the liberal idea of human nature allows for the appearance of action that promotes the common good (though on deeper analysis it can be shown to be self-interested). And even within a given individual's thought the two strands may be in evidence. For the purposes of this analysis, however, it is only necessary to distinguish these positions analytically; this Article uses clues from the historical facts of a given case or individual's thought in order to demonstrate the dominant view of human nature at play.

Both liberals and republicans had a much more comprehensive understanding of property in the Founding Era than is typical today.[11] Prof. Laura Underkuffler argues that James Madison's understanding of property was typical of the Founders Fathers. Madison begins with a definition of property in material things: "This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world . . . .'"[12] He then continues:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.
>
> In the former sense, a man's land, or merchandize [sic], or money is called his property.
>
> In the latter sense, a man has property in his opinions and in the free expression of them.
>
> He has property of peculiar value in his religious opinions and in the profession and practice dictated by them . . . .[13]

While many of the elements of Madison's broader understanding of property are enshrined in the Bill of Rights, his narrower understanding is enshrined in the Takings Clause, which he played a key role in drafting and promulgating.[14] He understood that it was the physical taking of property that was most vulnerable to government abuse and so most in need of protection if the individual was to have the autonomy needed to participate in public life. Therefore, he understood the Takings Clause to apply only to government

7. 260 U.S. 393 (1922).

8. 505 U.S. 1003, 22 ELR 21104 (1992).

9. *See* Treanor, *supra* note 1, at 821 and n.196, at 820; Joyce Appleby, Liberalism and Republicanism in the Historical Imagination 322-39 (1992); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. Cal. L. Rev. 1171, 1203-28 (1992). It might be noted here that the concepts "liberal" and "republican" did not carry the same meanings historically as they do in the contemporary context. The text of the Article clarifies the historical meanings of the terms.

10. Treanor, *supra* note 1, at 821. Prof. William Treanor continues: "Whereas liberals are comfortable with economic self-interest, republicans have a profoundly ambivalent stance toward private property. . . . At the same time, republicans treasured private property, and land in particular, as providing the individual with the autonomy that was a prerequisite for full participation in the polity." *Id.*

11. *See generally* Underkuffler, *supra* note 2.

12. James Madison, *Property*, *in* 6 The Writings of James Madison 101 (G. Hunt ed., 1906), *quoted in* Underkuffler, *supra* note 2, at 135.

13. *Id.*

14. Treanor, *supra* note 1, at 836-37.

action that physically appropriated an individual's property.[15] He held that physical property cannot be appropriated by the government *under any circumstances* without just compensation. And he held this position because he felt that such protection was necessary to ensure that the individual could participate in public life.

## III. Historical Background on Regulatory Takings: 1887 to 1922

Until the 1922 U.S. Supreme Court decision in *Pennsylvania Coal*, the Takings Clause was understood (as Madison had originally intended it) to require compensation when the federal government physically took private property, but never to require compensation when federal regulation limited the way property could be used.[16] *Pennsylvania Coal* expanded the Takings Clause and made regulation that went "too far" in reducing the value of an individual's property subject to compensation. Unsurprisingly, then, in terms of its precedent setting value, *Pennsylvania Coal* is considered the most significant takings case ever decided by the Court.[17] Yet this case is not without precursors that helped to delineate and define the takings issue.

In 1887, the Court, in *Mugler v. Kansas*,[18] for the first time comprehensively analyzed the relationship between states' police power and the Takings Clause.[19] This case involved a Kansas state law that prohibited the manufacture or sale of intoxicating liquors within the state. Peter Mugler, a brewer, argued that under the Fifth Amendment, a state law that put him out of business was a taking and required compensation. The Court ruled against him and reaffirmed the absolute power of the states to regulate activities on private land that they deemed injurious to the public:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[20]

*Mugler*, then, upheld the states' legislative power to declare certain uses of private property to be public nuisances (beyond those that the courts have already held to be common-law nuisances).

In 1894, the Court clarified and developed this ruling in *Lawton v. Steele*.[21] *Lawton* involved a fish preservation statute that declared any fishing equipment other than hook and line or fishing rod to be a public nuisance and could be destroyed by any person without compensating the owner. The *Lawton* Court set forth the classic public ends-reasonable means-substantive due process test. This test must be met for a state to justify its restriction of private land use. The *Lawton* ends-means test states:

> To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as opposed to those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[22]

This test is deferential to the states in their restriction of noxious use, requiring only that the restriction truly be in the public interest and the means be necessary and not too oppressive. However, the *Lawton* Court made it clear that the states' decisions would still be subject to judicial review because "the legislature has no right to declare that to be a nuisance which is clearly not so."[23]

Although proponents of property legislation used the "noxious use" label to justify increasing restrictive property uses that were not common-law nuisances, the Court was reluctant to interfere with this traditional use of police power.[24] The absolute nature of the states' police power *to prevent noxious uses* was not questioned. The Court did, however, become increasing skeptical of, and sought to restrict, uncompensated government regulation of unharmful uses of private property.[25] While regulation of noxious uses was intended to protect the public from harm, regulation of non-noxious uses was often intended to improve the public condition. In a number of cases prior to *Pennsylvania Coal*,[26] the Court held that when the end sought by a regulation was the prohibition of a significant non-noxious land use, this end could only be obtained through the exercise of eminent domain and was thus compensable.

In 1921, in *Block v. Hirsh*,[27] the Court developed the reasonableness balancing test to apply to regulations restricting non-noxious uses of property. The Court upheld the challenged federal rent-control statute because the government's interference with a noninjurious use of property had an important public purpose in alleviating the housing shortage resulting from the end of World War I. Justice Oliver Wendell Holmes, writing for the majority, however, stated that such regulation could go "too far" and amount to a taking without due process of law.[28] The *Block* Court, in effect, held that the police power to regulate non-noxious use of

15. As Justice Harry A. Blackmun put it: "James Madison, the author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1057 n.23, 22 ELR 21104 (1992) (Blackmun, J., dissenting).

16. *See* Treanor, *supra* note 1, at 783.

17. For example, in 1987, Chief Justice William Rehnquist observed that it "has for 65 years been the foundation of our 'regulatory takings' jurisprudence." Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 508, 17 ELR 20440 (1987) (Rehnquist, C.J., dissenting). Prof. Bruce Ackerman called it "both the most important and most mysterious writing in takings law." Bruce Ackerman, Private Property and the Constitution 156 (1977). Prof. Richard Epstein maintains that "*Pennsylvania Coal* has long been regarded as perhaps the single most important decision in takings literature." Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 12 (1987).

18. 123 U.S. 623 (1887).

19. Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" From* Mugler *to* Keystone Bituminous Coal, 14 B.C. Envtl. Aff. L. Rev. 660 (1987).

20. 123 U.S. at 669.

21. 152 U.S. 133 (1894).

22. *Id.* at 137.

23. *Id.* at 138.

24. Hippler, *supra* note 19, at 665.

25. *Id.* at 666.

26. *See*, *e.g.*, Curtis v. Benson, 222 U.S. 78 (1911); Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919).

27. 256 U.S. 135 (1921).

28. *Id.* at 156.

property was permissible if the regulation was reasonable and addressed a pressing public need. The reasonableness of a regulation considered the diminution of property value, whether the regulation left the property owner with an economic use, and the extent and duration of the restriction.[29] The *Block* reasonableness test applied only to non-noxious cases and weighed the magnitude of the burden to the individual against the benefit to the public interest. Insofar as this test required a balancing of private harm against public benefit, it was, at least theoretically, more restrictive of government regulation than the *Lawton* ends-means test used to evaluate the validity of regulation that restricted noxious uses of property. This latter test required no balancing but simply tested if the restricted use can reasonably be considered harmful by the affected community and if the restriction was a reasonable way to address that harm. Under the *Block* reasonableness test, the magnitude of the burden to the property owner could constitute a taking even if the burden was necessary to achieve a public purpose. Prior to *Pennsylvania Coal*, then, these were the two primary tests developed to aid the Court in adjudicating regulatory takings.[30]

While permanent physical occupations are always takings and nuisance-control measures are never takings,[31] *Pennsylvania Coal* is the classic articulation of a different sort of test that builds on the *Block* reasonableness test. In essence, it says that when government regulation of a property use that is not a nuisance puts too great a burden on the property owner, it cannot go uncompensated. *Pennsylvania Coal* involved a challenge to Pennsylvania's Kohler Act. This Act barred coal companies from removing coal when such removal would cause subsidence or collapse the ground above the mine. The Court found that the statute violated the Takings Clause. In the words of Justice Holmes, who wrote the majority opinion, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[32] In this case, the Court found that the regulation was regulating a non-noxious use and took 100% of the portion regulated. The Court, therefore, ruled that a taking had occurred.

This case fundamentally expanded the meaning of property in the Takings Clause. Prof. William Treanor argues that "*Pennsylvania Coal* represented the culmination of Justice Holmes' career-long critique of a physicalist view of property and the attendant view of the Takings Clause."[33] Justice Holmes viewed property as value, not as physical possession. And since the Takings Clause protects property, the Takings Clause protects value.[34] This position raises difficult questions about when a court should offer compensation. The inquiry into when a regulation "goes too far" is open-ended and unconstrained.[35]

Justice Holmes' reading of the case and understanding of property rested on a fundamentally classical liberal view of human nature. When land is viewed as monetary value and it is assumed that a property owner has the right to maximize this value (as in *Pennsylvania Coal*),[36] the character of land as a physical entity becomes obscured by the drive to maximize its productive potential. Land becomes an abstract commodity serving the individual owner's economic self-interest. There are a number of factors that indicate that Justice Holmes viewed human beings (in the classical liberal tradition) as driven by self-interest and essentially individualistic, without constitutive social ties or relations to others that define the individual. First, as pointed out above, his view of land as value implies that land is an abstract commodity at the service of the owner's economic self-interest. Second, his seeming lack of deference to the *community's* definition of harm implies a view of society as a collection of competing interests without constitutive communal ties or any goal transcending the goals chosen by the individual. Finally, his implied belief (through the expansion of the Takings Clause) that government should protect the individual's pursuit of economic self-interest indicates a normative view of such pursuit. This view of human nature ties the individual more closely to the market than to physical land.

In his dissent, Justice Louis D. Brandeis used the more deferential *Lawton* ends-means test because he viewed the Kohler Act as *prohibiting* a noxious use rather than *promoting* a private or public good. He argued, therefore, the police power was absolute and could be used regardless of the extent of diminution of property value.[37] Justice Brandeis' deference to the community's definition of harm is consistent with the traditional republican view, which insisted that humans are constituted by their links to an interconnected social web. This web both helps define individuals and may require individuals to forego pursuit of a private good for the common good. Justice Brandeis also argued that even if Justice Holmes' reasonableness test were used, the balancing ought to take into account the entire property holdings of the Pennsylvania Coal Company and not only the affected portion.[38] If this full space baseline were used, then the diminution in property value would not be severe enough to find a taking even if the use was non-noxious. Justice Brandeis' insistence on a full space baseline coheres well with the view

29. *Id.* at 157-58.

30. The Court also developed a third test that it called "Average Reciprocity of Advantage." This test could be used to justify a land use regulation of non-noxious uses of land, and was applied in cases where police power was used to actively promote private economic expansion. "The cases rested on the idea that the regulation provides an average reciprocity of advantage—the reciprocal benefits flowing to the burdened party as a result of the regulation make it fair under certain circumstances for a few individuals to bear the entire burden of the regulation." Hippler, *supra* note 19, at 673. This test is not as relevant as the other two tests in environmental regulatory takings cases.

31. Jesse Dukeminier & James E. Krier, Property 1197 (1992). *See id.* at 1188 and 1241-70 for a nuance of these categorical rules in *Lucas*.

32. *Pennsylvania Coal*, 260 U.S. at 415.

33. Treanor, *supra* note 1, at 798.

34. *Id.* at 802.

35. This position also presents a problem in the context of growing ecological sensitivity. Insofar as it treats land and money as convertible, it ignores the ecological functions of the land and encourages whatever use of land yields the greatest economic benefit without concern for any ecological costs that can be "externalized," with the cost borne by others.

36. This maximization of economic value is, of course, subject to common-law torts. But this does not fundamentally alter the fact that this understanding of land is based on an essentially individualistic understanding of human nature. This limitation simply subjects one individual's pursuit of self-interest to the limitation that it not interfere with an individual's or group of individuals' pursuit of self-interest. It pits self-interest against self-interest, but not self-interest against the common good or a transcendent purpose.

37. *Pennsylvania Coal*, 260 U.S. at 417, 418, 420-22.

38. *Id.* at 419.

that individuals and land exist in a context of community, and community is characterized by continuity of space and time that cannot be arbitrarily rendered into discrete entities.

## IV. Interlude

Between *Pennsylvania Coal* in 1922 and *Lucas* in 1992, sweeping, interrelated changes occurred in the American landscape and way of life. These material changes brought in their wake profound changes in the American psyche and world view. These transformations have also sharpened (as well as modified) the liberal and republican views of human nature.

The economic growth of the United States following World War II was unprecedented. The changes during this period were broad and deep: standards of living increased and material consumption grew; the country became increasingly urbanized; the population nearly doubled; systems of transportation and production grew in scale and complexity; and trade became increasingly globalized. Simultaneously, marketing strategies and advertisements grew in sophistication and pervasiveness as the production system sought to develop markets for its growing outputs.[39] As society became increasing mobile, as individuals gained material possessions such as the automobile and household appliances,[40] as goods and services were increasingly commodified and de-personalized,[41] and as the biophysical sources of production became ever more obscured,[42] the bonds of community no longer seemed necessary for human flourishing—now defined primarily in economic and consumptive terms. In these circumstances, the economic understanding of the human being, characterized by extreme individualism, seemed increasingly plausible and became increasingly ingrained in the American psyche.[43]

Yet even as this liberal, economic understanding of human nature gained strength, a countervailing movement with modest beginnings in the early 1960s began to grow.[44] This movement had deep roots in the republicanism of the Founding Era (which, in turn, had roots going at least back to classical Greece). But its current manifestation was catalyzed by concern about degradation of the natural environment. Ironically, the same forces of economic growth and material abundance that seemed to lend credence to the economic understanding of human nature also stimulated this new movement of ecological concern about human impacts on the natural world. As the environmental impacts of unregulated industrialization became increasingly apparent in pesticide poisoning, species extinction, water and air pollution, acid rain, and, eventually, ozone depletion and the threat of global warming, significant sectors of the American population were galvanized and demanded legislative remedies for these problems.

As awareness grew about the interconnectedness of ecological systems and the connection between human activity and the degradation of these systems, members of this burgeoning movement offered a view of human nature that differed markedly from the economic model of the human. Profs. Herman Daly and John Cobb articulate well this strongly relational vision of human nature, which they call "person-in-community": "People are constituted by their relationships. We come into being in and through relationships and have no identity apart from them. . . . The social character of human existence is primary."[45] Humans partially transcend these relationships in freedom, but it is precisely the quality of the individuals' relationships to others that make such transcendence possible. From this perspective, with its strong affinity to the republican tradition, humans are constituted by their relationships both to other humans and to the natural world. The goal of flourishing is no longer limited to the economic success of humans, but is broadly defined to include both humans and the natural world, and among humans to include spiritual as well as physical well-being. The common good is a central organizing principle, though it does not eclipse the good of the individual; rather "the well-being of the community as a whole is constitutive of each person's welfare."[46]

## V. Takings Clause Today

Having characterized two fundamental understandings of human nature during the Founding Era and during the years in which the takings issue was initially defined, as well as how these understandings have evolved in recent years, let us explore how they play out in the Court's decision in *Lucas*. In 1986, David Lucas bought two lots on the Isle of Palms, a barrier island east of Charleston, South Carolina.[47] In 1988, South Carolina enacted the Beachfront Management Act,[48] which prohibited construction of improvements, except for decks and narrow wooden walkways, seaward of a setback line that was based on an assessment of the

39. *See*, *e.g.*, William Cronon, Nature's Metropolis: Chicago and the Great West 235-47 (1991).

40. For example, workers no longer needed to live in close proximity to work. People no longer needed to depend on neighbors for friendship, as they could drive to distant places and visit friends. Households became their own mini-factories performing many of the functions previously undertaken in the community. And as family size shrank and community withered, services such as childcare were taken over by professional care givers.

41. For example, as meat packers in Chicago, Illinois, gained power through predatory pricing and shrewd marketing, they forced local butchers to carry only dressed beef from Chicago rather than cutting their own beef to the individual tastes of their customers. The butcher then ceased to be a member of the community with whom personal relations developed. Rather now the butcher became a salesmen of standardized products produced at a distant location. Cronon, *supra* note 39, at 227-47.

42. *See*, *e.g.*, Cronon, *supra* note 39, at 256-57.

43. Profs. Herman Daly and John Cobb describe the economic understanding of the human beings as follows:

> The chief feature of *Homo economicus* . . . is extreme individualism. What happens to others does not affect *Homo economicus* unless he or she has caused it through a gift. Even external relations to others, such as relative standing in the community, make no difference. In addition, only scarce commodities, those that are exchanged in the market, are of interest. The gifts of nature are of no importance, nor is the morale of the community of which *Homo economicus* is a part.

Herman E. Daly & John B. Cobb, For the Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future 87 (1994).

44. Rachel Carson's book, *Silent Spring* (1962), is often viewed as the beginning of the popular environmental movement.

45. Daly & Cobb, *supra* note 43, at 161.

46. *Id.* at 164.

47. *Lucas*, 505 U.S. at 1003. The factual material that follows is from the Court's decision in *Lucas*.

48. S.C. Code Ann. §§48-39-250 to -360 (Law. Co-op. Supp. 1992).

high water marks of the previous 40 years. The South Carolina legislature gave the following justifications for the Act: (1) the dune/beach system acted as a storm barrier; (2) many miles of coast were critically eroding; (3) the dune/beach system was important for tourism and provided habitat for many species; (4) development would imperil nearby property; and (5) protective devices had not proven effective against the damages caused by development.[49]

The Court, in an opinion by Justice Antonin Scalia, held that when legislation deprives an owner of all economic value in real property, compensation must be granted unless the planned development violates "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[50] Justice Scalia explicitly drew on the balancing test developed by Justice Holmes in *Pennsylvania Coal*. The Court's use of a balancing test rather than a more deferential test like the *Lawton* ends-means test indicated their desire to protect the economic use of property against encroachment by the community. Justice Scalia reasoned that while the balancing test established that a taking can occur if regulation "goes too far," it also offers insight into when a *given regulation* goes too far. Drawing on the Court's in dicta precedent, Justice Scalia argued that the Court had held that a categorical taking occurs "where a regulation denies all economically beneficial or productive use of land."[51] The case was remanded to the South Carolina Supreme Court to identify, if possible, background principles of nuisance and property law that prohibited the uses Lucas intended.

In a provocative article, Prof. Joseph Sax seeks to uncover the understandings of property that underlie the *Lucas* ruling.[52] He argues that some of Justice Scalia's seemingly odd rulings in this case make sense if it is understood that what he is attempting to do is bend over backwards to limit the legal foundation of the emerging view of land as part of an ecosystem.[53]

> From a certain environmental perspective, making places less natural is itself "harmful." If transformation to human use is itself defined as harmful, many land uses which were previously legitimate could become unlawful. This concern leads Justice Scalia to shift from a conception of property rights that defines what owners cannot do ("harm" to others) to what they can do (develop land to produce private economic return). *Ownership is thereby redefined as some irreducible right of use by the private landowner.*[54]

From this basic argument, Professor Sax goes on to develop what he sees as the two fundamentally different views of property rights, which he calls land in the "transformative economy" and land in the "economy of nature." These views, he argues, lie behind the Court's position and the takings issue generally.[55] The conventional perspective on property views land in the transformative economy. From this perspective, land is seen as a discrete entity with boundaries clearly marked by the property deed; it is inert and unproductive in its natural state. Land is made productive by transforming it into a human artifact that produces goods for the human economy. The emerging ecological view of property presents a fundamental challenge to this conventional view. From an ecological perspective, land is viewed as already productive and performing important services in its unaltered state. For example, forests regulate global temperature and marshes sustain marine fisheries. From this perspective, land is seen as consisting of systems *defined by their functions* rather than by human-drawn property lines. It is viewed as part of the ecological community, and landowners have an affirmative role to play in protecting ecological functions. Though this view allows for transformation of land to meet human needs, such transformation always takes place with the larger goal of protecting the ecological community.

Professor Sax draws on William Cronon's analysis of the transformation of New England by the settlers as evidence for his thesis on land in a transformative economy and states that "getting rid of the natural, or at least domesticating it, was a primary task of the European settlers of North America."[56] While Professor Sax's analysis is penetrating and helpful, his characterization of land in a transformative economy harkens back to the time of frontier settlement and is not the most fundamental understanding of land in *today's* transformative economy. While land may indeed be viewed in the manner Professor Sax points out, this view is derivative from the more fundamental view of land as an abstract commodity, or as value. This view of land as an abstract commodity underlies Justice Scalia's opinion in the same way that it underlay Justice Holmes' opinion in an earlier era.

It is this view of land as an abstract commodity that has become overwhelmingly dominant in economic theory.

> [T]he discipline of economics has come to treat land as a mixture of space and expendable, or easily substitutable, capital. Both are treated as commodities, that is, as subject to exchange in the marketplace and as having their value determined exclusively in this exchange. . . . Even when it is regarded as space and expendable capital one might expect some attention to be paid to the land's physical properties. But in general, economics abstracts from the physical characteristics of commodities, attending only to their price. Insofar as different locations or other characteristics affect price, the characteristic is briefly noted.[57]

It is this economic view of land that is dominant in today's transformative economy.

This view of land is built on the anthropological foundations of classical liberalism, which views humans as driven by self-interest and without essential constitutive ties to the community. Professor Sax's analysis of the Court's opinion in *Lucas* highlights this view of human nature when he argues that the Court redefined ownership to be "some irreducible right of use by the private landowner. Ownership

49. *Id.* §48-39-250.

50. *Lucas*, 505 U.S. at 1029.

51. *Id*. at 1015. *See* Agins v. City of Tiburon, 447 U.S. 255, 260, 10 ELR 20361 (1980).

52. Joseph Sax, *Symposium: Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1443 (1993).

53. *Id.* at 1438.

54. *Id.* at 1441 (emphasis added).

55. *Id.* at 1442-46. The following discussion summarizes Professor Sax's analysis.

56. Sax, *supra* note 52, at 1442. *See* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 54-81 (1983).

57. DALY & COBB, *supra* note 43, at 111.

then 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."[58] The liberal view of human nature supports this understanding—property rights are prepolitical; self-interest is normative, with personal benefit taking priority over communal benefit; and individuals are defined in isolation, with society as a collective of competing interests so that the individual is not morally obligated to contribute positively to any communal or social good.

Conversely, the view of land in the economy of nature is characterized by interconnectedness and the recognition of a positive duty of stewardship. This view resonates with an alternative view of human nature, characterized above as "person-in-community." In this vision, there is recognition of a common good of stewardship that transcends and makes demands upon the individual good of economic well-being. There is recognition of the interconnectedness among human beings and between humans and the natural world.

## VI. Conclusion

The primary problem with the individualistic view of human nature is that it uses one aspect of human nature—the individualistic aspect of self-interest displayed in the market place—to describe human nature as a whole.[59] In attempting to elevate this abstraction to a description, it leaves behind real human concerns for justice, fairness, and the well-being of community.[60] It runs into contradictions such as that between its claim that human beings are self-interested beings with insatiable wants and the reality that aggressive, want-stimulating marketing is needed to sell products.[61] This model of human nature also fails to account for actions in the political arena, where such actions as the vast increases in spending for the poor that occurred in the 1960s and 1970s are difficult to account for solely on the grounds of narrow self-interest.[62] And, more generally, this view fails to integrate the insight that people can be moved by ideas and bonds of solidarity, and not simply by their own self-interest.

The person-in-community model of human nature is not only a better fit with human life as it is experienced, it also offers at least some guidance on the takings issue. In the takings debate, the first principle flowing from the individualistic, economic model of human nature might be that "a strong presumption of individual independence from the government [exists and] can be overridden under the police power only by showing dangers to others."[63] Conversely, the first principle flowing from the person-in-community model might be that there is a strong presumption that a community's definition of wrongdoing is legitimate and that takings jurisprudence should focus "on whether the lawmakers [in the relevant community] reasonably believed that conduct at issue would be regarded as blameworthy *by the people of that jurisdiction at that time*."[64] And while the latter principle does not automatically make hard cases easy, it may lend some conceptual clarity to the issue by forcing a court to consider *why* the government acted and not primarily on the diminution of value.[65] Furthermore, the person-in-community principle puts the burden on the plaintiff to demonstrate that the community could not *reasonably* have regarded the conduct at issue as wrongdoing. This approach would leave more space for the argument that ecological harm is a noxious use and that due weight should be given to the land's function. By implication, under this understanding of the Takings Clause, the courts would be more likely use deferential tests, like the *Lawton* ends-means test, to determine if a taking has occurred.

The underlying anthropology of this person-in-community principle and its correlate ecological understanding of land can also help clarify two of the most difficult conundrums in takings jurisprudence: the time baseline and the space baseline. The time baseline concerns whether the value of the property is measured from the time of ownership or the time since the regulation passed. The space baseline concerns whether the court looks at the entire area of land owned or just that portion that is affected by the regulation. The person-in-community is characterized by continuity in relationships through space and time. Likewise, land in an ecological world view is seen as having a history and being interconnected with the larger life support systems. Given this understanding of the human and of land, the presumption in takings cases would be that the time baseline starts with ownership since this is the start of that individual's relationship to that land, and this relationship is partially constitutive of the individual. The space baseline should cover the relevant area, defined in terms of ecological functioning, since human-made property boundaries create artificial separations while land is interconnected.

58. Sax, *supra* note 52, at 1441.

59. *See*, *e.g.*, Daly & Cobb, *supra* note 43, at 84-96, 159-75.

60. *Id.* at 89.

61. *Id.* at 87.

62. *See*, *e.g.*, Steven Kelman, *"Public Choice" and Public Spirit*, Pub. Int., Spring 1987, at 80-94.

63. Richard Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 Colum. L. Rev. 591, 597 (1995).

64. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 53, 110 (1990) (emphasis in original). Professor Peterson adds in a footnote: "Under the moral justification principle, a judgment of wrongdoing will be presumed if such a judgment reasonably could have been made, unless the evidence shows that in fact no such judgment was made." *Id.* at 110 n.242.

She notes three factors that appear to affect societal judgments about wrongdoing:

> First, if an existing land use and a proposed new use will conflict, we tend to see the new use as the wrongful one, rather than blaming the existing one or saying that neither side is to blame. Second, when two land uses conflict, we tend to view land use that would generate a lower level of adverse impact . . . as having a superior claim. . . . Third, a widespread pattern of land use in a particular area may establish the norm of acceptable behavior in that area.

*Id.* at 102. She goes on to note that the hard cases generally arise when these three factors do not lead in the same direction.

Professor Peterson criticizes Professor Sax's argument because, in his argument, "neither takings cases nor nuisance law can be viewed as depending on judgments of wrongdoing. According to Professor Sax, nuisance law cases simply involve two conflicting land uses, neither of them wrong." *Id.* at 90; *see* Joseph Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); and Joseph Sax, *Takings, Private Property, and Public Rights*, 81 Yale L.J. 149 (1971). Professor Peterson cogently argues that this Coasean mode of analysis is simply inconsistent with ordinary perceptions of the world. In ordinary speech people consistently distinguish "harms" from "benefits."

65. Peterson, *supra* note 64, at 96.

These presumptions might of course be shown to be unsuitable or unjust in a particular case, but the burden to show this would be on the plaintiff. The individualistic principle, however, fails altogether to clarify the time and space baseline issues. Since land is viewed fluidly in terms of its economic value for the individual owner, ecological and temporal boundaries become secondary to economic self-interests. But such interests offer no principled guidance, no common metric, to clarify either baseline.

The tests the courts use to determine whether a taking has occurred are not neutral. They frequently reflect an underlying anthropology or understanding of the human person. In this Article, I have argued that the person-in-community model, with its affinity to the republican view of human nature, accords better with our lived experience than does the individualistic, liberal view. This person-in-community model is also better suited to address the escalating global-level environmental problems, where the impacts of human activity on the natural world have become increasingly evident. Given this general plausibility and the clarity it adds to takings cases, the person-in-community model is a promising one for courts to adopt.