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INTRODUCTION

I am honored to write this essay to celebrate the work of Professor Peter Gerhart, who was a tremendously creative thinker in the legal academy and also a valued friend.

There are many kinds of people in the teaching ranks. There are those who restlessly seek new ideas and remain undaunted if others do not immediately accept them. There are those who refuse to unmoor their work from their personal moral values, even when moral skepticism is the most popular conviction of those who are then writing in the field. There are those who never shed awareness of their own limitations because humanness and personal self-doubt match their critical habits of the mind. All of these characterized Professor Gerhart.

In choosing a piece of his work for this essay, I was inexorably drawn to one of his books, which is—to my mind—one of the crowning achievements of his academic life. Over the last decade, he sought to examine the role of moral theory in the foundational areas of private law: torts, property, and contracts.[1] In these remarks, I will focus on the second of these works: *Property Law and Social Morality*, which was published in 2014.

Although I have read many excellent works in my own field of property theory, and have hazarded contributions to the field myself, this book stands apart. Once I read it, I could not forget it. It is one of the most simple, yet brilliant answers to this question: do property owners have obligations to others? And, if so, *on what basis* is this obligation imposed?

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1. *See* PETER M. GERHART, TORT LAW AND SOCIAL MORALITY (2010); PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY (2014) [hereinafter PROPERTY LAW]; PETER M. GERHART, CONTRACT LAW AND SOCIAL MORALITY (2021).

I. THE RESTLESS SEARCH

The legal institution of private property, as known in the Western world, is rooted in a profound conundrum. The idea of individual property rights is *protective* in its very essence: it recognizes the profound need of human beings to control physical objects, certain intangible things, and other resources that are essential to the living of life.[2] At the same time, this bedrock idea creates a difficult problem. Individual property rights in external, physical, finite, non-sharable resources is a zero-sum game. If individual "A" is granted control—"property rights"—over particular land, chattels, or other resources, individual "B" necessarily is not. Does "A" acquire—along with her property holdings—any obligation to reckon with the impact of her property ownership on other individuals? Is there what I would call a "well-nigh incontestable" ground that compels that reckoning by "A" or other property owners?

This is, of course, at the core of all societal efforts to alter, diminish, or destroy previously conferred property rights claimed by individuals. Whether it is environmental controls, global-warming cutbacks, endangered-species laws, green-space-preservation laws, historic-preservation laws, affordable-housing mandates, or baldly redistributive efforts (through taxation or government confiscation), *any* change in previously earned or conferred property entitlements is in deep theoretical conflict with the protections for the individual that the private property system supposedly grants. We can come up with all kinds of rationalizations about how property owners actually come out better after these laws and their purported losses, and in many cases that may be true. For instance, it does property owners little good if their prerogatives are preserved but the planet is destroyed by global warming catastrophes. We can also point out that as members of society, property owners necessarily owe obligations to their fellow citizens.[3] However, in the United States, where ideas about the sanctity and primacy of private property rights are so strong—indeed, in the view of many, constitutionally[4] or morally guaranteed—the gaping chasm between property's protective promise and the realities of social intervention and deprivation creates a deep unease.

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2. I have called this the "common conception" of property. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 39–40 (2003).

3. *See, e.g.*, Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009).

4. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.").

Knowledge of this situation has led to an avalanche of writing in the past thirty years that has attempted to identify what I would call a well-nigh incontestable source for imposing other-regarding obligations on private property owners. One effort, with which I have been strongly identified, questions whether private property guarantees as implemented in American law are in fact as "one-sided" (individually protective) as is often portrayed.[5] This effort spawned what is now known as the "progressive property movement."[6] In parallel fashion, other scholars have highlighted historical understandings of property rights—such as eighteenth-century understandings—to demonstrate that the idea of property as protection of the individual's autonomous sphere is in fact a recent creation.[7] As Professor Robert Gordon wrote, despite

> a lush flowering of absolute dominion [property] talk . . . , [t]he real building-blocks of basic eighteenth-century social and economic institutions [envisioned] . . . property rights held and managed collectively . . . ; property surrounded by restriction on use and alienation; [and] property qualified and regulated for communal or state purposes . . . .[8]

Another approach has been to anchor other-regarding obligations of property owners in constitutional text or the nature of democratic government. These scholars have argued that the individual rights conferred by the American Constitution, and the general principles of

5. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 1 (1997); JOSEPH WILLIAM SINGER, ENTITLEMENTS: THE PARADOXES OF PROPERTY 3–4, 6 (2020); UNDERKUFFLER, *supra* note 2, at 52.

6. *See, e.g.*, RACHAEL WALSH, PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION 2–3 (2021); Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIR. 349, 351–52 (2014); Jessica L. Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105, 1107 (2018); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 109–15 (2013); Laura S. Underkuffler, *A Theoretical Approach: The Lens of Progressive Property*, *in* RESEARCHING PROPERTY LAW 11, 13 (Susan Bright & Sarah Blandy eds., 2016); Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 253 (2019).

7. *See, e.g.*, ALEXANDER, *supra* note 5, at 5; Robert W. Gordon, *Paradoxical Property*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 95, 95–96 (John Brewer & Susan Staves eds., 1995); Carol M. Rose, *Property as Wealth, Property as Propriety*, *in* COMPENSATORY JUSTICE: NOMOS XXXIII, at 223, 232–36 (John W. Chapman ed., 1991); Carol M. Rose, *Public Property, Old and New*, 79 NW. U. L. REV. 216, 219–21 (1984) (book review).

8. Gordon, *supra* note 7, at 96.

democratic government, assume that individual citizens have the ability to live, to exercise conferred rights, and to effectively participate in government; and that all of those in turn require that minimal survival needs for food, medical care, and shelter are met. As Professor Frank Michelman famously wrote, "[s]atisfaction of basic welfare interests [is] . . . a crucial ingredient of any serious attempt" to guarantee individual constitutional rights and the right of political participation.[9] Because the preservation of private property can stand in the way of such welfare transfers, it is imperative—for this reason—that other-regarding obligations on property owners be imposed.[10]

Yet another approach has been to choose a particular value or objective, which is plausibly but not generally associated with the idea of property as protection, and to argue that this value—when examined—requires, through the idea of reciprocity, that property owners be concerned about the ownership, or lack of ownership, of others. For instance, human flourishing[11] or the development of particular human capacities[12] have been chosen as the most fundamental reasons for the creation of property systems, and the (consequent) touchstones for examining their operation. Once we have accepted the deep roles of such values in the operation of property systems, it follows from the idea of reciprocity that those values and their fruits must be afforded to all. For instance, if we believe that human flourishing or the development of critical human capabilities are

9. *See* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 3 WASH. U. L.Q. 659, 678, 684 (1979).

10. *See, e.g.*, David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 LAW & SOC. INQUIRY 1, 32, 47–48 (1996); Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 AM. J. JURIS. 159, 177–78 (1997); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 962–64 (1973); Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1903–04 (2001); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 34 (1987) (arguing that because education is fundamental to participation in democracy, there is a right to such an education from the state); Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2045–48 (2006) (arguing that there is a "federal responsibility for ameliorating social and economic inequality" which can be fulfilled, for example, by the guarantee that an adequate education is available to all).

11. *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 89–90 (2012); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 749 (2009) [hereinafter *Social-Obligation Norm*].

12. *See, e.g.*, C.B. Macpherson, *Human Rights as Property Rights*, DISSENT, 1977, at 72, 77 (suggesting that property is a means to "a full and free life" by allowing the use and development of human capabilities and energies).

of importance for us, "to avoid contradicting ourselves,"[13] we must recognize their importance for others. And if we believe that property ownership is critical to achievement of those objectives, we must agree that universal property ownership of some kind—an "other-regarding" obligation—is a part of our constructed property system.

All of these theories are powerful. However, they are all subject to a powerful critique. All of these theories either seek to undermine the individually protective view of property with a different one, or claim some outside source—the Constitution, theories of democratic government, or, implicitly, some other transcendent goal or value—is the source of other-regarding obligations to which property owners are then declared to be subject. Any one of these theories might be empirically true (such as how property is now or has in fact existed), or might correctly identify deep societal commitments that conflict with the individually protective ideal (such as the right to life, to political participation, or to the material means for human flourishing). However, a fundamental critique remains, and is consistently raised by the other-regarding obligations sceptic.

Of course, one can always challenge the sanctity of individually protective property rights with alternative visions, or with unrelated values. However, all such moves are in themselves highly contentious ones. For instance, if we have initially conferred property rights upon individuals because of an abstract human need for property, then these new theories or values might well compel extending property ownership to others. But if we have conferred property rights upon particular individuals for other reasons—for example, because of their industry, or because of our belief in the need for the security of ownership—these new theories or values can be seen as simply the arbitrary imposition of different priorities or ideas.

The bottom line is this: if the goal is to establish other-regarding obligations for property owners on grounds that are well-nigh incontestable, these theories do not achieve it.

This kind of critique is, of course, not limited to attempts to impose other-regarding obligations on property owners; it is the familiar and ultimate objection to *any* attempt to introduce qualifications or restrictions into the understanding of *any* previously recognized right. As long as the qualification or restriction comes from a "rethinking" of the right, or some outside value, the argument can be made that it rests on contestable grounds and those contestable grounds are (for some reason) of insufficiently proven validity.

This brings us to Professor Gerhart's book. He is keenly aware of this conventional critique of other-regarding theories of property, and he sets out to surmount it. His task, as he assigns it to himself, is to find a way that other-regarding obligations for property owners can be

13. *Social-Obligation Norm*, *supra* note 11, at 769; *see also* ALAN GEWIRTH, REASON AND MORALITY 104–05 (1978).

convincingly demonstrated to be *entailed by—to be unavoidably and inherently a part of*—the core idea and values of the private-property regime, itself.[14]

II. The Gerhart Book

The task that Professor Gerhart assigns himself is extremely demanding—indeed, it is *maximally* demanding. It takes as given the existence and desirability of an individually protective private-property regime. It therefore rejects the idea that we can impose other-regarding obligations by rejecting the assumptions of that regime, or citing other, competing values or sources as governing legal principles. Under this approach, the other-regarding obligations must somehow be derived from the idea, values, or necessary implementation of the private-property regime itself. They cannot simply be the result of resorting to other external, competing (and presumably contestable) values or legal principles.

In his book, *Property Law and Social Morality*, Professor Gerhart frames the issue as an apparent conflict between property and morality: "property"—in its ordinary meaning—seeks to protect individual interests, and "morality"—as a limitation on property rights—does not.[15] However, it is possible, in his view, to identify a theory that explains not only why property rights are what they are, but also how and why they must be limited by the well-being of other individuals.[16]

His aspiration, therefore, is not simply to impose upon the idea of property some unrelated theory of justice, a move which will be inherently contestable. As he states, an approach in which "the clashing rights, interests, or values" of others are pitted against those of the property owner creates familiar and potentially insuperable problems.[17] Rather, his goal is to establish a property owner's obligation to others utilizing only the values and ideas that are already accepted as a part of the idea of (protective) property itself. He writes that we need a theory in which "an owner's obligations and disabilities . . . flow from the *same source* that gave rise to the [property] rights in the first place . . . ."[18]

For the lawyer or philosopher, the requirements of this approach identify the gold standard for a demonstration of this type.[19] If a

14. *See* Property Law, *supra* note 1, at 5.

15. *See id.*

16. *See id.* at 6.

17. *See id.* at 11.

18. *Id.* at 12 (emphasis added).

19. For example, Professor Greg Alexander argues that a grounding for the other-regarding obligations of property owners can be found in something

particular legal principle or value is conceded to be highly desirable, on some ground, claiming its indictment by citing competing ideas or values is a cheap shot. It is obvious that the individually protecting character of a private property regime will be indicted if a communitarian perspective is asserted to be superior. Simple assertion of a communitarian view's superiority is not, however, convincing proof that this challenge to the individually protecting view is well-nigh incontestable. It is, in fact, highly contestable. Only if the critique can be shown to be entailed by—to be unavoidably and inherently a part of—the challenged protectionist view, will it be unquestionably convincing.

As a first step, there must be some unquestionably accepted understanding of what property is intended to achieve for owners. Several equally acceptable candidates come to mind, such as protection, security, and autonomy. Indeed, these goals—when it comes to property—are mutually reinforcing. Protection of an individual's property (land, money, and so on) creates physical and economic security, which in turn allow the individual to act freely without interference (physically or otherwise) in making life's choices. This is captured by the traditional image of private property as protecting "the individual's autonomous sphere."[20]

The particular private-property objective that Professor Gerhart chooses for focus is autonomy. Private law, including property law, "sees each person as an autonomous actor, fully endowed with the freedom to make decisions that do not positively interfere with the projects and preferences of others."[21] In a sense, the selection of autonomy as the value that property serves could be seen as an arbitrary one. However, its selection does not violate the rules of Gerhart's mission. If autonomy has been accepted as an intrinsic part

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other than raw (and contestable) moral principles: it can be found in our duties to ourselves. Our obligation to support others—the communities in which we live—"is not based on reciprocity, and is not contractarian." Because living in a community is necessary for our own well-being, supporting others "is based on the obligation each of us owes to ourselves to live well." *See* GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING, at xv (2018); *see also id.* at 52.

20. United States Supreme Court decisions are replete with this image. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (property "establish[es] a sphere of private autonomy which government is bound to respect."). The pervasiveness of this image in the way that property is imagined is recognized by scholars across the political spectrum. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 22 (1985); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1626 (1988). *See generally* UNDERKUFFLER, *supra* note 2, at 39–40.

21. GERHART, PROPERTY LAW, *supra* note 1, at 121.

of and reason for property protection, focus on that value cannot draw complaint.

From this point, identification of a source of other-regarding obligations of property owners flows easily. It follows inexorably from the statement of private property and autonomy that Professor Gerhart has just made. Autonomy guarantees the freedom to make decisions "*that do not positively interfere with the projects and preferences of others.*"[22] From that simple statement, an other-regarding norm is born.

The centrality of this restriction on property owners is obvious to Professor Gerhart, whose primary theoretical inquiries involved the law of torts. If an individual acts, and by that action harms another, it is universally accepted that the individual is accountable for the harm that she has caused.[23] Just as tort duties flow from actions that an individual takes, so it is true in the world of property. Obligations to others *"flow[] from an [owner]'s activity decisions."*[24] There is, he writes, no need to import external bases or ideas about other-regarding obligations. Other-regarding obligations of property owners arise from the simple idea of tortious conduct, and responsibility for it.

At first blush, one wonders, how is this so revolutionary? Every property owner is aware of common law nuisance, under which one property owner cannot flood, pollute, and so on, the land of another. Nuisance lies at the juncture of property and tort: in first-year law school education, it appears in property law casebooks, and also in those dealing with torts. If the nuisance idea is so unquestionably accepted, and illustrates the connection between the rights of property and the theory of torts, how is Professor Gerhart's theory so startlingly fundamental?

The brilliance of Professor Gerhart's insight lies not in its reminding us of the universal recognition of the law of nuisance; the fact that we do not need to be reminded of those bedrock principles is central, itself, to the theory he presents. Indeed, to meet his goal of incontestability, the fundamental principle must—of necessity—be instantly and universally recognizable. The power of his insight lies in his breaking down of the "conceptual silo" that has encased nuisance law, and his clear and unequivocal recognition of the implications of its principles.

Consider, for instance, the following example. *Lucas v. South Carolina Coastal Council*[25] is now one of the most famous decisions by the United States Supreme Court in all of the jumbled complexity and bitter political debate surrounding federal takings law.[26] The facts in

22. *See id.* (emphasis added).

23. *See id.* at 27.

24. *Id.* at 142 (emphasis added).

25. 505 U.S. 1003 (1992).

26. *See* Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2024, 2027 (2013).

Lucas were classic—absolutely ordinary—which has helped to elevate this case to its significance. In 1977, the South Carolina Legislature enacted the Coastal Zone Management Act.[27] The Act "required owners of coastal zone land that qualified as [an environmental] 'critical area' . . . to obtain a permit" from the South Carolina Coastal Council prior to development.[28] "In the late 1970s, Lucas and others began residential development [activities] on the Isle of Palms, a barrier island" located near the City of Charleston.[29] In 1986, he purchased two lots with the intention of erecting single-family homes on them.[30] At the time of their purchase by Lucas, the lots were not "critical areas" under the Act.[31]

In 1988, the South Carolina Legislature enacted another environmental protection law, the Beachfront Management Act.[32] The purpose of this Act was to protect the beach-and-sand-dune coastal system from unwise development which could "jeopardize[] the stability of the beach/dune system, accelerate[] erosion, and endanger[] adjacent property."[33] As a result of this Act, in conjunction with the former Act, the development of Lucas's parcels was prohibited.[34]

Lucas challenged this situation in court, claiming that it "effected a taking of his property without just compensation."[35] He "did not take issue with the validity of the [Beachfront Management] Act as a lawful exercise of South Carolina's police power"; he conceded that the goals of the Legislature in passing the legislation were legitimate police power objectives.[36] A state government can act to save coastal areas from erosion and other property endangerment. However, Lucas asserted that the legal protection that was afforded to his property rights was

27. *See Lucas*, 505 U.S. at 1007 (noting the passage of the Coastal Zone Management Act, No. 123, 1977 S.C. Acts 224).

28. *Id.* at 1007–08 (citing S.C. CODE ANN. § 48-39-130(A) (1976)).

29. *See id.* at 1008.

30. *See id.*

31. *See id.*

32. *See id.* (noting the passage of the Beachfront Management Act, No. 634, 1988 S.C. Acts 5120).

33. S.C. CODE ANN. § 48-39-250 (Supp. 1990).

34. *See Lucas*, 505 U.S. at 1008–09. The Act permitted property owners to request relief from the development prohibition under some circumstances. Ten lot owners sought special permits to develop on land where the Act had similarly barred development. *See* Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation*, *in* PROPERTY STORIES 221, 236, 246 (Gerald Korngold & Andrew P. Morriss eds., 2004). However, Lucas spurned that alternative and decided "to come out with all guns blazing . . . ." *Id.* at 231.

35. *Lucas*, 505 U.S. at 1009.

36. *See id.*

superior. If the Legislature acted in this way, it owed him compensation.[37]

To frame this in our current terms, Lucas did not argue that his planned activities would not harm others. In fact, he conceded as much. Rather, he argued that the *fact of harm* and *legal responsibility for harm* are two different things. A property owner is not responsible for harming others by his actions, because a property owner's rights are not inherently subject to other-regarding obligations.

What did the United States Supreme Court do with this case? Justice Scalia, writing for the majority, sustained Lucas's claim. The idea "that 'harmful or noxious uses' of property may be proscribed by government regulation without . . . compensation" was flatly rejected.[38] Rather, in each case the effect of the restriction on the complaining landowner must be considered. If the impact on the property owner is too severe, the government must compensate, "no matter how weighty the asserted 'public interests' involved."[39]

So—under this understanding—other-regarding obligations are not always a part of property rights. Indeed, if the pecuniary or other effect of other-regarding (public) interests on the owner is severe enough, the owner must be *compensated* for that loss, even if his actions cause catastrophic loss to the other.

This understanding might be seen as something aberrational, or limited to what was then Scalia's wing of the Court.[40] However, to minimize the widespread nature of this belief would be a mistake. The idea that property owners are protected from loss—no matter how strong the opposing interests—permeates American popular culture and, often, American law. All of us have seen news stories and read legal opinions that reek with outrage at how a landowner's plans to fill wetlands, excavate ponds, armor shorelines, or build on fragile ecological areas were "unjustly" curtailed. Other-regarding obligations? There is little mention of these. They are "pale sisters," at best, of the bedrock imperative that property rights deserve protection.

There is, however, one anomalous quirk in the *Lucas* case. Although the Court (through Justice Scalia's opinion) rejected the idea that property owners must always account for the harm from their actions, there was one exception that was articulated to this rule. That exception exists if the owner's actions create a common-law nuisance. The Court majority stated—as a kind of aside—that avoiding common-

37. *See id.*

38. *See id.* at 1022, 1024–27.

39. *See id.* at 1028–29 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).

40. In other work, I have called this understanding a perversion of the requirements of both property rights and justice. *See* Laura S. Underkuffler, Tahoe's *Requiem: The Death of the Scalian View of Property and Justice,* 21 CONST. COMMENT. 727, 730–31 (2004).

law nuisance is always required of property owners, because it is a "part of [the landowner's] title."[41] It is *an inherent part* of all property rights "to begin with."[42]

Strangely, the Court's majority did not really explain why other-regarding obligations are "of course" imposed by nuisance law, but not by legislative or other harm-preventing government enactments. Most importantly, when it comes to the kinds of harms that are prohibited, the subject matter of nuisance law and protective legislation is largely identical. For instance, the harms that were addressed by the legislature in the *Lucas* case—i.e., erosion and other physical damage to others' lands—are classically those that nuisance law addresses.[43] There was some murmuring in the majority's opinion about a landowner *knowing* or *accepting* nuisance restrictions, in contrast to legislative enactments,[44] although the opinion elsewhere acknowledged that "the property owner necessarily expects [that] the uses of his property [will] be restricted . . . by various [newly enacted] measures" in furtherance of police power objectives.[45]

There is, of course, the fact that protective powers under nuisance law are radically (geographically) limited: proof and "causation" requirements of common-law nuisance law limit cases, as a practical matter, to claims against neighbors or other owners of nearby properties.[46] Perhaps, therefore, the reason for the Court's distinction between other-regarding obligations in the two contexts is purely ideological: in an effort to advance an agenda of property protection, the majority simply chose to (arbitrarily and radically) limit the permissible legal sources for other-regarding obligations.

Be that as it may, at this point we must return to Professor Gerhart's book. The brilliance of his book is that it does not accept the nuisance/legislative distinction, or any distinction, in applying the idea that the causing of harm triggers a reckoning with other-regarding obligations.

By cutting through the noise and perceiving the true foundation for other-regarding obligations in property law, Professor Gerhart's book is

41. *See Lucas*, 505 U.S. at 1027, 1029.

42. *See id.*

43. RESTATEMENT (SECOND) OF TORTS § 834 cmt. b (AM. L. INST. 1979).

44. *See Lucas*, 505 U.S. at 1027–29 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

45. *Id.* at 1027.

46. *See* RESTATEMENT (SECOND) OF TORTS § 834 cmt. f (AM. L. INST. 1979) (stating that liability for a person's actions attaches only when it can be shown that "his activity was a substantial factor in causing the harm . . .").

a simple but masterful stroke. By building upon our foundational intuition that harm to others requires prevention and redress—as is unquestionably the case in all of tort law—we find that there is no reason to deny the application of that principle to the actions of property owners as well.

The value of any theory is whether it would have any practical impact on how rights are perceived, and how cases are decided. Professor Gerhart's theory, if truly implemented and understood, would achieve the undeniable link between property rights and duties to others that property theorists and other commentators have long sought. The claimed immunity of Lucas or another owner from a reckoning with the dangers that their proposed actions pose to others would be seen as a frivolous assertion, rather than as a bedrock and ultimately determinative assumption in the case. Gone would be the presumed legitimacy of claims by landowners that their property rights are unquestionably superior when they want to fill wetlands that are entirely within their property boundaries,[47] or they want to build a completely out-of-character building due to an obvious municipal zoning error,[48] or when they argue—as an absolute matter—that the forced preservation of an endangered species' habitat violates their property rights.[49]

In short, we learn that the imposition of other-regarding obligations when it comes to private property ownership does not require the introduction of a new complex or convoluted theory. It can be found in the simple idea that one who acts, and thereby harms others, is (of course) answerable in the law.

CONCLUSION

Professor Gerhart's book does not pretend to answer all of the when, where, and how questions that are involved in the imposition of other-regarding liability, in tort or in property. Indeed, as I have pointed out elsewhere, his limitation of his theory to actions of "interference" with the property holdings of others, and excluding actions involving "acquiring" property rights to the detriment of

47. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 611, 630–31 (2001); Just v. Marinette Cnty., 201 N.W.2d 761, 766–68, 770, 772 (Wis. 1972).

48. *See, e.g.*, Haas v. City & County of San Francisco, 605 F.2d 1117, 1118–19, 1121 (9th Cir. 1979).

49. *See, e.g.*, Southview Assocs. v. Bongartz, 980 F.2d 84, 89–90, 92 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); Sierra Club v. Dep't of Forestry & Fire Prot., 26 Cal. Rptr. 2d 338, 340, 344 (Cal. Ct. App. 1993); Cerritos Gun Club v. Hall, 96 F.2d 620, 621–22 (9th Cir. 1938).

acquisition of property by others, is—to my mind—an unnecessary and illogical theoretical limitation.[50]

However, no work that has greatly advanced our understanding has answered all questions or dealt with all projections. The fact remains that in the area of its explicit application, the idea that actions that cause harm to others are subject to proscription *whatever the context* is a powerful indictment of those who attempt to assume that prerogatives of property owners are the most natural, and should presumptively reign supreme. Actions are actions; harms are harms. If an owner's actions will erode the land of others, or destroy the species that others value, or contribute to irreversible climatic harm, the fact that these actions take place on the land of the owner, or are "common law" ownership rights, has no bearing on the question. As universally acknowledged in nuisance law, property owners do not have immunity when their actions demonstrably harm others. To Professor Gerhart's enduring insight, it's just that simple.

50. *See* Laura S. Underkuffler, *A Moral Theory of Property*, 2 TEX. A&M J. REAL PROP. L. 301, 308–10 (2015).