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From Social Recognition of Property to Political Recognition by the State: Peter Gerhart's Property Law and Social Morality and the Evolution of Positive Rights

Christopher Serkin

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FROM SOCIAL RECOGNITION OF PROPERTY TO POLITICAL RECOGNITION BY THE STATE: PETER GERHART'S *PROPERTY LAW AND SOCIAL MORALITY* AND THE EVOLUTION OF POSITIVE RIGHTS

By Christopher Serkin[†]

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I. INTRODUCTION

Peter Gerhart's new book, *Property Law and Social Morality*, offers an important and original view of property.¹ Gerhart weaves together many contemporary theories into a coherent vision of property as a locus for duties to others. More precisely, he views ownership as the right to make decisions with regards to a resource—decisions that are constrained by obligations owners owe to others.² The book also offers an evolutionary account at the heart of property. Gerhart argues that property's origins can be found in competing claimants to a resource deciding whether to fight to acquiesce to one another's claims. With repeated interactions over time, a "social recognition" emerges of the claims that others will, in general, respect. That social recognition defines the content of a community's expectations with regards to property. Moreover, that social recognition informs how the community, through the State, defines positive property rights, and so social recognition and the State itself co-evolve in tandem.

The content of property rights therefore does not come from natural law, but nor is it purely positive. It is the product of the State—and its various branches—interpreting, reflecting, and adjusting the social recognition within the community in an iterative process. Positive property rights, in this view, are an expression of the community's

[†] Professor of Law, Vanderbilt Law School. Thanks to Thomas Cheeseman for excellent research assistance in the preparation of this piece.

1. PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 1 (Cambridge Univ. Press 2014).

2. Larissa Katz made one version of this view prominent when she described ownership as "agenda-setting authority" over a resource. See Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 (2008). Others have explored the affirmative obligations that attend property ownership. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127 (2009); Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007).

interests, and are designed to ensure that property owners are sufficiently other-regarding in their decisions about how to use their property. For this reason, constitutional limits on the government's power to regulate property are limited only to those extreme cases where the government acts arbitrarily (under due process analysis) or actually eliminates property owners' right to exclude (under the Takings Clause).³ Regulation is part of an ongoing dialogue between the community and the State in which the topic, fundamentally, is the social recognition of property.⁴

Gerhart's book makes real contributions and nicely incorporates doctrinal payoffs. It sells short, however, the distributional concerns embedded in core property doctrines and so does not entirely account for the extent to which positive law can and does diverge from social recognition. It therefore admits constitutional protection for property that is too parsimonious, and that also does not embrace the full complexity of the relationship between property and the State.

This short response argues that positive property rights—especially in a modern regulatory state—are inherently redistributive. When the State has a choice between different regulatory strategies for achieving public goals, constitutional limits like the Takings Clause should not rely on formal categories but must instead account explicitly for distributive concerns. At the end of the day, the State is an active, not passive, player in the definition of property rights, a role that comes with both constitutional limitations and requirements.

II. GERHART'S EVOLUTIONARY THEORY OF PROPERTY

Gerhart conceives of property as the right to make decisions regarding a resource. Those decisions, however, are not unconstrained. Instead, they are limited by the obligations that property owners owe to others. Specifically, Gerhart argues that a community comes to recognize the content and limits of property rights through repeated interactions. When someone claims a right to a resource, someone else with an interest in the resource can choose to accept the other's assertion or can contest it and fight for it. Over time, patterns in those choices—how much to claim, whether to fight, whether to acquiesce—ripen into norms that define a community's expectations vis-à-vis resources in the world.⁵

3. GERHART, *supra* note 1, at 258.

4. *Id.* at 252 (“In the legislative realm, social values evolve from continuing conversations about the provision of public goods that cannot be provided through private agreements and markets—goods such as environmental and historical preservation, public access to important resources, and social safety nets.”).

5. *Id.* at 101 (“The evolutionary path is hard to predict and will take different turns in different communities, depending on the trade-off between violence and norm development.”).

This is an iterative and evolving process. For example, someone in a proto community might claim a right to all the fruit from a tree that he discovered. Others in his group, however, might assert their own claims. They then face a choice: respect the others' claims or fight over them. Of course, the threat of violence might lead one or another to scale back his claim in order to avoid a fight. Maybe the discoverer, instead of trying to keep all the fruit, decides to content himself with only the fruit he can carry, leaving the rest on the tree for the others. If no fight ensues as a result, and the same is true in repeated interactions within the community, a norm might develop that an initial finder can claim all the fruit he or she can carry, but no more. For Gerhart, then, social recognition is a substitute or alternative for violence; it is the product of norms that develop when people consistently choose to acquiesce instead of fight against assertions of rights.

The State, in this view, develops alongside property because "states lower the cost of enforcing prevailing property norms [I]t makes sense to institutionalize norm development through governance to limit self-help and violence as a means of changing shared belief systems."⁶ Fundamentally, the State operates as a medium for the evolution and enforcement of socially recognized rights. When the community instantiates those rights into law, it is reflecting, at least in a general way, the content of socially recognized rights. Sometimes the State follows and sometimes the State leads the social recognition of the content of property rights, but always it is roughly constrained by the limits of what people will accept.

Gerhart's account joins a crowded field of stylized mythologies about the origins of private property.⁷ But his is a particularly elegant one because it neatly threads the needle between natural rights theories and legal positivism. In his view, property rights and the modern state are byproducts of repeated interactions between people; they reflect community expectations through the gradual coalescence of expectations surrounding the avoidance of violence.

There is a kind of optimistic inevitability built into Gerhart's theory. The co-development of property and the State occurs through dynamic interactions, but all consistent with evolutionary pressures favoring cooperation. Initially, people avoid violence because it makes them better off, and then rely on the State to enforce and to develop norms, also as a substitute for violence. The resulting property norms are therefore those that the community as a whole agrees

6. See *id.* at 95–96.

7. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); THOMAS HOBBES, *LEVIATHAN OR THE MATTER, FORM AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (Michael Oakeshott ed., Collier Press 1968) (1651).

are better than the alternative resort to force.⁸ This gives a kind of moral authority to the resulting content of positive law.

For Gerhart, then, the State develops naturally and in tandem with social recognition because it is a more effective medium for norm-formation than are repeated threats of violence. He offers the hopeful suggestion that social recognition and the State co-evolve, with each pushing the other along a similar kind of trajectory towards the development of shared norms and expectations.

This co-evolution suggests a narrowly circumscribed role for constitutional limits on property regulation. Social recognition, whether established through individuals' interactions in the world, or mediated through the State, defines the limits of people's rights with regard to their property. And because property rights are always limited by the obligations owners owe to non-owners and to each other, the State can allocate the burdens and benefits of ownership in society without taking property rights, subject only to porous limits on the police power.

In short, people own their property subject to an evolving social recognition of limits on ownership. This evolution is not unfettered, but its limits are based primarily in the Due Process Clause and not the Takings Clause.⁹ The Due Process Clause requires that regulatory burdens be apportioned subject to adequate process, and that they be imposed non-arbitrarily. But Due Process does not focus on the extent of the regulatory burden, in the sense of "going too far" under the *Penn Central* test for regulatory takings.¹⁰ And in fact, Gerhart would all but abolish regulatory takings law. The Takings Clause is implicated only in those situations where the government has actually eliminated a property owner's right to exclude and has thereby supplanted and not merely regulated voluntary interactions.¹¹

This is a kind of organic conception of the interaction between the community and the State.

The modern State, however, is subject to its own institutional forces separate from the evolutionary pressures within the community. Instead of a medium for developing and expressing community values, the State may be better seen as a separate player with its own interests and concerns. There are a number of theoretical conceptions of the

8. For an account of how people affect property norms by violating them, see EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS* (2010). For an account of violence in the formation of community norms, see Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood*, 98 VA. L. REV. 635 (2012); Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 ILL. L. REV. 59.

9. Other constitutional limits, like Equal Protection, also apply, but Gerhart focuses most of his analysis on the Due Process Clause.

10. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

11. GERHART, *supra* note 1, at 289.

State that would propel the kind of analysis that follows here.¹² For purposes of this short essay, I do not commit to any one, but simply observe that the individual interests of government actors, or institutional pressures on different branches of government, may generate laws and regulations that do not track the interests or values of the community they represent.

The divergence between community norms and positive law is well known in the field of property in particular. Robert Ellickson's pioneering work on the ranchers of Shasta County, for example, shows how community norms around grazing rights can develop separately and apart from the content of positive law.¹³ That divergence is also on display in the tension between different branches of government when it comes to property, with common law doctrines articulated by courts at odds with legislative reforms that modify rights.¹⁴ Gerhart may well claim that this is all just part of property's evolution. Political participation and active litigation are simply part of the dialogue around the evolving content of property rights. But once the State is viewed as a separate entity, subject to its own separate evolutionary pressures, its interactions with private property look less inevitable and more like a contested battleground. The resulting tensions go directly to the allocation of burdens and benefits in society, and cannot help but implicate distributive concerns. Gerhart tries to limit his theory of property to corrective justice alone, but the result is too narrowly drawn.

Following a long tradition, Gerhart defines distributive justice to include "the responsibility that the community owes to individuals [It] is the realm of tax and social welfare law" ¹⁵ Fundamentally, it is about "the distribution of wealth, not the distribution of rights and responsibilities with respect to wealth."¹⁶ This is distinct from corrective justice, which addresses "relations between individuals with respect to resources" ¹⁷ As he explains, "[c]orrective justice is within the realm of private law, which makes decisions based on notions of corrective, interpersonal morality, not the obligations of the

12. These include, for example, civic republicanism and public choice theory, among others. See, e.g., Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE II* (James M. Buchanan & Robert D. Tollison, eds. 1984).

13. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

14. Compare, e.g., *The Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 803 (N.Y. 1996) (articulating common law Rule Against Perpetuities); with Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 89, 100–01 (2013) (cataloguing perpetuities reforms).

15. GERHART, *supra* note 1, at 23–24.

16. *Id.* at 24.

17. *Id.*

collective.”¹⁸ Quintessentially, a conversion action implicates corrective justice; tax policy, including property tax policy, implicates distributive justice.

Gerhart acknowledges that the distinction between the two “is not always honored in property theory”¹⁹ He is right, but the reason may be deeper than he admits. When it comes to private law, and the State as mediator between private parties, it is relatively easy to focus only or at least primarily on corrective justice. But Gerhart tries to impose a similar limit onto his treatment of public law as well, which is much more difficult. By limiting his focus to corrective justice, Gerhart risks missing the complexity of the interaction between the community and the State, and in particular the constitutional limits on State power.

III. SOCIAL RECOGNITION AND THE TAKINGS CLAUSE

According to Gerhart, existing “regulatory takings doctrine is pernicious precisely because it asserts the function of the state is to protect the value of property rather than protect the right to see value from property.”²⁰ Constitutional limits on the allocation of burdens and benefits should be confined to due process. Gerhart would apply the Takings Clause only when the State has expropriated the owner’s right to exclude (which it may only do when the market cannot produce a particular social good).²¹ The difference is conceptual, but the stakes are very real, because due process violations generally invalidate the government action, while takings violations result only in compensation.

Traditionally, and even sometimes still today, courts have distinguished between regulations on the one hand and takings on the other. They reason that a regulation is permissible, but a taking is not.²² For these courts, the ultimate question is one of classification: which of these two categories does a particular action fall within? Gerhart’s analysis is reminiscent of this approach. He claims that the distinction between eminent domain and a regulation is simply

18. *Id.* at 23.

19. *Id.* at 22.

20. GERHART, *supra* note 1, at 267.

21. *Id.* at 286–87 (“A prerequisite to market coordination of private decisions is that private owners have the right to exclude others. Without the right to exclude the market does not function. When the market is not serving its coordinating function and needs to be replaced with another method of coordinating decisions about resources (which is the function of the takings power), it is the right to exclude that must be taken because taking the right to exclude allows the state to coordinate uses in a way that mimics a well-functioning market.”).

22. *Cf. e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986) (“[T]he outer limit of the police power has traditionally marked the line between *noncompensable* regulation and compensable takings of property, not the line between compensable takings and the area where the constitution bars government from engaging in any sort of exchange whatever.”).

whether or not the government has taken the right to exclude.²³ That, he says, is the dividing line between usurping the property owner's rights to make decisions regarding the property, and not.²⁴

For Gerhart, the Takings Clause is, in a sense, outside of the definition of property. It polices the outer boundary of property, delimiting when it is no longer private. But the Takings Clause should be seen as internal to the definition of property. It applies to rebalance the burdens of ownership, not only when ownership is supplanted by the State, but also when its associated burdens and benefits are unduly distorted by the State. Instead of a constraint on those regulations that are tantamount to expropriation, the Takings Clause reflects a compromise that protects some property owners from the most extreme costs and consequences of beneficial legal change.²⁵ It is actually a middle ground, allowing the government to regulate and the legal change to occur, but requiring compensation if the results are too burdensome. While the State may reasonably disagree with property owners about the applicability of the Takings Clause in specific cases, the overall nature of the protection as facilitating legal change can be embraced by the regulator as well as by the regulated. In other words, the Takings Clause can actually facilitate the evolution of property norms. Extending Gerhart's own evolutionary account reveals the important role that takings protection can play.

Gerhart describes social recognition evolving with assertions of rights that are modified over repeated interactions. Someone may claim an entire orchard but, when challenged, retreat to a claim to a particular tree, or even just a single apple.²⁶ The same can be true of positive rights, too. Recall, *pace* Gerhart, that the State and state actors have incentives that are distinct from the community's. Therefore, the State's preferred outcome—and first attempt—may simply be to rule by fiat. Faced with rebellion or political opposition, the State might be forced to moderate its assertion of power, either by withdrawing its assertion of power, or promising to compensate instead. Where offered, the promise of compensation can be seen as a compromise position by the State to make palatable those restrictions

23. GERHART, *supra* note 1, at 287 (“[R]egulations that take away the right to exclude are takings.”).

24. *Id.* Gerhart acknowledges that some regulations have the same effect and thinks the Takings Clause should apply there too, but regulatory takings doctrine traditionally goes much further than this, and Gerhart rejects that extension. He would limit regulatory takings doctrine only to those cases that amount to permanent physical occupations.

25. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 349 (2014) (“The compensation requirement for regulatory takings serves to protect property owners from the effects of legal transitions . . .”).

26. GERHART, *supra* note 1, at 93–94 (“The claim may not be to an apple; the person who picks an apple may, by virtue of that act, claim the entire apple orchard or all the apples in the world . . .”).

or controls that would otherwise generate too much opposition.²⁷ The Takings Clause embodies this compromise; it is a political precommitment to pay compensation for exertions of regulatory power that would otherwise be unacceptable. This is not a novel theory. Frank Michelman's account of demoralization costs is remarkably similar, although he uses a different vocabulary.²⁸ The State must pay when the costs of not doing so are too high.

This conception of the Takings Clause, however, cannot be implemented without attending specifically to concerns of distributive justice. It is about offering a compromise specifically when regulatory burdens are perceived as unfair or unjust. The Takings Clause is therefore intimately bound up with distributive justice. One of the Supreme Court's pronouncements about takings liability is as insightful as it is vague: The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²⁹ As Hanoch Dagan recognized, "This statement places the Aristotelian notion of distributive justice—which requires that recipients of benefits and burdens receive their share according to *some* criterion—at the heart of takings jurisprudence."³⁰

Recognizing the State's interventions in property as redistributive makes it easy to see that such redistribution can happen in one of two ways. It can happen either through the explicit expropriation of property from some people to give to others, as in *Hawaii Housing Authority v. Midkiff*.³¹ But it can, and usually does, happen through the redefinition of property rights. Three examples demonstrate this point clearly, the first focusing on the distributive aspects of the line between due process and takings; the second on the distributive aspects of the line between regulatory takings and eminent domain; and the last on the distinction between institutional actors. All make the point that Gerhart's narrow role for the Takings Clause fails to account for contexts in which the Takings Clause is an important limitation on state power.

The first is the zoning of prior non-conforming uses.³² Gerhart himself points to this issue as an example of the due process limits on

27. This is an apt if overly simplified description of the origins of the United States, and its break with England. Dissatisfied with the property regime in England, and the King's continued control over property in America, the American Revolution redefined the scope of governmental authority over property, and wrote new restrictions into the Constitution.

28. Frank I. Michelman, *Property, Utility & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

29. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

30. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 742 (1999).

31. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

32. See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222 (2009) (for a comprehensive examination of the problem).

retroactive legislation. Indeed, if a government attempts to regulate retroactively, the effect is “adjudicating claims based on past events” which “violates due process.”³³ This is entirely consistent with basic intuitions, especially when it comes to criminal law (as reflected in the *ex post facto* clause), torts, and some common law property doctrines. But the line between prospective and retroactive regulation in the context of public land use regulation—Gerhart’s quintessential example of public regulation—turns out to be much more complex, as I have argued in previous work.³⁴ The problem, fundamentally, is that every land use regulation has a retroactive effect. As Holly Doremus has pointed out, “new property rules can never be wholly forward-looking,” because while “they can be applied only to new activities, they can never be applied to new land.”³⁵

Consider, then, a land use regulation that eliminates an existing use of property—for example a new zoning rule that prohibits adult uses in a particular zone, and does not grandfather existing uses. That ordinance is not retroactive in the strong sense because it only requires compliance with the law going forward. It does not impose penalties or fines based on the prior existing use in the past. The ordinance has a retroactive effect, however, because it interferes prospectively with the property owner’s past decisions—i.e. the choice to build the adult use in the first place. But all land use regulations have such an effect to a greater or lesser degree. If someone buys farmland planning to develop a subdivision, and a zoning change downzones the property to agricultural use only before the subdivision occurs, she will also experience the zoning change as having a retroactive effect.³⁶

For purposes of the argument here, the problem is not just that the boundary line between prospective and retroactive land use regulations is difficult to draw. The problem is that the boundary should not be policed exclusively by due process analysis. It may well be that a regulation requiring the immediate cessation of a use is important, and creates significant public benefits that outweigh the burden to the property owner. The regulation is thus rationally related to a legitimate and even important government purpose and so satisfies due process. But that should not necessarily end the analysis because of the extent of the burden on the property owner. The real question here is not whether the government should be able to act. It should, if eliminating the existing use really benefits society more than it harms the burdened property owner. The real question is whether the government should have to compensate for the impact of its regulation.

33. GERHART, *supra* note 1, at 300.

34. See Serkin, *supra* note 32, at 1262–63.

35. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 11–12 (2003).

36. See Serkin, *supra* note 32, at 1264.

Under Gerhart's account, the answer is simple: No. The regulation does not eliminate the right to exclude. It is "merely" a land use regulation. And under due process analysis, it is a permissible one. This example, though, demonstrates the challenges of Gerhart's stingy view of the Takings Clause. In at least some cases, the government should be allowed to eliminate a prior non-conforming use, but should have to pay compensation to do so.³⁷ Deciding precisely when and in what circumstances the government must pay compensation in such a case depends on particular distributive commitments. Formalistic line-drawing between due process and takings will not answer the question.

The line between eminent domain and regulatory takings also implicates distributive justice. Consider, in this regard, a developer seeking to build a significant new building in New York City, or other major metropolitan area. There may be corrective-justice limits on the developer's right to build. For example, the developer cannot build in a way that causes subsidence of neighbors' property. The new building also may not be allowed to interfere with existing buildings' light and air. In fact, it is not too much of a stretch to see most of the content of a traditional zoning ordinance as reflecting basic limitations on property rights based on social recognition and, ultimately, corrective justice as Gerhart defines them. This all fits nicely in Gerhart's account.

Other requirements, however, do not. Inclusionary zoning, for example, can require developers to provide affordable housing. Exactions in various forms may require set asides for open space, infrastructure development, and even outright payments for school costs and so forth. These affirmative obligations are often built directly into the zoning ordinance defining the rights of the property owner, and they are squarely redistributive. They are not concerned with the reciprocal interactions between neighboring property owners, but instead are about the allocation of benefits and burdens in society more generally.

These kinds of zoning interventions can actually be substitutes for an explicit exercise of eminent domain. A government seeking to provide affordable housing that the market is failing to produce has a number of strategies to pursue. It can take property by eminent domain and build public housing, or it can leave property in private hands but demand the private production of affordable housing as a precondition for other development. For Gerhart, these regulations do not eliminate the right to exclude and so are not subject to takings analysis. That, however, is an uncomfortable result. It is again easy enough to envision regulatory burdens that satisfy due process but

37. See *id.* at 1288 ("The normative justifications for current existing use protection are surprisingly unconvincing.").

that nevertheless impose substantial burdens and are, in effect, substitutes for eminent domain.

Admittedly, Gerhart attempts to caveat out exactions from his takings analysis.³⁸ He may extend that qualification to inclusionary zoning, special assessments, and other explicit demands that the government makes of property owners. But this starts to swallow up an enormous swath of modern land use controls.

I am generally sympathetic to the normative goal of limiting regulatory takings doctrine. I agree that the State has, and should have, broad power to regulate. But this particular line-drawing seems overly formalistic, especially once one accepts the extent of redistribution that happens through the State's interaction with property. And it is impossible to decide the limits of the government's power to demand obligations from property owners without invoking explicitly distributive concerns.

Importantly, positive property rights implicate distributive justice even when the source of the rights is judicial and not legislative. The Takings Clause is most associated with regulatory burdens, but the source of beneficial legal changes can also be judge-made law, and the analysis is surprisingly similar. The burgeoning literature on judicial takings—or is it a flash in the pan?—makes this point directly.³⁹ And an example is useful.

In the 1970s, two sugar companies in Hawaii were in litigation over water rights.⁴⁰ Each claimed a right to water from a river. The suit wound its way up to the state Supreme Court, which ruled, *sua sponte*, that the water did not belong to either company but instead belonged to the people of Hawaii.⁴¹ The two sugar companies immediately joined sides and filed suit in federal district court alleging that the state court's opinion amounted to a taking of their property. After various procedural moves, and an eventual clarification by the state Supreme Court, the suit was ultimately dismissed. But it points to an important concept. Had the case proceeded, there is no obvious reason why the federal courts' response should have been limited to the binary choice under due process of either accepting the state court's conclusion, or striking it down.

The state court's ruling squarely implicated distributive justice, effectively allocating important resources between private companies and the public. And it may well have effectuated a change in people's

38. GERHART, *supra* note 1, at 260 (“I do not challenge (or discuss) the exactions cases”).

39. See, e.g., Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553 (2012).

40. Williamson B. C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts “Take” Property?*, 2 U. HAW. L. REV. 57 (1979–1981).

41. *Robinson v. Ariyoshi*, 441 F. Supp 559, 563 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

background expectations. But that change might have been simultaneously beneficial to society, and unfairly burdensome to the affected companies. If a federal court had struck down the ruling under Due Process, it might have been unfair to the public, and indeed might have prevented an important evolution in the law. But if it upheld the ruling, it could have worked a serious and unfair burden to the property owners. It is at least possible that a compensation remedy under the Takings Clause provides a beneficial alternative remedy, one that allows the evolution in property law but serves the interests of distributive justice.⁴² Whether or not that would have been an appealing remedy in this particular case, this discussion reinforces a more general point: positive definitions of property rights implicate distributive concerns that can be best addressed through the Takings Clause, whether the source of the definition is regulation or judge-made law.

Finally, the Takings Clause can exert pressure in the opposite direction as well. Gerhart's exceedingly narrow role for regulatory takings doctrine is at least in tension with his theory of a duty to others arising out of decision-making. In the private sphere, Gerhart offers a subtle account of other-regarding decisions, compelling property owners to consider the interests of other people when their decisions have an impact on others' wellbeing. This is a remarkably tort-like view of property, but also nicely accounts for a number of thorny cases and property doctrines.⁴³

It is not clear, however, why this is limited to private decision-making. Gerhart says: "In private law, courts assess individuals' decisions about resources by comparing an individual's behavior with the behavior of an ideal decision maker and correcting those behaviors that do not seem to embody an appropriate way of thinking about the well-being of others."⁴⁴ That same reasoning could apply to decisions by the State. Just as private decision makers can fail to account for the consequences of their actions to others, so too can the State fail to address the appropriate allocation of burdens and benefits resulting from its property regulations.

Gerhart rejects extending this reasoning to the State because he ultimately adopts a relatively passive role for the State in its interaction with property. Recognizing how intimately the State's interaction with private property is bound up with distributive justice, however, makes this passive role harder to defend.

Once the State acts to define the content of property rights on grounds of distributive justice—whether through regulations or otherwise⁴⁵—the State cannot assume the role of passive enforcer of pri-

42. Bloom & Serkin, *supra* note 39, at 615–16.

43. GERHART, *supra* note 1, at 287.

44. *Id.* at 47.

45. See generally Bloom & Serkin, *supra* note 39 (applying the Takings Clause to judicial decisions).

vate rights. It is intimately bound up in the content of those rights, the justifications for which are always evolving. In our fast-paced world, a regulation that was justifiable on distributive justice grounds when enacted can become unjustifiable as conditions in the world change. Limiting property regulation to concerns of corrective justice, and limiting regulatory takings doctrine to a narrow set of permanent physical occupations, sells short the extent to which the State is and should be entangled with the substantive content of property, and its distributional consequences.

Extending Gerhart's focus on the duties arising out of decision making to the State has important doctrinal consequences, as well as these more conceptual and normative ones. Traditional regulatory takings analysis focuses almost exclusively on the effect of regulations and governmental acts on property value. But this is problematic because it makes the government potentially liable only for government actions and not for government inaction. In a new article, I argue that the government can—under certain limited conditions—violate the Takings Clause by failing to act to protect property. I do not need to rehearse the full argument here, but I justify my claim on several grounds. First, from an efficiency perspective, takings liability that applies only to government actions creates an incentive for the government to do nothing. Second, from a distributive perspective, the ultimate allocation of burdens and benefits in society can result from withholding regulatory benefits from some as surely as it can from imposing regulatory burdens on to others. In Michelman's terms, "Governmental inaction can be demoralizing, too."⁴⁶

This is admittedly an unorthodox account of the Takings Clause, both doctrinally and normatively. But Gerhart's theory of property should offer additional support. Once the state is viewed as something separate from the community—subject to its own evolutionary pressures, as I argued above—its interactions with property owners can produce the same expectations over time as owners' interactions with each other. Just as repeated interactions over time can produce affirmative obligations on owners to each other, it can also plausibly produce affirmative obligations on the State. And applied to the State, recognizing such a duty can have important progressive effects, from discouraging the government to ignore the risks of sea level rise, to encouraging the government to respond to various systemic threats to property. But the principal mechanism for enforcing that obligation is the Takings Clause. In other words, Gerhart's evolutionary account of property should support affirmative obligations on the state, but is in real tension with his thin view of constitutional rights.

Whatever one's view of the substance of regulatory claims based on governmental inaction, the more general point is the more important

46. Serkin, *supra* note 25 at 366.

one here: Gerhart recognizes a largely passive role for the State. This does not sufficiently recognize the broad range of responsibilities that the State properly owes to the public, responsibilities that are sometimes required by the Takings Clause, although not according to Gerhart.

IV. CONCLUSION

Gerhart has written an important and subtle book. His evolutionary account of property, and his focus on decision-making is bound to have a lasting impact. His ability to demonstrate coherence in a broad range of property doctrines is a testament to the persuasiveness of his approach. Extending his evolutionary account to the political realm, and to the recognition of property rights by the State, enriches our understanding of positive rights. But it also reveals limits to his analysis of the State's interaction with property. Recognizing that distributive justice concerns are at the heart of property's evolution within the State suggests that the State has an active role in allocating the burdens and benefits of property ownership, a role that it can abuse through regulatory excess or through inaction.