

ESSAY

DEMYTHOLOGIZING PROPERTY AND THE ILLUSION OF RULES: A RESPONSE TO TWO FRIENDLY CRITICS

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Academic life can be a depressing experience. Despite the enormous amount of time many academics spend producing written scholarship, most of us have little expectation that more than a tiny handful of people will read our published work, if indeed it is read at all. And probably even fewer of us have any expectation whatsoever that the results of our often wrenching labor will be publicly aired. It is a rare occasion when an academic's scholarship is the subject of public recognition. But oh, how we crave any sort of public commentary, favorable or critical! So, I am extremely grateful that Dean Dagan and Professor Underkuffler found my book, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*, worthy of public critique. I am deeply grateful to them for participating in this discussion and also to the Editors of the *Cornell Law Review* for devoting the space in these pages to make this public conversation possible. In this brief Essay, I will confine my comments to what seem to me to be Dean Dagan's and Professor Underkuffler's main points.

I

DEMYTHOLOGIZING PROPERTY: A REPLY TO PROFESSOR UNDERKUFFLER

Professor Underkuffler primarily focuses on my notion of the social-obligation norm in constitutional property law.¹ She begins discussing the need for such a norm by describing a mythology that besets property.² Property, she suggests, is typically imagined and discussed, both in popular and legal consciousness, in terms of separation, isolation, individual autonomy, and self-control.³ Within this

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¹ See Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1242 (2007) (essay).

² See *id.* at 1234–44.

³ See *id.* at 1244.

discourse, property is one-sided and nearly absolute, defined from the individual owner's perspective alone.⁴ This way of understanding property rights is a mythology, she contends, because property is unavoidably social.⁵ Property is not and logically cannot be purely individual; it always affects someone else.⁶

Underkuffler notes that this dissonance between discourse and reality is true of all individual rights, but she contends that the mythology of property is particularly engrained in popular consciousness.⁷ Although political rhetoric and popular culture tend to define and discuss all individual rights solely from the rights-bearer's perspective, most people intuitively understand that rights such as free speech are social, contextual, and contingent.⁸ They recognize that these rights are relational and that the myth that such rights are purely individual and acontextual is just that: a myth.⁹ This is not so with respect to property rights, according to Underkuffler. She believes that people generally conceive of property as individual and isolational rather than social.¹⁰ One indication of this, she suggests, is that inquiries concerning the justice of takings law are one-sided, focused solely on what the owner has lost rather than what others have gained.¹¹

As Professor Underkuffler notes, this situation is ironic—and, I would add, somewhat paradoxical—because the mythology of rights as nonrelational and one-sided is actually less true of property than it is of other rights.¹² People can conceive of freedoms such as the right to free speech in such terms because they are freedoms that, as she puts it, “individuals can naturally, *individually*, and *equally* enjoy.”¹³ In contrast, private property rights permit individuals who control resources subject to these rights to exclude others in such a way that the excluded parties cannot simultaneously enjoy these resources.¹⁴ This is, of course, the familiar allocative function of property rights.¹⁵ Precisely because of this allocative function, it is impossible to define

⁴ See *id.*

⁵ See *id.* at 1244–45, 1247–48.

⁶ See *id.* This, I take it, is the point of the arresting sentence in what is perhaps the single most influential essay on the literature on the economics of property rights: “In the world of Robinson Crusoe property rights play no role.” Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 347 (1967).

⁷ See Underkuffler, *supra* note 1, at 1244–45.

⁸ See *id.* at 1244.

⁹ See *id.*

¹⁰ See *id.* at 1244–45.

¹¹ See *id.* at 1246–47.

¹² See *id.* at 1247.

¹³ *Id.* (emphasis added).

¹⁴ See *id.*

¹⁵ GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 5 (2006).

property rights in strictly private terms. There are always losers along with winners.

I would refine Professor Underkuffler's point only slightly. As I pointed out in my book, individual rights other than private property may also have allocative effects.¹⁶ But the difference between rights to property and rights to speech, for example, is that the allocation of scarce resources is not understood to be a function, let alone a core function, of speech. The allocation of scarce resources *is*, however, a core function for property rights.¹⁷ Indeed, the inherently allocative aspect of property rights is a major reason why there has been so much debate about private property rights.¹⁸

Professor Underkuffler acknowledges that this mythology of property can perform useful functions, but argues that the benefits of this mythology have dwindled in modern American society, where reality is becoming more obvious.¹⁹ In agreeing with me that it is now necessary to explicitly develop a social-obligation norm in American takings law, she states, "We no longer have the luxury of operating with the 'mythology' of property as a free-standing, individually protective, socially acontextual entity."²⁰ The regulatory revolution in land-use law has exposed the dissonance between the myth and the reality of property rights, leading property-rights advocates to organize popular political campaigns to roll back all manner of land-use regulations.²¹ Fueling this backlash, Professor Underkuffler contends, is the mythology of property.²² The problem is not just that legislatures are eliminating beneficial land-use measures, but that the whole debate lacks "acknowledgment of property's necessary and unavoidable contextuality."²³

Although the absence of any explicit social-obligation norm in American takings law is not the only factor that has contributed to this mythology of property and to the mythology's impact on the debate over land-use regulation, it is one important contributing factor. It is not that such a norm is entirely absent—a social-obligation norm *does* exist in American property law. Traces of it are scattered around both constitutional and private-law doctrines.²⁴ However, murky notions such as the Takings Clause's "noxious use" doctrine obscure the so-

16 *See id.*

17 *Id.*

18 *Id.*

19 *See* Underkuffler, *supra* note 1, at 1248–49.

20 *Id.* at 1243.

21 *See id.* at 1250–51.

22 *See id.* at 1250.

23 *Id.* at 1252.

24 *See* ALEXANDER, *supra* note 15, at 227–33.

cial-obligation norm.²⁵ The core premise of the noxious use doctrine, though, is that private owners have a duty to protect and promote society's well-being.²⁶ The doctrine implicitly acknowledges that, as Professor Underkuffler has elsewhere put it, "[p]roperty rights are, *by nature*, social rights."²⁷ Frank Michelman has also identified something similar to what I call the social-obligation norm in American constitutional law.²⁸ His account of our constitutional commitment to property as a tool for the common good is worth quoting fully. He states:

Our constitutional culture includes a deep and ancient tradition of expected regard, when you make use of your property, for other people's and the public's interest and concerns. It includes a deep and ancient strain that says this expectation of regard for public interest and concerns is subject, when the occasion requires, to legislative definition and regulatory enforcement, a strain that developed early under the rubric of public nuisance. The tradition, in sum, is one of a law of property *that is functionally oriented to contemporary community goals, as well as to protection of private advantage*, and that relies on the police powers of legislatures, alongside common law adjudication by courts, to negotiate and mediate between the two.²⁹

It is one thing, however, for the social-obligation norm to exist implicitly in legal doctrines; it is another thing to overtly acknowledge and develop it. This is what has been lacking in American law, especially takings law. Although takings law does implicitly acknowledge a social-obligation norm, courts have not systemically developed that norm.

Making the social-obligation norm explicit is important for both expressive and substantive reasons. The Takings Clause expresses multiple social meanings that go beyond the fairness and efficiency rationales that courts and commentators typically acknowledge. The Takings Clause's normatively pluralistic character reflects the normatively pluralistic character of American property law generally. Like the private law of property, the Takings Clause, as Dean Dagan has elsewhere commented, "is devoted to realizing not only the common good of individual liberty but also other common goods: social responsibility and equality."³⁰

²⁵ See *id.* at 76–77.

²⁶ See *id.*

²⁷ LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 145 (2003).

²⁸ See Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 *FORDHAM ENVTL. L. REV.* 409, 416 (1995).

²⁹ *Id.* (emphasis added) (footnotes omitted).

³⁰ Hanoeh Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 *MICH. L. REV.* 134, 149 (2000).

Takings discourse needs to articulate openly these multiple meanings, especially social responsibility. An open recognition and systematic development of the social-obligation dimension of ownership would confront the mythology of property that is distorting our public debate over the propriety of various land-use regulations. Mythologies die hard, but they are not immune from attempts to pry open their basic assumptions. This is the point at which a comparative approach can make its greatest contribution. It throws into question those taken-for-granted assumptions of the legal system and the society that it serves. As Professor Underkuffler observes, my discussion of the work of social-obligation norms in the German and South African constitutions illustrates that the security of property rights does not depend on the existence of the mythology of property as nonrelational.³¹ Open recognition of the social obligation, as she puts it, “need not push us down some slippery slope in which all sense of the human need for property is lost.”³²

II

THE SOCIAL-RESPONSIBILITY NORM AND THE ILLUSION OF RULES: A REPLY TO DEAN DAGAN

Dean Dagan’s self-described “friendly critique” is indeed friendly.³³ What unites us far outweighs what divides us. We disagree primarily over means, not ends. Both of us are committed to the project of recognizing and normatively developing the social dimension of property in both private and constitutional law. Even our differences over means are relatively modest. Still, it is worth discussing at least those differences that seem most significant.

A. Ends

Dean Dagan states that the purpose of the social-obligation norm is justice.³⁴ *Of course* it is about justice. But the real question is what conception of justice should ground the duties that property owners owe to society. It is precisely because there are many competing theories of justice that the scope and consequences of the social-obligation norm are inherently, and strongly, controversial. Dean Dagan’s conception of justice appears to be a straightforwardly liberal conception of distributive justice.³⁵ But there are other objectives a social-obligation norm could serve, including community. Dean Dagan’s concep-

³¹ See Underkuffler, *supra* note 1, at 1240–43, 1253.

³² See *id.* at 1253.

³³ Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1256 (2007) (essay).

³⁴ See *id.* at 1259.

³⁵ See *id.*

tion of community seems to be one in which a community can only demand concessions from its members if it is likely to pay back those debts in the long, if not the short, run.³⁶ That is, membership in a community, political or otherwise, never warrants sacrifices by its members that are highly unlikely to remain uncompensated.³⁷ A full response to this claim would require a much more lengthy and fundamental treatment than I can give in this brief reply. I do want to note, however, that there remains something about this conception that strikes me as incomplete. The theory that long-term as well as short-term or immediate compensation needs to be taken into account in determining whether compensation is due seems to me correct, within limits. There is genuine reason for concern that the social-obligation norm might be carried too far and oppress the poor and politically weak. Dean Dagan's theory of long-term reciprocity serves as a useful way to identify and isolate such cases of exploitation.³⁸

But I suspect that my conception of community is more robust and, in that sense, more demanding than Dean Dagan's. This conception of community, which I have defended elsewhere,³⁹ holds that being a member of a community means that sometimes we may have to make sacrifices even though, individually, we may not plausibly receive compensation, even over the long term, that remotely approximates the sacrifices we made. An obvious example is military conscription. Without necessarily committing myself to advocating restoration of the draft, I simply want to point out that one possible basis for justifying compulsory military service is the notion that membership in a political community may entail noncompensable sacrifices for the good of the entire community, as well as enjoyment of the fruits of community membership. Of course, there is a legitimate concern that this conception of community may be taken too far. We need to protect important values like fairness, self-realization, and human dignity, even as we recognize that community membership imposes duties. This is the irreducible tension that runs throughout takings law and at least partly explains why takings law is unavoidably muddled.⁴⁰ But if we limit recognition of our contributory obligations strictly to circumstances where the individual eventually gets a benefit as valuable as the burden she has sustained, then we weaken our con-

³⁶ See *id.* at 1266–67.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989).

⁴⁰ See Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENT. 259, 260–61 (1992); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 599, 604 (1991); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 588–97 (1984).

ception of community and hinder it from fostering human flourishing. Making the community's return contribution to the individual the sole touchstone for whether and when individuals owe obligations to the community ends up implicitly operating on the same quid-pro-quo logic in which the community's legitimacy depends on its serving the well-being of the ontologically prior individual, rather than, in some sense, constituting the individual.⁴¹

B. Means

Dean Dagan's most significant points, in my mind, involve the means by which the social-obligation norm is realized. He criticizes several aspects of German constitutional property law as problematic for various reasons,⁴² and I want to join issue with him on some of these.

As a preliminary matter, a clarification is in order. Regarding the role of dependence in setting the strength of the social-obligation norm, German law does not view the dependence of nonowners on the use of another's property in the abstract.⁴³ Dependence is not an isolated factor; it is inextricably bound up with the overall relational calculus. Thus, Dean Dagan's suggestion that courts should "focus[] on the nature of the relationship between the dependent party and the owner whose property is diminished in value"⁴⁴ is precisely the approach to setting the social-responsibility level that German law adopts. This point was inadequately clarified in my book.

The most intriguing suggestion in Dean Dagan's critique concerns the possibility of awarding partial compensation.⁴⁵ Here again, our differences are less significant than our agreements. Both of us agree that partial compensation is "a more nuanced takings doctrine than the one currently available."⁴⁶ Our basic disagreement concerns the use of rules rather than a more open-ended standard as the guiding norm for determining when and how much partial compensation courts should award. Dean Dagan argues that my "endorsement of ad hoc application of constitutional commitments and ex post adjustment of property rights is unjustifiable [and] . . . unnecessary to

⁴¹ An older but still rich exposition of this approach to community is Jacques Maritain, *The Person and the Common Good*, 8 REV. POL. 419, 449–50 (1946). I am indebted to Eduardo Peñalver for bringing this essay to my attention.

⁴² See Dagan, *supra* note 33, at 1265–67.

⁴³ See ALEXANDER, *supra* note 15, at 135–36 (discussing the German courts' analysis of dependence in the context of other factors and illustrating these contextual factors with the example of the *Small Garden Plot Case*).

⁴⁴ Dagan, *supra* note 33, at 1266.

⁴⁵ See *id.* at 1267–69.

⁴⁶ *Id.* at 1268.

achieve [our] goals.”⁴⁷ Here, we simply disagree. Without rehearsing the all-too-familiar arguments in the rules-vs.-standards debate,⁴⁸ I do need to make two points about the question of means. First, I did not mean to advocate the unrelenting use of open-ended and vague standards. Rather, my suggested approach is better described as “judicial practical reasoning.”⁴⁹

The second point concerns Dean Dagan’s important, indeed, central, emphasis on equality. He argues that “[r]ule-based regimes promote equality by reducing the (sometimes unconscious) possibility of a bias in the application of officials’ discretion.”⁵⁰ It is not clear to me that in the abstract, rules promote equality better than a more discretionary regime. My sense is that this can only be determined contextually. Much depends on what substantive issue is at stake, what institution is involved, and how well-known the rule is among the pool of persons who are subject to it. There are good reasons to be skeptical about the equality-promoting benefits of rules. For example, the lay public (and even some lawyers) may not know the legal rules, especially those that are highly technical in character. Even if known, moreover, technical rules often require legal assistance in order to honor them in practice. The rules prescribing formalities for execution of wills, for example, traditionally have been hard-edged, but there is good reason to believe that they hurt the poor far more than they do the wealthy.⁵¹ It is easy for the lay person to get tripped up by them, making it strongly advisable for people to have lawyers prepare their wills.⁵² Indeed, one of the main reasons why the trend in wills law is against hard-and-fast rules⁵³ is precisely because they tend to disadvantage the poor. The common-law Rule Against Perpetuities is perhaps an even more obvious example of a “crystal”-like rule⁵⁴ whose compliance as a practical matter requires legal counsel—usually high-

47 *Id.*

48 For compelling arguments on this issue see *id.* at 114 n.88 (listing sources); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 136–39 (1997); and Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

49 See Frank Michelman, *A Reply to Susan Rose-Ackerman*, 88 COLUM. L. REV. 1712, 1712 (1988).

50 Dagan, *supra* note 33, at 1268.

51 See, e.g., James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 545 (1990).

52 Cf. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036–37 (1994) (noting easily overlooked formal defects, none of which would necessarily be obvious to a layperson, that might cause a court to invalidate a will).

53 See generally *id.* (exploring the tension regarding the “role of formalism in private law adjudication” and critiques of formalism in wills adjudication).

54 Carol Rose first coined the term “crystal” as applied to rules. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

priced legal counsel at that.⁵⁵ Such rules are traps for the unwary or unsophisticated and frustrate rather than advance the goal of equality.

A second problem with rules from the perspective of equality is that they can be set up to favor a particular set of class interests, precisely the problem that worries Dean Dagan.⁵⁶ An obvious example is Professor Richard Epstein's approach to takings questions.⁵⁷ Epstein's theory of takings is quite clear and rule-like, but it is hardly likely to promote equality. Its effect would be simply to lock in the existing distribution of wealth, thereby advantaging the haves over the have-nots.

A third problem with Dean Dagan's proposal is that the "rule-ness" of his rules is somewhat illusory. For example, the proposal would have courts apply differential levels of compensation according to the type of benefited community.⁵⁸ Differential percentages of compensation are set depending upon whether the beneficiary of the expropriation or (in the case of a regulatory taking) a land-use regulation is a "local" or a "larger" community.⁵⁹ But the distinction between local and broader communities is not self-defining. The relevant local community of an affected landowner will vary depending on the identity and size of the landowner. My local community is not the same as Del Webb's⁶⁰ or any other large publicly traded developer. Del Webb's relevant community is not confined to one city or even one state, as mine is.⁶¹ The difference in our respective communities affects the calculus of reciprocity. Dean Dagan's notion is that long-term reciprocity is greater (requiring a lower level of compensation) when a local community is the actor than when a large community is the actor creating the harm.⁶² But because Del Webb operates on a vastly different, i.e., larger, scale than I do, our relevant communities are different, and what harmful actions we, as landowners, can justifiably tolerate—our reciprocity bases—will differ substantially. Operating within the terms of Dean Dagan's analysis, one might argue that harmful actions by the state or even the federal government

⁵⁵ Cf. Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1027 (1987) (noting that even many lawyers do not understand the Rule Against Perpetuities well enough to be certain they are creating valid interests).

⁵⁶ See Dagan, *supra* note 33, at 1268–69.

⁵⁷ See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

⁵⁸ See Dagan, *supra* note 33, at 1269–72.

⁵⁹ See *id.* at 1270.

⁶⁰ Del Webb Corp. is a national development corporation that specializes in building communities throughout the United States for families and active adults age 55 and over. For more information, see Del Webb Corp., *Active Adult Communities*, www.delwebb.com (last visited June 27, 2007).

⁶¹ See *id.*

⁶² See Dagan, *supra* note 33, at 1269–72.

against me may require compensation because the degree of long-term reciprocity is slight, but precisely because of its larger scale, Del Webb is much more likely to be able to tolerate the same action with no payment of compensation.

The shifting meanings of local and nonlocal communities as the scale of the affected owner changes complicates the other element in Dean Dagan's grid of rules, the distinction between property that is "fungible" and that which is "constitutive."⁶³ As an owner's local community changes, so will the identity of its property as constitutive or fungible. Property that was constitutive of Hewlett-Packard when William Hewlett and David Packard were tinkering in a garage in Palo Alto is today fungible. These complications undermine both the predictability and equality benefits of Dean Dagan's grid.

Despite these differences, Dean Dagan, Professor Underkuffler, and I are in basic agreement on fundamental points regarding the inherent existence of a social obligation in ownership and on the need for scholars and courts to explicitly acknowledge and develop the social-obligation norm, especially in takings law. Comparative law is certainly not the only source that might usefully guide such an endeavor, but it is a very good place to start.

⁶³ See *id.* at 1270–72.