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Introduction

Sheila R. Foster
Fordham University School of Law

Daniel Bonilla

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SYMPOSIUM

**THE SOCIAL FUNCTION OF PROPERTY:
A COMPARATIVE PERSPECTIVE**

INTRODUCTION

Sheila R. Foster & Daniel Bonilla***

The classical liberal conception of property dominates the modern legal and political imagination. The idea that property is a subjective and nearly absolute right controls the way in which much of modern law and politics understand this institution. It is common for citizens, politicians, and academics to view property as an individual right that is limited only by the rights of others and the public interest. The holder of this right is therefore someone who can use, reap the benefits of, and dispose of her assets in the manner she deems appropriate, provided the limits imposed by the legal order and the common good are not violated.¹ This right, moreover, is essential for the exercise of individual autonomy.² Property enables and reflects the decisions made by individuals with respect to their life plans. Property provides the material substratum that allows people to construct their identities and express their moral commitments. Individual autonomy and property are thus deeply intertwined. Consequently, the classical liberal concept of property imposes negative duties on both the state and individuals.³ Both should refrain from acting in such a way as to adversely affect individual rights to property.

Despite its ubiquity in the modern legal and political consciousness, the classical liberal conception of property competes with, and is challenged by,

* Albert A. Walsh Professor of Law and Vice Dean, Fordham University School of Law. This symposium was sponsored by the Albert A. Walsh Chair in Real Estate, Land Use, and Property Law. My deepest gratitude extends to Professor Daniel Bonilla, for conceiving of the idea for this symposium, and Toni Fine, Assistant Dean for International Affairs at Fordham, for her assistance in organizing a very successful intellectual gathering.

** Associate Professor and Co-director of the Public Interest Law Group, University of the Andes School of Law, Bogotá, Colombia. He is currently the Leitner Center Distinguished Visiting Professor, Fordham University School of Law.

1. LOREN LOMANSKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 111–51 (1987).
2. Eric Mack, *Self-Ownership and the Right of Property*, 73 *MONIST* 519 (1990).
3. Richard A. Epstein, Property Rights and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State 6–10 (Aug. 5, 2009) (Hoover Inst. Task Force on Property Rights), http://www.law.nyu.edu/ecm_dl/v1/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_062726.pdf.

other forms of imagining the institution. Classical liberal property has been sharply criticized by theoretical perspectives as diverse as egalitarian liberalism,⁴ socialism,⁵ and communism.⁶ These perspectives generally challenge the classical liberal conception as incomplete or unjust. Critics indicate, for example, that classical liberal property obscures the obligations and connections that the subject has with the community,⁷ or they emphasize the negative consequences that this right has on the distribution of wealth.⁸ At the normative level, opponents of classical liberal property offer a variety of alternatives, from the abolition of private ownership of the means of production to strong government intervention in the rights to property in order to achieve redistributive aims.

I. LEÓN DUGUIT AND THE IDEA OF THE SOCIAL FUNCTION OF PROPERTY

One of these alternative concepts, and perhaps one of the most suggestive and influential of the twentieth century, is the social function of property.⁹ This way of understanding property was articulated paradigmatically by the French jurist León Duguit¹⁰ in a set of six lectures given in Buenos Aires in 1911.¹¹ At these conferences, Duguit argued that property is not a right but rather a social function.¹² According to this view, property has internal

4. See JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* 125–84 (1994); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* ch. 12 (Oxford Univ. Press 1990) (1988).

5. See P.J. PROUDHON, *WHAT IS PROPERTY: AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT* (Benjamin R. Tucker trans., 1876).

6. See KARL MARX, *THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844*, at 93–114 (Foreign Languages Publ'g House 1961) (1844).

7. See Patricia J. Williams, *On Being the Object of Property*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 165, 165–80 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

8. See generally MICHAEL OTSUKA, *LIBERTARIANISM WITHOUT INEQUALITY* (2003); Peter Vallentyne, *Libertarianism and the State*, 24 *SOC. PHIL. & POL'Y* 187 (2007).

9. See generally M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT'L L.* 191 (2010).

10. León Duguit (1859–1928) was a professor of public law at the University of Bordeaux beginning in 1886. For biographical information on Duguit, see José Luis Monereo Pérez & José Calvo Gonzalez, *León Duguit (1859-1928): Jurista de una Sociedad en Transformación*, 4 *REVISTA DE DERECHO CONSTITUCIONAL EUROPEO* 483, 483–86 (2005). Duguit is considered to be the father of the social function of property. See UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 31 (2000); Julian Conrad Juergensmeyer, *Florida's Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 *FLA. L. REV.* 695, 701 (1996); David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-liberal Constitutionalism*, *LAW & CONTEMP. PROBS.*, Autumn 2000, at 83, 92.

11. See LEÓN DUGUIT, *LAS TRANSFORMACIONES DEL DERECHO PÚBLICO Y PRIVADO* (Editorial Heliasta 1975) [hereinafter DUGUIT, *LAS TRANSFORMACIONES*]. Some of Duguit's works translated into English are LEÓN DUGUIT, *LAW IN THE MODERN STATE* (Frida Laski & Harold Laski trans., 1919) and León Duguit, *Changes of Principle in the Field of Liberty, Contract, Liability, and Property*, reprinted in *THE CONTINENTAL LEGAL HISTORY SERIES, THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY* 65 (Layton Bartol Register & Ernest Bruncken trans., Little, Brown, & Co. 1918).

12. DUGUIT, *LAS TRANSFORMACIONES*, *supra* note 11, at 236.

limits—not just external ones as in the case of the liberal right to property.¹³ The owner has obligations with respect to his things. He cannot do what he wants with his property. He is obliged to make it productive. The wealth controlled by owners should be put at the service of the community by means of economic transactions.¹⁴ Consequently, the state should protect property only when it fulfills its social function. When the owner is not acting in a manner consistent with his obligations, the state should intervene to encourage or to punish him. Taxation and expropriation are powerful tools for achieving such ends. From this perspective, the state has both negative and positive obligations with respect to property.

The idea of the social function of property is based on a description of social reality that recognizes solidarity as one of its primary foundations.¹⁵ For Duguit, the weaknesses of the classical liberal theory of property stem from the erroneous description of the individual and the society in which she is based. Liberalism's emphasis on the individual and her rights is, for him, closely intertwined with the description it offers of human beings and the political community.¹⁶ In liberal thought, people are essentially autonomous and rational beings. Individuals have the ability to articulate, transform, and try to realize life plans by making use of reason. Consequently, the political community is a voluntary creation of individuals geared towards increasing the likelihood of autonomously and rationally constructing their life plans.¹⁷ The political community is the sum of the individuals that compose it. Rights, like those of property, are the instruments articulated to ensure that the state does not intervene unduly in the continuous process of construction and revision of individual identity. To Duguit, this conception of the subject and society loses sight of the fact that the interdependence between people (which is nothing other than solidarity) is the central element of social reality.¹⁸ Solidarity is not a political principle but a social fact.

For Duguit, a precise description of society makes clear that its members have needs and capacities that are sometimes similar and other times different.¹⁹ The social division of labor is therefore crucial to ensuring the satisfaction of these needs. In order for the people and the community to flourish, each individual must comply with a series of functions determined by the position she occupies in society. The theory of the social function of property is thus, in the words of Duguit, “realist” and “socialist”²⁰: realist in that it is based solely on facts that can be known empirically; socialist in that it stems from basis of solidarity, that is, the interdependence that

13. *See id.* at 179.

14. *Id.* at 240.

15. *Id.* at 235–36.

16. *Id.* at 177.

17. *Id.*

18. *Id.* at 180–84.

19. *Id.* at 182.

20. *Id.* at 181.

characterizes society. Duguit therefore draws explicitly on the positivism of Auguste Comte²¹ and the structural functionalism of Emile Durkheim.²²

Based on this functionalist description of society, Duguit challenges both the individualism²³ and the metaphysical nature²⁴ of the liberal right to property. Both dimensions of liberal property, Duguit argues, are defined in a paradigmatic way in the Declaration of the Rights of Man of 1789 and the Napoleonic Code.²⁵ Duguit considered the Declaration and the Code to be the two legal-political documents most representative of liberal thought. Duguit asserts that many jurists believe, wrongly, that these two texts contain the principles from which a perfect and eternal legal system can be derived,²⁶ an order that would have the same formal characteristics as Euclidean geometry.²⁷ Thus, for Duguit, challenging how property is conceived in these two sets of norms is challenging the core of liberal law.²⁸ The two central norms on matters of property in this legal-political framework are Article 2 of the Declaration and Articles 544 and 545 of the Napoleonic Code. Article 2 of the Declaration states, “The purpose of all civil associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.” Articles 544 and 545 of the civil code of Napoleon affirm that:

Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes. No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity.²⁹

According to these norms, Duguit states, property is defined as an individual, natural, and nearly absolute right, limited only by the legal order and the public interest.

Duguit’s critique of the individualism of the liberal right to property has three components. The first challenges the supposition from which the liberal right to property departs: the existence of an isolated individual.³⁰ For Duguit this is a premise that does not correspond with an accurate description of reality. Human beings, when properly described, are not isolated beings who seek to construct and realize their life plans alone. On the contrary, they are deeply interconnected beings that need each other to

21. *Id.* at 176.

22. *Id.* at 182.

23. *Id.* at 237.

24. *Id.* at 174–76.

25. *Id.* at 172.

26. For an analysis of Duguit’s anti-formalist positions, see Mauricio García-Villegas, *Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States*, 31 *LAW & SOC. INQUIRY* 343, 349–56 (2006).

27. DUGUIT, *LAS TRANSFORMACIONES*, *supra* note 11, at 172.

28. For Duguit, civil law has four main components: liberty, property, contracts, and torts. *Id.* at 183–84.

29. *CODE NAPOLEON* arts. 544–545 (Fr.).

30. DUGUIT, *LAS TRANSFORMACIONES*, *supra* note 11, at 178.

meet their physical and spiritual needs. As mentioned, for Duguit, interdependence is a key feature of social reality.³¹

The second component of the argument makes explicit the inconsistency that exists for Duguit between the idea of an isolated individual and the right of property.³² If people live separately from other members of society, it does not make sense to speak of a right that imposes negative duties on third parties. If human beings are monads that repel each other, what is the goal, Duguit asks, of a right that forces other members of society to refrain from intervening in the property of others?

The third and final component of Duguit's critique challenges the assumption that classical liberal property exists only to serve individual interests.³³ Duguit finds it objectionable that this right protects only the relationship between a subject and her property. Classical liberal property obscures the connections between the economic needs of the community and the wealth that is recognized and protected through the institution we know as property. It should also serve the community. This does not mean that Duguit is committed to a socialist political perspective or that he is challenging capitalism. He is very clear to distance himself from the former, and to accept the latter as a fact.³⁴ For Duguit, putting property at the service of the community means putting it into production. His argument has nothing to do with state ownership of the means of production or with class struggle. Normatively, Duguit is committed to what we might call the "rule of productivity." The wealth concentrated in property cannot remain unproductive. The social consequences would be profoundly negative. The needs of the community members would certainly not be satisfied and social cohesion would be in jeopardy.

Duguit also criticizes the metaphysical character of the liberal right to property. On one hand, he challenges the concept of a subjective right.³⁵ For Duguit, this concept implies the existence of a will that is imposed on another will. The existence of a subjective right implies the existence of a duty to a third party. Thus, this type of right requires knowledge of the nature of individual will, a criterion to measure it, and another to apply it. Duguit states, however, that individual will cannot be known empirically. All we can know are the external manifestations of the will of individuals. Will is a metaphysical entity that cannot be grasped through the scientific method. On the other hand, Duguit challenges the supposed natural character of the classical liberal right to property. The jus-naturalism to which classical liberalism is committed is incompatible with its positivism. Natural rights are not made knowable through observation of the world; they are normative criteria without empirical basis.

Nevertheless, the concept of the social function of property has not been relevant in the theoretical discussion on the content and effects of property

31. *Id.* at 181.

32. *Id.* at 178.

33. *Id.* at 237.

34. *Id.* at 236.

35. *Id.* at 175.

alone.³⁶ This idea has also been incorporated by a significant number of European and Latin American legal systems³⁷ and has been instrumental in the political struggle that has occurred in some countries to achieve a fairer distribution of land.³⁸ In Latin America, for example, the social function of property was included in several constitutions,³⁹ such as the Mexican,⁴⁰ the Colombian,⁴¹ and the Brazilian,⁴² and has been instrumental in justifying the agrarian and urban reform projects developed in several countries in the region.⁴³ As many of the papers published in this issue will show, the social function of property has had interesting conceptual histories and applications in Latin America.

II. THE SOCIAL OBLIGATION NORM IN U.S. PROPERTY LAW

In the United States, no legal norm includes explicitly the words “social function of property.” However, some U.S. legal scholars consider that a “social obligation” norm does exist in U.S. law, albeit perhaps only at the margins of property jurisprudence. According to this norm, property owners have social responsibilities to others that extend beyond the highly individualized, and atomized, conventional account of property rights.⁴⁴ The conventional account in U.S. law and theory situates the individual owner as insulated from the demand by others in society and owing no further obligation to them, except for the duty not to cause harm to others

36. Ugo Mattei, *The Peruvian Civil Code, Property and Plunder: Time for a Latin American Alliance to Resist the Neo Liberal Order*, 5 GLOBAL JURIST TOPICS 1, 8 (2005), <http://www.bepress.com/cgi/viewcontent.cgi?article=1149&context=gj>; Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435 (2006); Schneiderman, *supra* note 10, at 83–109.

37. See, for example, the German constitution of 1949, Article 14(2). GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 14, sec. 2 (Ger.); *infra* notes 40–42.

38. GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 1–2 (2006); Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law* (bepress Legal Series, Working Paper No. 1607, 2006), <http://law.bepress.com/expresso/eps/1607>; Flavia Santinoni Vera, *The Social Function of Property Rights in Brazil* (Latin Am. & Caribbean Law. & Econ. Ass'n (ALACDE) Annual Papers, Berkeley Program in Law & Econ. 2006), available at <http://www.escholarship.org/uc/item/0tp371xs>.

39. M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 205–06 (2004).

40. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.], 5 de Febrero de 1917, art. 27.

41. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58.

42. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, XXIII (Braz.).

43. Thomas T. Ankerson & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 95 (2006).

44. See generally HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005); Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1054–56 (2007).

and their property.⁴⁵ Scholars have long pushed backed against this view, situating property as central to organizing and shaping social relations, and entailing obligations to non-owners and the community as a whole.⁴⁶ This relational view of property is an important building block for how scholars understand social obligation norms in U.S. property law.

The social obligation norm is a concept with much plasticity. The idea that property owners owe affirmative obligations to the welfare of others, and to societal welfare more generally, can map onto a number of different ideological orientations, including classical liberalism. The obligation of property owners to contribute, through taxation, to the provision of public goods such as law enforcement, schools, and fire protection is a relatively “thin” but stable version of the norm.⁴⁷ In a similar vein, from a law and economics standpoint, the presence of market failures (such as free riders and holdouts) might entail curtailing an owner’s dominion over his property in order to promote and maximize public welfare.⁴⁸ Eminent domain has often been justified on the grounds that allowing the government to acquire or “take” private property under certain circumstances produces the most economically efficient result for taxpayers.⁴⁹ One might also properly view a libertarian conception of ownership as entailing a social obligation to guarantee to *all* persons the resources necessary for individual autonomy and personhood.⁵⁰ Such a view would not privilege the enforcement of the rights of property owners if the law does not also guarantee sufficient resources to non-property owners.⁵¹

Regardless of the specific ideological orientation that one brings to this idea of “social obligation,” it shares with Duguit’s idea of the “social function” of property recognition of the interdependence of individuals within a society and of the role that property has in promoting the common good. At a minimum, the social obligation norm recognizes the ways in which property is central to human interactions, human flourishing, and the relationship between an individual and her community.⁵² Beyond that recognition, the scope of the social obligation norm is something that will need further articulation in order to understand not only its normative contours but also its practical application.

Professor Gregory Alexander has labored the most to develop the social obligation norm in the U.S., and to distinguish “thin(ner)” versions of the norm, such as those articulated above, from his “thick(er)” version. Alexander develops the norm to entail an obligation on the part of property

45. Alexander, *supra* note 44, at 746–47.

46. *See generally* SINGER, *supra* note 44.

47. Alexander, *supra* note 44, at 753–57.

48. *See, e.g., id.* at 753; Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1259 (2007).

49. *See, e.g.,* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 55–56 (6th ed. 2003); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81–82 (1986).

50. Dagan, *supra* note 48, at 1259–60 & nn.30–31 (citing Margaret Jane Radin’s personhood account and John Rawls’s work).

51. *Id.* at 1260.

52. *See, e.g.,* Alexander, *supra* note 44, at 765–67; Dagan, *supra* note 48, at 1260–61.

owners to provide to society those benefits and goods that society reasonably regards as necessary for human flourishing.⁵³ Developing this norm requires a fairly thick conception of the relationship between an individual and her community, a relationship which serves to anchor the norm in a particular social reality.⁵⁴ Alexander's articulation of this relationship resonates very strongly with Duguit's description of social reality.⁵⁵ For Alexander, like Duguit, the individual is not an isolated, self-sufficient, social and political animal. Rather, dependency and interdependency are constitutive of the human condition and, importantly, of the capacity of humans to flourish in society.⁵⁶ Building on the "capabilities" approach of Amartya Sen and Martha Nussbaum, Alexander argues that development of one's capabilities is a human good that society ought to promote through entitling each person to the material resources required to nurture the capabilities essential to human flourishing.⁵⁷ That each person has an obligation to others in the community to promote the requisite capabilities necessary for human flourishing is based both on our interdependence with one another and on our shared acknowledgement, as rational moral beings, of the right of every being to develop these capabilities.⁵⁸

Alexander's robust, or thick, version of the social obligation norm is forthrightly redistributive in its aims and implications. He recognizes that "human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life."⁵⁹ As such, an owner's social obligation is to contribute to her community those benefits that the community reasonably regards as necessary for its members' development of those human qualities essential to their capacity to flourish as moral agents.⁶⁰ Alexander finds scattered throughout property doctrine examples in which private property owners are required to sacrifice their ownership interest in a way that comports with this social obligation norm and, importantly, in instances where neither law and economics nor classical liberal analysis can justify, or has a hard time justifying, such sacrifices.⁶¹ According to Alexander, the thicker version of the social obligation norm is at work (or potentially at work) in eminent domain cases and cases adjudicating remedies for nuisance, both of which involve state-sanctioned forced sales of private property for the common good or community best

53. Alexander, *supra* note 44, at 760–74.

54. *Id.* at 757.

55. Alexander's robust conception of community, and the individual's relationship within it, was developed first in his work with Eduardo Peñalver. *See generally* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009).

56. Alexander, *supra* note 44, at 760–61.

57. *Id.* at 762–65, 767–68.

58. *Id.* at 768–70.

59. *Id.* at 768.

60. *Id.* at 774.

61. *Id.*

interest.⁶² He also invokes his social obligation concept to explain cases in which the owner is prohibited from using his or her property in some way that the community regards as against its collective interest—such as in the case of historic preservation laws, environmental regulations, and beach access rights under the public trust doctrine.⁶³

III. PROPERTY THROUGH A SOCIAL LENS

Both Duguit's and Alexander's work push against the classical liberal impulse to cabin the "core" of property rights as aligned with individual autonomy and to relegate the limitations on individual autonomy to the "periphery" of property rights.⁶⁴ The classical liberal approach considers the owner's right to possess and use tangible things, and to exclude others from possessing and using those things, as the core of the right to private property, and requires that any limitations on that right be justified by important societal interests. Another way of thinking about the structure of the classical liberal version of the right to private property in U.S. law is that it creates a strong, albeit rebuttable, presumption in favor of the owner's right to exclude; a presumption that can be overcome by important societal interests.⁶⁵

Duguit and Alexander paint a much more complex picture of what is at the core of the right to own property.⁶⁶ Property's social function, and the owner's obligation to provide certain benefits to society, instead work as an internal constraint on private property rights. As such, a society's shared values and moral commitments exist, perhaps uncomfortably, alongside the owner's right to exclude. The core of property, then, ideally reflects the plurality of values that we as a society believe property should serve, and it is up to the legal system to negotiate them in defining the contours of private property rights.⁶⁷

What form this negotiation assumes will vary depending upon the legal, political, and social culture of a particular society. This variance is what makes a comparative examination of the ways these ideas and concepts have played out so rich and fascinating. On May 14, 2011, we convened an impressive group of scholars to examine the contemporary interpretations and use of the social function of property in Latin America and its exclusion or marginal inclusion in the U.S. In particular, we wanted to highlight and examine the interpretations of the social function of property articulated during the last two decades by some Latin American constitutional courts,

62. *Id.* at 775–82.

63. *Id.* at 791–810; *see also id.* at 810–15 (discussing implications for intellectual property law).

64. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976) (classical legal theory is concerned with identifying "core" individual freedoms and a "periphery" of limitations on those freedoms).

65. *See* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 964–67 (2009).

66. *See, e.g.,* Gregory S. Alexander, *Reply: The Complex Core of Property*, 94 CORNELL L. REV. 1063 (2009); *see also supra* notes 11–14 and accompanying text.

67. Alexander, *supra* note 66, at 1066.

as well as the symbolic and material effects that these readings have had in the region. Similarly, we wanted to scrutinize and analyze the concepts and institutions through which the social function of property has entered the U.S. legal system and explore why these concepts and institutions have had such a limited influence. Finally, we sought to identify the tensions and connections that the social function of property has with relatively new legal concepts like the ecological function of property, and to explore its connections with various historical discourses and social structures in the U.S. and Latin America.

*A. Contemporary and Theoretical Approaches
to the Social Function of Property*

The papers in this issue are organized in two sections. The first, “Contemporary Theoretical Approaches to the Social Function of Property,” is composed of four articles. Gregory Alexander’s paper presents an analysis of some of the major theoretical perspectives in the United States that defend the idea that property inherently includes social obligations.⁶⁸ Alexander judiciously examines the work of Hanoch Dagan, Joseph William Singer, and Jedediah Purdy. In his analysis, Alexander seeks to clarify whether these theories of the social function of property appeal to a monism or pluralism of values in order to justify their assumptions. This is a topic that Alexander believes has received little attention and is central to assessing the plausibility of each of these perspectives. Alexander seeks to determine whether these theories are based on a single value (autonomy, for example) or if they are justified by multiple values (autonomy, community, and equality, among others).

However, Alexander’s article is not just descriptive, analytical, and critical; it is also normative. Alexander argues that normative pluralism is morally superior to normative monism. A theory of the social function of property that is justified by and seeks to realize multiple values is capable of recognizing the different spheres that make up society and the different values that should control them. This type of theory also has the ability to interpret property in a manner that accommodates the characteristics and normative requirements made in each of these realms (social, family, and work, for example). Consequently, in his article, Alexander examines the significance of the concepts of normative pluralism and monism in light of contemporary moral theory, presents a taxonomy of theories of the social function of property that draws on these two concepts, and examines the problem of the incommensurability of values that supposedly affects the theories committed to normative pluralism.

The essay by Nestor Davidson examines the dominant political and legal discourses on property in the United States.⁶⁹ Davidson argues that the

68. See Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017 (2011).

69. See Nestor M. Davidson, *Sketches for a Hamiltonian Vernacular as a Social Function of Property*, 80 FORDHAM L. REV. 1053 (2011).

individualist liberal interpretation advocated by James Madison and the republican interpretation defended by Thomas Jefferson are the axes around which the U.S. debate on property has historically revolved. Davidson also argues, though, that there is a third perspective that has been given much less attention but that has had important symbolic effects in the legal community: that advocated by Alexander Hamilton. Davidson argues that Hamilton defends the idea that property must have social obligations. In Davidson's view, Hamilton defends the idea that property should be used in ways that benefit the community and that conflicts over property must be resolved, protecting existing rights in favor of promoting the development of the community.

Eduardo Peñalver offers an analysis of the relationship between property and memory.⁷⁰ Peñalver structures his analysis around the distinction between the memory of property and the memory in property. The first refers to how individuals or communities recall an object that they once owned. The second refers to the memories that have become part and parcel of the property. Peñalver also argues that both can be divided into physical memory or distributive memory. Physical memory is connected to particular objects that were owned and remembered by an individual or community, a house or a farm, for example; distributive memory is related to forms of allocation of property transferred inter-generationally and that influence the political and economic structure of a society, such as feudalism or capitalism. Finally, Peñalver examines the relationship between each of these categories and the law. Thus, for example, he studies the relationship between memory of or about property and adverse possession and taxes. In Peñalver's conception, the analysis of the relationship between memory and property will make explicit some of the social functions of property that usually remain in the margins of the social, political, and legal community.

The article by Colin Crawford has as its main objective the defense of a normative theory of the social function of property.⁷¹ For Crawford, a proper interpretation of this institution should seek to facilitate the flourishing of all citizens of a political community. To justify his argument, Crawford draws on the theory of justice advocated by Amartya Sen. Consequently, Crawford examines the relationship between property and the capacities that human beings should develop in order to exercise their autonomy. Crawford also argues that to comply with its objective, a theory of the social function of property that has human flourishing as its main goal must be closely connected with the concept of sustainable development. For Crawford, the ecological function of property must be one of the dimensions of the category "social function of property." Finally, Crawford analyzes the connections between the doctrine of "socio-environmentalism" and the social function of property. Crawford argues that this doctrine has multiple sources, from U.S. environmental law to the

70. See Eduardo M. Peñalver, *Property's Memories*, 80 *FORDHAM L. REV.* 1071 (2011).

71. See Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 *FORDHAM L. REV.* 1089 (2011).

theory of environmental human rights to the global movement for environmental justice. Nevertheless, Crawford also points out that this doctrine originated in Latin America from the region's experience with the application of and theoretical reflection on the social function of property. For Crawford, judicious examination of the contemporary forms the institution has acquired must go through a social-environmental analysis in Latin America.

B. The Social Function of Property at Work in Latin America

The second section, "The Social Function of Property in Latin America: Legal and Case Law Developments," is composed of three articles. In the first article of this section, Daniel Bonilla argues that the structure of the legal regime of property in Colombia has been shaped by liberalism.⁷² A genealogical analysis of the recent history of the legal forms that define and regulate property, Bonilla argues, provides evidence for three key periods in the creation and consolidation of the right to property in the country. These three periods, Bonilla adds, revolve around different forms of interpreting and weighing the three fundamental values in the liberal canon: autonomy, equality, and solidarity. The first period, beginning in 1886 and ending in 1936, is marked by a classical liberal property regime in which the Constitution and civil law form an ideologically coherent set that prioritizes the principle of autonomy over the principles of equality and solidarity. The second period, between 1936 and 1991, is structured by a mixed system that recognizes the social function of property in the Constitution but preserves an individualistic notion of property in the civil code. The third and final regime of property, beginning in 1991 and still in effect today, is an ideologically consistent constitutional and legal framework committed to the idea that the right to property must be defined through the principles of solidarity and equality. In his article, Bonilla argues that the three periods comprising the recent history of the right to property in Colombia are structured around a set of five conceptual oppositions: individualism–solidarity; limited intervention–general intervention; private–public; Constitution as political program–Constitution as norm; and property as a right–property as social function. In his article, Bonilla analyzes how these conceptual oppositions configure each of the key periods in the recent history of property in Colombia.

In the second paper of this section, Alexandre dos Santos Cunha provides an analysis of the social function of property in Brazil.⁷³ Cunha argues that this theory enters the Brazilian legal system as a result of the influence of Italian jurists Pietro Cogliolo and Enrico Cimbali. Cunha indicates that the work of Duguit was not decisive for the reinterpretation of the classical liberal concept of property in Brazil, as it was in other Latin American

72. See Daniel Bonilla, *Liberalism and Property in Colombia: Property as a Right and Property as a Social Function*, 80 FORDHAM L. REV. 1135 (2011).

73. See Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 FORDHAM L. REV. 1171 (2011).

countries such as Colombia or Chile. Consequently, Cunha states, this theory has not been interpreted in Brazil as imposing internal limits on property. Brazilian courts, influenced by Cogliolo and Cimbali, have understood that the social function is a justification of the power of the legislature to create external limits to the exercise of property. Cunha also argues that although the social function of property enters the Brazilian legal system with the Constitution of 1934, it is only with the issuance of the civil code of 2002 that this concept of property gains strength and permeates the Brazilian legal system. Accordingly, Cunha's essay analyzes how the civil code of 2002 has influenced the way the Brazilian jurists understand the social function of rights in general and the social function of property in particular.

In the third article of this section, M.C. Mirow examines the constitutionalization of the social function of property in Chile.⁷⁴ Mirow thus examines the differences between the Constitution of 1833 and that of 1925 with respect to property. In particular, he makes explicit the differences between the classical liberal concept of property that characterizes the former, and the functionalist concept of property that characterizes the latter. Similarly, Mirow studies the influence that Duguit had on this change in the Chilean legal system. Mirow carefully analyzes the debates among the members of the Constituent Assembly that drafted the Constitution of 1925, and analyzes the impact that Duguit's lectures in Buenos Aires had on the social function of rights in these discussions. Finally, Mirow discusses the role that President Arturo Alessandri played in transforming the way property was conceived in the Chilean legal system.

CONCLUSION

As this set of papers illustrates, the ongoing academic discussion about the social function of property has many dimensions. Moreover, the idea that property owners owe social obligations to others can play out quite differently across various legal, political, economic, and social systems. Our goal in this symposium was to continue to add texture to the discussion and to highlight the ways in which the social function of property has operated in Latin American systems. We thank each of the authors for their considerable contribution to this important topic and look forward to continuing the conversation.

74. See M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 *FORDHAM L. REV.* 1183 (2011).