

## PROPERTY AS CONSTITUTIONAL MYTH: UTILITIES AND DANGERS

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Recently, a revolution has begun in the American study of constitutional law. For many years constitutional scholarship was primarily an insular domestic concern. However, American scholars and decision makers have suddenly become actively aware of the existence of constitutional regimes in other countries and the value of studying those regimes. Just as globalization has become an irresistible force in politics and commerce, it is fast becoming an irresistible force in the study of constitutional law as well.

Comparative critiques have played a particularly prominent role in the roiling world-wide debate over the desirability and meaning of the constitutional protection of property. Scholars in countries with established democratic histories, as well as those in fledgling democracies, have engaged in wide-ranging comparative critiques in their efforts to determine answers to difficult questions surrounding the constitutionalization of property.<sup>1</sup>

To date, the American scheme of constitutional protection of property rights has been largely immune from international critique, at least from scholars within this country. The publication of *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*<sup>2</sup> has shattered this immunity. I have known of Professor Alexander's work on this project for several years and have been eager

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† Arthur Larson Professor of Law, Duke University. These remarks were first presented at the Cornell Law School on September 20, 2006. I am grateful for the richly insightful and provocative comments that I received on that occasion, as well as those I received informally from many colleagues about the ideas in this Essay.

<sup>1</sup> See, e.g., Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 417 (G.E. van Maanen & A.J. van der Walt eds., 1996); Thomas Allen, *Commonwealth Constitutions and the Right Not to Be Deprived of Property*, 42 INT'L & COMP. L.Q. 523 (1993); Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24 CAN. J. POL. SCI. 309 (1991); Richard W. Bauman, *Property Rights in the Canadian Constitutional Context*, 8 S. AFR. J. HUM. RTS. 344 (1992); Matthew Chaskalson, *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth*, 9 S. AFR. J. HUM. RTS. 388 (1993); Aeyal M. Gross, *The Politics of Rights in Israeli Constitutional Law*, ISR. STUD., Fall 1998, at 80.

<sup>2</sup> GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 23 (2006).

to see the outcome. It does not disappoint. It is a superbly executed and compelling account of the transnational and transcultural issues involved in property law and property theory. In addition, it is not simply a comparative offering. It is also an eloquent statement of the challenges of, and possible solutions to, critical questions in the American constitutional protection of property. Indeed, readers of Professor Alexander's book will find it impossible to continue to think of American takings jurisprudence as an insular body of law, reflecting only American issues and American concerns.

The book opens with what may strike readers as a surprising question: whether the constitutional protection of property rights, or the text of particular constitutional property clauses, matters in the degree of protection that property enjoys. This question is surprising because scholars generally assume that such textual issues are critical ones. Alexander challenges this assumption by arguing that although the presence or absence of constitutional protection of property may affect outcomes, it is far from outcome-determinative.<sup>3</sup> For instance, property enjoys a great deal of protection in New Zealand and Canada, two countries that deliberately omitted property from their lists of entrenched individual rights.<sup>4</sup> By contrast, the United States, which has had a robust property-protection clause from the beginning, readily redistributes property through taxation, regulation, and other means. In addition, although text matters, "text alone is not outcome determinative";<sup>5</sup> rather, "[j]udicial interpretation of a constitutional property clause turns on many factors, among which is its text."<sup>6</sup> Other factors that influence the interpretive process, such as "background (non-constitutional) legal and political traditions and culture," are at least equally important.<sup>7</sup>

The book then summarizes American takings law and critiques its problems from various philosophical and doctrinal perspectives. It continues with detailed analyses of the treatment of property rights by the German Basic Law (*Grundgesetz*) and the new South African Constitution.<sup>8</sup> Both comparative examples are well chosen. The German system—a post-World War II product—is well developed through extensive judicial interpretation, and commentators generally regard it both as enjoying a great deal of internal coherence and as a worthy model for others.<sup>9</sup> The South African document, drafted and adopted within the last twelve years, was the product of unprece-

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<sup>3</sup> See *id.* at 20–21.

<sup>4</sup> See *id.* at 23.

<sup>5</sup> *Id.* at 27.

<sup>6</sup> *Id.* at 6 (endnote omitted).

<sup>7</sup> See *id.* at 27.

<sup>8</sup> See *id.* at chs. 3, 4.

<sup>9</sup> See, e.g., *id.* at 12.

dented international consultation and scholarly commentary.<sup>10</sup> In addition, the German and South African systems represent political traditions and aspirations that are sufficiently similar to, but still sufficiently different from, those in the United States as to yield rich and provocative comparisons. For instance, as Alexander notes, “all three countries are constitutional democracies with a private property/free market economic system.”<sup>11</sup> Each “recognize[s] the centrality of private property rights while simultaneously undergirding a very different calculus of individual and community interests.”<sup>12</sup>

Through this comparative exploration, Alexander develops certain lessons for American takings jurisprudence.<sup>13</sup> These lessons include particular doctrinal prescriptions. All of these innovations are used in other legal systems in which property rights are strongly protected, making them “basically congenial with the fundamental commitment of the Fifth Amendment’s takings clause[,] . . . . [y]et all . . . are [also] almost entirely absent from the agenda of issues that dominate American takings law scholarship.”<sup>14</sup>

First, Alexander suggests the use of a proportionality principle in American takings cases.<sup>15</sup> The proportionality principle—and here, I shall oversimplify greatly—requires that any *prima facie* violation of a constitutional right be justified, “‘considering the importance of the right, the degree of intrusion, and the nature of the asserted governmental interest.’”<sup>16</sup> This principle, which is a central concern in the constitutional jurisprudence of Germany, South Africa, and other countries,<sup>17</sup> forces the reviewing court to consider transparently the particular facts, interests, and values that the competing parties represent.<sup>18</sup>

Second, Alexander urges the adoption of a purposive approach in American takings jurisprudence.<sup>19</sup> Under this approach, courts “analyze takings cases by explicitly focusing on the core purpose of constitutional protection of property, identifying the central constitutional value that such heightened protection is intended to serve, and asking whether that value is immediately at stake under the circum-

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<sup>10</sup> Cf. *id.* at 155–59 (discussing the intense debate surrounding the adoption of the property clause and noting the role of academics and international actors in this debate.)

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* at 199–243.

<sup>14</sup> *Id.* at 199.

<sup>15</sup> See *id.* at 199–214.

<sup>16</sup> *Id.* at 201 (quoting Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,”* *Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 608 (1999)).

<sup>17</sup> See *id.* at 200–01.

<sup>18</sup> See *id.* at 202.

<sup>19</sup> See *id.* at 215–23.

stances before it.”<sup>20</sup> This approach would also require transparency in American takings law, this time in “the [United States Supreme] Court’s . . . conceptions of the core purposes of constitutional property” protection.<sup>21</sup> Alexander observes that “[o]ne of the strongest points of contrast between American takings law and its counterparts in Germany and South Africa is that German and South African courts are consistently and explicitly guided by a purposive approach to analyzing what their constitutions’ commitments to property require in the immediate case.”<sup>22</sup> As a result, the decisions of these courts demonstrate a consistency and fidelity to the constitutional property values in question that American decisions do not.<sup>23</sup>

Third, Alexander argues for a reevaluation of American courts’ compensation practices in light of comparative models. For instance, German courts may order that the government pay “equalization benefits” to property owners whose challenges to the constitutionality of government regulations fail but who are nonetheless disproportionately affected by the regulations.<sup>24</sup> This, Alexander writes, “directly addresses the problem that arises when efficiency considerations suggest that a regulation should be held valid but fairness considerations suggest . . . at least some degree of compensation.”<sup>25</sup> The German courts also display greater flexibility in compensation practices in their willingness to consider factors such as the degree of personal attachment to property (for instance, property used for a personal residence as opposed to property held strictly for investment purposes) and the extent to which pre-existing public subsidies have created the subject property’s value.<sup>26</sup>

All of these discussions and prescriptions by Alexander are, in a sense, content neutral. There is no necessary outcome, in a normative sense, that results from the questioning of our legal practices or from the idea of “borrowing” from other jurisdictions. His approach in all of this is cautious. Even those doctrinal ideas that he does advance—such as “proportionality” between government means and ends and an “explicitly purposive analysis” that identifies a property’s central values—do not, of themselves, necessarily entail any particular vision of property’s protection, or lack thereof.

He does, however, make one proposal that throws this caution to the winds. This is the explicit exhortation that American takings jurisprudence should develop an articulated norm of social obligation.

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<sup>20</sup> *Id.* at 215.

<sup>21</sup> *Id.* at 217.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 218.

<sup>24</sup> *Id.* at 236.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 240–41.

“Traces of an implicit social-obligation norm,” Alexander writes, “are scattered throughout American takings decisions.”<sup>27</sup> These traces are evident, for instance, in the courts’ treatment of historic preservation laws<sup>28</sup> and the responsibilities of owners of land to adjacent landowners.<sup>29</sup> However, these examples are a far cry from the explicit German and South African jurisprudential requirements that property owners’ interests be seen through the lens of a general norm of social obligation.<sup>30</sup> Indeed, Alexander argues, the failure to explicitly acknowledge the social obligations of ownership is what is most deficient about American takings jurisprudence.<sup>31</sup>

The question that immediately arises is, *why*? If we are to demand that American takings law overtly adopt a particular normative posture, we must have reasons for that demand. In his book, Professor Alexander argues primarily—and very convincingly—that the acknowledgment of a social-obligation norm as a formal part of takings law is necessary to rationalize our takings law and to develop the implicit concerns with social obligation that are already found within it.<sup>32</sup>

In this Essay, I advance another reason for this move—one that is less concerned with the structure of law than with the hurly-burly of politics. I argue that we should develop an articulated social-obligation norm not only because it would rationalize an irrational situation, or even because it is a good idea; rather, we should do so because we must. Political, cultural, legal, and other realities leave us no choice. We no longer have the luxury of operating with the “mythology” of property as a free-standing, individually protective, socially acontextual entity. We must explicitly acknowledge property’s other side. Furthermore, comparative law, as articulated by Professor Alexander in this book, gives us some ideas of how to do this.

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Saying that there is a “problem” in constitutional law that must be fixed requires that we discover that problem. What is the problem here? What is wrong with articulating the constitutional protection of property in terms that focus solely on the individual?

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<sup>27</sup> *Id.* at 223.

<sup>28</sup> *See, e.g., id.* (discussing *Penn Cent. Transp. Co. v. New York City*, 366 N.E.2d 1271 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978)).

<sup>29</sup> *See, e.g., id.* at 225–27 (suggesting that the nuisance exception to the noxious-use doctrine that Justice Scalia advanced in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1991), “reflects a social-obligation norm”).

<sup>30</sup> *See, e.g., id.* at 97, 131–47, 149, 182–97.

<sup>31</sup> *See id.* at 224.

<sup>32</sup> *See id.* at 224–35.

Indeed, all individual constitutional rights in the American legal system are designed to protect *individuals* against the oppressive exercise of government power.<sup>33</sup> Whether one thinks of freedom of speech, freedom of religion, due process of law, the protection of property, or other rights, the foundational model is the same: these rights protect the individual's interests against the dangers of unchecked majoritarian power.

This model necessarily creates certain mythologies. One of these mythologies, reflected in political rhetoric and popular culture, is that these individual rights are free-standing entities, defined from the individual's perspective alone, and, for this reason, absolute or nearly absolute in nature.<sup>34</sup> When politicians or other popular figures speak of "free speech," "freedom of religion," or the "protection of property," they do not generally intend their appeals to evoke the idea of rights-in-social-context. Rather, they awaken the image of rights as protecting separately conceived, separately maintained, and unfairly beleaguered individual interests.

In most constitutional areas, however, we know—after even momentary reflection—that the mythology of constitutional rights as purely individual concerns is, in fact, a mythology. Even the most unreflective person knows that one cannot shout "fire" in a theater or practice a religion that involves cannibalism. The mythology of individualism is there, and it is powerful, but it is tempered by the obvious reality of social interests. Indeed, we know, on some intuitive level, that the ideas of free speech, freedom of religion, or due process of law are themselves essentially social concepts. They deal with, and describe, our interactions with others.

The right to the protection of property, however, is different. Property, in its common conception,<sup>35</sup> not only protects us against government interference, but also against all others. It is, by its very nature, bound up with ideas of individual separation, individual isolation, individual autonomy, and individual control. Scholars might argue that property involves social relations, or "the self with others,"<sup>36</sup>

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33 Some, of course, also provide protection against other individuals. See, e.g., U.S. CONST. amend. XIII (forbidding slavery and involuntary servitude).

34 See Laura S. Underkuffler, *On Property*, 100 YALE L.J. 127, 128–33 (1990).

35 See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 38–46 (2003) (describing the "common" individually protective conception of property in law).

36 See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 4–7 (1997) (describing property as a way to choose and support a proper and just social order); Kevin Gray, *Equitable Property*, in 47 CURRENT LEGAL PROBLEMS 157, 209 (M.D.A. Freeman & R. Halson eds., 1994) (presenting property as including the values of human dignity and the "sense of the reciprocal responsibility which each citizen owes to his or her community"); JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 208–09 (2000) (referring to obligations to others as an inherent part of traditional understandings of property); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1893 (2005) (arguing that property is

but this is not how the general populace of this country culturally or reflexively imagines property. And it is not, therefore, the way that the constitutional protection of property is popularly perceived. The “right to property” means the protection of possessions, the protection of one’s business, and the protection of expectations to develop one’s land. This mythology, then, is simply a deep and enduring expression of what we believe as a cultural matter to be the reality of this right.

Moreover, this mythology is, I would argue, deeply rooted in our legal understanding of the constitutional right to the protection of property. Take, for instance, the notorious problem of defining property for constitutional purposes. Although in practice the Supreme Court has implemented what seems to be its own understanding of “property,”<sup>37</sup> it has repeatedly insisted, as an explicit doctrinal matter, that we look to private law—state law—to determine what property is for constitutional purposes.<sup>38</sup> Is the right to develop land in a particular situation a constitutionally cognizable property interest?<sup>39</sup> Is the money that could theoretically be earned on one’s principal a constitutionally cognizable property interest?<sup>40</sup> U.S. Supreme Court cases are replete with statements of the “obvious” maxim that private law creates property interests and the Constitution protects them.<sup>41</sup> We assume that private law defines or creates the “thing” that the individual has at stake. “Property” is a complicated idea that is created by state-law, private-law, and individually oriented concepts.

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intrinsically and robustly social and joins individuals in community); Underkuffler, *supra* note 34, at 141 (describing property as encompassing a broad range of human liberties within a collective context of support and restraint).

<sup>37</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) (arguing that protected property expectations are “based on objective rules and customs that can be understood as reasonable by all parties involved” and that such “reasonable expectations must be understood in light of the whole of our legal tradition”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (citing the “ordinary meaning” of “the taking of a property interest”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (stating that “[p]roperty rights in a physical thing” include the rights “to possess, use, exclude, and dispose of it”); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (explaining that property includes the “traditional” bundle of rights).

<sup>38</sup> See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) (plurality opinion) (describing property as the “common, shared understandings . . . derived from a State’s legal tradition”); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (“[T]he existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’” (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (“[T]he several States[ ] [are] possessed of residual authority . . . to define ‘property’ in the first instance.”).

<sup>39</sup> See, e.g., *Lucas*, 505 U.S. at 1016 n.6, 1027–30 (citing state law).

<sup>40</sup> See, e.g., *Phillips*, 524 U.S. at 164 (citing state law).

<sup>41</sup> See, e.g., *Palazzolo*, 533 U.S. at 630 (plurality opinion); *Phillips*, 524 U.S. at 164; *Lucas*, 505 U.S. at 1016, 1027–30; *PruneYard*, 447 U.S. at 84.

Contrast this with, for instance, freedom of speech, freedom of religion, or the right to counsel in criminal cases. In none of these areas do the courts, rhetorically or otherwise, assume recourse to private law. In these contexts, private law might be a peripheral consideration in public policymaking, but there is no taking of privately defined interests and concepts and transplanting them as intact units into public constitutional law. For example, the Court might consider the private law of libel in determining First Amendment freedom of the press, but we would never see the Court opine that in determining the content of the individual's interest (in free speech, or freedom of religion, or criminal counsel), we look to private law. Yet this transplantation is exactly what we do—at least as a matter of articulated policy—with property.

Our conceptions of justice in the context of takings law reflect another example of this mythology of property in constitutional law. Our intuitions, along with many federal court opinions, assume that justice must be a critical part of the American takings question.<sup>42</sup> Justice, as it is generally conceived, involves the evaluation of competing claims.<sup>43</sup> As I have previously written, whether a law or its operation is “just” depends on both the advantages and disadvantages that one party derives from the operation of that law (or its absence), and the advantages and disadvantages that other parties experience.<sup>44</sup> For instance, when examining what the right to counsel means in a criminal case, we consider the interests of the accused *and* the interests of the public in determining whether a particular interpretation of this guarantee is just.<sup>45</sup> Justice is, in other words, an “inherently relational inquiry.”<sup>46</sup> When considering “justice” in law, it is incoherent to evaluate the claims of one party without reference to the other.<sup>47</sup>

Yet, that is exactly what the articulated “justice” inquiry in American takings law has traditionally done.<sup>48</sup> The question, as we have heard it time and again, is whether the government has gone “too far”

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<sup>42</sup> The most famous invocation of justice in takings cases is found in *Armstrong v. United States*, in which the Court stated that 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *accord, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 702 (1999); *Nollan*, 483 U.S. at 835 n.4; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978).

<sup>43</sup> See Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 749–51 (2004).

<sup>44</sup> See *id.* at 749.

<sup>45</sup> See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977) (analyzing the right to counsel with regard to police attempts to elicit statements from criminal defendants).

<sup>46</sup> See Underkuffler, *supra* note 43, at 749 (emphasis omitted).

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 747–52.



in damaging the property owner's interests.<sup>49</sup> Has the landowner lost too much value? Has the owner of a chattel or principal lost too many rights? We are concerned with what the complaining property owner has lost but *not* with what the public has lost. Indeed, the idea of "public justice" in the takings context seems like an oxymoron. As a popular and cultural matter, we assume agreement with Justice Scalia's famous statement that to be concerned with public interests in these cases is to be concerned with protecting the "profit" of the "thief."<sup>50</sup> This is true even though the proposed actions of the property owner—for instance, engaging in environmentally damaging coastal development, or the draining of wetlands, or the destruction of historic buildings—may in fact make that owner more aggressor than victim.

The mythology of property as a free-standing entity, defined from the individual perspective alone, and nearly absolute in nature is thus a bedrock feature of the way that we envision the constitutional protection of property, in a way that is not true of other rights. That, I would argue, is the truth. It is also a tremendous irony.

It is ironic because this mythology is, in fact, less true of property than any other constitutional right. For instance, it is at least possible to envision free speech, freedom of religion, or due process of law in purely private terms. Freedom of speech, freedom of religion, and due process of law are freedoms that individuals can naturally, individually, and equally enjoy. There is no necessary additional cost that society or any particular individual incurs if another person believes freely, or speaks freely, or is afforded the protection of the laws. These are freedoms that, in their essence and their necessary exercise, we can at least conceive in purely individual terms.

Property is very different. When property involves external, physical, finite resources—as most of it does—it is, in fact, *impossible* to conceive of it in wholly private terms. If the law protects the enjoyment of a particular resource by one person, then it denies the enjoyment of that same resource by another. If the law upholds my right to possess this land, it necessarily denies your claim to possess that land. If it upholds my right to clear timber, deplete species, or strip-mine coal, it denies your claim to control these resources. Property decrees which members of society are winners and which ones are losers. In the context of finite resources, property is a zero-sum game. Property cannot be "private" because its very nature defies this description.

As a result, we are in the extremely odd situation in which the mythology of constitutional rights is strongest in the area in which it is

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<sup>49</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–15 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>50</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

the most inapposite. To reconcile this contradiction, the exaltation of the protection of private property interests by federal constitutional fiat has been far more hortatory than real. If we look at the bottom-line protection of property in takings cases, we find more often than not that the legislative impairment of private interests prevails. For instance, as commentators have often observed, under the “balancing” test that the federal courts often employ, the public interests almost always win, and the private interests almost always lose.<sup>51</sup> Richard Epstein, in what I think is an accurate comment, writes that under current takings doctrine, “virtually any asset is fair game for obstruction by the political process, whether through taxation or regulation.”<sup>52</sup>

What, then, should we make of this situation? We have an anomaly in which we subscribe most strongly to the individual-protectionist mythology in the area in which it is the least real. Should we—as Alexander urges<sup>53</sup>—simply abandon this mythology and recognize property for what it is: a socially contingent and obligated right?

This question requires us to consider what we have not yet considered: the utilities and the dangers of the mythology itself.

There are, I believe, distinctly positive functions that this mythology serves. Scholars have pointed out that what I call the “mythology” of property serves in important ways as a basis for popular limits on the powers of government.<sup>54</sup> The popular belief in the separateness and sanctity of property will restrain government action even if it does not do so in the way that the belief itself demands. Given the dangers of majority trampling of minority rights, this is an important political and legal function.

In addition, this mythical belief about the nature of the right to property protection is rooted in a deep human psychological need. Property rights in their various forms structure our daily lives, our human relationships, and our assurance of physical survival. They dictate our ability to both realize our dreams and avoid our fears. We believe that property rights are free-standing, individually protective, and socially acontextual because we want to—we *need* to—believe this myth.

On this ground, again, the mythology of property is very useful. Believing in this mythology helps us sleep better at night and encour-

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<sup>51</sup> See, e.g., ALEXANDER, *supra* note 2, at 94–95.

<sup>52</sup> Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 56 (1992).

<sup>53</sup> See ALEXANDER, *supra* note 2, at 11, 199–248.

<sup>54</sup> See, e.g., Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 263 (Jon Elster & Rune Slagstad eds., 1988) (pointing out that the “judicial practice does not seem as yet to have shaken the popular force of the idea of property as a limit to the legitimate power of government”).

ages our investment in the world around us. If we believe that our property is protected, by the Constitution or otherwise, a positive function is served: we live our lives accordingly. It is simply irrelevant that the protection of these private interests is, in actuality, more hortatory than real.

All of this might mean that we are better off with the status quo. Why should we sign onto Alexander's campaign to force acknowledgment of a "social-obligation norm"<sup>55</sup> when the mythology of property causes no harm and confers distinct benefits? Perhaps we should ignore, or even celebrate, this mythology of property. As Guido Calabresi and Philip Bobbitt keenly observed some thirty years ago, transparency in societal decision making is not always possible or desirable in maintaining basic values or achieving social goals.<sup>56</sup> Sometimes subterfuge and obfuscation are far more effective in achieving the desired outcome.<sup>57</sup> Perhaps Germany or South Africa needs this transparency in its constitutional property scheme, but it could be argued that we are doing fine, or even better, believing in our property "mythology" while at the same time living a very different property "actuality."

There is, however, a darker side to this mythology with which we must reckon. The celebration of this mythic state assumes—indeed, it depends on—a situation in which the difference between the mythology and the reality of the protection of property is not popularly known. To work in a positive manner, society at large must believe in the mythology of property's protection, even though courts and legislatures are simultaneously implementing something that is quite different.

For many years, this delicate balance between believed mythology and legal actuality was, for the most part, preserved. During the 1950s, 1960s, and 1970s, discrete individuals or particular interest groups might have been forced to confront the social contingency of their property rights, but the issue was not one of general, popular consciousness. The system was arguably in an uneasy but largely invisible equipoise.

With the regulatory revolution in the past few decades, particularly in land use, this situation has changed. Wetlands preservation, the Endangered Species Act, ever-more restrictive zoning laws, shore-

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<sup>55</sup> See ALEXANDER, *supra* note 2, at 223–35.

<sup>56</sup> GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 26 (1978).

<sup>57</sup> See *id.* (recognizing that, although honesty about society's choices may be the ideal approach, "evasion, disguise, temporizing, [and] deception" may be necessary if society is to "confront suffering without being willing to discard its values every time it cannot uphold them"); cf. Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 54, at 19 (discussing the value in excluding particularly divisible issues from the public sphere).

line restrictions, historic preservation, and the like became household concerns and the subjects of bitter rhetorical and political debate. Highly articulate property-rights advocates have pushed to expose the cognitive dissonance between property's mythology and property's protection.<sup>58</sup> The exposure of this gulf and the national government's refusal to change our course has provoked a "politics of outrage" from commentators, legislators, and average citizens.<sup>59</sup>

Indeed, the courts' failure to give greater credence to the mythological promise of property rights has worked to refocus the struggle in the legislative arena. Those who insist that property rights are free-standing, individually protective, acontextual entities have had some profound and disturbing success, particularly in state legislatures.

In 2004, Oregon voters passed "Measure 37."<sup>60</sup> This measure requires that if any state, city, county, or metropolitan government enacts or enforces any land use regulation that restricts the use of private real property or any interest in it after the owner of that property or any family member acquired it, the government must pay the owner the reduction in fair market value of the affected property or forego enforcement.<sup>61</sup> "Land use regulations" include environmental laws, state and local land conservation laws, local government comprehensive plans, zoning ordinances, land division ordinances, transportation ordinances, rules regulating farming and forest practices, and any other statute or local ordinance "regulating the use of land or any interest therein."<sup>62</sup>

The result has been predictable. Counties and other local governments are simply waiving challenged regulations rather than pay-

<sup>58</sup> See, e.g., JAMES V. DE LONG, *PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE* (1997); NANCIE G. MARZULLA & ROGER J. MARZULLA, *PROPERTY RIGHTS* (1997); Epstein, *supra* note 52.

<sup>59</sup> See UNDERKUFFLER, *supra* note 35, at 127–28.

<sup>60</sup> See William Yardley, *Anger Drives Property Rights Measures: Support Is Strong for Measures Limiting Governments' Power*, N.Y. TIMES, Oct. 8, 2006, at 34.

<sup>61</sup> See OR. REV. STAT. § 197.352 (1), (2), (3)(E) (2005). The relevant portions of the statute read as follows:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation . . . .

Exceptions are "public nuisances under common law," restrictions "for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations," and restrictions prohibiting the "selling [of] pornography or [the] perform[ance of] nude dancing." *Id.* § 197.352 (3)(A), (B), (D).

<sup>62</sup> See *id.* § 197.352 (11)(B).

ing budget-busting damage awards.<sup>63</sup> As of late 2006, aggrieved parties had filed 2,446 claims with the state of Oregon, which would cost more than \$5.7 billion to reimburse.<sup>64</sup> One landowner filed a claim of \$57 million, based on what his orchard would be worth if divided into nearly 800 housing units.<sup>65</sup> Measure 37 claims have ranged from a desire to put a single additional house on a residential lot, to the building of large housing developments, to an open-pit mining operation.<sup>66</sup> The new law pits neighbor against neighbor, as landowners who relied on zoning and other laws to create value for their property now find those laws crumbling in the face of their neighbors' claims. The orchard owner, asked about the fury that his plan unleashed among his neighbors, replied, "Life is not equal . . . . There is a law that got passed, and there is going to be a good amount of whining going on."<sup>67</sup> This is, essentially, an assertion that "I am entitled to my actions." As one state senator put it, "Measure 37 blew up our land-use system."<sup>68</sup>

Nor is Oregon—one of the nation's historically most progressive land use states—alone on this issue. Ballot measures modeled on Measure 37 are pending in California, Arizona, Idaho, and Washington.<sup>69</sup> Similar legislation already exists in Florida, Mississippi, and Louisiana.<sup>70</sup> The Bert-Harris Property Rights Act, enacted in Florida, calls for compensation if new government regulation negatively impacts "an existing fair market value" of property.<sup>71</sup> Since its enactment, claims have been made against building height limitations, density restrictions, communications tower restrictions, wetlands protections, tree protections, rental unit restrictions, historic building restrictions, and others.<sup>72</sup> Individual property owners' demands have ranged from \$40,000 to \$23.5 million.<sup>73</sup> In virtually every case that one study found, state and local officials, faced with staggering costs,

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<sup>63</sup> See Yardley, *supra* note 60 ("'Not a penny' has been paid to property owners . . . . Local governments, lacking money to pay, have simply waived the zoning rules."); see also Jeff Barnard, *Growing Number of Counties Approving Property Rights Claims*, ALBANY DEMOCRAT-HERALD, Feb. 11, 2005 at A6; Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1.

<sup>64</sup> See Ben Arnoldy, *Topping 2006 Ballots: Eminent Domain. In November, 12 States Have Initiatives on the Ballot That Seek to Protect Private Property Against Seizure and Regulation*, CHRISTIAN SCI. MONITOR (Boston), Oct. 5, 2006, at 1.

<sup>65</sup> See Harden, *supra* note 63.

<sup>66</sup> See Barnard, *supra* note 63; Douglas Larson, *Measure 37 Puts Newberry Crater at Risk*, REGISTER-GUARD (Eugene, Or.), Sept. 11, 2006, at A11.

<sup>67</sup> Harden, *supra* note 63 (quoting John M. Benton).

<sup>68</sup> *Id.* (quoting Senator Charlie Ringo).

<sup>69</sup> See Arnoldy, *supra* note 64; Yardley, *supra* note 60.

<sup>70</sup> See George Charles Homsy, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 278–79, 281 (2005).

<sup>71</sup> FLA. STAT. ANN. § 70.001(3)(b) (West 2004).

<sup>72</sup> Homsy, *supra* note 70, at 285–92.

<sup>73</sup> See *id.* at 287.

severely compromised or abandoned the enforcement or enactment of the challenged regulation.<sup>74</sup>

How is it that these “takings” laws were enacted? The history in Oregon is typical. The stories and comments that were used to fire public passions for Measure 37 were replete with both belief in the mythology of property and outrage at the exposure of its mythological status. For instance, “[p]eople work hard to save enough money to buy property. No one should take property without compensation – not even the government.”<sup>75</sup> “Measure 37 is very simple. If government takes your property, then government should pay for it.”<sup>76</sup> “[O]ur founding fathers placed a high wall of protection around [this right].”<sup>77</sup> “Ballot Measure 37 will help [us] . . . recover what has been stolen from us.”<sup>78</sup> Property regulation is “theft.”<sup>79</sup>

These sentiments are undoubtedly real, and they are not without foundation. Property regulation can yield injustice, and the need for security through property is a powerful and undeniable demand of human existence. However, both the extreme nature of these emotions as well as the complete lack of acknowledgment of property’s necessary and unavoidable contextuality are startling. To say that property is a “fortress” or regulation is “theft” is, quite frankly, incredible in view of property’s reciprocal reality. The campaigns cast the debate as one of fairness, but, paradoxically, only consider the interests of the complaining property owner alone.<sup>80</sup>

There may have been a time when society could fairly well accommodate such beliefs—when available land was vast and population pressures low. With our ever-increasing population and land use conflicts, however, such beliefs are dangerously anachronistic. When we see such beliefs achieving legislative (as well as popular) ascendancy,

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<sup>74</sup> See *id.* at 288–95.

<sup>75</sup> *State Legislators Support Measure 37, Argument in Favor, Measure 37 Arguments, in 2004 GENERAL ELECTION VOTERS’ PAMPHLET 107, 107, available at [http://www.sos.state.or.us/elections/nov22004/guide/meas/m37\\_fav.html](http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html) (last visited July 9, 2007).*

<sup>76</sup> Deschutes County Farm Bureau, *Yes on Measure 37!, Argument in Favor, Measure 37 Arguments, in 2004 GENERAL ELECTION VOTERS’ PAMPHLET, supra* note 75, at 108.

<sup>77</sup> Dennis Tuuri, Parents Education Association, *Argument in Favor, Measure 37 Arguments, in 2004 GENERAL ELECTION VOTERS’ PAMPHLET, supra* note 75, at 117.

<sup>78</sup> Dorothy English, *Argument in Favor, Measure 37 Arguments, in 2004 GENERAL ELECTION VOTERS’ PAMPHLET, supra* note 75, at 105–06.

<sup>79</sup> Ruth Pruitt, *Argument in Favor, Measure 37 Arguments, in 2004 GENERAL ELECTION VOTERS’ PAMPHLET, supra* note 75, at 113 (“When Enron steals your life savings, it’s considered theft. When the City of Portland steals your life savings, it’s called ‘new regulation.’”).

<sup>80</sup> See, e.g., Daniel Brook, *How the West Was Lost*, LEGAL AFF. Mar.–Apr. 2005, at 44, 48 (“Measure 37’s backers cast the debate as one about fairness and cost, not a referendum on land use planning. . . . The hope, if one can call it that, for supporters of land use planning in Oregon is that the results of the referendum, which its opponents failed to describe before the election, will become clear afterward, as former farmland is bulldozed and begins to bear a crop of subdivisions, Best Buys, and trailer parks.”).

we must consider what has contributed to this situation in American politics, culture, and law. No longer is this mythology of property simply an odd cultural quirk on which we, as policymakers, can remark and forget. Rather, we must confront the role that this mythology plays in shaping the social and political debates that, in turn, shape our society and our laws.

It is in this context that I find Professor Alexander's book—among its many other virtues—such a vital contribution to the discourse about the real problems that we face. Through his presentation and analysis of other legal systems, systems with which we share crucial values and assumptions, he shows us viable alternatives in a way that simple theoretical argumentation cannot. Prior to this book, we were vaguely aware that other legal systems have different treatments of the protection of property, but we had no real reason or way to relate those to our own. Through this book, Professor Alexander shows us that this mythology of property is not necessary—in this case, as a constitutional idea—to protect the legitimate contours of property protection. By examining the explicit contextuality of property rights assumed in these other systems, he shows that squarely facing property's contextual nature need not push us down some slippery slope in which all sense of the human need for property is lost. Furthermore, he shows us how this kind of honest and explicit examination will help us face the critical societal choices that property necessarily, and inevitably, involves.

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In a recent article in the *New York Times*, we learn how the mayor of Caracas, Venezuela—a place where shanty towns cover the City's hillsides—has ordered the “forced acquisition” of the Caracas Country Club to make way for homes for as many as 11,500 poor families.<sup>81</sup> “We've done studies that show that 20 families survive for a week on what's needed to maintain each square meter of grass on a golf course,” the mayor explained.<sup>82</sup> Needless to say, the possible destruction of this historic architectural and tropical gem, which was built in the 1920s, has ignited a huge outcry.<sup>83</sup> In this case, one can see both sides. The human squalor in the shanty towns is appalling by any conceivable measure. On the other hand, I know the magical allure of the place slated to be destroyed, having attended a magnificent party there several years ago.

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<sup>81</sup> See Simon Romero, *Caracas Mayor Lays Claim to Golf Links to House Poor*, N.Y. TIMES, Sept. 3, 2006, at 3.

<sup>82</sup> *Id.*

<sup>83</sup> See *id.*

We are fortunate in this country that we do not face such choices. We read, with curiosity, Professor Alexander's discussions of evictions of thousands of squatters in South Africa<sup>84</sup> and other foreign crises. However, the global message of this book is that we are not as immune from these struggles as we think. Our struggles tend to be over conflicting uses of land that are less shocking than the South African example, but as long as property entails the distribution and use of external, physical, finite resources, there will be conflict and strife. This book shows us how we, in the United States, might begin a cultural and legal conversation about those real conflicts of the twenty-first century.

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<sup>84</sup> See ALEXANDER, *supra* note 2, at 173–77.