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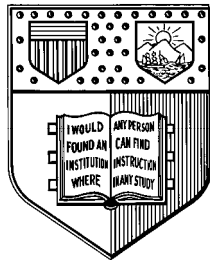
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The Social-Obligation Norm in American  
Property Law

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### **The Social-Obligation Norm in American Property Law**

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Cornell Law School research paper No. 08-002

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## THE SOCIAL-OBLIGATION NORM IN AMERICAN PROPERTY LAW

Gregory S. Alexander\*

Private property ordinarily triggers notions of rights, not social obligations. After all, the core function of private property, at least according to conventional lore, is to insulate individuals from the demands of society, both in its organized political form and its non-political collective form. It is true, of course, that the common law has long recognized limits on the exercise of property rights, limits that grow out of the needs of others in cases of conflicting land uses. The obvious example is the common law of nuisance law, which judges developed using the ancient maxim *Sic utere tuo ut alienum non laedas* (“Use your land in such a way as not to injure the land of others”) as their guiding principle. But such limits on property rights are the exception, not the rule, the periphery rather than the core.<sup>2</sup> The core image of property rights in the minds of most people is the owner’s right to exclude others, with no obligation owed to them.<sup>3</sup>

That image is highly misleading. The right to exclude itself, thought by many to be the

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I am indebted to Hanoch Dagan, Ben Barros, Larissa Katz, Dave Lametti, Annelise Riles, Joe Singer, Laura Underkuffler, and Andre van der Walt for helpful comments and suggestions. Eduardo Peñalver provided me with exceptionally valuable comments. I am greatly indebted to him.

<sup>2</sup> The core-and-periphery imagery owes to Duncan Kennedy. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>3</sup> See, e.g., Thomas W. Merrill, *The Right to Exclude*, 77 NEB. L. REV. 730 (1998).

more important twig in the so-called bundle of rights,<sup>4</sup> is subject to many exceptions, both at common law and by virtue of statutory or constitutional provisions. For example, the common law requires land owners to permit police to enter privately-owned land to prevent a crime from being committed or to make an arrest.<sup>5</sup>

More generally, property owners<sup>6</sup> owe far more responsibilities to others, both owners and non-owners, than the conventional imagery of property rights suggests. Property rights are inherently relational,<sup>7</sup> and because of that character owners necessarily owe obligations. But the responsibility dimension of private ownership has been sorely under-theorized in American law.

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<sup>4</sup> See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); J.W. HARRIS, *PROPERTY AND JUSTICE* (1996); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1959); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

<sup>5</sup> See RESTATEMENT (SECOND) OF TORTS § 204.

<sup>6</sup> In using the term “property” as the object of entitlement-claims, I mean what one might call “old style” property, especially land. The vast majority of takings disputes, certainly in the U.S., involve land. In linking the right of property with access to food and shelter, I move beyond property as it is conventionally understood to include socio-economic rights. I am hardly the first to make this linkage. One strategy by which some proponents of so-called positive rights, i.e., socio-economic rights, have sought to gain recognition of such rights as a *constitutional* matter has been to adopt the republican definition of property as the material foundation for personal identity, self-governance, and participation in civic life. Under that definition, socio-economic rights are a species of, indeed perhaps the most important species of, the right of property. In American constitutional jurisprudence, the foremost exponent of this view has been Frank Michelman. (For an early example, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.) Elsewhere in the world the linkage between property and socio-economic rights is less controversial than it is here.

<sup>7</sup> Some of the important writings on the relational aspect of property include LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003); JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Revived Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005), Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005), and Jennifer Nedelsky, *Reconceiving Rights as Relationship*, REVIEW OF CONSTITUTIONAL STUDIES/ REVUE D'ÉTUDES CONSTITUTIONNELLES 1, 16 (1993).

The social obligations of owners have been relegated to the margins while individual rights such as the right to exclude have occupied the center stage.

The purpose of this Article is to change this picture by drawing attention to the social-obligation norm in American property law. The Article makes both positive and normative claims. On a positive level, I argue that American property law, both private and public, in fact includes a social-obligation norm, but it recognizes that norm only implicitly. As a result the norm has not been developed in any systemic way, either by courts or scholars. This Article provides the first systematic explication of the social-obligation norm. The social-obligation theory developed here explains a remarkably wide array of existing legal doctrine in American Property law, ranging from the power of eminent domain to the modern public trust doctrine. Some of these doctrines are explicable on other theoretical grounds as well as on the basis of the social obligation norm. This is especially true of utilitarianism, or economic efficiency, whose protean character makes it possible to explain a wide range of outcomes in terms of maximizing social welfare. As I will discuss later, however, in some cases, utilitarian or efficiency explanations seem strained at best, disingenuous at worst, and in these cases the social obligation theory provides the superior explanation. The general point is that utilitarian/efficiency and social-obligation theory explanations are not necessarily mutually exclusive.

The normative claim is that the version of the social-obligation norm that I develop here is morally superior to other candidates for the social-obligation norm. It is so because it best promotes human flourishing, i.e., enabling individuals to live lives worthy of human dignity. In some cases it may also promote social utility or economic efficiency, but those values do not provide its primary normative foundation. Although the social-obligation theory developed here is not indifferent to welfarist considerations, its overriding normative commitment is to human

flourishing.

Property scholarship has been dominated in recent years by law-and-economics analysis. One goal of this Article is to offer an alternative to that mode of analyzing property disputes. Although law-and-economics theory certainly provides important insights into a remarkably wide range of property issues, its vision is limited and at times flawed. Perhaps the greatest flaw in law-and-economics theory is the poverty of its analysis of moral values and moral issues.<sup>8</sup> Other scholars have critiqued in considerable detail the moral failings of law-and-economics theory's exclusive concern with aggregate social welfare,<sup>9</sup> and I need not revisit those criticisms here. It is sufficient here to note that law and economics has achieved its near-hegemonic position within the property world despite the highly contested nature of its normative foundations. It has achieved that position because of the failure of property scholars to grapple with the foundational issues in law and economics, taking them, rather, largely as givens. This Article challenges those givens.

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<sup>8</sup> For an especially vivid example of the weakness of law-and-economics' moral theory, see Louis Kaplow and Steven Shavell, *Moral Rules, the Moral Sentiments, and Behavior: Toward a Theory of an Optimal Moral System*, 115 J. POLIT. ECON. \_\_\_ (2007). See also LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

<sup>9</sup> For specific critiques of Kaplow's and Shavell's version of welfarism, see Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003); Richard H. Fallon, Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979 (2003); Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791 (2003); Robert C. Hockett, *Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=933129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933129). For general critiques of the moral foundations of law-and-economics theory, see, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 16-29 (1996); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* *passim* (1995); JULES COLEMAN, *MARKETS, MORALS, AND THE LAW* 95-132 (1988); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 237 (1985). For a critique of utilitarianism generally, the modern classic is J.J.C. SMART and BERNARD WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 77-151 (1973).

The Article begins with a sketch of the social-obligation norm in classical liberal property theory. In Part I, I contrast that thin conception of the social-obligation norm with another, more robust conception. This second conception links ownership's social obligation with the idea of community, and it is the conception that I wish to examine most closely here. Because there are multiple conceptions of community, more than one version of the community-based conception of the social-obligation norm is possible. Part II focuses on one prominent version, developed by Hanoch Dagan in a series of important and influential articles.<sup>10</sup> I will refer to this version as the contractarian theory to underscore how that theory locates and justifies the responsibilities that private owners owe to society on the basis of contract-based reciprocity. Part III is the core of the Article. It describes and defends a version of the social-obligation norm that seeks to promote human flourishing. Finally, in Part IV, I argue that the social-obligation norm defended here is implicitly at work in many corners of existing American property law. To illustrate this, I briefly discuss several areas of legal doctrine that can be explained on the basis of the social obligation norm in its robustly civic version. The examples I have chosen fall into two categories. The first consists of cases in which property owners are compelled to sacrifice their entitlements in exchange for monetary compensation. In the language made famous by Calabresi and Melamed,<sup>11</sup> these are cases in which the entitlement is protected by a liability rule rather than a property rule. The second category consists of cases in which the property owner keeps title to her asset but loses the right to use it in some way because

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<sup>10</sup> See, e.g., Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007); Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771 (1999).

<sup>11</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

of judicial or legislative regulation. Taken together, the two categories cover virtually the entire range of collective restrictions of property interests. Within each category, I provide several examples and show how they can be explained as implementing an implicit social-obligation norm. In addition, I discuss an important recent constitutional-property case from South Africa in which the court's analysis strongly resonates with the social obligation theory.

I do not argue that American property law currently embodies, *tout court*, the robust version of the social-obligation norm that I defend here. Such a claim would be sheer nonsense, as anyone slightly familiar with American property law knows. For example, one reason why American takings law is so murky is the fact that American courts have failed openly to acknowledge, let alone rigorously develop, the social obligation dimension of the constitutional idea of property.<sup>12</sup> My point rather is that the robust version of the social-obligation norm can explain many of the most controversial legal practices in which owners have been required to sacrifice either some use of their entitlement or the entitlement itself.

It is one thing to recognize the existence of an implicit social obligation of private ownership; it is another thing to explicitly acknowledge such an obligation as a formal element of property law. While American property law does implicitly acknowledge a social-obligation norm, it lacks any systematic development of that norm. Having never explicitly recognized a social-obligation norm as a formal aspect of takings jurisprudence, American courts have never developed the contours of that obligation. This Article attempts to fill in that gap.

### **I. THE SOCIAL OBLIGATION NORM IN CLASSICAL LIBERAL PROPERTY THEORY**

Several conceptions of the social responsibility norm, but two are especially notable.

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<sup>12</sup> GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* (2006).

The first is based on classical liberalism. This conception provides a strikingly thin understanding of the social obligations of private ownership. It is limited to Anglo-American common-law's negative obligation to avoid committing nuisance, captured by the *sic utere tuo* maxim, and a weak affirmative obligation to contribute toward the provision of public goods, such as national defense or police and fire protection.

The economic version of this view explains which affirmative obligations owners owe to their community on the basis of the familiar problems of free riders and holdouts.<sup>13</sup> Individual owners are obligated to make contributions to the public fisc because voluntary means of financing public goods founder on the shoals of high transaction costs, free riders, and holdouts. What is conspicuously absent from the list of projects to which the individual owner's social-responsibility obligation must contribute is the redistribution of wealth done for the sake of equality of welfare. The purging of wealth-redistribution from the scope of legitimate social-responsibility objectives would mean, for example, that the progressive income tax, the Social Security tax, and unemployment benefits taxes are all illegitimate.<sup>14</sup> The thin version of the social-obligation norm requires affirmative action of the owner only for the purpose of providing public goods, narrowly defined.

The thin conception of the social-obligation norm is not so much wrong as it is radically

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<sup>13</sup> In speaking of the economic version of the thin conception of the social obligation in this paragraph, I am referring to one particular, though prominent, version of economic theory rather than economic theory in general. This version is commonly associated with well-known personalities on the Right such as Richard Epstein and Milton Friedman. *See, e.g.*, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); MILTON FRIEDMAN, *CAPITALISM & FREEDOM* (1962). Mainstream economists do not support wealth redistribution through property law, but they do support redistribution through other means, notably taxation, on utility-maximizing grounds.

<sup>14</sup> *See* EPSTEIN, *TAKINGS*, *supra* note 12, at 295-303, 309-312.

incomplete and indeterminate. It is descriptively inaccurate, and its descriptive inaccuracy makes it normatively unappealing as well. As Joseph Singer has pointed out, “It is well understood that owners cannot use their property to harm others, but it is not well understood how difficult it is to define what that means.”<sup>15</sup> The problem with using the harm principle as the basis for defining the social obligations of ownership is that it misleads owners into believing that Blackstone’s description of ownership as conferring on owners “sole and despotic dominion” over their property is accurate. It wasn’t accurate in Blackstone’s time,<sup>16</sup> and it certainly isn’t accurate today. Modern property law imposes a wide range of obligations on obligations on owners. For example, landlords must act to maintain their buildings in habitable conditions for their tenants, including, perhaps, keep air conditioning systems in good repair.<sup>17</sup> Owners of residential real estate must disclose to potential buyers the existence of all known defects in the premises, including, according to one view, neighborhood noise problems.<sup>18</sup> Landowners may not construct buildings on their property in a way that interferes with their neighbors’ access to sunlight used for solar power.<sup>19</sup> And the list of legally-imposed obligations on owners continues to grow.

The thin version of the social-obligation norm underlies what Frank Michelman calls the “possessive” conception of constitutional property rights. According to the possessive version of

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<sup>15</sup> SINGER, ENTITLEMENT, *supra* note 6, at 16.

<sup>16</sup> For what Blackstone actually thought, *see* David Schorr, *Who Said Blackstone Was a Blackstonian?*, \_\_ THEORETICAL INQUIRIES IN LAW \_\_ (forthcoming 2008); Carol M. Rose, *Canons of Property Talk, or Blackstone’s Anxiety*, 108 YALE L.J. 601 (1998).

<sup>17</sup> *See, e.g.,* Park Hill Terrace Assocs. v. Glennon, 369 A.2d 938 (N.J. App. Div. 1977).

<sup>18</sup> *See* Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Cal. App. 1992).

the constitutional right of property, Michelman states, “we primarily understand property in its constitutional sense as an anti-redistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends.”<sup>20</sup> As Michelman points out, the social-obligation norm can thicken even under the aegis of this “possessive” conception of constitutional property. Not only does the conception sometimes accept a surprisingly broad range of regulatory measures undertaken to correct “market failures,” it also may tolerate explicitly redistributive acts of the state as in fact necessary health or safety measures.<sup>21</sup> Still, as Michelman notes, on those occasions we are apt to feel (to the extent, that is, that we are under the influence of thin social-responsibility thinking), even if we do not admit, that the regulation has transgressed the boundary between the owner’s zone of personal autonomy and the legitimate need of the state to act in the interest of providing public goods.

The thin conception of the social-obligation norm is illustrated in a controversial decision of the U.S. Supreme Court several years ago. In *Lucas v. South Carolina Coastal Council*,<sup>22</sup> the Court held that a state environmental regulation designed to protect public safety and ecological security against hurricanes was *per se* unconstitutional where its economic impact on a landowner was to reduce the value of his land to nothing. The Court, in an opinion by Justice Scalia, carved out a very limited exception to this categorical rule, however. It stated that the regulation would be constitutionally valid if the owner’s planned use of his land constituted a

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<sup>19</sup> See *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982).

<sup>20</sup> Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987).

<sup>21</sup> *Id.* at 1319-1320.

<sup>22</sup> 505 U.S. 1003 (1992).

nuisance as defined by traditional state, not federal, law. The state's supreme court had held that the regulation did not amount to an unconstitutional taking because it was aimed at abating a public harm, citing several earlier decisions of the U.S. Supreme Court.<sup>23</sup> Those cases had generally been understood to say that whenever a land-use regulation is aimed at preventing a harm to the public, it is valid, regardless of its economic impact on affected landowners.<sup>24</sup> Justice Scalia, however, offered a new interpretation of those cases, significantly reducing their impact. He stated that the "public-harm-abatement," or "noxious-use" test, as it is also known, was really nothing more than an early formulation of the test for determining whether the regulation in question fell within the state's so-called "police power," i.e., was a matter of legitimate governmental control. In his view, the conclusion that a challenged land-use regulation was legitimate because it was an attempt to abate a public nuisance amounts to saying nothing more than that the regulation is a permissible exercise of governmental power. It is not necessarily mean that the regulation may not be successfully challenged as a taking under the Fifth Amendment's Just Compensation Clause.

Scalia added one further bit of work to the public-harm-abatement, or "noxious use" test. He stated that where a land-use regulation goes to far as to reduce the market value of the land to zero, the regulation will be struck down as an unconstitutional taking, unless the owner's intended use of the land constitutes a public nuisance. Now, nuisance law is notorious for its murkiness, and many courts have approached the question of what actions constitute a public nuisance in a dynamic way, taking into account changes in social conditions. That is, they have

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<sup>23</sup> See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>24</sup> See DAVID A. DANA and THOMAS W. MERRILL, *PROPERTY: TAKINGS* 147-48 (2002).

recognized that activity that may have been acceptable to the public one hundred years ago are not acceptable today in a congested urban environment. That what not Justice Scalia's view, however. He stated that the state may avoid its obligation to compensate owners in cases of total economic wipe-outs only if "[t]he use of the[] properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of [the] background principles of nuisance and property law explicit."<sup>25</sup> In other words, it is only where a regulatory prohibited use is one which historical state law has *always* prohibited as constituting a nuisance that the obligation to pay compensation is not triggered. In effect, then, this reading of the "noxious-use" doctrine freezes those uses of land that are for constitutional purpose a nuisance – meaning that the owner is responsible to the public for its well-being and may be regulated by the state without payment of compensation – just to those actions that state common law has *never* permitted at any time in its history.

This version of the "noxious-use" doctrine is one approach to developing a social-obligation norm. It has the apparent advantage of making the scope of the social-obligation norm relatively clear and certain by anchoring it a fixed private-law norm. That advantage is only apparent, however. As Justice Blackmun in his *Lucas* dissent<sup>26</sup> and a number of academic commentators<sup>27</sup> have pointed out, Scalia's approach to handling the problem of the scope of the nuisance exception begs many questions. Why should nuisance, for purposes of takings law, be

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<sup>25</sup> *Id.* at (Emphasis in original).

<sup>26</sup> *See id.* at

<sup>27</sup> *See, e.g.*, DANA & MERRILL, PROPERTY: TAKINGS, at 106-110; Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 SO. CALIF. L. REV. 70 1 (1996); William T. Fisher, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1406-08 (1993).

defined on the basis of judge-made law alone rather than on the basis of statutory law as well as common law? Why should federal judges defer to state courts in defining state law for constitutional purposes rather interpreting state law themselves? Why should the meaning of nuisance be frozen in the nineteenth century? To the extent that the common law controls, what if, as is commonly the case, the background decisions defined nuisance in a dynamic way, creating an evolving body of nuisance law rather than a static one? Even if we assume that it is normatively desirable to restrict the social-obligation norm to traditional nuisance law, *à la Lucas*, that approach will be very difficult to implement in anything like the clear and settled way that Justice Scalia had in mind.

Rather than inquiring, as Justice Scalia does, what limitations are inherent in title to land, one might develop the social-obligation norm by focusing directly on the *obligations* of ownership. The language of obligation has certainly not been absent American takings jurisprudence. Both the liability of property to condemnation for public use and losses resulting from exercises of the police power are, as Justice Frankfurter stated, “properly treated as part of the burden of common citizenship.”<sup>28</sup>

But if American courts occasionally have invoked the language of obligation and duty in takings cases, they have not set about systematically developing a coherent constitutional norm of the social obligation of ownership. They deploy the language of obligation here and there in takings cases, but there has been nothing resembling a sustained account of a constitutional norm predicated on the idea that private ownership entails obligations to act (or refrain from acting) for the purpose of promoting the collective good of the community.

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<sup>28</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

A fully developed social-obligation norm requires some social vision, that is, some substantive conception of the common good which serves as the fundamental context for the exercise of the rights and duties of private ownership. There are, of course, many competing conceptions of the collective good of the community. Precisely for this reason, the substantive scope of the social obligation of ownership is highly and inevitably contestable. As Kevin Gray has pointed out, “At stake are rival views of the political balance to be maintained between individual and community interests.”<sup>29</sup> Gray goes on to state that defining exactly what social obligations inhere in private ownership “highlights crucial questions about the implicit content of *citizenship*.”<sup>30</sup>

## II. THE CONTRACTARIAN VERSION OF THE COMMUNITY-BASED SOCIAL OBLIGATION NORM

The first conception of the social-obligation norm is premised on a social vision that, in the words of Hanoach Dagan, “underplays the significance of belonging to a community.”<sup>31</sup> Dagan goes on to say that the first conception’s social vision “perceives our membership [in a political and social community] in purely instrumental terms, and insists that our mutual obligations as members of such a community should be derived either from our consent or from their being to our advantage.”<sup>32</sup>

The second conception of the social obligation norm is considerably thicker.<sup>33</sup> It picks

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<sup>29</sup> Kevin Gray, *Land Law and Human Rights*, in LOUISE TEE, ed., *LAND LAW: ISSUES, DEBATES, POLICY* 211, 240 (2002).

<sup>30</sup> *Ibid.* (emphasis in original)

<sup>31</sup> Dagan, *Takings and Distributive Justice*, *supra* note 9, at 771.

<sup>32</sup> *Id.* at 771-72 (footnote omitted).

<sup>33</sup> For examples of such a conception see, Dagan, *Takings and Distributive Justice*, *supra* note 9,

up where the first conception leaves off, taking the idea of belonging in a community seriously and building on that idea to develop a social-obligation theory that is liberal even while it focuses on community. This contractarian<sup>34</sup> version of the community-based conception of social obligation has been most fully developed in recent years by Dean Hanoch Dagan in a series of important articles.<sup>35</sup> Dean Dagan is committed to the project of normatively developing the social dimension of property law, both in the private and public legal spheres. The basis for any conception of the social obligation norm is justice. But obviously there are many competing theories of justice. The theory of justice that underlies the thin, non-community-based conception of the social-obligation norm is classical liberalism, the same theory that underlies approaches to constitutional protection of property such as Richard Epstein's, for example.<sup>36</sup> A community-based conception of the social-obligation norm must be based upon a theory of justice that allows a greater capacity for wealth redistribution. Such a conception seems underlie the approach to constitutional property that Dean Dagan has developed. His approach appears to be based on a theory of justice that is rooted in a theory of justice that clearly liberal, but not

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at 771-774; Joseph William Singer and Jack Beerman, *The Social Origins of Property*, 6 CANADIAN J. OF L. & JURIS. 217, 241-248 (1993); SINGER, ENTITLEMENT, *supra* note 6, at 197-216.

<sup>34</sup> It is important to clarify the sense in which I am using the term "contractarian." Contractarianism is a broad methodological approach in moral philosophy that does not yield any particular substantive moral position. So, although many libertarians, such as Robert Nozick, have used contractarian arguments, the contractarian approach has also been deployed in favor of wealth redistributive views such as Rawls'. The important point is not to confuse contractarianism with libertarianism.

<sup>35</sup> See, e.g., Dagan, *The Social Responsibility of Ownership*, *supra* note 9; Dagan, *Just Compensation, Incentives, and Social Meanings*, *supra* note 9; Dagan, *Takings and Distributive Justice*, *supra* note 9.

<sup>36</sup> See EPSTEIN, TAKINGS, *supra* note 12, *passim*.

*classically* so. The fact that it remain firmly tethered to the liberal political tradition is indicated clearly, I believe, by his understanding of community.

Dean Dagan's conception of community shares with the earlier versions of community that I have traced a commitment to methodological individualism. That is, it assumes that the basic unit of social organization is the individual, understood as fully autonomous from her very beginnings. From this perspective communities are seen as agglomerations of autonomous individuals, drawn together to act volitionally for the realization of certain shared ends. Community is valuable only insofar as it contributes to the satisfaction of some individual preference. It is never an end in itself. On this view, the relationship between the self and communities is both contractual and welfarist. The self and communities are bound together by mutual agreement, sometimes express but commonly implied, to associate with each other to pursue some shared end.

According to this contractarian theory of community, what motivates the self to act as a member of one or more communities is preference-maximization. Individuals associate with each other in groups in order to maximize their own personal welfare. Individuals choose to act with others, to participate as members, when they hold what Charles Taylor calls "convergent" goods, which he distinguishes from "shared" goods."<sup>37</sup> Convergent goods are those in which individuals have a common interest, say, the common interest of tenants in preventing a fire in their building. By contrast, goods are shared when "part of makes it a good is precisely that is it shared, that is, sought after and cherished in common."<sup>38</sup> The good is not mine; it is ours. With

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<sup>37</sup> Charles Taylor, *Social Theory as Practice*, in 2 CHARLES TAYLOR, PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 96 (1985).

<sup>38</sup> *Ibid.*

convergent goods, individuals interact in pursuit of individually defined ends that happen to overlap with the ends pursued by others. The goods are not constitutive of the group or community.

From a contractarian perspective such as this, communities can make of its members only those demands that it is likely to pay back in the long, if not the short, run.<sup>39</sup> That is, membership in a community, political or otherwise, does not ever warrant sacrifices by its members that are highly unlikely to remain uncompensated, even in the long run.<sup>40</sup> Uncompensated involuntary sacrifices violate the basic commitment to personal autonomy and the protection of legitimate individual expectations. It is legitimate to expect individuals to make personal sacrifices for the common good just insofar as accounts will be evened up in the long run, that is, so long as there exist reasonable grounds to believe that the total long-term burdens that the individual bears will balance out with the total long-term benefits she receives.<sup>41</sup>

### III. HUMAN FLOURISHING AND THE SOCIAL OBLIGATION OF OWNERSHIP

There is a second conception of community that is more robust and, in that sense, more demanding than Dean Dagan's. In recognition of its relationship with the practice of citizenship, Elsewhere Eduardo Peñalver and I have called this thicker conception of community the "ontological" conception.<sup>42</sup> It might also be called "Aristotelian," for it builds on the Aristotelian

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<sup>39</sup> See, e.g., Dagan, *The Social Responsibility of Ownership*, *supra* note 9.

<sup>40</sup> See *ibid.*

<sup>41</sup> Dagan, *Takings and Distributive Justice*, *supra* note 9, at 776 .

<sup>42</sup> See Gregory S. Alexander and Eduardo M. Peñalver, *Properties of Community*, \_\_ THEORETICAL INQUIRIES IN LAW \_\_ (forthcoming 2008). This understanding of the social obligation norm is one version of what I have called the "proprietary" theory of property. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN*

notion that the human being is a social and political animal, not self-sufficient alone. It stresses the fact that although human beings value and strive for autonomy, dependency and interdependency are inherent aspects of the human condition. Although a full explication of the theoretical foundation of this conception is beyond the scope of this paper,<sup>43</sup> I begin this Part by describing its key normative commitment to human flourishing and briefly summarizing the argument linking that ideal with a concrete theory of the social obligation of ownership.

The Aristotelian conception of human beings as social and political animals operates as part of a substantive understanding of what it means to live a distinctively human life and to flourish in a characteristically human way. Any adequate account of human flourishing must stress two characteristics.<sup>44</sup> First, human beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent upon, other human beings. Living within a particular sort of society, a particular web of social relationships, is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish. Second, human flourishing must include at least the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about is valuable within those available alternative choices. These two characteristics of human flourishing are deeply interconnected.

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AMERICAN LEGAL THOUGHT, 1776-1970 *passim* (1997).

<sup>43</sup> For a fuller discussion of the philosophical underpinnings of this version of the social-obligation norm espoused in this Article, see Alexander and Peñalver, *Properties of Community*, *supra* note 41, at \_\_\_ .

<sup>44</sup> I must emphasize that the patterns of human life consistent with human flourishing will be richly diverse and varied. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 85 (1980).

The account of human flourishing on which the civic conception of community is based borrows from the “capabilities” approach developed in recent years by Martha Nussbaum and Amartya Sen.<sup>45</sup> That approach measures a person’s well being not by looking at what they have, but by looking at what they are able to do.<sup>46</sup> The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls “functionings,” rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties. Social structures, including distributions of property rights and the definition of the rights that go along with the ownership of property, are to be judged, at least in part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction.

Nussbaum and Sen importantly distinguish between the first-order patterns that constitute well lived human lives (*functionings*) and the second-order freedom or power to choose to function in particular ways, which they call “*capabilities*.” As Nussbaum explains, “A person’s ‘capability’ refers to the alternative combinations of functionings that are feasible for her to achieve.”<sup>47</sup> Among the functionings that are necessary for a well-lived life are freedom, understood as including freedom to make deliberate choices among alternative life horizons, practical rationality, and sociality. Although the actual achievement of these and other

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<sup>45</sup> See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Martha C. Nussbaum, *The Supreme Court 2006 Term, Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 5 (2007).

<sup>46</sup> AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 10-11 (1985).

<sup>47</sup> NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 44, at 87-88.

functionings are necessary components of any plausible conception of the well-lived life, the experience of choosing among a number of possible valuable functionings (perhaps even including the choice not to function in certain ways) is *itself* an important functioning.<sup>48</sup> Accordingly, a proper concern for human autonomy requires looking beyond mere functionings to include the capabilities that various social matrices generate for their members.<sup>49</sup>

There is ample room for robust debate about exactly what capabilities are the crucial components of human flourishing.<sup>50</sup> We need not dwell on this debate. The crucial point for present purposes is that no individual can acquire these capabilities or secure the resources to acquire them by herself. This is because the physical process of human development mandates our dependence on others for a great deal of the time during which we are cultivating the necessary capacities. This form of dependence is perhaps most clear with respect to life and its subsidiary goods. We enter the world utterly dependent on others for our physical survival.<sup>51</sup> Even upon reaching adulthood, we continue to place at least partial physical dependence (and even emotional or psychological dependence) on others as we move through a dangerous world. It is often little more than dumb luck that separates the independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence begins once again to loom ever larger.

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<sup>48</sup> *Id.*

<sup>49</sup> SEN, DEVELOPMENT AS FREEDOM, *supra* note 44, at 74-76; *see also* Purdy, *A Freedom-Promoting Approach to Property*, *supra* note 6, at 1258-63.

<sup>50</sup> *Compare, e.g.*, NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 44, at 78, with FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 43, at 81-90.

<sup>51</sup> *See* MACINTYRE, DEPENDENT RATIONAL ANIMALS 71-74 (1999).

But the social and material dependence of the capabilities necessary for human flourishing goes well beyond the physical dependence we exhibit at the beginning and end of life. Freedom, practical rationality, sociality and their attendant functionings can meaningfully exist only within a vital matrix of social structures and practices. Even the most seemingly solitary and socially threatened of these capabilities, freedom, depends upon a richly social, cultural, and institutional context for the presence of which the free individual must rely on others. Charles Taylor puts the point this way:

[W]e live in a world in which there is such a thing as public debate about moral and political questions and other basic issues. . . . What would happen to our capacity to be free agents if this debate should die away, or if the more specialized debate among intellectuals who attempt to define and clarify the alternatives facing us should also cease, or if the attempts to bring the cultural of the past to life again as well as the drives to cultural innovation were to fall off? What would there be left to choose between? And if the atrophy went beyond a certain point, could we speak of choice at all?<sup>52</sup>

Alastair MacIntyre similarly discusses how we necessarily depend upon others to develop as beings capable of engaging in practical reasoning. “We become independent practical reasoners,” he argues, “through participation in a set of relationships to certain particular others who are able to give us what we need.”<sup>53</sup> From the earliest age and well into adulthood, if not for our entire lives, we receive from and we rely on parents, teachers and mentors and friends for lessons about planning and evaluation, causes and consequences, self-restraint and discipline, the raw material from which the capability of practical reason emerges. We are, in short, inevitably dependent upon communities, both chosen and unchosen, not only for our physical survival but also for our ability to function as free and rational agents.

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<sup>52</sup> Charles Taylor, *Atomism*, in TAYLOR, PHILOSOPHICAL PAPERS, *supra* note 36, at 205.

<sup>53</sup> MACINTYRE, DEPENDENT RATIONAL ANIMALS, *supra* note 50, at 99.

Communities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities.<sup>54</sup> Even (or more properly, precisely) as free, rational persons, we never cease to operate within and depend upon the matrices of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense with others with whom we are connected as members of one or typically more communities. Each of our identities is literally constituted by the communities of which we are members. Asked who we are, we inevitably talk about the communities where we were born and raised, our nation, our family, where we attended school, our friends, our religious communities and clubs. Indeed, individuals and communities interpenetrate one another so completely that they can never be fully separated.<sup>55</sup>

The communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations and the scope of our aspirations. The homeless person, accustomed to receive little more than abuse or neglect, may come to expect little more out of life.<sup>56</sup> Similarly, while membership in certain communities can obviously be based upon

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<sup>54</sup> The conception of community which underlays my approach to the social-obligation norm owes much to the following works: ALASTAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (1999); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); CHARLES TAYLOR, *SOURCES OF THE SELF*; MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE*; ROBERT BELLAH, et al., *HABITS OF THE HEART*

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.

<sup>55</sup> For an elaboration of this idea, see Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 *CORNELL L. REV.* 1, 21-28 (1989).

<sup>56</sup> See SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 45, at 21 (“A person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-

contract or voluntary agreement, the very possibility of these voluntarily associative relationships depends upon our prior and continuing (and typically involuntary) participation in or exposure to communal institutions that impart to us the information and capacities that give us the tools needed to permit us to understand and engage in voluntary choosing at all.<sup>57</sup>

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fulfillment if he or she has learned to have ‘realistic’ desires and to take pleasure in small mercies.”).

<sup>57</sup> See Taylor, *Atomism*, in TAYLOR, *PHILOSOPHICAL PAPERS*, *supra* note 36, at 196-98; Alexander, *Dilemmas of Group Autonomy*, *supra* note 54, *passim*.

Beyond nurturing the individual capabilities necessary for flourishing, communities, of all varieties, serve another, equally important function. Community is necessary to create and foster a certain sort of society, one that is characterized above all by just social relations within it.<sup>58</sup> By “just social relations,” we mean a society in which individuals can interact with each other in a manner consistent with norms of equality, dignity, respect, and justice as well as freedom and autonomy.<sup>59</sup> Communities foster just relations with societies by shaping social norms, not simply individual interests.<sup>60</sup>

Precisely because the capabilities are essential to what it means to flourish in a distinctively human way, their development is an objective human good, something that we ought (insofar as we accept these particular capabilities as intrinsically valuable) to promote as a good in and of itself. Every person is equally entitled, as a matter of human dignity, to flourish. This being so, then every person must be equally entitled to those things essential for human flourishing, i.e., the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities. In the absence of these capabilities and supporting resources, recognition of the entitlement to flourish is simply an empty gesture. But not every society will be equally conducive to human flourishing. The cultivation of the capabilities necessary for flourishing depends upon social matrices, and the condition of those matrices

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<sup>58</sup> See ALEXANDER, *COMMODITY & PROPRIETY*, *supra* note 41, at 1-3 and *passim*.

<sup>59</sup> An alternative formulation for such a society is one that borrows from the South African Constitution, which refers to “an open and democratic society based on human dignity, equality and freedom.” SO. AFRICAN CONST. § 36(1).

<sup>60</sup> Of course, this is not to say that all communities promote just social relations. There are many examples, past and present, of communities that do not. The point that we are making is that communities have the capacity to do so by virtue of their social-norm-shaping function.

varies among societies, sometimes quite widely. A society that fosters those functionings and capabilities that are necessary for human flourishing is morally better than one that is either indifferent or (even worse) hostile to their manifestation.

Just why does a person have an obligation to others in the community to promote the requisite capabilities? Several possible bases for this obligation exist. It might be possible, for example, to base it on some notion of long-term self-interest. The idea would be that the communities which aided and continues to aid the person's development as autonomous moral agent depend for their well-being, and in turn, hers, on the person's helping it. Without necessarily rejecting that argument, we prefer to base the obligation on a version of Alan Gewirth's universalizability principle.<sup>61</sup> The basic idea behind that principle is that if as rational agents, we have rights, then in order to avoid contradicting ourselves we must acknowledge that all persons, as rational agents in the same relevant sense, have them. Thus, Gewirth stated, "the mutuality of human rights is a stringent kind of symmetrical relation whereby each person has rights to freedom and well-being against all other humans [and] every other human also has these rights against him, so that he has correlative duties toward them."<sup>62</sup> Gewirth termed a society based on this principle of universalizability (or consistency) a "community of rights," and he noted that not only does the community support the members' rights but also the members have obligations to the community.<sup>63</sup>

The argument I am making here is similar: If an individual, as a rational moral agent,

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<sup>61</sup> ALAN GEWIRTH, *REASON AND MORALITY* (1978).

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.* at 83.

values her own flourishing, then to avoid self-contradiction, she must value the value of others as well. As we discussed earlier, each individual's commitment to develop his/her own necessary capabilities results from nothing more than the fact that s/he is a rational human being. That being so, then rationality constrains each of us to acknowledge the right of every other human being, as a rational moral agent, to develop the same capabilities. Moreover, this has certain normative consequences. Because we value the development of their capabilities just as we do our own, we are obligated, under certain circumstances, to foster their development. Our valuing the requisite capabilities means that we recognize that they have a special moral status and that we acknowledge that it is good that we develop them in ourselves.<sup>64</sup> To avoid contradicting ourselves, we must make the same normative commitment to their development in others just as we have committed ourselves to developing them in us.

If there is general agreement that human capacities such as survival (including physical health), the ability to engage in practice reasoning, and to make reasoned decisions about how to live our lives are components of the well-lived life, as surely there is, then there should also be agreement that we are all obligated to support and nurture the social structures without which those human capabilities cannot be developed.<sup>65</sup> Consequently, viewed from the standpoint of the capabilities necessary for human flourishing, how we participate in political and social communities cannot just be an expression of our preexisting autonomy; it cannot be solely a volitional act committed for instrumental reasons such as preference satisfaction. It is also an objectively grounded obligation rooted in our recognition of the value of the capabilities that are

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<sup>64</sup> See Taylor, *Atomism*, *supra* note 36, p. 194.

<sup>65</sup> *Id.* at 197.

necessary for the well-lived life. Charles Taylor has expressed this social vision in the following terms:

[S]ince the free individual can only maintain his identity within a society/culture of a certain kind, he has to be concerned about the shape of this society/culture as a whole. He cannot . . . be concerned purely with his individual choices and the associations formed from such choices to the neglect of the matrix in which such choices can be open or closed, rich or meagre.<sup>66</sup>

Stated differently, acknowledgment of our human dependence upon others, on the social matrices that nurture the capacities that enable us to flourish, creates for us a moral obligation to support these matrices. The major claim here, in short, is that our (and others') dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.

The repayment of this debt "is not and cannot be a matter of strict reciprocity," MacIntyre points out.<sup>67</sup> Reciprocity, at least in any ordinary sense of that term, cannot account for this obligation for several reasons. First, the persons to whom we are required to give are often not the same as those from whom we received. There is no way of predicting in advance who are the persons to whom we shall be required to give. It might be our parents, but it might be total strangers from whom we have received nothing.

Second, even if the persons to whom to give are the same as the persons from whom we previously received some benefit, what we give is often not the same as what we received. This will commonly be the case between parents and children and indeed between all persons of

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<sup>66</sup> Taylor, *Atomism*, in TAYLOR, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS, at 187, 207.

<sup>67</sup> MACINTYRE, DEPENDENT RATIONAL ANIMALS, *supra* note 53, at 100.

different generations whenever some form of nurturing was involved. What our parents gave to us to nurture us as we developed into healthy and stable adult persons capable of making thoughtful choices is typically quite different from the kind of care they later require of us as their dependency grows with age. Moreover, often the amounts differ, sometimes very considerably. As members of flourishing social networks, we understand that often what we give we give unconditionally, because the measure of what is expected of us is the need of others rather than what we have already received or expect to receive in the future.<sup>68</sup> This is most obviously true between parents and children, but it also holds true in wider relationships, that is, relationships outside the family. We give to our friends, colleagues, neighbors, and others in the myriad of social networks that constitute our ordinary lives, and we give to them according to their need rather than as repayment for the benefits they have conferred upon us in the past. If reciprocity is at work here, it is so only in the attenuated sense that we ourselves need these social networks to continue our own development as persons possessing those human capacities essential to being a fully responsible moral agent. The real basis of our obligation here is not reciprocity but dependency. We need to belong to such social networks for the development of certain essential human capacities, and that dependence places on us an obligation to maintain those nurturing social networks.

Citizenship in its broadest sense is one of the most important forms of social network membership characterized by the process that I have been describing. Americans are apt to think of citizenship these days as something detached from everyday life, as a matter of public rituals and occasional role-playing. But in another sense, citizenship is a matter of interacting with

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<sup>68</sup> *Id.* at 108.

others for the sake of the common good. It, too, involves dependence on others to become autonomous individuals. Here as well, our dependence creates debts, and once again, repayment of these debts is not strictly a matter of reciprocity. Why we owe, what we owe and to whom we owe repayment cannot be calculated, at least not solely, on the basis of some sort of quid-pro-quo schedule. We owe because we are dependent, we are members. What we owe and to whom we owe is just as often as not determined by the needs of others rather than what and from whom we have exactly received what we ourselves needed.

Of course, there is a legitimate concern that this thicker conception of community may be taken too far. Important values like fairness, individual respect, and human dignity need to be protected, even as we recognize that community membership involves the possibility of unreciprocated sacrifices. This is an aspect of the irreducible tension that runs throughout all of the law of property, especially constitutional property, and it at least partly explains why takings law is unavoidably muddy.<sup>69</sup> 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 conception of community and hinder it from fostering human flourishing. For human flourishing depends upon not simply upon participation in networks of social relationships but upon the existence of social relationships that are non-strategic. 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

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<sup>69</sup> See Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COM. 259, 261 (1992); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 599 (1991); Carol M. Rose, *Mahon Reconstructed: Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566–69 (1984).

contractarian 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.

Arguing in response to an earlier explication of the civic theory,<sup>70</sup> Dean Dagan has argued that “[a] naive dismissal of property’s protective role may . . . lead to the systemic exploitation of weak property owners and to a cynical abuse of social solidarity, subverting the very aims it intends to further.”<sup>71</sup> This leads him to conclude that “some skepticism about the disproportionate contribution to the community’s well-being is appropriate particularly when contributions are required from politically weak or economically disadvantaged landowners.”<sup>72</sup>

There are a number of problems with this argument. First, it may lead to results that are very regressive. It is basically a variation on the familiar argument that redistributive measures end up hurting the poor. Professor Richard Epstein, for example, forthrightly states, “It is a melancholy truth that in practice redistribution often works in favor of those who have political power and not those who have genuine need. The only moral case for redistribution is to overcome differences of wealth in the service of those with real human needs. Once redistribution becomes a legitimate function of government, it is likely to be unleashed in ways that flatly contradict this purpose.”<sup>73</sup> The lesson that Epstein, like others on the political Right, draw from this apparent insight, is that government should never (or at least rarely) engage in redistribution. The same regressive outcome is likely to be true of Dean Dagan’s argument.

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<sup>70</sup> See ALEXANDER, *THE GLOBAL DEBATE* *supra* note 11, at .

<sup>71</sup> Hanoch Dagan, *Re-Imagining Takings Law* [9] (unpubl. ms. 2007).

<sup>72</sup> *Ibid.*

<sup>73</sup> RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 61 (2003).

Because of its regressive effects, Dean Dagan's argument seems to confound his desire to have burdens fairly spread through his concept of reciprocity.

Another problem with the argument is that its empirical foundations are at least contestable. The argument poses one of those unanswerable public-choice puzzles, such as, is the discrete and insular minority uniquely disadvantaged or is it, to the contrary, uniquely advantaged in a democratic political process? There is simply no incontestably correct answer. Those who make the argument nearly always assume that there is, and their argument is based on just that – an unsubstantiated assumption.

None of this is to deny Dagan's point concerning expectations. When individuals are required to make sacrifices for the benefit of society, they commonly do so with an expectation that their sacrifice will be reciprocated in some fashion at some point in the future, and those expectations often will be legitimate. The theory that long-term as well as short-term or even immediate forms of reciprocity need to be taken into account in determining whether monetary compensation is due is correct as far as it goes. Dean Dagan's theory of long-term reciprocity is one way of identifying and isolating cases in which the social-obligation norm might be abused, frustrating legitimate expectations or disproportionately burdening the poor or other politically weak groups.<sup>74</sup> However, there is no a priori reason to believe that such cases will be the rule rather than the exception. As I indicated earlier, whether discrete and insular minorities are uniquely disadvantaged or uniquely advantaged<sup>75</sup> in ordinary democratic political processes is an

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<sup>74</sup> *Ibid.*

<sup>75</sup> Strictly as a matter of public choice theory, for example, there are more than a few well-organized interest groups representing the poor and various minority groups in legislatures at both state and federal levels.

empirical question any answer to which will be inherently contestable. To assume that the poor will always be politically disadvantaged is simply begging the question.

#### **IV. THE SOCIAL OBLIGATION AT WORK: A PARTIAL TYPOLOGY**

Having sketched the theoretical foundation and character of this human-flourishing focused version of the social-obligation norm, the question naturally becomes just what it includes. What exactly is the content of this version of the social obligation norm? The most general guide that I can give is that the owner must provide the society of which she is a member those benefits that the society reasonably regards as necessary for the development in its members of those human qualities essential to their capacity to act as moral agents and that have some reasonable relationship with ownership of the affected land. To make that general guide clearer this Part provides several examples of legal doctrines that can best be explained on the basis of the social-obligation theory that I have defended. The list is intended to be illustrative, not exhaustive. What will emerge is a partial typology of social-obligation practices extant in American property law and cognate fields. The point is not that current American property law, public and private, already has fully internalized the idea that private owners owe thick responsibilities to the communities to which they belong. It has not. But it has been partially internalized, albeit indirectly and confusingly. The purpose of this Part, then, is to illustrate how the human-flourishing focused conception of the social-obligation norm in fact operates (and might operate) in American law and to call for open acknowledgment of its existence and explicit development of its parameters. Traces of an implicit social-obligation norm are scattered throughout American property law. Much clarity would be gained if the norm were acknowledged as the basis for the relevant legal practices.

This Part has both positive and normative objectives. It seeks to provide an explanatory account of doctrinal practices in which private owners are required to sacrifice their ownership interests in some way. It also discusses when and why this version of the social obligation norm justifies the political community's requiring such sacrifices by private owners. The results of the social obligation theory will sometimes overlap sometimes with the prescriptions of economic analysis, but not certainly not always. The social obligation theory will sometimes call for individual sacrifices that economic theory will not, and it will explain certain doctrinal practices that economic analysis has difficulty explaining. More fundamentally, as we will see, the focus of the social obligation theory is fundamentally different from that of economic analysis and other theories derived from utilitarianism, as well as from classical liberalism.

The examples are divided into two categories. The first are cases of entitlement sacrifices through forced sales. Owners are required to sacrifice some property interest to the community in exchange for monetary compensation. In the language of Calabresi and Melamed<sup>76</sup> their entitlement is protected by a liability rule rather than a stronger property rule. The second category consists of instances in which the owner keeps her property but is prohibited from using it in some way that the community regards as against its collective interest.

#### *A. Entitlement Sacrifices*

There are many occasions in which property law protects owners only incompletely in the sense that it requires the owner to sell her entitlement unwillingly and at an objectively set price. Ordinarily, of course, no one may take private property at any price unless the owner voluntarily sells it willingly, but this is not always the case. This section considers a few of the

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<sup>76</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

many examples of state-sanctioned forced sales. In recent years the conventional explanation of these forced-sale doctrines has been economic. Because of high transaction costs the transfer of the entitlement will not occur even though such a transfer would benefit all concerned.

Protecting the entitlement through a liability rule, meaning that others have a right to take the property so long as they compensate the owner, maximizes economic efficiency under such circumstances.<sup>77</sup> Without suggesting that forced sales may not be justified on such instrumentalist grounds, I want to suggest in this section that another, perhaps in some cases, better way of understanding these forced sales is as an aspect of the social obligation inherent in private ownership. A few example should suffice to establish the point.

### 1. Eminent Domain

Several rationales for the power of eminent domain, a power that can be traced back to ancient Rome, have been offered by scholars from Grotius<sup>78</sup> to Posner. The reigning conventional wisdom is Posner's: what justifies the power of the state to force the sale of private property is economic efficiency.<sup>79</sup> Eminent domain is necessary to overcome monopolies that occur when desirable government projects are site-specific. To pick a familiar example, say a city plans to build a new airport on land that is privately owned by several owners. No other site is feasible, so the city must acquire each of these parcels. As economists have long pointed out, this means that each owner has a monopoly on an asset critical to the government's plan, and each is in a position to extract monopoly rents from the government in exchange for selling

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<sup>77</sup> See, e.g., *id.* at 1106.

<sup>78</sup> See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 807 (Francis W. Kelsey trans., Carnegie Inst. of Wash. 1925) (orig. pub. in 1646).

<sup>79</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55-56 (6<sup>th</sup> ed. 2003).

her/his parcel. Eminent domain allows the government to achieve the benefit of building the airport at a lower cost to taxpayers than would be the case if the government had to acquire each parcel through market transactions.<sup>80</sup>

Eminent domain can be understood in terms of the civic obligation as well. The capacities necessary for individuals to flourish as autonomous moral agents require the existence not only of social networks within which individuals carry the activities that enable them to experience freedom but also what Charles Taylor calls “the mundane elements of infrastructure without which we could not carry on these higher activities . . . .”<sup>81</sup> These elements of infrastructure include just the sorts of public projects for which the power of eminent domain is typically exercised: roads, airports, utility lines, public buildings, communication systems, and the like. This infrastructure is the literally the foundation upon which our society, our culture, and our polity rests. It is no exaggeration to say that without this infrastructure, our civilization, the very civilization that nurtures those qualities through which we experience ourselves free individuals capable of making choices among alternatives and defining for ourselves our wants, needs, and values, would not exist. Each of us as a member of this political community, then, depends upon the continued effectiveness of this infrastructure, and that dependence requires that we bear some responsibility for maintaining it.

Eminent domain is a legal and political process for determining just what that responsibility is. At its most general level, the power of eminent domain represents our collective

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<sup>80</sup> For a particularly clear explanation of the economic problem and how eminent domain solves it, see Thomas W. Merrill, *The Economics of Eminent Domain*, 72 CORNELL L. REV. 61, 81-82 (1986).

<sup>81</sup> Taylor, *Atomism*, in Taylor, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS, at 205.

judgment that the state is justified in demanding of us as members of the political and society community that nurtures us as flourishing individuals that under certain conditions we as landowners may have to sacrifice title to our land in exchange for just compensation, measured as fair market value.

Although eminent domain has a fair share component, it has an element of individual sacrifice. Its effects are necessarily concentrated on those whose property is condemned. Because “just compensation” is, under current American judicial doctrine, fair market value compensation, which does not reflect the owner’s subjective valuation and might be inadequate even if “just compensation” were defined to include subjective value,<sup>82</sup> those who lose their property through eminent domain really do lose something that the rest of us (who are paying our taxes in part to fund their compensation) do not. Perhaps a conception of reciprocity can explain this aspect of eminent domain, but it will require an attenuated form of reciprocity.

The fact that the power of eminent domain is collective obviously creates a risk of abuse. The political community is justified in demanding this entitlement sacrifice only to the extent that the demand represents a bona fide determination of what is in the community’s best interests by a genuinely representative expression of that community. Where instead the political process has been hijacked by interest groups who disproportionately benefit from the exercise of eminent domain, the community’s demand is not justified. Determining just when the exercise of eminent domain is the perversive result of interest-group politics is obviously a difficult matter. One rule of thumb that has been suggested is that the risk of abuse is greatest in case where condemnation of the land is followed by retransfer of the land to one or a few private parties and

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<sup>82</sup> The point here is simply that not all subjective attachments are reducible to monetizable terms.

the price charged by the government on retransfer is less than the compensation award, based on the opportunity cost formula.<sup>83</sup> This strikes me as very useful rule of thumb for courts to use. The mere fact that government charged less on the retransfer than the amount of the condemnation award should not lead a court necessarily to conclude that the taking was not for a “public use.” But it should be strong evidence that what Merrill calls “secondary rent-seeking”<sup>84</sup> has occurred and lead to heightened judicial scrutiny of the government’s demand of the landowner.<sup>85</sup>

Although the civic social-obligation theory overlaps with the economic theory in its broad contours, the two are not identical. The economic theory says that individuals are obligated to sacrifice their own private well-being for the sake of the common good, defined as aggregate wealth. From the civic perspective, the problem is that with economic theory’s call for individual sacrifice but with its simplified and simplistic definition of the common good. This is one reason why many economically-minded analysts have difficulty understanding why people react so strongly against using eminent domain for projects like shopping malls. From the economic point of view, what matters is that high transaction costs are standing in the way of some wealth-maximizing use of land. Economic theory posits that the purpose of eminent domain is to get around high transaction costs. The use to which the land itself is to be put is irrelevant. It could be a bridge, a road, or a shopping mall for all the economist cares.

There is certainly something to be said in favor of this perspective. What sensible person

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<sup>83</sup> Merrill, *The Economics of Public Use*, *supra* note 75, at 87-88.

<sup>84</sup> By “secondary rent-seeking,” Merrill means efforts by interest groups to acquire (or defeat) a legislative grant of eminent domain. *See id.* at 86.

<sup>85</sup> *See generally* Gregory S. Alexander, *Eminent Domain and Secondary Rent-Seeking*, 1 NYU J. OF LAW & LIBERTY 958 (2005).

would say that the wealth of a society is irrelevant? Wealth obviously is part of the common good, but aggregate social wealth is not the *summum bonum*. Moreover, although it does not seem inherently illegitimate or immoral for a political community to ask some individuals to sacrifice so that the wealth of their society can increase, even when that wealth is in private hands, the analysis of sacrificing very quickly becomes very complicated in ways that are difficult for economic analysis entirely to capture. For example, will the private beneficiary of eminent domain be engaged in a business that creates good jobs for the local community? Is the use of eminent domain really necessary in a given case, or is it just politically easy because of the political powerlessness of the affected group? These are questions that economic analysis cannot answer, at least not easily, nor can the social-obligation theory answer them easily. The difference, however, is that under the civic version of the social-obligation theory they must be faced directly and openly, and they will not be analyzed in terms of a conception of the common good that is limited to aggregate social wealth. Rather they will be addressed from the perspective of a substantive conception of the goods that are necessary to a well-lived human life and the social structures necessary to foster those goods.

## 2. Remedies for Nuisance

Remedies for nuisances and other interferences with property entitlements raise the same basic problem as that involved in eminent domain law. When and for what reasons is it justifiable for the state to deprive a private owner of her property in exchange for a monetary award that may not compensate her at the level of her subjective valuation? In law-and-economics terms the question is when an owner's entitlement should be protected by a liability rule, which involves a forced sale very much like eminent domain, rather than a property rule, which usually involves an injunction against the interfering activity. Ever since the classic article

by Guido Calabresi and Douglas Melamed in the 1972 *Harvard Law Review*,<sup>86</sup> law-and-economics scholars have endlessly debated this question from the perspective of a single social good – aggregate social wealth. But just as eminent domain can be understood in terms of the civic obligation of ownership, so can remedies for nuisances and other encroachments upon private property interests. Consider the famous case of *Boomer v. Atlantic Cement Co.*<sup>87</sup> The court there granted an injunction against a nuisance, but the injunction was to be vacated upon payment by the defendant of permanent damages to the plaintiff. In effect, then, the defendant who caused the nuisance was allowed by paid damages rather than be enjoined if it found damages cheaper than shutting down its operation, which was almost certainly the case. The court's rhetoric was redolent of economic interests and utility, but notions of individual sacrifice and social obligation are not far from sight. The court candidly acknowledged that its remedy represented a direct departure from the well-established New York rule that once a nuisance has been found, an injunction will issue against the offending activity despite the existence of a great disparity between the economic effect of the injunction and the effect of the nuisance.<sup>88</sup> Under this rule the owner sacrifices nothing of her property interest, which is fully protected. Under *Boomer's* damages remedy, the owner is required to sacrifice her entitlement through a forced sale that yields a price that may or may not fully compensate her.

Just as the conventional wisdom explains eminent domain in terms of avoiding high transaction costs to maximize aggregate wealth, so most legal theorists today rationalize *Boomer*

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<sup>86</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>87</sup> 257 N.E.2d 870 (N.Y.1970).

<sup>88</sup> *Id.* at

in wealth-maximizing terms.<sup>89</sup> Social obligation theory may complement the wealth-maximizing story of *Boomer* by reading the case as one in which the individual owners were legitimately required to sacrifice their entitlement (freedom from the pollution caused by the defendant's cement plant) as part of their civic obligation to support "the mundane elements of infrastructure without which we could not carry on [the] higher activities"<sup>90</sup> of deliberating with each other, engaging with each other in economic exchange, living lives within families, groups of friends, discovering ourselves, and the myriad of other activities through which we experience freedom and fulfillment. For without industries such as the defendant's the culture in which we live, the culture that nurtures those goods that are essential a well-lived human life, would not be possible, at least not in the form as we know it. Because industries like the defendant's, the argument would go, are one of the social structures undergirding that culture, individual sacrifices to maintain them may have to be made, particularly by property owners whose entitlements the industries directly affect.

Some courts have made exactly this sort of individual sacrifice argument in determining that some activity was not a nuisance despite the fact that it substantially harmed a property

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<sup>89</sup> Calabresi and Melamed cited it as exemplary of the use of a liability rule for purposes of economic efficiency. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability*, *supra* note 81, at 1116 n.55. The law-and-economics literature on *Boomer* is staggeringly large. For representative examples, see Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules*, 109 HARV. L. REV. 713 (1996); Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in PROPERTY LAW AND LEGAL EDUCATION 7 (Peter Hay & Michael H. Hoeflich eds. 1988); A. Mitchell Polinsky, *Resolving Nuisance Disputes*, 32 STAN. L. REV. 1075 (1980).

<sup>90</sup> Taylor, *Atomism*, in Taylor, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS, at 205.

interest. In *Estancias Dallas Corp. v. Schultz*,<sup>91</sup> for example, the court approvingly quoted the following language from a previous case:

“Some one must suffer these inconvenience rather than that the public interest should suffer. . . . These conflicting interests call for a solution of the question by the application of the broad principles of rights and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property.”<sup>92</sup>

The argument basically tracks the individual sacrifice theory sketched earlier to explain eminent domain from a social-obligation perspective. It applies equally to the remedy issue involved in *Boomer* as it does to the substantive question whether a nuisance exists.

It is also possible that the civic version of the social obligation theory would generate the opposite result in *Boomer*, as perhaps it would in some of the more controversial eminent domain cases, including *City of New London v. Kelo*.<sup>93</sup> In *Boomer*, we might conclude that because the defendant’s activity enables the flourishing of those human capacities through which we experience individual freedom only in a very attenuated way, a forced sale of the plaintiff’s entitlement to live in her home free from constant noise and pollution cannot be justified on the basis on her obligations to her community. Not every social structure or political institution and not every social activity is necessary to foster the goods that are required for a well-lived life. From the perspective of developing these essential goods, some social structures or activities are more important than others. A tighter nexus between the institution whose activity is under

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<sup>91</sup> 500 S.W.2d 217 (Tex. Civ. App. 1973).

<sup>92</sup> *Id.* at 219 (quoting *Storey v. Central Hide & Rendering Co.*, 226 S.W.2d 615, 619 (1950)).

<sup>93</sup> 545 U.S. 460 (2005).

challenge and the goods necessary to a well-lived life is required before the political community can legitimately demand that an owner sacrifice her property entitlement. Arguably, in *Boomer*, the required nexus does not exist.

A proponent of the civic version of the social obligation theory might reach the same conclusion with respect to *Kelo*. She might conclude that the development project in that case will promote the development of those human capacities necessary for robust moral autonomy only in very attenuated ways, such as a marginal increase in available jobs, rather than, to pick an obvious example that would be an easy case for the social-obligation theorist, providing a new public library.<sup>94</sup> The social-obligation theorist would remain constantly mindful of the risk that the state may demand more of private owners more than it legitimately can and that there are limits to the sacrifices that owners may be asked to make in the interest of maintaining a society and a polity that nurture human goods essential to a well-lived life.

### 3. Remedies Redux: A Comparative Perspective from South Africa

The thick civic version of the social obligation norm I have described can be the basis for social transformation. Recognition of the social obligation norm, even in its thick civic version, will not necessarily or always, lead to social transformation, but it can serve as the basis for a profound change in the way in which a society and polity are structured.

A recent and ongoing example is South Africa. The property clause of the 1996 South African Constitution incorporates a thick social obligation norm through its explicit commitment

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<sup>94</sup> How a proponent of the civic theory would actually decide *Kelo* would depend upon a number of facts concerning the actual elements and effects of the Pfizer project. My point is simply suggestive.

to land reform and racial justice.<sup>95</sup> It states, for example, that “[t]he state must take reasonable

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<sup>95</sup> The property clause of the 1996 South African Constitution is section 25. It provides as follows:

25 Property

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application—
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
  - (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - a. the extent of direct state investment and subsidy of the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
2. For purposes of this section—
  - a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
  - b. property is not limited to land.
3. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
4. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
5. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
6. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from provisions of this section is in accordance with the provisions of section 36(1).
7. Parliament must enact the legislation referred to in subsection (6).

legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” It further provides that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.” Equally striking, if not more so, are cognate provisions that create an array of positive socio-economic rights, notable rights to housing and health care.<sup>96</sup> The result is a constitution that has been called “the most admirable constitution

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Among the leading commentaries on the constitutional property clause in South Africa are the following sources: A.J. VAN DER WALT, *CONSTITUTIONAL PROPERTY LAW* (2005); Theunis Roux, *Section 25*, in STUART WOOLMAN et al., *CONSTITUTIONAL LAW OF SOUTH AFRICA*, 2d ed. 46-1 (2003); Theunis Roux, *Property*, in HALTON CHEADLE, et al., *SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS 429* (2002); Geoff Budlender, *The Constitutional Protection of Property Rights*, in GEOFF BUDLENDER et al., *JUTA’S NEW LAND LAW* 1-1 (1998).

<sup>96</sup>Several provisions of the 1996 Constitution create socio-economic rights. Among the most important of these are the following:

#### Section 26. Housing

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

#### Section 27. Health Care, Food, Water, and Social Security

- (1) Everyone has the right to have access to
  - a. health care services, including reproductive health care;
  - b. sufficient food and water; and
  - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights
- (3) No one may be refused emergency medical treatment.

in the history of the world.”<sup>97</sup> Even if that assessment is considered excessive, there is no question that the South African Constitution is a truly remarkable document, one that is truly unprecedented and that unambiguously seeks to be transformative in nature. Its overriding goal is effecting the fundamental transformation of a society that has suffered profound political and economic injustices not only during the apartheid regime that was formally created in 1948 but also during the years of de facto apartheid before that.<sup>98</sup> The very fact that the South African Constitution aims at being one of the primary engines of a fundamental social transformation in its society makes it historically unparalleled and worthy of serious attention by constitutional

#### Section 28. Children

(1) Every child has the right

...

- c. to basic nutrition, shelter, basic health care services and social services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices

...

(3) In this section “child” means a person under the age of 18 years.

#### Section 29. Education

(1) Everyone has the right

- a. to a basic education, including adult basic education; and
- b. to a further education, which the state, through reasonable measures, must make progressively available and accessible.

Among the leading scholarly discussions of socio-economic rights in South Africa are the following sources: Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in STUART WOOLMAN, et al., *CONSTITUTIONAL LAW OF SOUTH AFRICA*, 2d ed. 33-i (2004); A.J. van der Walt, *A South African Reading of Frank Michelman’s Theory of Social Justice*, 19 *SOUTH AFRICAN PUB. L.* 253 (2004); Murray Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 *SOUTH AFRICAN J. OF HUM. RTS.* 284 (2004).

<sup>97</sup> CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 261 (2001).

<sup>98</sup> For a valuable historical discussion of the pre-apartheid era practices that paved the way for legal apartheid, see LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 154-187 (2000).

scholars around the world.

In the context of South Africa today, “social transformation” primarily means land reform. The eventual outcome of the country’s attempt to realize its verbal commitment to creating “an open and democratic society based on human dignity, equality and freedom”<sup>99</sup> depend heavily on its ability radically to transform its land regime, not only as a legal system but as a social reality. This is so in a country where landlessness and homelessness are ubiquitous among non-Whites, where literally millions of Blacks live in the desperate poverty of “informal” housing settlements (i.e., squatter settlements),<sup>100</sup> and where many Blacks still do not enjoy secure land tenure rights.<sup>101</sup> Without access to land and to more secure tenure rights, South

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<sup>99</sup> SO. AFR. CONST. § 36(1).

<sup>100</sup> “Homelessness” is an amorphous and unhelpful concept in any society, but especially so in South Africa. There, hundreds of thousands of people live in informal (and illegal) squatter settlements. These people do live in homes in a sense, but the homes are grossly inadequate. Some are former farm workers who migrated to urban areas. Some are urban wage-earners who cannot afford decent housing. Most are unemployed.

Land redistribution in South Africa has occurred at a frustratingly slow pace. The maldistribution of landownership continues to follow racial lines. When apartheid ended, the new, democratically-elected government promised that it would transfer 30 percent of white-owned commercial farmland to non-whites by 2014. In its 2006-2007 Annual Report, the South African Department of Land Affairs reported that less than 5 percent had been transferred. REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF LAND AFFAIRS, ANNUAL REPORT, 1 April 2006 - 31 March 2007, at 9, available at <http://unpan1.un.org/intradoc/groups/public/documents/CPSI/UNPAN028127.pdf>. Informal housing settlements, or so-called shanty towns, continue to be created throughout the country. Although many of the inhabitants are migrants from rural areas to urban areas in search of jobs, others are farm workers who are the victims of illegal evictions, sometimes carried out by local authorities. See Marc Wegerif, Bev Russell, and Irma Grundling, *Still Searching for Security: The Reality of Farm Dwelling Evictions in South Africa*, Nkuzi Development Ass’n, available at [http://www.nkuzi.org.za/docs/Evictions\\_Survey.pdf](http://www.nkuzi.org.za/docs/Evictions_Survey.pdf).

<sup>101</sup> Many of the strategic objectives for providing tenure security for people living and working on farm were not achieved as of 2007. See REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF LAND AFFAIRS, ANNUAL REPORT, 1 April 2006 - 31 March 2007, *supra* note 95, at 61.

Much current insecurity of land tenure is the result of lingering effects of the past,

Africa's Black majority will find no solace in the noble sentiments expressed in the new political and legal rhetoric, including that of the Constitution.

The constitutionally-compelled programs for land redistribution and tenure reform are still ongoing, with 2014 as the current target date.<sup>102</sup> Progress has been made, but given the magnitude of the problem of landlessness in South Africa today, an enormous amount of work remains to be done. Huge numbers of Black South Africans continue to live in squatter settlements in appalling conditions, and more and more such settlements continue to be built. Many are the result of migration of jobless Blacks from the poorer states such as Limpopo and the Eastern Cape to urban areas in wealthier states like the Western Cape in search of jobs. Others are the result of illegal evictions of Black farm workers from white-owned farms.<sup>103</sup>

The ubiquity and conditions of these squatter settlements is one of the most shocking sights to the first-time visitor to modern South Africa. These settlements, which are sometimes created following illegal invasions of either public or private land<sup>104</sup> but more commonly the

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including not only apartheid but also conquest. See Geoff Budlender, *The Constitutional Protection of Property Rights*, in GEOFF BUDLENDER, JOHAN LATSKY, and THEUNIS ROUX, JUTA'S NEW LAND LAW 1-70 (1998). For an excellent overview of the historical practices that have made Black land tenure commonly insecure, see CHARLES VAN ONSELEN, THE SEED IS MINE: THE LIFE OF KAS MAINE, A SOUTH AFRICAN SHARECROPPER 1894-1985 3-11 (1996).

<sup>102</sup> As of March 31, 2007, 93% of the land restitution claims filed had been settled. The remaining claims are the most difficult ones, rural claims, mostly in the poorest provinces. See REPUBLIC OF SOUTH AFRICA, COMMISSION ON RESTITUTION OF LAND RIGHTS, ANNUAL REPORT 2006-2007, at 3, available at [http://land.pwv.gov.za/restitution/Annual\\_reports/CRLR%20ANNUAL%20REPORT.pdf](http://land.pwv.gov.za/restitution/Annual_reports/CRLR%20ANNUAL%20REPORT.pdf)

<sup>103</sup> See note 95 *supra*.

<sup>104</sup> As the Court stated in *Port Elizabeth Municipality*, "The term land invasion . . . must be used with caution." The term, Sachs pointed out, "can be stretched to cover widely dissimilar cases, [such as] where a relatively small number of people have erected shacks and lived on undeveloped land for relatively long periods of time, or the situation in *Grootboom* where

result of state-created settlements under apartheid laws, differ in size, but all of them are inhabited by desperately poor (and mostly Black) South Africans living in desperate conditions.

Land invasions have a long history in South Africa. The way in which the South African government historically has reacted to land invasions directly informs the relationship between the property right and the right to housing under the Constitution.<sup>105</sup> With the end of the apartheid regime in 1993, land invasions by poor Blacks and the creation of informal and unauthorized housing settlements continued apace. The years of apartheid policies had created an acute housing shortage for Blacks in many parts of the country. In response to the land-rights provisions of section 25 and specifically to section 26(2)'s direct command to the state to "take reasonable legislative . . . measures, . . . to achieve the progressive realization of [the right to have access to adequate housing]," local governments enacted housing programs aimed at meeting housing needs, but the combination of the high demand for adequate low-cost housing and constrained government budgets has left many desperately poor people with no alternative to the deplorable informal housing settlements.

The transformation to a just society, a society in which decent housing is provided to every South African, will, of course, take years. The process will require a combination of several factors, among which are economic development, education, and above all a serious policy commitment at the highest level of South Africa's government. In the meantime the problem will persist, and land invasions will continue. These land invasions will present courts

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although a thousand desperate people occupied a hillside due to be developed for low-cost housing, no intent to jump the queue was shown and a remedy was not refused, or [where] there had been a deliberate and premeditated act culminating in the unlawful invasion and occupation of a large tract of land." *Id.* at n.22.

<sup>105</sup> *Id.* at [15].

with opportunities for courts themselves to act in creative and socially transformative ways, reaching decisions on the basis of the thick communitarian social-obligation norm to ameliorate the intolerable conditions that are the lingering result of apartheid. There is evidence that the South African courts have risen to the occasion. Perhaps no case better illustrates this than the Supreme Court of Appeal's remarkable decision in the case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*

In that case some 400 residents of an informal settlement in Johannesburg moved onto adjacent land that they mistakenly thought was owned by the city. In fact, the land was privately owned by Modderklip Farm. Within six months the new settlements included 18,000 people living in 4,000 shacks. The owner sought to evict the occupants, relying on the Prevention of Illegal Eviction and Unlawful Occupation of Land (PIE) Act. The lower court granted an eviction order, but the occupants failed to vacate. Meanwhile the Modder East settlement had grown to 40,000 inhabitants.<sup>106</sup> An execution writ was issued, and the sheriff was ordered to execute it. She insisted on a large sum of money<sup>107</sup> to cover the estimated cost of employing a private firm to carry out the eviction and demolition of the shacks. The owner was unable or unwilling to pay the sum, especially since it exceeded the estimated value of the land. Modderklip then filed trespassing charges against the occupants, some of whom were found guilty. The sheriff, however, failed to take any action, treating the matter as a civil dispute. Modderklip then sought assistance from various public bodies. The President referred the matter to the Department of Land Affairs, which referred the matter to the Department of Housing,

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<sup>106</sup> The settlement had just one water tap, and the only facilities were rudimentary pit toilets.

<sup>107</sup> R1.8 million (approximately \$275,000).

which did not respond. In the meantime, the sheriff had increased the sum required for eviction. Understandably frustrated, the owner once again went to court and obtained a declaratory order forcing all of the relevant government officials (including the National Police Commissioner) to take all necessary steps to remove the unlawful occupants (the enforcement order).

The case before the Supreme Court of Appeal was a combined application from the state for appeal from the initial eviction order and from the enforcement order. The court denied leave to appeal the eviction order but granted the appeal from the enforcement order in part. The court issued a different enforcement order.

At first blush the case appears to be solely a matter of private law, enforcement of a simple eviction order. Indeed that is exactly how the state and the police initially treated the case. The Supreme Court of Appeal took a different view of the situation, however. It observed that this attitude “does not reflect an adequate appreciation of the wider social and political responsibilities [that the Constitutional Court in previous cases] identified in respect of persons such as the present occupiers.”<sup>108</sup> In the court’s view, the case in fact posed an apparent conflict between two constitutional duties of the state: its duty to protect Modderklip’s ownership rights under section 25 and its duty to provide access to adequate housing under section 26. The court treated the state’s failure in this regard as simultaneously a breach of the occupants’ section 26 housing right and Modderklip’s section 25 property right.<sup>109</sup> The basis for that conclusion was section 7(2) of the Constitution, which provides that the state is under a duty to “respect, protect, promote and fulfill the rights in the Bill of Rights.” In the court’s view, by failing to provide the

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<sup>108</sup> 2004 (8) BCLR at 828.

<sup>109</sup> *Id.* at 841.

occupants with alternative housing in accordance with section 26, the state failed to protect the owner's section 25 property right, as section 7(2) requires. The court stated:

[I]n a material respect the state failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers need for land to fall on an individual . . . .<sup>110</sup>

Failure to protect one right, in other words, meant failure to protect another right. The theory is that the constitutional duty to protect and promote fundamental rights, derived from a constitutional provision placing such a duty on the state, places a general duty on states to protect their citizens from all infringements of their fundamental rights, even when those rights are threatened by the actions of other individuals rather than the state.

On appeal, the Constitutional Court acknowledged that the eviction order was correct and that Modderklip was entitled to that order. But the Court conditioned that right on the state's first providing alternative land or housing to the squatters. It explicitly ordered the state to comply with its constitutional obligations by provide land so so that eviction could proceed (unless, of course, the state elected to purchase or expropriate the land). The occupants were entitled to remain on Modderklip's land until the state provided them with alternative land. In the meantime the owner, Modderklip, was entitled to receive from the state the compensation awarded by the Supreme Court of Appeal.

Both the Supreme Court of Appeal and the Constitutional Court focus on the state's obligations, but the decision implicates the private landowner's obligations as well. It seems likely that in the long run the state will be compelled, as a practical matter, to acquire either new

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<sup>110</sup> *Id.* at 834.

land or, more likely, the land currently occupied. In the meantime, however, Modderklip's constitutional property right will be protected through a liability rule rather than a property rule, i.e., through damages rather than through eviction, which would restore Modderklip's right to possession. In effect, both courts forced the state to exercise its eminent domain power by acquiring at least a temporary interest in Modderklip's land, something akin to a determinable tenancy. This remedy clearly is less than what Modderklip wanted. Even if the damages are equal to the fair rental value of the occupied portion of his farm, it seems likely that he was not satisfied with this remedy. It was the right of exclusive possession of his farm – his entire farm – that he really wanted, but the courts held that he was constitutionally obligated to sacrifice that entitlement.

Modderklip's sacrifice is no trivial matter. He was forced to continue a relationship with a contingent of squatters that was the equivalent of a small city's population, a relationship that doubtless he was eager to terminate. Moreover, as time goes by, the force of the squatters' claims to remain on its land permanently will grow even stronger, increasing the pressure on the state to expropriate the land outright, albeit with payment of some compensation to Modderklip.

This compelled sacrifice cannot be squared with classical liberal principles. It was not voluntarily undertaken and is not justified as essential to the preservation of equal (negative) liberty. Likewise, it is difficult, although perhaps not impossible, to justify on utilitarian grounds. Although the forced transfer of property can be justified on utilitarian grounds,<sup>111</sup> the utilitarian

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<sup>111</sup>In the absence of externalities or high transaction costs, utilitarians generally favor voluntary transfers of property because individuals are in the best position to know the value they place on a piece of property. As one of us has argued elsewhere, however, it is not impossible to justify forced transfers of property on utilitarian grounds when there is reason to believe that the maldistribution of wealth has impeded the ability of parties to express their preferences through voluntary, market transactions. *See* Penalver & Katyal, *supra* note at Part III.A. But the law is

calculus seems indeterminate with respect to two features of the *Modderklip* decision: (1) the court's use of a liability rule rather than, as in the case of adverse possession, a direct transfer of the entitlement to the squatters; and (2) the court's decision to require the state, rather than the squatters, to pay Modderklip for the right to remain on the land.

In contrast to these difficulties, the *Modderklip* result, both in its broad outlines and in its specific details, fits very comfortably within the social obligation theory developed in this Article. The squatters' access to land for dwellings is surely a component of the minimal material conditions for human flourishing, on almost any conception. The capabilities of life and freedom, for example, are virtually meaningless if someone does not have a place they are entitled to be.<sup>112</sup> The state therefore labors under an obligation to work to provide its citizens with the opportunity to obtain such access. One crucial way the state can do this is by providing the legal and social underpinnings for a robust and prosperous market economy. But when a market economy is built on distributions of resources that are themselves skewed by past injustices, as in the case of South Africa, or when markets, as they are prone to do, operate to the exclusion of those at the bottom of the economic ladder, the state's intervention in the economy is justified, provided it is undertaken non-arbitrarily and in a manner consistent with principles

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usually careful to hem in exceptions to the normal rule in favor of voluntary transactions in order to increase its confidence that any particular forced transfer is actually justified on the grounds of market failure. This is apparent, for example, in the case of adverse possession, which imposes a number of barriers in front of the squatter, in part as a means of filtering out those who are truly unable to express in the market the value they place on the land and in part as a means of limiting adverse possession to owners who clearly do not place a very high value on the land being possessed. In this case, there is reason to think that the squatters placed a very high value on the land they occupied, but, given Modderklip's speedy response to the land invasion, there is no reason to think that he valued the land any less.

<sup>112</sup> See, e.g., Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

of subsidiarity.

As a large landowner, Modderklip is under an obligation to contribute from its own property in order to assist in providing the squatters with the opportunity to obtain the resources they need to flourish. Modderklip's obligation is not unlimited, however. After all, it is an obligation that falls on all property owners within the national community, and therefore should not be placed on just one property owner's shoulders. The preferred method for discharging that obligation, from any number of standpoints, then, would be through a well-structured system of land reform. Within such a program, large landowners like Modderklip would still bear a disproportionate burden (disproportionate, at least, on a per capita bases, though not on the basis of wealth or landownership), but a legislatively mandated, systematic process of redistribution could be made both transparent and predictable and the costs of redistribution spread as widely as possible. In the absence of adequate state action to work towards such a systematic solution, however, self-help by people like the Modder East squatters is both predictable and understandable, but such self-help, left unremedied, places an excessive demand on the targeted landowners, like Modderklip. The obvious solution is to try, after the fact, to craft a remedy that best approximates the obligations and entitlements of each of the parties.

The courts' opinions in the *Modderklip* case appears to do just that. They weave a respectful path between the obligations of the state and Modderklip, as well as the entitlements of both Modderklip and the squatters. They prohibit the squatters from being thrown back into landlessness, but they also help spread the costs of that decision for the landowner by ordering the state to compensate Modderklip for the loss of its land. They hold out the possibility that the landowner might recover its land at some point in the future, but they also invite the state to acquire the land through its power of eminent domain in order to give it over to the squatters as

part of the operation of South Africa's ongoing process of land reform.

### *B. Use Sacrifices*

The second scenario in which existing legal practices can be explained in terms of a social-obligation norm are cases in which the owner keeps her property but is prohibited from using it in some way that the community regards as against its collective interest. Conceivably, this might include a wide variety of land-use regulations and other forms of restrictions of the use or enjoyment of property. I will limit the discussion to four examples: historic preservation laws and the *Penn Central* decision; nuisance regulations; the public trust doctrine; and the obligations associated with ownership of art and objects of cultural heritage.

#### 1. Historic Preservation Regulations and *Penn Central*

Historic preservation laws, which restrict in significant respects the uses to which owners of historically important buildings or owners of land located within historic districts may put their properties, may be understood as implicitly based on the civic version of the social obligation norm. Suppose a city's agency responsible for protecting designated historic districts disapproves a proposed plan to remodel a residence located within a designated historic district. Its reason is that the proposed redesigned style would be "conspicuously incompatible" with the character of existing buildings and general area of the historic district. The agency is saying, at a minimum, that the owner owes surrounding owners an obligation to maintain the property values of everyone in the vicinity. Given the unique character of the neighborhood, property owners in historic districts are in relationships of interdependency that confer on each of them obligations that urban landowners otherwise have.<sup>113</sup>

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<sup>113</sup> See *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970).

The agency may also be saying that the general public welfare that justifies exercises of the state's police power may impose an obligation on private owners of buildings within the historic district to sacrifice to some degree their autonomy regarding the use of their building. Owners are nested not only within communities of contiguous neighbors but within their wider urban communities. The unique identities of their buildings, from which the buildings' owners enjoy ample economic benefits, are not the result of the labor of the buildings' owners, present and/or past, alone. Rather, their special identity has depended upon various forms of support, including but by no means limited to material support, provided by persons and institutions throughout the entire urban community. This dependency imposes on the buildings' owners an obligation to maintain the very uniqueness whose existence the wider community has enabled. That obligation may involve economic sacrifices that would not normally be legally imposed on the private owners of buildings.

The Supreme Court's controversial *Penn Central* decision<sup>114</sup> illustrates both points. In that case the New York City Landmark Commission had previously designated the famous Grand Central Terminal, which Penn Central then owned, as a historical landmark because of the building's incomparable nineteenth-century *beaux-arts* facade. Penn Central wished to erect a multi-state commercial building atop the Terminal, and the Commission disapproved two submitted plans claiming that both plans would do serious damage to unique aspects of the Terminal. The owner went to court, claiming that the Commission's denial of its plans to develop the airspace above the Terminal amounted to an unconstitutional takings of its private property.

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<sup>114</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

The Court upheld the Commission's actions. It first concluded that there was no substantial diminution in value because the owner was still able to earn a reasonable return on its investment. Moreover, the Court said, the development denial did not eliminate all of the owner's possible uses of its preexisting rights in the airspace above the Terminal. The owner has been granted transferable development rights (TDRs) in the airspace, and it could use those rights to develop the airspace above other buildings that it owned in the vicinity. Writing for the majority, Justice Brennan stated, "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the owner] and, for that reason, are to be taken into account in considering the impact of the regulation."<sup>115</sup> The Court concluded next that the Commission's action did not interfere with any investment-backed expectation of the owner because the company had not yet actually invested any money in the development project. Finally, Justice Brennan pointed out that the denial of the development permit did not involve any physical invasion by the government of the owner's airspace. Rather, he said, the effect of the action was similar to that of a routine zoning decision.

One way of justifying the *Penn Central* decision is on the basis of the norm of reciprocity. Something like a reciprocity norm seems to have been involved in the New York Court of Appeals' opinion in *Penn Central* where the court relied on reasoning that echoed Henry George's theory that society has a legitimate interest in exploiting that portion of a

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<sup>115</sup> 438 U.S. at 137. In dissent, Chief Justice Rehnquist vigorously challenged that assertion. In his view TDRs have relevance only as compensation for a taking, and as compensation they were inadequate because they are not "a full and perfect equivalent for the property taken." *Id.* at 150 (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)).

resource's value that is due to society's contribution.<sup>116</sup> "It is enough," the New York court stated, "that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due."<sup>117</sup>

Dean Dagan has justified the *Penn Central* decision on the basis of a quite different version of the reciprocity norm. Under his "intermediate conception of long-term reciprocity"<sup>118</sup> theory the regulatory agency is not required to pay compensation "if, and only if, the disproportionate burden of the public action in question is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magnitude to the landowner's current injury that she gains from other—past, present, or future—public actions (which harm neighboring properties)."<sup>119</sup> Dagan believes that under this intermediate version of reciprocity no compensation was due to the owners of Grand Central Terminal. The benefit that he sees as having been provided them arose from the various other regulatory measures that protected and enhanced New York City's "tourist attractions, business, and industry,"<sup>120</sup> especially in midtown Manhattan, where Grand Central Terminal is located. Thus, argues Dagan, the owners "will benefit directly and proportionately in the long-term from the aggregated benefits of the city's

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<sup>116</sup> See generally HENRY GEORGE, *PROGRESS AND POVERTY* (1955; first pub. 1879). For a more comprehensive application of George's "single-tax" idea to modern takings law, see T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988).

<sup>117</sup> *Penn Central*, 42 N.Y.2d at 328.

<sup>118</sup> Dagan, *Takings and Distributive Justice*, *supra* note 9, at 769.

<sup>119</sup> *Id.* at 769-770 (footnote omitted).

public actions, despite the transient disproportionate burden.”<sup>121</sup> Surely there is something to this point. The designation of Grand Central Terminal as a historic landmark in all likelihood made it an even bigger tourist attraction than it already was. More tourists generated more revenue for the owner. The rent that Penn Central received from tenants who run commercial operations, including retail concessions, within the building likely increased as a result of rent-escalation clauses that are common in commercial leases for retail stores. This marginal gain in profit should be seen as the result of the regulatory action of the New York City Historical Landmark Commission, providing exactly the kind of long-term reciprocity of advantage that Dagan has in mind. Once this fact is coupled with the further fact that there was nothing arbitrary about identifying Grand Central Terminal as subject to the restriction (for they were the owner and they were the ones proposing the change in question), the case for a compensation requirement becomes weaker and weaker.

As persuasive as Dagan’s argument is, there is another way of looking at the decision that directly addresses a question that critics of the decision pose. Rather than focusing on reciprocity, the social-obligation theory addresses the question, what sacrifices may the state legitimately ask private landowners to make concerning the use of their land? Stated somewhat differently, the question is, what obligations do landowners owe to their communities with respect to the use, condition, or care of their property?

The social-obligation theory recognizes that because individuals can develop as free and

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<sup>120</sup> *Id.* at 797.

<sup>121</sup> *Id.* at 798.

fully rational moral agents only within a particular type of culture<sup>122</sup> all individuals owe their communities an obligation to support in appropriate ways the institutions and infrastructure that are the part of the foundation of that culture. This support may sometimes involve sacrificing preference-maximizing uses of their property. *Penn Central* is such a case. A property owner's obligations to its community may include maintaining aesthetic values as well as physical safety and health.<sup>123</sup> This is especially true with respect to a building like Grand Central Terminal. The Landmark Preservation Commission's designation of that building as an historical landmark was a legal recognition that as owners of an obviously special, nearly unique building Penn Central owed the community of which they were a part an obligation not to use it in ways that would irrevocably destroy its unique architectural status. The Court's decision sustaining the uncompensated rejection of the owner's plans to develop that building in ways that would have done just that was a judicial enforcement of a democratically sanctioned scheme of use-sacrifices required of all private owners of New York City buildings whose aesthetic and historic integrity the Commission has determined to be vital to the continuing well being of the culture of the City of New York.

Although it is certainly true that not every aspect of a community's infrastructure is necessary to maintain the kind of culture that enables development of those qualities without which no individual can experience meaningful freedom or practice personal responsibility, buildings like Grand Central Terminal are indispensable. Were New York City to lose all of historic architectural patrimony, its culture would be not merely different but civically

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<sup>122</sup> See TAN [ ] *supra*.

<sup>123</sup> See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

impoverished. Distinctive architectural sites are integral to an urban community's identity and the identities of its inhabitants. Historical landmarks create collective urban memory; destruction or radical alteration of such landmarks erase collective historical memory. Erasure of historical memory destabilizes a society and its culture, with potentially severe political consequences. It is no accident that repeatedly throughout history repressive regimes have sought to erase the historical memories of past cultures that nurtured capacities necessary for robust free citizenship, and not infrequently part of the effort at erasure involved architectural landmarks.

Private ownership of those aspects of the society's infrastructure upon which the civic culture depends in this way comes with special obligations. Those obligations may require that the owner forego compensation, even long-term, in-kind compensation, when an urban authority legitimately invokes its power to protect private property from being altered in ways that would permanently destroy its civically unique and supportive aspects. The development of Grand Central Terminal contemplated in *Penn Central* would have inflicted on the community of New York a significant loss of cultural capital. No compensation should be constitutionally required to prevent a private owner from inflicting such a loss in the first place, a loss that is fundamentally at odds with its obligations as an owner of that property.

## 2. Environmental Regulations

Virtually every environmental regulation, federal, state, and local, can be explained in terms of the civic version of the social-obligation norm. Consider wetlands regulations, for example. The basic story of wetlands and legal regulation of their use is by now well-known. The contribution of wetlands to maintaining the well-being of fragile and complex ecosystems is enormous. Wetlands perform a remarkable variety of valuable functions, ranging from filtering and storing water to providing fish and wildlife habitats. At the same time, prior to the 1970s,

wetlands were disappearing at an alarming rate, as population increase and urban development created greater pressure to fill in wetlands, making them available to commercial and residential development. Since then, wetlands have been widely regulated at both federal and state levels. These regulations, however, have provoked no small amount of litigation involving constitutional challenges to their validity.

Are wetlands regulations takings of private property for which the state must pay the owners compensation, or are they a sacrifice that owners must make as an aspect of the obligation they owe to the communities? At one level, it is easy to understand why the affected landowners claim wetlands regulations take their property. At time one, they were free to develop their land by draining the wetland or filling it. At time two, that entitlement to develop has effectively been removed from their bundle of rights and given to the state acting on behalf of the general public. If the public wishes to have such a benefit, they argue, fine, but the public has to pay for it.

The problem with the argument, of course, is that it assumes the answer to the very question the challenged regulation poses. Does the owner of wetland have the legal entitlement to develop it, resulting in the destruction of the wetland ecosystem? How can we answer this question without begging the question?

This is the problem that has bedeviled courts that have tried to resolve takings challenges to wetlands regulations and other forms of environmental restrictions under the so-called “noxious-use” doctrine. That doctrine basically provides that if the regulation in question seeks to abate a noxious use, then no compensation is due the affected owner. Animating the doctrine is the idea that the use which the regulation prohibits was never part of the owner’s bundle of rights

to begin with; hence, the regulation did not deprive the owner of any aspect of her ownership.<sup>124</sup>

Commentators usually locate the doctrine's origins in the famous nineteenth-century case of *Mugler v. Kansas*.<sup>125</sup> The Court in that case upheld a state statute prohibiting the operation of a brewery. Its conclusion that the statute did not effect a taking was based on this central insight: "[A]ll property in this country is held under an implied obligation that the owner's use of it shall not be injurious to the community."<sup>126</sup> This statement might have been the foundation for a fully developed notion of the implied obligation of owners, but that potential was never realized. The Court subsequently applied the doctrine in *Hadacheck v. Sebastian*<sup>127</sup> and other cases following it.<sup>128</sup> Numerous state court decisions have also relied on the doctrine.<sup>129</sup>

The doctrine's current status in modern takings law is somewhat murky. The Supreme Court appeared to affirm it in *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>130</sup> but just a few years later, in *Lucas v. South Carolina Coastal Council*,<sup>131</sup> the Court severely undermined the doctrine's significance. Seemingly rejecting the conventional view of the doctrine as a

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<sup>124</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>125</sup> 123 U.S. 623 (1887).

<sup>126</sup> *Id.*, p. 665.

<sup>127</sup> 239 U.S. 394 (1915).

<sup>128</sup> See *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

<sup>129</sup> See, e.g., *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981) (ordinance prohibiting development of wetlands sustained); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (same); *Sibson v. State*, 336 A.2d 239 (N.H. 1972) (same).

<sup>130</sup> 480 U.S. 470 (1987).

<sup>131</sup> 505 U.S. 1003 (1992).

categorical rule of no-taking in cases where the regulated activity imposes a general harm, the *Lucas* Court relied on an argument that several scholars, especially economists and law-and-economics scholars, have made over the years.<sup>132</sup> The fundamental problem with the doctrine, as conventionally understood, these scholars have argued, is that it seems to beg the question.<sup>133</sup> As a test for determining when regulations do not constitute takings, the noxious-use doctrine “will not work unless we can establish a benchmark of ‘neutral’ conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation).”<sup>134</sup>

The point is a clever one, but too clever by half. As economist William Fischel has quipped, “It is cleverness of this sort by which economists read themselves out of the takings debate.”<sup>135</sup> Fischel’s sensible point is that from the ordinary person’s perspective, there is little difficulty in distinguishing between, for example, a regulation restricting the size or location of highway billboards, on the one hand, and another regulation limiting the amount of toxic emissions from factories, on the other. As Fischel pithily states, “‘Down’ does not become ‘up’

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<sup>132</sup> As far as I am aware, the argument was first made in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967). While Professor Michelman’s more recent work certainly places him outside the ranks of law-and-economics scholars, his earliest work was among the first generation of economics-influenced legal scholarship, a point that I made in Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545 (1982).

<sup>133</sup> See, e.g., Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVIRON’L L.J. 433 (1995).

<sup>134</sup> Michelman, *Property, Utility, and Fairness*, *supra* note 125, at 1197.

<sup>135</sup> William A. Fischel, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 354 (1995).

just because one can invert oneself on a trapeze.”<sup>136</sup> From the “Ordinary Observer’s”<sup>137</sup> viewpoint, the billboard regulation, as an aesthetic regulation, provides the public with a benefit, while the emissions regulation, as a health measure, prevents a public harm.

The noxious-use doctrine may be understood to represent, then, an effort to define the contours of the landowner’s property right in view of the conditions of social interdependency and the obligations to which interdependency gives rise. As I previously discussed,<sup>138</sup> because we are all necessarily dependent on various communities to help us develop the essential human capabilities that are requisite for our lives to flourish, we are obligated to contribute to maintain the vitality of those facets of our communities that contribute to the cultivation of those capabilities. From this perspective the harm-prevention-versus-benefit-conferral conundrum is altogether beside the point, a distraction from the real question. Rather than asking whether the

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<sup>136</sup> *Ibid.*

<sup>137</sup> The term “Ordinary Observer” was first coined by Bruce Ackerman in his influential 1977 book. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

<sup>138</sup> See TAN *supra*.

regulation in question is one that prevents a public harm or confers a benefit upon the public, the more helpful question to ask is whether the landowner's obligation to contribute to the vitality of capabilities-nurturing elements of her community includes restrictions on her land use for environmental purposes like wetlands preservation.

The cases in which courts have relied on the noxious-use doctrine to support their decisions to sustain such regulations against constitutional challenges may be understood as affirming the existence of precisely such an obligation. Exactly what human good or capability is involved will not necessarily be the same in every case involving environmental regulations, but certainly one such good that is likely to be involved is the good of life, or physical survival, which includes ancillary goods such as health. It seems quite plausible suppose that the preservation of wetlands is necessary for the health of various ecosystems upon which human beings are dependent. That is, wetlands are indeed part of the infrastructure that nurtures the capabilities that are the foundation of the well-lived life. If that is the case, then wetlands not only deserve our support for our own well-being, but more to the point, those who own land containing wetlands are obligated to contribute to the integrity of their wetlands for the benefit of the community served by the wetlands.

This may have been something like what the court had in mind in a well-known wetlands decision. In *Graham v. Estuary Properties, Inc.*,<sup>139</sup> the Florida court sustained the validity of a wetlands regulation against a takings challenge. Struggling to find some objective criteria for distinguishing between environmental regulations that prevent harms to the public and those that confer benefits to the public, the court stated, "It would seem . . . that if the regulation preventing

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<sup>139</sup> 399 So. 2d 1374 (Fla. 1981).

the destruction of the mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant harm to the public, the exercise of the police power was reasonable. On the other hand, if the retention of the forest simply created a public benefit by providing a source of recreational fishing for the public, the recreation might be a taking.”<sup>140</sup> Read one way, this is no more than another way of restating the question-begging harm-prevention/benefit-conferral distinction. But there is another way of reading this key passage, one that links to social-obligation norm and the capabilities theory that I have described. The court may have been trying to express the idea that if the mangrove forest was part of the infrastructure whose vitality is essential to support and nurture the human capabilities that are the foundation for a well-lived life, then its owner is obligated to contribute to health, for in that case the physical health of the community is inextricably linked with the ecological health of the mangrove forest. If, on the other hand, the contribution that mangrove forests make to the development of the essential human goods is substantially attenuated (or non-existent), then the owner owes the community no obligation to maintain the mangrove’s health.

The point can be generalized. Social-obligation norm analysis can be generally applied to all sorts of environmental regulations, ranging from the federal Endangered Species Act<sup>141</sup> to the development moratoria at issue in *Tahoe Sierra*.<sup>142</sup> For example, it provides a better explanation of why the federal Eagle Protection Act was upheld under the takings clause in *Andrus v.*

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<sup>140</sup> *Id.* at 1381.

<sup>141</sup> 16 U.S.C. § 1531.

<sup>142</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

*Allard*.<sup>143</sup> The Court in that case relied on the familiar bundle-of-rights conception of ownership, stating, “[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”<sup>144</sup> The bundle-of-rights metaphor is an unsatisfactory way of explaining why the statute is valid because it really begs the question. One could just as easily argue, as Richard Epstein has,<sup>145</sup> that the bundle of rights is unitary so that removing any one twig from the bundle itself constitutes a taking. The whole bundle-of-rights metaphor ought to be abandoned.<sup>146</sup> It would have been far more helpful (and candid) if the Court had asked whether the owners of artifacts made with parts of bald or golden eagles owed their communities an obligation not to use those assets as a market commodity. Stated differently, the question to be asked is whether the owner’s obligation to contribute to the well-being of those institutions and other aspects of her political culture that nurture the capacities necessary for the kind of individual freedom that we associate with rights-bearing includes restrictions on her commercial use of artifacts she owns made with parts of eagles. The answer to this question does not seem obvious to me. The case would have to be

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<sup>143</sup> 444 U.S. 51 (1979).

<sup>144</sup> *Id.* at 65-66.

<sup>145</sup> See EPSTEIN, *TAKINGS*, *supra* note 12, at 57-63.

<sup>146</sup> For critiques of the bundle-of-rights conception, see JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 9-13 (2000); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517 (2003); Adam Mossof, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENV'T'L L. REV. 281 (2002); J.E. Penner, *The “Bundles of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996); J.L. Schroeder, *Chix Nix Bundle-O-Six: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994).

made on some sort of connection between the eagle (golden as well as bald) as a political symbol and the vitality of our political culture. In any event, I need not provide an answer, for it is the question that interests me. Reframed in terms of the social-obligation theory, the question posed in *Andrus v. Allard* is harder than the facile one framed by the Court, but that is precisely the one that should have been addressed.

### 3. The Right to Exclude: Beach Access and Other Controversies

Another controversial set of recent decisions that is better explained in terms of social obligation theory concerns the right to exclude. The right to exclude has never been absolute, of course, but judicial decisions over the past few decades have whittled away at its breadth to a significant extent. One of the most controversial contexts in which this narrowing has occurred is the issue of public access to beaches. Although courts have provided the public access to beaches on various doctrinal grounds,<sup>147</sup> the most important –and controversial – of these has been the public trust doctrine.<sup>148</sup>

The controversy surrounding the public trust doctrine since its modern resurrection is well known and need not be repeated here.<sup>149</sup> As one scholar has stated, “To some, the doctrine .

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<sup>147</sup> See, e.g., *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (custom); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974) (same); *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970) (dedication); *Concerned Citizens of Brunswick County Taxpayers Ass’n v. Rhodes*, 404 S.E.2d 677 (N.C. 1991) (prescription).

<sup>148</sup> Other expansive uses of the public trust doctrine include use of and access to all waters usable for recreational purposes (see *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984)), preservation of inland wetlands (see *Just v. Marinette County*, 201 N.W. 2d 761 (Wis. 1972)), and protection of wildlife and their habitats (see *Pullen v. Ullmer*, 923 P.2d 54 (Alaska (1996))).

<sup>149</sup> The modern revival of interest in the public trust doctrine begins, of course, with the classic article by Joe Sax. Joseph L. Sax, *The Public Trust Doctrine on Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

. . . is a check on government attempts to give away or sell [important natural] resources for short-term economic gain. To . . . others, it is a back-door mechanism for judicial taking of private property without just compensation through a clever argument that the property was never ‘private’ in the first place.’’<sup>150</sup> The controversy has gained steam in recent years as some courts have used the public trust doctrine as the basis for extending public access to beaches, including privately-owned dry-sand portions of beachfront property,<sup>151</sup> concomitantly reducing the scope of the right to exclude.

Historically, public access to beaches was quite limited. Basically, the public was permitted to access only the land between the mean high and low tide lines, i.e., wet-sand areas. The purposes for which the public was permitted to access this land were also limited – only fishing. (Navigable waters themselves were also subject to public access for navigation and commerce as well as for fishing.) In recent years some courts have added recreation as one of the purposes for which the public is entitled to use the wet-sand portion of the beach.<sup>152</sup> The more striking expansion of beach access via the public trust doctrine, custom, and other doctrinal headings, however, has been the extension to privately-owned dry-sand portions of the beach. The New Jersey Supreme Court has taken the lead in this expansion of public beach access via

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<sup>150</sup> Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

<sup>151</sup> *See, e.g.*, *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005); *Raleigh Beach Ass’n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984)

<sup>152</sup> *See, e.g.*, *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or.1969); *Hixon v. Public Service Comm’n*, 146 N.W.2d 577 (Wis. 1966). *But see* *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (refusing to extend public trust doctrine to recreational uses); *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974) (same).

the public trust doctrine. In *Matthews v. Bay Head Improvement Association*,<sup>153</sup> the court held a private nonprofit entity which owned or leased most of the beachfront lots in the Borough of Bay Head did not have unlimited right to excluded members of the public from the dry sand portion of its beach. “The public must be afforded reasonable access to the foreshore [i.e., wet sand area] as well as a suitable area for recreation on the dry sand.”<sup>154</sup> In defining the contours of this right of reasonable access to privately-owned dry sand area, the court identified four factors as relevant: “[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned sand area, nature and extend of the public demand, and usage of the upland sand land by the owner.”<sup>155</sup>

The holding in *Bay Head* by the fact that the Bay Head Improvement Association was, in its view, a “quasi-public” entity.<sup>156</sup> The court subsequently expanded the scope of public access under the public trust doctrine when it held that a private beach club that was not a quasi-public entity was required under the *Matthews* reasonable access norm to provide members of the public access to the beach across its dry sand area. In *Raleigh Avenue Beach Association v. Atlantis Beach Club*,<sup>157</sup> the court applied the four factors it had set out in dicta in *Matthews*. Based on those factors and the circumstances of the case, the court concluded that the club was required to make its upland sad area, though privately owned, available for use by the general

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<sup>153</sup> 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

<sup>154</sup> *Id.* at 366.

<sup>155</sup> *Id.* at 365.

<sup>156</sup> *Ibid.* The court concluded that the improvement association satisfied its obligation by opening up its membership to everyone rather than limiting it to Bay Head residents and by making daily passes as well as seasonal passes available for sale to nonresidents.

public, although it could charge appropriate fees for certain services the club provided. The court stated

[R]ecognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not coextensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.<sup>158</sup>

The significance of this holding is that it lifts the restriction on public beach access to dry sand areas owned by quasi-public entities. Under *Raleigh Avenue Beach Association*, the public is entitled to access dry sand areas regardless of who the owner is.

The practical impact of this expansion of the public trust doctrine on the traditional right to exclude may or may not be significant, depending on how courts apply the four-factor test in various circumstances. Even if the practical impact is slight, however, *Raleigh Avenue Beach Association's* symbolic impact on the right to exclude is considerable, for it muddies the seemingly crystalline traditional rule that a private owner of the dry sand portion of the beach may exclude others at will by imposing a reasonable access requirement.

The beach access cases are difficult to justify on utilitarian grounds. Certainly if utility is measured by the willingness-to-pay metric favored by law-and-economics analysts, it seems unlikely that the result of the case is a net gain. Although it may well be the case that the beach users collectively would value the entitlement more than the owner would, the decision to assign the entitlement to them without compensating the owner is likely to be inefficient for several

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<sup>157</sup> 879 A.2d 112 (N.J. 2005).

<sup>158</sup> *Id.* at 121.

reasons. First, the result is likely to create what Frank Michelman called demoralization costs.<sup>159</sup>

In this context these costs may well be quite high, as the owner faces the prospect of complete strangers sunning themselves in front of her house on her beach.<sup>160</sup> Second, by diluting the right to exclude with respect to one type of publicly valuable resource, these decisions create uncertainty for present and future owners of other resources that their ownership rights might become subject to the same kind of dilution if the public demand for the resource they own similarly increases in the future. The economic value of resources is best maximized over time by a system of clearly delineated property rules giving owners robust exclusionary rights.<sup>161</sup> Property law's traditional doctrine on beach access was precisely such a regime, and the recent cases represent a significant departure from that cost-minimizing approach.

Social obligation theory more easily explains the recent beach access cases. They can be understood as attempts by courts to define the contours of private ownership of an increasingly valuable interest in land in a way that promotes human flourishing under conditions of growing social congestion, interdependency, and disparities of wealth. To see this, consider the following scenario.

Imagine that you are a single parent living in a public housing project in Camden, New

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<sup>159</sup> See Michelman, *Property, Utility, and Fairness*, *supra* note 131,

<sup>160</sup> These demoralization costs could be offset by requiring by protecting the beach owner through a liability rule rather than a property rule, i.e., compensating the owner. This is one way of understanding the Supreme Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). From a law-and-economics perspective, however, the weakness of this solution is that it creates a problem of high information costs. See Henry Smith, *Property and Property Rules*, 79 NYU L. REV. 1719 (2004).

<sup>161</sup> See *id.*; Henry Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEG. STUDIES S453 (2002).

Jersey. It is August, and your non-air-conditioned apartment is sweltering. You and your 5-year old daughter desperately want a day at the beach. You take the bus (you have no car) on the long ride to the stop on the New Jersey shore nearest your home. The beach there is privately owned, and the nearest public beach is several miles away, inaccessible by public transportation. The beach in front of you is beautiful. It is also empty because the owner works in New York City and visits his beach home only sporadically. You might try to trespass and perhaps get away with it, but reluctantly (and much to the chagrin of your hot and cranky daughter) you choose to obey the law and take the long bus ride back to Camden.

This is not an invariable scenario for poor city-dweller, of course. There are ways by which they, at least some of them, can reach public beaches. What the story does illustrate is the subtle and sometimes not-so-subtle ways in which access to recreation is limited or simply unavailable for poor people. Recreation is not a luxury but a necessity, especially for the poor. It is an important aspect of the capabilities of both life and affiliation. With respect to life as a good, there is ample and growing medical evidence that recreation and relaxation importantly contribute to good health, reducing the risk of diseases ranging from depression to heart disease. Yet some of the very groups who need recreation the most do not, as a practical matter, have access to it. This includes women and especially single mothers. It is no coincidence that the frustrated would-be beachgoer in my story was a single parent. Single mothers are notorious self-sacrificers, literally jeopardizing their health for the sake of their children. I do not suggest that public access to privately-owned beaches is the magic elixir to improve the health of young single mothers. I do suggest, however, that recreation is an important aspect of health, itself a vital dimension of the capability of life, and that providing all persons, including poor people, with reasonable access to basic modes of recreation and relaxation would materially contribute

to the goal of being capable of living lives worth living.

Recreation also supports affiliation as a good. As a good, affiliation encompasses subsidiary goods such as friendship and social participation.<sup>162</sup> Indeed, affiliation, or sociability, as it might also be called, may explain, or partly explain, many of the circumstances in which courts have recognized some version of a reasonable access rule that limits the common-law right to exclude. Affiliation includes the ability “to recognize and show concern for other human beings, to engage in various forms of social interaction; [and] to be able to imagine the situation of another.”<sup>163</sup> Affiliation is the indispensable means through which communities create just social relations. By teaching us how to be concerned for others, how to show that concern, and how to place ourselves in their shoes, communities inculcate in us values of equal dignity, equality, respect, and justice, as well as individual autonomy.

No one has written more eloquently about the role of recreation in creating healthy social relationships than Carol Rose. In her justly celebrated article “The Comedy of the Commons,” Rose, paraphrasing the great 19<sup>th</sup> century landscape designer Frederick Law Olmstead, wrote:<sup>164</sup>

[R]ecreation can be a socializing and educative influence, particularly helpful for democratic values. Thus rich and poor would mingle in parks, and learn to treat each other as neighbors. Parks would enhance public mental health, with ultimate benefits to sociability; all could revive from the antisocial characteristics of urban life under the refining influence of the park’s soothing landscape. . . .

Substitute “beach” for “park,” and the point is the same. Rose goes on to point out that these

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<sup>162</sup> NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 44, at 82-83, 92.

<sup>163</sup> Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 1, 23 (2007).

<sup>164</sup> Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779 (1986) (footnotes omitted).

socializing benefits can be maximized only if recreation is “open to all minimal costs, or at costs borne by the general public, since all of us benefit from the greater sociability of our fellow citizens.”<sup>165</sup> As Rose concludes, “[T]his value should not be ‘held up’ by private citizens.”<sup>166</sup>

Under the traditional law on beach access, sociability was indeed “held up” by private citizens. Public beaches do exist, of course, but in many parts of the country, they are few and far between. Access to them is often difficult or impractical for the urban poor, the very people who in some ways need recreation the most.

We live in a society characterized by conditions of increasing congestion and social interdependency. The social obligation theory recognizes that those very conditions, especially our interdependency, creates for all property owners an obligation to contribute in ways that are appropriate to them to the vitality of the community’s material infrastructure that facilitate the cultivation of affiliation, among other essential human capabilities. For private beach owners this obligation may include providing members of the general public with reasonable access to portions of their beach, depending upon various circumstances of the sort specified by the court in *Raleigh Avenue Beach Association*. This obligation is not open-ended. Under the social obligation theory the issue in beach-access cases is whether the landowner’s obligation to contribute to the vitality of capabilities-nurturing aspects of her community includes sharing with members of the general public access to her land, at least at certain times and under certain circumstances. Where the public has reasonable means of access to the beach elsewhere, as will surely be the case sometimes, the owner’s right to exclude is preserved.

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<sup>165</sup> *Id.* at 780.

<sup>166</sup> *Ibid.*

Public access to privately-owned land is hardly unprecedented. The common law provides a number of examples of situations in which the private landowner is obligated to permit members of the public to her property for the purpose of furthering one or more of the necessary capabilities in some way. The family home is the obvious example of property that is closed to the public. Yet even here outsiders may be privileged to enter. *A* may enter *B*'s house, for example, for the purpose of saving *B*'s life or *A*'s.<sup>167</sup> This rule can be explained as a means of promoting personal security, a capability that is surely required for the well-lived life. With respect to shared property, tenants have long been permitted to receive visitors, and unless an agreement provides otherwise, landlords are not free to exclude such visitors.<sup>168</sup>

Affiliation, or sociability, is at work in the common-law rule restricting the landlord's right to prevent tenants from receiving visitors. The space that the tenant has rented is her home, and the home is one of the primary venues in which social interaction, through which the capacity to sympathize and empathize with others develops, occurs.

Affiliation as well as health, as an aspect of the capability of life, also explain controversial right-to-exclude cases like *State v. Shack*.<sup>169</sup> In that case two defendants entered private property to aid migrant farmworkers employed and housed on the property. The defendants worked for government-funded organizations that provided health-care and legal services to migrant farmworkers. The owner-employer demanded that the defendants leave his property, and they refused. The defendants were convicted of violating the New Jersey criminal

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<sup>167</sup> See RESTATEMENT (SECOND) OF TORTS § 197, comment *h*.

<sup>168</sup> *E.g.*, *State v. DeCoster*, 653 A.2d 891 (Me. 1995); *Williams v. Lubbering*, 63 Atl. 90 (N.J. 1906).

<sup>169</sup> 277 A.2d 369 (N.J. 1971).

trespass statute. On appeal, the New Jersey Supreme Court held that there was no trespass, no breach of the right to exclude. The court said that title to land cannot include dominion over people whom the owner allows on the land, in this case, the farmworkers. The owner's property right is not absolute and must be accommodated with the interests of others.

The court's decision to provide the farm workers with access to the right of access in *Shack* would be difficult to justify on utilitarian grounds. Certainly if utility is measured by the willingness-to-pay metric favored by law-and-economics analysts, it seems extremely unlikely that the result of the case is a net gain. The farm owner would almost certainly be willing to pay far more for the right to exclude the health-care and legal services providers than the migrant farm workers would have been willing to pay for the right to have them as visitors. The court's decision to allocate to entitlement to the farm workers was almost certainly inefficient.

The decision is not difficult to justify under the social obligation theory, however. As the court pointed out, migrant farm workers are a rootless and isolated community, often unaware of the opportunities that exist for them to meet their needs to medical, legal, and other forms of care. As a community they are particularly fragile and need certain property rights to enable them to perform their capabilities-developing function. The property right to receive visitors to the farms where they work and live was virtually the only effective means of providing them with access to such basic necessities as medical care.

In this context, affiliation takes on a more fundamental meaning, literally grounding other capabilities, including life, without which it would be impossible for their lives to flourish. It is, moreover, the foundation for creating just social relations within the members of the migrant farm community by providing the workers with equality and dignity otherwise denied them by their employer's treatment.

Still, *State v. Shack* is an unusual case in which affiliation is at work to explain why some limited form of public access to privately-owned land has been ordered. The more typical setting is recognition of a quasi-public interest in land where the location either functions as a kind of civic commons or otherwise has been opened to members of the public.<sup>170</sup> In these contexts affiliation takes on a more straightforward meaning. It means the wide spectrum of ordinary socializing activities that are the necessary foundation for any robust civil society, ranging from cheering at a Little League baseball game with other parents to chatting with companions on a walk along the beach. In these sorts of socializing events, as Carol Rose has shown,<sup>171</sup> place matters. The requisite socializing activity – affiliation – often, though not always, is site-specific. It cannot be carried on just anywhere but must be done in a particular venue or at least type of venue. Baseball must be played on an open (hopefully) grassy area, whereas beachcombing requires an unobstructed beach. Modern public trust doctrine cases commonly involve just this situation, i.e., circumstances in which some social activity that nurtures the capability of affiliation is tied to a particular venue or at least type of land, such as the beach, and the plaintiff is in effect asking the court to recognize the owner's obligation to enable that activity and to define the contours of the owner's property interest in a way that does so. The question to be asked in these cases is whether the owner's general obligation to contribute to the human flourishing of others includes a specific obligation to promote affiliation by providing some sort of reasonable public access to her land. The answers to that question will not come easily nor uniformly. It will not always be clear that public access to some form of land will promote

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<sup>170</sup> See KEVIN GRAY AND SUSAN FRANCIS GRAY, *ELEMENTS OF LAND LAW*, 4<sup>th</sup> ed. 282-287 (2005).

<sup>171</sup> Rose, *The Comedy of the Commons*, *supra* note 163, at 758-761.

affiliation in a significant way, warranting even some limited form of public access under the public trust doctrine.<sup>172</sup> Small wonder, then, that courts in cases like *Matthews* and *Raleigh Avenue Beach Association* have struggled to developed some sort of metric by which they may cabin the reasonable access rule and identify its scope of operation. Public access will not always be justified by the need to nurture affiliation, but surely as social conditions change, making affiliation more difficult,<sup>173</sup> the good of affiliation will justify some version of a reasonable access rule in some circumstances where public access to privately-owned land is sought for recreational purposes.

#### IV. CONCLUSION

Professor Joseph Singer has trenchantly observed, “Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.”<sup>174</sup> He is right. American property law is not solely about either individual freedom or cost-minimization. It is also about human flourishing and supporting the communities that enable us to live well-lived lives. It is to those ends that property recognizes that owners owe obligations. Yet although American property law implicitly includes a robust social-obligation norm, courts and scholars have failed to identify, let alone systematically to develop that norm. This Article has attempted to begin filling that gap.

The time has come for property scholars to come to grips with the social obligation norm. To do so, they will need to end the virtual hegemony of law-and-economics analysis in property

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<sup>172</sup> *Cf. id.* at 780-781.

<sup>173</sup> For one (albeit controversial) account, see ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>174</sup> SINGER, *ENTITLEMENT*, *supra* note 6, at 18.

theory. Law and economics theory cannot provide a satisfactory account of many of the obligations that courts have imposed on property owners. Its moral dimension is too anemic to do justice to the values that inhere in those obligations, values that notably include human flourishing. The social obligation theory takes those values seriously. It recognizes that ownership and obligation are deeply connected with each other and that their mediating connection is community. It further recognizes that there is no inherent conflict between legal support of the communities that facilitate human flourishing and legal respect of the moral autonomy of the individual. Finally, it recognizes that the obligation imposed on owners to sacrifice their property interests in some way can often be justified on the basis of cultivating the conditions necessary for members of our communities to live well-lived lives and to promote just social relations, where justice means something more than simply aggregate wealth-maximization. Explicit recognition of this social obligation norm is long overdue. It is high time for property scholars to begin developing a social obligation theory.