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# The Just and the Wild

Laura S. Underkuffler\*

The question of the extent to which previously recognized property rights should continue to be protected has undoubtedly bedeviled every legal system that has attempted to address it. On the one hand, the legal idea of property reflects a broad societal commitment to the continued honoring of historically based entitlements on which individuals depend. On the other hand, every complex society is acutely aware of the inadequacy of the simple idea of the legal protection of existing rights as a response to human poverty, environmental degradation, and other critical problems.

This issue of who has what—or *who can count on what*—is at the heart of the American takings problem. Our feelings and fears about poverty, wealth, preservation, and change fuel legal and political battles over the question of the taking of property by government. Property is seen as a bulwark which protects individual wealth, liberty, and autonomy. Whether government can impair this bulwark—without recognizing that impairment—implicates, on the deepest levels, our fundamental feelings of security.<sup>1</sup>

Because of the complexities and extraordinarily high stakes in this field, it presents particular fascinations and minefields for scholars. It is difficult to give useful advice about takings law without oversimplifying the issues or short changing our own, conflicting emotions. In its efforts in this task, the work of Professor Carol Rose is without peer. It is (at the same time) intellectually profound, meticulously balanced, practically useful, and boldly and provocatively passionate.

There are many brilliant facets to Carol's takings work, as Professor Vicki Been so cogently captures.<sup>2</sup> Carol's core ideas—such as the recognition that takings doctrine is (of necessity) largely composed of ex-post standards, that it should consider the governmental level at which the challenged regulation occurs, that it should explicitly engage process

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1. See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 1-2 (2003).

2. See Vicki Been, *Tribute to Carol Rose*, 18 *YALE J.L. & HUMAN.* 141 (2006).

concerns, and others<sup>3</sup>—have been so influential in the field that it would be difficult to find a reputable takings scholar today who would deny them. As a consequence, in this response to Vicki's presentation, I will not criticize her observations, but rather will add to them.

When we consider takings law, the most obvious issue, as I stated before, is how, and under what circumstances, we (as a society) should continue to honor previously recognized, individual entitlements. The extent to which those entitlements or claimed property rights can be collectively altered, without consequence, is the traditional concern of takings doctrine. This focus, of course, assumes that there is a "right" to "property" that the individual asserts—and that we have common understandings of those concepts. It is in addressing these prior issues that Carol's work makes some of its richest contributions—contributions that impact not only the takings field, but all of our thinking about property. In particular, there are two ideas (or values, if you will) on which I shall argue that her work insists: first, that when we envision rights, we grapple with "The Just"; and in addition, that when we envision property, we acknowledge "The Wild."

"The Just" and "The Wild" are my names for Carol's ideas, which capture values that are rarely acknowledged in takings law. "The Just" and "The Wild" are largely overlooked, despite their foundational importance in understanding the ideas of "rights" and "property."

Let us begin with "The Just." In her article, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*,<sup>4</sup> Carol discusses the raft of "takings bills" that have been considered in recent years by state and federal legislatures.<sup>5</sup> These bills have been energized by what has been argued to be the rampant government override of property owners' rights, and the failure of the Supreme Court to rectify the situation.<sup>6</sup> Although often portrayed as a "new" phenomenon, requiring "new" measures, these complaints, she explains, are not new: they have been around since the time of the Nation's founding. From the moment that individual claims to the protection of property were staked, government's operations have thwarted those claims, and protests have been voiced in American politics.

These historical observations might be seen as interesting, but adding little: they simply confirm, over time, the potential overreaching of government. Carol does not, however, leave the matter here. Rather, she describes how, in earlier times, these conflicts were recognized as

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3. See *id.* at 145-50.

4. Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996).

5. *Id.* at 265-66.

6. *Id.*

considerably more complex. Although historic Anglo-American legal principles certainly recognized the importance of private property rights, they also recognized what were called “public rights,” or rights of the unorganized public in water, air, wildlife, and other resources.<sup>7</sup> In short, takings law, in its traditional form, involved more than a simple effort to vindicate property owner’s interests—it involved a balancing of private rights and their public counterparts. Indeed, she writes, what was true then is true today: both private *and* public rights are necessary parts of our property regime, and they are of an intrinsically “complimentary character.”<sup>8</sup>

The idea that the public might have protectable interests that coexist, in some limited sense, with private property rights is not, of itself, so startling. We can all think of accepted public interests in navigable water courses, ambient air, and other traditional settings. If this were all that Carol’s work suggests, her contribution would be modest. In fact, what Carol suggests is a powerful and far more radical notion. She writes not of “public interests,” but of “public rights”—a difference in language with profound significance. This is because—as I shall now describe—with “public rights” come upheaval, questioning, and a potentially very different conception of justice.

Let us consider, for a moment, what legal rights are. We generally think of rights (in law) as rights-holders’ demands that are *fortified*, by their classification as rights, against competing public interests. Indeed, when we declare an individual demand to be a legal right, it is because we take the individual and his interests seriously. To honor this grounding, we assume that individual rights must, as a *prima facie* matter at least, be more powerful, more normatively compelling, more worthy of protection than competing non-rights interests.<sup>9</sup>

When we think of individual property rights—to exclude, use, transfer, and so on—this model seems to capture our intuitions. Property rights are not absolute; but *as rights*, they enjoy presumptive power against the public interests that oppose them. Indeed, *it is the identity of property rights as “rights”* that dictates that they are presumed (as a threshold matter, at least) to win, and that the opposing public interests are presumed (as a threshold matter, at least) to lose. In individual-rights/public-interests battles, it is this assumed, superior normative force of individual rights *as rights* that dictates this model of relative powers.

Let us consider, now, the question of takings. How does this model affect our views of property claims and government? How does it affect,

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7. *See id.* at 267, 272-74.

8. *Id.* at 267; *see also id.* at 276-82.

9. *See, e.g.,* Underkuffler, *supra* note 1, at 64-74 (discussing the operation of this model of rights in the protection of property).

in this context, our ideas of individual and collective justice?

When we think of “property rights” in the sense just described, we *assume* that the individual’s claim is well grounded, and that it is the protection of this *entitlement* that is in question. This model assumes that the takings claimant is a project pursuer (or property protector) with a *right* to those actions, who will be (potentially) wronged by government. The focus here is not on the legitimacy of the individual claims, but on the legitimacy of the incursion by government. Indeed, it is the individual’s presumed, normatively superior “right”—and the government’s presumed, normatively inferior “interest”—that arouses the general sentiment in takings cases that the government’s action is “wrong,” its impact “unfair,” and that it is (as a matter of justice) the individual’s moral debtor.

It is this model, so ubiquitously assumed in individual-rights law, that Carol implicitly challenges in this context. In many resources cases, she argues, we do not have (and should not have) presumptively superior individual property *rights* against presumptively inferior public *interests*—we cannot make that leap, that assumed, normative pre-determination. Rather, in these cases, the normative line-up is (and should be) *rights vs.* (equally, presumptively powerful public) *rights*—not rights vs. lesser public interests.

The reason for rethinking the normative equation in this context is, in fact, quite simple. In takings cases, the individuals involved often are not simply innocent project pursuers or property protectors, the “victims” of government action. Rather, because of the interrelated and reciprocal nature of property uses and harms, these individuals may threaten equal or greater harm to what are at least normatively equal public interests.<sup>10</sup> In other words, we must, in these cases, rethink the assumption that the individual is (by virtue of his “right”) the *victim*, and the government or public the *aggressor*.

In addition, the recognition of competing public *rights* in these cases is not simply a choice that we might make; it is—to use Carol’s words—a part of the “moral infrastructure” of property.<sup>11</sup> Collective or public claims in this context are, after all, simply the claims of political aggregates of individuals.<sup>12</sup> Simply because the broader citizenry’s resource claims are asserted in collective form does not mean that they should be presumed to be less worthy of protection. It is, in short, the nature of the competing interests involved that should determine presumptive power, not the identity or numbers of their holders.<sup>13</sup> To put it simply, justice—in takings

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10. See Rose, *supra* note 4, at 272-74 (discussing negative land-use externalities).

11. *Id.* at 298.

12. This, of course, does not mean that public interests cannot be more, for example, in the sense of capturing broader goals or commitments. See Underkuffler, *supra* note 1, at 129-31.

13. See Rose, *supra* note 4, at 298 (“[C]itizens are entitled to expect that public rights . . . [will

cases—requires more than simple platitudes about individual loss, or other one-sided inquiries. It requires searching, *bilateral* consideration of the vital interests at stake, as asserted by *both* contending parties.<sup>14</sup>

And so, in considering the “right” to “property” involved in takings, we see how we must grapple with “The Just.” What about “The Wild”?

When we think of property, we most commonly think of rights to use, exclude, transfer, and destroy. In other words, property, as we generally conceive of it, involves human powers and human agencies. With this in mind, the ideas of “property” and “wildness” seem to be completely and entirely antithetical. Property, Carol writes, means control; it is “sunny, tame, and placid.”<sup>15</sup> The wild is very different. It is a “miasmatic [and] shadowy” place, often “filled with sudden violence.”<sup>16</sup> Indeed, she observes, our history is one of taming “the unowned, property-less character of the wild,” and transforming it into the “productiveness” of property.<sup>17</sup>

The idea, therefore, that “The Wild” is somehow an integral part of our idea of property (and its protection) seems to be quite far fetched. However, Carol makes us think again. For instance, in *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*,<sup>18</sup> she acknowledges the utility of conventional property ownership, in the form of the protection of individual claims to tangible and intangible resources.<sup>19</sup> She argues, however, that our ideas of property and its functions—on an individual or collective legal—must not be limited to this model. Indeed, as property’s conventional forms have been vindicated in some contexts, *the idea itself* has undergone change in others. The idea that property is individually protective or product-specific has been challenged by collaborative norms in cyberspace, the use of unconventional forms of property by previously under-acknowledged persons and groups, and the widespread acceptance of a new environmental ethic.<sup>20</sup> She writes, for instance, of the Internet’s story-tree culture and collaborative artworks, and the creative work of indigenous peoples, as “making salient the value of interactive group productions.”<sup>21</sup> She writes, in a particularly stunning observation, that “it may be ‘spaces’

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be safeguarded] along with private ones . . .”).

14. See Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2005).

15. Carol Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 2-4 (1994).

16. *Id.* at 4.

17. *Id.* at 2.

18. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998).

19. *Id.* at 129-30.

20. See *id.* at 145-80.

21. *Id.* at 160-61.

rather than the products from those spaces”<sup>22</sup> that we should value, since it is “the gaudy looseness of public access [that] nourishes the creativity” that property laws aim to foster.<sup>23</sup>

In other words, although the idea of “property” as “tamed”—and individually packaged—might be useful in some contexts, it is distinctly damaging in others. Property, of necessity, has an emergent, interactive, and ever-changing nature.<sup>24</sup> It is, after all, simply that which denotes what, at a particular point in time, humans’ relative spheres of influence will be. When we consider what “property” means, for protection or takings, we must remember the role of the unexpected, the unplanned, the unintended—in other words, “The Wild”—in human lives and institutions.

In addition, the idea of “The Wild” and property does not stop here. Just as the value of “The Wild” must be acknowledged in our relations with each other, so it must be acknowledged in the relations of humans with nature. As Carol writes in *Given-ness and Gift*,<sup>25</sup> “[e]ven in the most tame, the most human-centered realms of property, one often catches a glimpse of wildness. Every gardener knows that shrubbery has a mind of its own, and even the beekeeper knows that her honeybees are wild animals who choose to occupy her hives.”<sup>26</sup> Indeed, it is the wildness in such things that we crave and must protect, as we seek to “reduce” them to property. In one of the most beautiful and insightful passages in all of her work, Carol writes that “[h]owever dim our vision, we all understand that plastic trees are not the same as real ones . . . . [P]lastic trees are somehow too tame, too infinitely malleable, and hence utterly incapable of interaction.”<sup>27</sup> We want something that talks back. We don’t want to tame all of nature. We want, “even in a garden,” to find the “elusive streak of the wild.”<sup>28</sup>

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It is easy, when we think of property and its protection, to be aware of immediate, material human interests. Indeed, it is in those interests, and their underlying values, that we (as property holders) are viscerally invested. The encouragement of industry, the protection of expectations, the promotion of individual security—with all of these we can immediately identify. It is Carol’s genius to inspire us to think more deeply. And, as we consider “rights” and “property,” perhaps we—as a competitive, frenetic, building, rapacious species—will learn that there is

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22. *Id.* at 161 (emphasis added).

23. *Id.* at 162.

24. *See id.* at 181.

25. Rose, *supra* note 15, at 1.

26. *Id.* at 30 (footnote omitted).

27. *Id.*

28. *Id.*

something more than our own grasping:

- . . . the inner warmth of having done what is just;
- . . . the beautiful thorniness of the wild rose.