Property as Constitutional Myth:

Utilities and Dangers

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Recently, a revolution has begun in the American study of constitutional law. An insular domestic concern for years, American scholars and decisionmakers have suddenly become actively aware of the existence of constitutional regimes in other countries and the value that study of those regimes might yield. Just as globalization has become an irresistible force in politics and commerce, it is becoming an irresistible force in the study of constitutional law as well.

Comparative critiques have played a particularly prominent role in the roiling world-wide debate over the desirability and meaning of the constitutional protection of property. Scholars in countries with established democratic histories, as well as those in newly established democracies, have engaged in wide ranging comparative critiques in their efforts to determine answers to difficult questions surrounding the constitutionalization of property.[2]

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[2]*See, e.g.*, Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, *in* PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 417 (G.E. van Maanen & A.J. van der Walt eds., 1996); Thomas Allen, *Commonwealth Constitutions and*

To date, the American scheme of constitutional protection of property rights has been largely immune from international critique, at least from scholars within this country. With the publication this year of Professor Greg Alexander's book, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence,*[3] this immunity has been shattered. This book is a superbly executed and compelling account of the transnational and transcultural issues involved in property law and property theory. In addition, this book raises – as I shall discuss below – fundamental issues surrounding the nature of property and its constitutional protection. For this reason, I shall use this book's arguments as the point of entry for my comments.

The book opens with what may strike readers as a surprising question: whether the

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the Right Not to Be Deprived of Property, 42 INT'L & COMP. L.Q. 523 (1993); Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24 CAN. J. POL. SCI. 309 (1991); Richard W. Baumann, *Property Rights in the Canadian Constitutional Context*, 8 S. AFR. J. HUM. RTS. 344 (1992); Matthew Chaskalson, *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth*, 9 S. AFR. J. HUM. RTS. 388 (1993); Aeyal M. Gross, *The Politics of Rights in Israeli Constitutional Law*, ISR. STUD., Fall 1998, at 80.

[3] GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 23 (2006).

constitutional protection of property rights, or the text of particular constitutional property clauses, matters in the degree of protection that property enjoys. The question is surprising because participants in these debates have generally assumed that such issues are critical ones. Professor Alexander argues that although the presence or absence of constitutional protection of property may affect outcomes, it is far from outcome-determinative.[4]

[4]*See id.* at 20-21.

For instance, property enjoys a great deal of protection in New Zealand and Canada, which deliberately omitted property from their lists of entrenched individual rights.[5] By contrast, the United States, which has had a robust property-protection clause from the beginning, readily redistributes property through taxation, regulation, and other means. In addition, although text matters, "text alone is not outcome determinative";[6] rather, "[j]udicial interpretation of a constitutional property claim turns on many factors, among which is its text."[7] Of equal or greater importance are other factors that influence the interpretive process, such as background (non-constitutional) legal and political traditions, and culture.[8]

The book proceeds to summarize American takings law, and to critique its problems from various philosophical and doctrinal perspectives. It continues with detailed analyses of the treatment of property rights by the German Basic Law (*Grundgesetz*) and the new South African Constitution.[9] Both comparative examples are well chosen. The German system – a post-World War II product – is well developed through extensive judicial interpretation, and generally has been regarded by commentators as enjoying a great deal of internal coherence and as a worthy model for others.[10] The South African document, drafted and adopted within the last twelve

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[5]*See id.* at 23.

[6]*Id.* at 27.

[7]*Id.* at 6 (footnote omitted).

[8]*See id.* at 27.

[9]*See id.* at chs. 3,4.

[10]*See, e.g., id.* at 12.

years, was the product of unprecedented international consultation and scholarly commentary.[11] In addition, the American, German and South African systems represent political traditions and aspirations that are sufficiently similar, and sufficiently different, as to yield rich and provocative comparisons. For instance, as Professor Alexander notes, "all three countries are constitutional democracies with a private property/free market economic system."[12] Each "recognize[s] the centrality of private property rights while simultaneously undergirding a very different calculus of individual and community interests."[13]

As a result of this comparative exploration, Professor Alexander advances several important principles that are at odds with current American takings jurisprudence.[14] These lessons include particular doctrinal prescriptions. All of these innovations are used in other legal systems in which property rights are strongly protected, making them "basically congenial with the fundamental commitment of the Fifth Amendment's takings clause[,] .... [y]et all ... are [also] almost entirely absent from the agenda of issues that dominate American takings law scholarship."[15]

First, Professor Alexander advocates the use of a proportionality principle, as developed in the constitutional jurisprudence of Germany, South Africa, and other countries.[16] The

[11] *Cf. id.* at 155-59 (discussing the intense debate surrounding the adoption of the property clause and noting the role of academics and international actors in this debate).

[12] *Id.* at 12.

[13] *Id.*

[14] *See id*. at 199-243.

[15] *Id.* at 199.

[16] *See id*. at 200-01.

proportionality principle – and here, I shall oversimplify greatly – requires that any *prima facie* violation of a constitutional right be justified, "'considering the importance of the right, the degree of intrusion, and the nature of the asserted governmental interest'".[17] This principle forces the reviewing court to transparently consider the particular facts, interests, and values that the competing parties represent.[18]

Second, Professor Alexander urges the adoption of a purposive approach to takings jurisprudence.[19] Under this approach, courts "analyze takings cases by explicitly focusing on the core purpose of constitutional protection of property, identifying the central constitutional value that such heightened protection is intended to serve, and asking whether that value is immediately at stake under the circumstances before it."[20] This approach also requires transparency in takings law, in "the [c]ourt's ... conceptions of the core purposes of constitutional property" protection.[21] Professor Alexander observes that "[o]ne of the strongest points of contrast between American takings law and its counterparts in Germany and South Africa is that German and South African courts are consistently and explicitly guided by a purposive approach to analyzing what their constitutions' commitments to property require in the immediate case."[22]

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[17]*Id*. at 201 (quoting Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality", Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 608 (1999)).

[18]*See id.* at 202.

[19]*See id.* at 215-23.

[20]*Id.* at 215.

[21]*Id.* at 217.

[22]*Id.*

As a result, their decisions exhibit a "coherence and integrity that [American decisions] lack."[23]

Third, Professor Alexander urges a re-evaluation of the compensation practices that are used in American courts, in light of comparative models. For instance, German courts may order that "equalization benefits" be paid to property owners whose challenges to the constitutionality of government regulations fail, but who are nonetheless disproportionately affected by the regulations.[24] This, he writes, "directly addresses the problem that arises when efficiency considerations suggest that a regulation should be held valid but fairness considerations suggest ... at least some degree of compensation ... ."[25] Greater flexibility in compensation practices is also reflected in the German and South African courts' willingness to consider factors such as the degree of personal attachment to property (for instance, property used for a personal residence as opposed to property held strictly for investment purposes), and the extent to which the subject property's value has been created by pre-existing public subsidies.[26]

All of these discussions and prescriptions are, in a sense, content-neutral. There is no necessary outcome, in a normative sense, from the adoption of any of these principles. Professor Alexander's approach in all of this is cautious. Even those doctrinal ideas that he advances – such as "proportionality" between government means and ends, and an "explicitly purposive analysis" which identifies property's central values – do not, of themselves, necessarily entail any particular vision of property's protection, or lack of it.

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[23] *Id.* at 218.

[24] *Id.* at 236.

[25] *Id.*

[26] *See id.* at 240-41.

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

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

The articulation of a social-obligation norm might, indeed, be articulated in the systems of other countries, such as Germany and South Africa, and ignored in the United States. However, this difference alone does not, of itself, make the case for such articulation in the United States or elsewhere. There could be reasons – very good reasons – why a social-obligation norm, while necessarily implicit, is not something that is usefully articulated as a part of national takings law. In his book, Professor Alexander argues primarily – and very

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[27] *Id.* at 223.

[28] *See, e.g., id.* at 223 (discussing Penn Cent. Transp. Co. v. City of New York, 366 N.E. 2d 1271 (N.Y. 1971), *aff'd,* 438 U.S. 104 (1978)).

[29] *See, e.g., id.* at 225-27 (suggesting that the nuisance exception to the noxious-use doctrine put forward by Justice Scalia in Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1991), "reflects a social obligation norm").

[30] *See, e.g., id.* at 97, 131-47, 149, 182-97.

[31] *See id*. at 224.

convincingly – that the acknowledgment of a social-obligation norm as a formal part of takings law is necessary to rationalize that body of law, and to develop the implicit concerns with social obligation that are already found within it.[32] In these remarks, I will advance another reason for this move – one less concerned with the structure of law than with the hurly-burly of politics. It is, I shall argue, not only the case that an articulated social-obligation norm will rationalize an irrational situation, or even because it is a good idea; rather, we "should" adopt this posture because we "must". Citing recent experience in the United States, I will argue that because of certain political, cultural, legal, and other realities, we have no choice. No loner can we operate with the "mythology" of property as a free-standing, individually protective, socially a-contextual entity. We no longer have this luxury. We must explicitly acknowledge property's other side. Furthermore, comparative law gives those of us without this tradition some idea of how to do this.

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To begin: To say that there is a "problem" in constitutional law that must be fixed requires that we establish that problem. What is the problem here? What is wrong with *articulating* the constitutional protection of property in terms that focus, solely, upon the individual?

Indeed, all individual constitutional rights in the American legal system are designed to protect individuals against the oppressive exercise of government power.[33] Whether one thinks of freedom of speech, freedom of religion, due process of law, the protection of property, or other

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[32]*See id.* at 224-35.

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

rights, the foundational model is the same: the individual's interests are protected, by these rights, against the dangers of unchecked majoritarian power.

In addition, by virtue of this model, certain mythologies are necessarily created. One of these mythologies, reflected in political rhetoric and popular culture, is that these individual rights are free-standing entities, defined from the individual's perspective alone, and (for those reasons) absolute or nearly absolute in nature.[34] When politicians or other popular figures speak of "free speech", "freedom of religion", or the "protection of property", their appeals are not generally intended to evoke the idea of rights-in-social-context. Rather, they awaken the image of rights as protecting separately conceived, separately maintained, and unfairly beleaguered individual interests.

In most constitutional areas, however, we know – after even momentary reflection – that this mythology is, in fact, a mythology. Even the most unreflective sort or person would know that one can't shout fire in a theater or practice a religion that involves cannibalism. The mythology is there – and it is powerful – but it is tempered by the obvious reality of social interests. Indeed, we know, on some intuitive level, that the *ideas* of free speech, freedom of religion, or due process of law *are themselves*, *essentially*, social concepts. They deal with, and describe, our interactions with others.

Consider, now, the right to the protection of property. Property is different. Property, in its common conception,[35] not only protects us against government interference, but also against all others. It is – *by its very nature* – bound up with ideas of individual (material) separation,

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[34]*See* Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128-33 (1990).

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

individual (chosen) isolation, individual autonomy, and individual control. Scholars might argue that property is social relations, or entrance, or "the self with others",[36] but this is not how property in this country is culturally or reflexively imagined. And it is not, therefore, the way that the constitutional protection of property – after a modicum or more of reflection – is popularly perceived. The "right to property" means the protection of possessions, the protection of one's business, the protection of expectations to develop one's land. The *mythology*, in this case, is simply a deep and enduring expression of what we believe (as a cultural matter) to be the reality of this right.

Moreover, this mythology is – I would argue – *deeply rooted in our legal understanding* of the constitutional right to the protection of property. Take, for instance, the notorious problem of defining property for constitutional purposes. Although (in practice) the Supreme Court has implemented what seems to be its own understanding of "property",[37] it has repeatedly insisted,

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[36]*See, e.g.,* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970 4-7 (1997) (property as a way to choose and support a proper and just social order); Kevin Gray, *Equitable Property*, 47 CURRENT LEGAL PROBLEMS 157, 208-09 (1994) (property as including the values of human dignity and the "sense of the reciprocal responsibility which each citizen owes to his or her community"); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 208-09 (2000) (referring to obligations to others as an inherent part of traditional understandings of property); Eduardo Peñalver, *Property as Entrance,* 91 VA. L. REV. 1889 (2005) (property, as a human institution, is intrinsically and robustly social, joining individuals in community); Laura S. Underkuffler, *supra* note 34, at 141 (1990) (property as encompassing a broad range of human liberties, within a collective context of support and restraint).

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

as an explicit doctrinal matter, that we look to private law – state law – to determine what property for constitutional purposes is.[38] Is the right to develop land, in a particular situation, a constitutionally cognizable property interest?[39] Is the money, that could theoretically be earned on one's principal, a constitutionally cognizable property interest?[40] United States Supreme Court cases are replete with statements of the "obvious" maxim that private law creates property interests and the Constitution protects them.[41] We assume that private law defines, or creates, the "thing" that the individual has at stake. "Property" is a complicated idea that is *created by* state-law, private-law, *individually oriented* concepts.

Contrast this – for instance – with freedom of speech, freedom of religion, or the right to counsel in criminal cases. In none of these areas do the courts, rhetorically or otherwise, assume recourse to private law. Private law might be a peripheral consideration in public policymaking – for example, the private law of libel may be considered in determining First Amendment freedom of the press – but we would never see the Court opine that "in determining the content of the

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rights of possession, exclusion and other powers of disposition).

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

[39]*See, e.g., Lucas*, 505 U.S. at 1016 n. 6, 1027-30 (citing state law).

[40]*See, e.g., Phillips*, 524 U.S. at 164 (citing state law).

[41]*See, e.g., Palazzolo*, 533 U.S. at 630 (plurality opinion); *Phillips*, 524 U.S. at 164; *Lucas,* 505 U.S. at 1016, 1027-30; *PruneYard*, 447 U.S. at 84.

individual's interest [in free speech, or freedom of religion, or criminal counsel] we look to private law." There is no taking of privately-defined interests and concepts, and transplanting them, as in-tact units, in public (constitutional) law. Yet this is what we do – as a matter of articulated policy, at least – with property.

Here is another example of this mythology of property in constitutional law. Our intuitions, and federal court opinions, assume that justice must be a critical part of the American takings question.[42] Justice, as it is generally conceived, involves the evaluation of competing claims.[43] As I have previously written, whether a law or its operation is "just" depends upon both the advantages and disadvantages that one party derives from the operation of that law (or its absence), and the advantages and disadvantages that are suffered by other parties.[44] For instance, when examining what the right to counsel means in a criminal case, we consider the interests of the accused *and* the interests of the public in determining whether a particular interpretation of this guarantee is just.[45] Justice is, in other words, an "inherently relational inquiry".[46] When considering "justice" in law, it is impossible to evaluate the claims of one

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[42]The most famous invocation of justice in takings cases is found in *Armstrong v. United States*, in which the Court stated that the Takings Clause was "designed to bar Government grom forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960); *accord*, *e.g.,* City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687, 702 (1999); *Nollan*, 483 U.S. at 835 n.4; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

[43]*See* Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 749-51 (2004).

[44]*See id.* at 749.

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

[46]*See* Underkuffler, *supra* note 43, at 749 (emphasis omitted).

party without reference to the other.[47]

Yet, that is exactly what the articulated "justice" inquiry in American takings law, traditionally, has done.[48]

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[47] *See id.*

[48] *See id*. at 749-52.

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

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

It is ironic because this mythology is, in fact, less true of property than any other constitutional right. It is *at least possible* (for instance) to envision free speech, freedom of religion, or due process of law in purely private terms, in the following sense. Freedom of speech, freedom of religion, and due process of law are freedoms that individuals can freely, naturally, *individually*, and *equally* enjoy. There is no additional cost necessarily entailed – to society or to any other individual – if another person believes freely, or speaks freely, or is

[49] *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[50] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

afforded the protection of the laws. These are freedoms that, in their essence and their necessary exercise, *can be conceived*, at least, in purely individual terms.

Property is very different. When property involves external, physical, finite resources – as most of it does – it is, in fact, *impossible to conceive* of it in wholly private terms. If the enjoyment of a particular resource by one person is protected, then the enjoyment of that same resource by another is denied. If my right to possess this land is upheld, then your claim to possess that land is denied. If my right to clear timber, deplete species, or strip mine coal is upheld, then your claim to control these resources is denied. Property decrees who are winners and who are losers. It is a zero sum game. Property cannot be "private", because its very nature defies this description.

As a result, we are in the extremely odd situation in which the *mythology* of constitutional rights is *strongest* in the area in which it is the most inapposite. To reconcile this contradiction, the exaltation of the protection of private property interests by federal constitutional fiat has been far more hortatory than real. If we get down to it, and look at the bottom-line protection of property in takings cases, we find – more often than not – that the legislative impairment of those private interests prevails. For instance, as has been often observed, under the "balancing" test that the federal courts often employ, the public interests almost always win and the private interests almost always lose.[51] Richard Epstein, in what I think is an accurate comment, writes that under current takings doctrine "virtually any asset is fair game for obstruction by the political process, whether through taxation or regulation".[52]

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[51]*See, e.g.,* ALEXANDER, *supra* note 3, at 94-5.

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

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

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

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

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

On this ground, again, the mythology of property is very useful. Believing in this

[53]*See* Alexander, *supra* note 3, at 223-35.

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

mythology makes us sleep better at night and encourages our investment in the world around us. If we *believe* that our property is protected, by the Constitution or otherwise, this positive function will be served: we will live our lives accordingly. The fact that the protection of these private interests must be more hortatory than real will be – well – simply irrelevant.

All of which might mean that we are better off with the status quo. Why should we sign onto Alexander's campaign to force acknowledgment of a "social-obligation norm"[55], when the mythology of property causes no harm, and confers distinct benefits? Perhaps we should ignore, or even celebrate, this mythology of property. As Guido Calabresi and Philip Bobbitt keenly observed some thirty years ago, transparency in basic values is not always the optimum course for achievement of societal goals.[56] Sometimes subterfuge and obfuscation are far more effective in achieving the desired outcome.[57] Perhaps Germany or South Africa needs this transparency. But (it could be argued) we're doing fine, or even better, with things as they are: mythology, ... and then: actuality.

There is, however, a darker side to this mythology with which I believe we must seriously reckon. The celebration of this mythic state assumes – indeed, it depends upon – a situation in which that the difference between mythology and reality is not popularly known. To work, in a positive manner, *we must believe* in the mythology of property's protection, even as (all the while) courts and legislatures are implementing something that is quite different.

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[55]*See* ALEXANDER, *supra* note 3, at 223-35.

[56]*See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 26 (1978).

[57]*See id.*; *cf.* Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 54, at 19 (discussing the value in excluding particularly divisive issues from the public sphere).

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

With the regulatory revolution in the past few decades – particularly, regarding land use – this situation changed. Wetlands preservation, the Endangered Species Act, ever-more restrictive zoning laws, shoreline restrictions, historic preservation, and so on became household concerns and the subjects of bitter rhetorical and political debate. Highly articulate property-rights advocates have pushed to expose the cognitive dissonance between property's mythology and property's protection.[58] The exposure of this gulf, and the national government's refusal to change our course, has provoked a "politics of outrage" from commentators, legislators, and average citizens.[59]

Indeed, the courts' failure to give greater credence to the mythological promise of property rights has worked to refocus the struggle in the legislative arena. In state legislatures, particularly, those who insist that property rights are free-standing, individually protecting, and a-contextual entities have had some profound (and, to some of us, disturbing) success.

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[58] *See, e.g.,* JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT – AND WHY YOU SHOULD CARE (1997); NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS (1997); Epstein, *supra* note 52.

[59] *See* UNDERKUFFLER, *supra* note 35, at 127-28.

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

The result has been predictable. Counties and other local governments are simply waiving challenged regulations rather than paying budget-busting damage awards.[63] To date,

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[60]*See* William Yardley, *Anger Drives Property Rights Measures: Support is Strong for Measures Limiting Governments' Power,* N.Y. TIMES, Oct. 8, 2006, at 34.

[61]*See* O.R.S. § 197.352 (1), (2), (3) (E) (2005). The relevant portions of the statute read as follows:

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

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

[62]*See id.* § 197.352 (11) (B).

[63]*See* Yardley, *supra* note 60 (So far, "'not a penny' has been paid to property owners ... . Local

2,446 claims have been filed with the State, which would cost more than $5.7 billion to reimburse.[64] One landowner, in the Hood River Valley, filed a claim of $57 million, based on what his orchard would be worth if divided up into 800+ housing units.[65] Measure 37 claims have ranged from a desire to put a single additional house on a residential lot, to the building of large housing developments, an open-pit mining operation, a casino.[66] The new law pits neighbor against neighbor, as landowners who relied on zoning and other laws to create value for their property now find those laws crumbling in the face of their neighbors' claims. The orchard owner, asked about the fury that his plan unleashed among his neighbors, replied, "'Life is not equal. There is a law that got passed, and there is going to be a good amount of whining going on.'"[67] (In other words, "I am entitled to my actions.") As one state senator put it, "Measure 37 blew up our land-use system".[68]

Nor is Oregon – one of the nation's historically most progressive land-use states – alone in this. Ballot measures modeled upon Measure 37 are pending in California, Arizona, Idaho, and

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governments, lacking money to pay, have simply waived the zoning rules."). *See also* Jeff Bernard, *Growing Number of Counties Approving Property Rights Claims*, ALBANY DEMOCRAT HERALD, Feb. 11, 2005, at A6; Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, THE WASHINGTON POST, Feb. 28, 2005 at A01.

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

[65] *See* Harden, *supra* note 63.

[66] *See* Barnard, *supra* note 63; Douglas Larson, *Measure 37 Puts Newberry Crater at Risk*, THE REGISTER-GUARD (Eugene, Ore.), Sept. 11, 2006, at A11.

[67] Harden, *supra* note 63 (quoting John M. Benton).

[68] *Id.* (quoting Senator Charlie Ringo).

Washington.[69] Similar legislation already exists in Florida, Mississippi, and Louisiana.[70] The Bert-Harris Property Rights Act, enacted in Florida, calls for compensation if new government regulation negatively impacts "an existing fair market value" of property.[71] Since its enactment, claims have been made against building height limitations, density restrictions, communications tower restrictions, wetlands protections, tree protections, rental unit restrictions, historic building restrictions, and others.[72] Individual property owners' demands have ranged from $40,000 to $23.5 million.[73] In virtually every case that one study found, state and local officials, faced with staggering costs, severely compromised or abandoned the enforcement or enactment of the challenged regulation.[74]

How is it that these "takings" laws were enacted? The history in Oregon is typical. The stories and comments that were used to fire public passions for Measure 37 were replete with belief in the mythology of property, and outrage at its exposed, mythological status. For instance, "[p]eople work hard to save enough money to buy property. No one should take property without compensation – not even the government."[75] "Measure 37 is very simple. If

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[69]*See* Arnoldy, *supra* note 64; Yardley, *supra* note 60.

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

[71]FLA. STAT. ANN. § 70.001(3)(b) (West 2004).

[72]Homsy, *supra* note 70, at 285-92.

[73]*See id.* at 287.

[74]*See id.* at 288-95.

[75]*State Legislators Support Measure 37, Argument in Favor, Measure 37 Arguments, in* 2004 GENERAL ELECTION VOTERS' PAMPHLET 107, 107, *available at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_fav.html (last visited Apr. 6,

government takes your property, then government should pay for it."[76] "[O]ur founding fathers placed a high wall of protection around [this right]."[77] "Ballot Measure 37 will help [us] ... recover what has been stolen from us."[78] Property regulation is "theft".[79]

There is no doubt but that these sentiments are real, and not without foundation. Property regulation *can* work injustice, and the need for security through property is a powerful and undeniable human force. However, what is startling here is the extreme nature of these emotions and the complete lack of acknowledgment of property's *necessary* and *unavoidable* contextuality. To say that property is a "fortress" or regulation is "theft" is – quite frankly – incredible in view of property's reciprocal reality. The campaigns cast debate as one of fairness – but to the complaining property owner alone.[80]

There may have been a time when such beliefs could be fairly well accommodated –

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[76]Deschutes County Farm Bureau, *Yes on Measure 37!, Arguments in Favor, Measure 37 Arguments, in* 2004 GENERAL ELECTION VOTERS' PAMPHLET, *supra* note 75, at 108.

[77]Dennis Tuuri, Parents Education Association, *Yes on Measure 37!, Arguments in Favor, Measure 37 Arguments, in* 2004 GENERAL ELECTION VOTERS' PAMPHLET, *supra* note 75, at 117.

[78]Dorothy English, *Argument in Favoar, Measure 37 Arguments, in* 2004 GENERAL ELECTION VOTERS' PAMPHLET, *supra* note 75, at 205-06.

[79]Ruth Pruitt, *Argument in Favor, Measure 37 Arguments, in* 2004 GENERAL ELECTION VOTERS' PAMPHLET, *supra* note 75, at 113 ("When Enron steals your life savings, it's considered theft. When the City of Portland steals your life savings, it's called 'new regulation'").

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

when available land was vast and population pressures low. With our ever-increasing population and land-use conflicts, however, such beliefs are dangerously anachronistic. When we see such beliefs achieving legislative (as well as popular) ascendency, we must consider what has contributed to this situation in American politics, culture, and law. No longer is this business of the "mythology of property" simply an odd cultural quirk on which we, as policymakers, can remark and forget. Rather, we must confront the role that this mythology plays in shaping the social and political debates that, in turn, shape our society and our laws.

It is in this that Professor Alexander's comparative analysis is such a vital contribution to the real problems that we face. Through his presentation and analysis of various legal systems – systems that share crucial values and assumptions – he shows us how alternatives in a way that simple theoretical argumentation cannot. Comparative analysis shows us that one *need not* operate with this mythology of property – in this case, as a constitutional idea – in order to protect the *legitimate* contours of property protection. By examining the explicit contextuality of property rights which is assumed in these systems, we become aware that squarely facing property's contextual nature *need not* push us down some slippery slope in which all sense of the human need for property is lost. Furthermore, this kind of honest and explicit examination will help us to face the critical societal choices that property necessarily – and inevitably – involves.

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In a recent article in THE NEW YORK TIMES, we are told how the mayor of Caracas, Venezuela – a place where shanty towns cover the city's hillsides – has ordered the "forced acquisition " of the Caracas Country Club to make way for homes for as many as 11,500 poor

families.[81] "'We've done studies that show that 20 families survive for a week on what's needed to maintain each square meter of grass on a gold course", the Mayor explained.[82] Needless to say, the possible destruction of this historic architectural and tropical gem which was built in the 1920s has ignited a huge outcry.[83] In this case, one can see both sides. The human squalor in the shanty towns is appalling by any conceivable measure. On the other hand, I know the magical allure of the place slated to be destroyed – having attended a magnificent party there, several years ago.

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

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[81] *See* Simon Romero, *Caracas Mayor Lays Claim to Golf Links to House Poor*, N.Y. TIMES, Sept. 3, 2006, at 3.

[82] *Id.*

[83] *See id.*

[84] *See* ALEXANDER, *supra* note 3, at 173-77.