

AFFIRMATIVE CONSTITUTIONAL COMMITMENTS:  
THE STATE'S OBLIGATIONS TO PROPERTY OWNERS

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INTRODUCTION

The United States Constitution enshrines primarily negative liberties.<sup>1</sup> It conveys rights to be free from government interference, but in its core provisions does little or nothing to create affirmative duties for the government.<sup>2</sup> At least that is the conventional view, reflected in several centuries of law and scholarship.<sup>3</sup> When it comes to property, this conventional view may be wrong. In my contribution to this year's excellent Brigham-Kanner Property Rights Conference honoring James Krier, I argue that the Constitution requires the government—at least sometimes, in particular contexts—to take affirmative steps to protect or promote the “just” allocation of resources in the world. This is unconventional as a matter of constitutional law, but is surprisingly consistent with important strands of contemporary property theory. In particular, I argue here that emerging conceptions of property as a locus for obligations as well as rights can function as a two-way street. While the nature of property means that the State can ask a lot of property owners, the dynamic nature of property rights means that those obligations sometimes reverse and owners can make demands of the State.<sup>4</sup>

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1. See, e.g., Arthur S. Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199, 199; see also David P. Currie, *Positive and Negative Constitutional Rights*, 54 U. CHI. L. REV. 864, 864–66 (1986).

2. The Constitution does explicitly create some affirmative constitutional obligations outside of the Bill of Rights. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2312 & n. 212 (1990). Some affirmative constitutional rights within the Bill of Rights also exist, like the right to counsel, but they remain the exception rather than the norm. See Currie, *supra* note 1, at 872–80 (describing affirmative constitutional obligations).

3. See, e.g., Currie, *supra* note 1, at 865 (citing *inter alia* DEBATES ON THE FEDERAL CONSTITUTION (J. Elliot ed., 1836)).

4. “State,” in this essay, refers to all branches of government.

In fact, there are a number of different doctrinal and theoretical accounts that might justify the recognition of affirmative constitutional obligations to protect property. I explore some of these broader issues in a new paper, arguing for a category of “passive takings” (i.e., violations of the Fifth Amendment Takings Clause as a result of government *inaction*), specifically in the context of sea level rise.<sup>5</sup> My goal here is at once narrower and subtler. As part of the conference’s panel on Property’s Moral Dimension, I will put aside doctrinal and consequentialist arguments for the State’s affirmative obligations to focus exclusively on moral justifications for affirmative obligations within property theory.

In recent years, notable property theorists, like Professors Gregory Alexander, Eduardo Peñalver, and Hanoch Dagan, have argued that property rights are not merely “negative”—not concerned exclusively with owners’ rights against the world—but also contain affirmative obligations to the community. Professor Dagan locates these affirmative obligations in “long-term average reciprocity.”<sup>6</sup> The State can impose obligations on property owners to the extent that property owners, in general and over the long term, can expect to receive offsetting benefits of equal or greater value. Professors Alexander and Peñalver, by contrast, locate their “social obligation norm” in conceptions of, and commitments to, human flourishing.<sup>7</sup> Because both property and community are necessary for such flourishing, property owners are morally obligated to “share” their property to promote others’ capacity to flourish, at least to some extent.<sup>8</sup>

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5. See Christopher Serkin, *Passive Takings: Government Inaction and the Duty to Protect Property* (2013) (unpublished manuscript) (on file with author).

6. See HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 103–05 (2011); 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) [hereinafter Dagan, *Just Compensation*]; Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999) [hereinafter Dagan, *Takings*]. This characterization of Dagan’s work comes from Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 751 (2009) [hereinafter Alexander, *The Social Obligation Norm*]. Dagan’s ultimate interests are broader than this, and encompass the regulative nature of property more generally, but this Essay focuses on only one aspect of Dagan’s work.

7. Their accounts appear together, and separately, in Gregory S. Alexander & Eduardo M. Peñalver, *Introduction*, in *PROPERTY AND COMMUNITY* (2010); Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1018 (2011); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127 (2009) [hereinafter Alexander & Peñalver, *Properties of Community*]; Alexander, *The Social Obligation Norm*, *supra* note 6, at 751.

8. See Alexander & Peñalver, *Properties of Community*, *supra* note 7, at 766–68.

The conclusion of both accounts is quite similar: the State can ask a lot of property owners without violating constitutional protections because the nature and content of property rights already contain the roots of those obligations. This Essay argues that these same obligations generate surprising and previously unrecognized reciprocal obligations on the State.

When the State regulates consistently with the underlying moral obligations of property ownership, its regulations are constitutionally permissible because it is not demanding anything from property owners that they are not already morally compelled to provide.<sup>9</sup> Laws and regulations that exceed or are inconsistent with those underlying moral obligations receive no such safe harbor. They are not necessarily unconstitutional, of course, but the State cannot rely on background commitments to the community as a defense. But community obligation accounts of property—whether based in reciprocity or human flourishing—are inherently dynamic in ways that libertarian accounts are not. Communities' needs change, the conditions of ownership change, and the appropriate allocation of benefits and burdens within a society changes over time. Therefore, where State-imposed obligations on property are justified or defended by their consistency with property owners' underlying moral obligations to others, those regulations can become unconstitutional over time. They can lose their safe harbor as conditions in the world change. Alterations in the balance of benefits and burdens, or in property owners' capacity to flourish, can require the government to act, either by modifying regulatory demands or paying compensation.

Interestingly, the two theoretical accounts outlined above suggest some different requirements on the State to act. Professor Dagan's focus on reciprocity means that the state must act whenever the implicit social bargain for long-term benefits is unexpectedly disrupted. The Aristotelian account of Professors Alexander and Peñalver, in contrast, requires the State to act when property owners' capacity to flourish is implicated, or when affirmative obligations imposed upon owners do not actually benefit the community.

This Essay first examines the current understanding of property as containing affirmative obligations. It then examines how theories

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9. The connection between moral obligations and constitutional rights raises serious issues that are set aside here for purposes of this Essay.

articulated most prominently by Professors Dagan, Alexander, and Peñalver can generate reciprocal obligations on the government to act. The Essay ultimately argues that recognizing the State's occasional responsibility to protect private property follows necessarily from these theoretical accounts and examines how they play out in the context of several leading doctrinal controversies.

### I. THE TRANSFORMATION OF PRIVATE PROPERTY

The common law of property has come a long way from its Blackstonian origins. It is no longer—to the extent it ever was—that “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>10</sup> The history of this evolution is contested, and the transformation is ongoing, but even a quick sketch sets the stage for a dynamic view of property with affirmative obligations on the State.

In one traditional account, property is, at its core, the right to exclude others. This Blackstonian vision has been justified on philosophical and normative grounds. For one, it creates a protected sphere of autonomy allowing owners to use or manage resources as they like, free from coercion and external demands.<sup>11</sup> Protecting property is thus constitutive of liberty. Without property, people cannot be free because they must rely on others (or on the State) for their well-being. Property is therefore a necessary precondition for free participation in the political community.<sup>12</sup>

Protecting property in this way also allocates to owners—and, hence, to the market—authority over a resource, allowing people to choose for themselves how best to maximize its value.<sup>13</sup> From this

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10. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND \*2 (1765–69). For the suggestion that the conception of property attributed to Blackstone was a caricature even in its own time, see Alexander, *The Social Obligation Norm*, *supra* note 6, at 754 (citing, *inter alia*, Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–06 (1998)).

11. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008); see also *THE PAPERS OF JAMES MADISON* § 16 (William T. Hutchinson et al. eds., 1962) (“In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.”).

12. See, e.g., ELY, *supra* note 11.

13. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 40 (8th ed. 2011).

consequentialist perspective, private property increases overall societal well-being. True, property rights in this country have never conferred entirely unconstrained power. Nuisance law as well as early police power regulations, for example, created meaningful limits on the rights of owners: not to interfere with others' use of their own property, not to create substantial risks of public harm, and the like.<sup>14</sup> Nevertheless, strong private property rights give owners extremely broad power over resources in the world to encourage their productive use, and to allocate resources to people who value them more highly.

One of the State's central purposes in this account is to protect private property and, therefore, private transactions involving property. According to John Locke, people voluntarily leave the state of nature, where they are free from coercion, only because the State can protect property in ways that individuals cannot.<sup>15</sup> The State's primary role is to provide known laws, neutral judges, and enforcement mechanisms that allow people to be secure in their property.<sup>16</sup> Indeed, descriptively, much of the common law is an expression of that State protection for private property. The State creates and enforces the background rules that allow people to order their lives in reliance on relatively stable rights.

For present purposes, the important observation underlying all of this is a particular and static vision of property rights and the State. Property consists of the right to exclude, and the State's role is essentially one of neutral enforcer. By making property rights relatively inviolable, the State protects private ordering through the rights of owners to exclude others.<sup>17</sup>

This Lockean and fundamentally libertarian view of property changed, however, with the rise of the regulatory state and its concomitant restrictions on private rights. In an account familiar to most lawyers (although one that admittedly oversimplifies the history<sup>18</sup>),

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14. See, e.g., STUART BANNER, *A HISTORY OF HOW, WHY, AND WHAT WE OWN* 64–65 (2011).

15. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* § 123 (C.B. Macpherson ed., 1980) (1690).

16. See *id.* § 131.

17. Larissa Katz usefully characterizes property rights as the authority to set an agenda vis-à-vis a resource. See Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008).

18. See, e.g., WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900* (1982).

the Supreme Court was initially resistant to emergent state interference with private rights in the early part of the twentieth century. The Court invalidated minimum wage laws,<sup>19</sup> child labor laws,<sup>20</sup> and more, all in the name of protecting private rights against government intrusion. But that came to a relatively abrupt end in *West Coast Hotel Co. v. Parrish*,<sup>21</sup> where the Supreme Court relented, recognizing that private rights were not an impermeable barrier to the State's police powers. At the heart of this change was a newfound understanding that the State had an appropriate role in preventing people from using private rights in ways that interfered too much with others' well-being—or at least judicial deference to such a determination.

This, in turn, paved the way for a considerably more nuanced vision of property rights and their constitutional protection. Instead of creating a sphere of nearly unfettered liberty against the State and others, property was increasingly seen as a bundle of rights.<sup>22</sup> Individual sticks in that bundle could be reconfigured or removed without eliminating property.<sup>23</sup> Property shifted away from a kind of categorical right against the world, to specific rights against other people (and the State) vis-à-vis a resource in the world. Property, then, became increasingly contextual. Rights against one person may not apply in the same way to another.

This relational understanding of property implicitly recognized that rights are generally zero sum. Expanding one person's right to exclude means limiting another's right to be included (or to access a resource).<sup>24</sup> That tension exposed a limit on the right to exclude—a limit defined by the negative effects of exclusion on others, and occasionally given voice in the case law.<sup>25</sup> Most famously, the New

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19. See *Lochner v. New York*, 198 U.S. 45 (1905).

20. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

21. 300 U.S. 379 (1937).

22. For a history of this conception, and a leading treatment, see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

23. But see BANNER, *supra* note 14, at 57–59 (arguing that the bundle of sticks metaphor was originally used to increase not decrease constitutional protection of property).

24. See DAGAN, *supra* note 6, at 37 (“In certain circumstances, the right of nonowners to be included and exercise a right to entry is also quite typical of property”).

25. See Dagan, *Just Compensation*, *supra* note 6, at 135 (“The premise of a progressive approach to takings law is that ownership is not merely a bundle of rights, but also a social institution that creates bonds of commitment and responsibility among owners and others affected by the owners' properties.”).

Jersey Supreme Court, in *State v. Shack*,<sup>26</sup> held that a farm owner could not exercise his property rights to exclude aid workers seeking to provide services to migrant farmworkers.<sup>27</sup> The Court wrote: “Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”<sup>28</sup> Likewise, limits on landlords’ ability to pursue self-help or the creation of public easements to access the beach reflect increased recognition of the limits of rights of exclusion.<sup>29</sup>

In this more contemporary understanding, the State has been transformed from the neutral enforcer of an unconstrained right to exclude—or some early libertarian approximation thereof—to a mediator of competing interests. Indeed, the late nineteenth and early twentieth centuries marked a fundamental shift in the relationship between private property and the State. With industrialization, the move to cities, and then the Great Depression, people became increasingly aware that the State does not have a monopoly on coercive power. Private rights can be exercised coercively, too. Profoundly unequal bargaining power allowed some companies to use private rights to secure unfair advantages over employees—for example, in company towns where workers were not so different from indentured servants, living on company-owned land and working for wages that were almost entirely recaptured by the company.<sup>30</sup>

A State that stood by simply to protect those private agreements was not protecting the welfare of its citizens as a whole. It was not enforcing some efficient and socially beneficial private ordering through truly voluntary market transactions. Instead, it was benefiting the rich at the expense of the poor—the wealth of the few over the welfare of the many. As one commentator wrote: “An illiterate

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26. 277 A2d 369, 371 (1971).

27. For a discussion of *State v. Shack*, see, e.g., Alexander & Peñalver, *Properties of Community*, *supra* note 7, at 149. The case may be an outlier in the case law but is a mainstay of academic discussion.

28. *Shack*, 277 A.2d at 371.

29. See, e.g., Alexander, *The Social Obligation Norm*, *supra* note 6, at 745, 801.

30. For a general discussion of the evolution of labor and the conditions of the workforce during this era, see generally William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); see also generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998) (discussing Robert Hale’s progressive-era view of coercion).

and impoverished peasant could not be master of himself and his destiny, however jealously his legal rights to unconstrained action might be protected.”<sup>31</sup> Or, as the English philosopher T.H. Green put it: “The individual is not in fact free from coercion merely because the state has not coerced him. On the contrary he is under pressure of some sort in respect to every act he performs.”<sup>32</sup>

Over time, and certainly by the second third of the twentieth century, liberal governments and their citizens began to recognize that the goal of the State was not simply to be an enforcer of private rights. Courts and commentators realized that the state had an important role, too, in creating the conditions necessary for people to increase their own well-being and welfare, however defined. The State therefore began to take a more active role in creating conditions that allowed more people to lead more fulfilling lives. Where private rights interfered sufficiently with others’ ability to advance their own well-being, the State began to step in as a corrective. Today, the modern State no longer stands on the sidelines like a referee, merely defending the private allocation of private rights, but instead plays a central role in defining and limiting the substantive content of property to prevent its most coercive effects.

This more community-focused view of property implies substantial limits on the right to exclude. Exclusion, and property generally, cannot be used in ways that place too great a burden on the community. There is an even more striking consequence, too. Property does not have to consist of purely negative rights—rights to be free from intrusion by others—but can also contain affirmative obligations to minimize its coercive pressure. And this means, among other things, that the State can recognize those obligations and make substantial demands of property owners without offending property rights.<sup>33</sup> Not

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31. Harry Holloway, *Mill and Green on the Modern Welfare State*, 13 W. POL. Q., 394, 397 (1960) (interpreting T.H. Green).

32. T.H. GREEN, *PRINCIPLE OF POLITICAL OBLIGATION* (1950), quoted in Holloway, *supra* note 31, at 397; *see also* Currie, *supra* note 1, at 868 (attributing to Green the view that “affirmative government aid might be essential to liberty.”).

33. In one modern formulation, property as an institution is fundamentally the delegation by the state of decision-making authority vis-à-vis a particular resource in the world. *See* Hanoch Dagan, *The Public Dimension of Private Property* 2 (2012) (unpublished manuscript) (on file with author) (suggesting one view that private property is “merely a form of regulation, one that happens to delegate decision making power to individuals (and corporations)



only must property owners allow access and entry to those in need—the famous ship-in-the-storm case,<sup>34</sup> or *State v. Shack*—but property owners can also be called upon to “use” their property to benefit society more generally, by preserving historic or environmental resources on their land, by maintaining a certain amount of open space, by shoveling the sidewalks in front of their houses,<sup>35</sup> and so forth.<sup>36</sup> Property owners therefore have state-recognized obligations to use (or forego using) their property in specific ways to advance the well-being of society as a whole.

## II. AFFIRMATIVE OBLIGATIONS IN PRIVATE PROPERTY

Contemporary property theory has increasingly recognized that property contains obligations to the community as well as negative rights to exclude others. This insight remains contested, and important scholarship continues to advance the exclusionary core of property rights.<sup>37</sup> Nevertheless, theorists have articulated different justifications for affirmative obligations in property, most notably professors Hanoch Dagan, Gregory Alexander, and Eduardo Peñalver.<sup>38</sup> Others exist as well,<sup>39</sup> but the competing visions articulated by Dagan, on the one hand, and Alexander and Peñalver on the other, capture the core of the insight.

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in the service of the public good and to the extent of such service”); see also Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029 (2012).

34. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910) (permitting trespass for necessity, but ordering payment of actual damages).

35. See Katz, *supra* note 33, at 2031–32 (“There are numerous examples in developed liberal democracies of governing through owners on a modest scale. For instance, snow laws require owners to shovel or clear snow for sidewalks that border their property.”).

36. Only some of these look like required uses, as opposed to restrictions on uses, but the difference between the two is often in the eye of the beholder. An affirmative obligation to mow one’s lawn is no different from a prohibition on allowing grass to grow above a certain length.

37. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 754 (1998) (“[P]roperty means the right to exclude others from valued resources, no more and no less.”); Penner, *supra* note 22. See also DAGAN, *supra* note 6, at 38.

38. See *supra* notes 6 and 7 (citing some of their leading articles).

39. See, e.g., DAGAN, *supra* note 6, at 58 (citing *inter alia* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009)); see also Jeremy Waldron, *Property, Justification and Need*, 6 CAN. J. L. & JURISPRUDENCE 185 (1993) (discussing various philosophical justifications for social obligations in the content of property).

### A. *Dagan and Average Reciprocity*

According to Professor Dagan, the State can make significant demands of property owners with the promise of an “average long-term reciprocity of advantage.”<sup>40</sup> The concept of “average reciprocity” lies at the heart of takings jurisprudence, and so delineates one constitutional boundary on government action.

In *Penn Coal v. Mahon*,<sup>41</sup> the Supreme Court found that Pennsylvania’s Kohler Act was an unconstitutional taking of coal companies’ “support estate” in coal. The Court distinguished an earlier case, *Plymouth Coal Co. v. Pennsylvania*,<sup>42</sup> in which it had upheld a law requiring coal companies to maintain walls between mines. In *Penn Coal*, the Court held that *Plymouth Coal* was distinguishable because the Act at issue in that earlier case simultaneously benefitted and burdened coal companies. Yes, it prohibited coal companies from breaking into others’ mines, effectively limiting access to some of their own coal in order to keep others’ workers safe. But it conferred a reciprocal advantage, because it prevented other coal companies from doing the same thing. According to the Supreme Court, the presence of this “average reciprocity of advantage” in *Plymouth Coal* justified the different outcomes in the two cases.<sup>43</sup>

Unfortunately, the concept of average reciprocity has bedeviled courts and commentators ever since.<sup>44</sup> How broadly should courts be

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40. See Dagan, *Takings*, *supra* note 6, at 768–78. The following account of Dagan’s work is based significantly on Alexander’s characterization of Dagan’s underlying normative commitments. See Alexander, *The Social Obligation Norm*, *supra* note 6, at 758–73. It is possible to read Dagan more narrowly, and his commitment to reciprocity as limited to resolving particular doctrinal problems in regulatory takings law. Nevertheless, Alexander’s characterization of Dagan provides a particularly useful opportunity to contrast two different views of community obligations in property, and so is adopted here relatively uncritically.

41. 260 U.S. 393 (1922).

42. 232 U.S. 531 (1914).

43. *Penn Coal*, 260 U.S. at 415 (“[The requirement in *Plymouth Coal*] was for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various law.”).

44. See, e.g., Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 667, 694–96 (2005) (discussing cases and theory); Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1490–1501 (1997); see also generally Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990); Brian A. Lee, *Average Reciprocity of Advantage* (2012) (unpublished manuscript) (on file with author).

able to look to identify reciprocal obligations? Zoning is the easy and also paradigmatic case. Restrictive zoning ordinances are constitutionally permissible under the Takings Clause because they impose reciprocal restrictions on neighbors' property.<sup>45</sup> An owner may be harmed if she is forbidden from building the apartment building she wanted to build on her lot, but she is benefitted by the fact that her neighbors also cannot build apartment buildings on theirs. More difficult cases, however, push the boundary. The outer extreme is the famous case of *Shanghai Power Co. v. United States*.<sup>46</sup> There, the Supreme Court rejected a takings claim based on President Carter's decision to extinguish a private lawsuit against Shanghai arising out of its nationalization of a hydroelectric dam. The Court ruled, in part, that the previous owner of the dam had received an average reciprocity of advantage from America's improved relations with China!<sup>47</sup>

It is in this doctrinal context that Professor Dagan originally proposed his vision for requiring only long-term reciprocity.<sup>48</sup> As he put it, reciprocity exists if "the disproportionate burden of the public action is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magnitude" from other public benefits.<sup>49</sup> In other words, a government can make demands of property owners so long as those demands are likely to be offset in the future by roughly proportional benefits from the State, although the benefits can take a very different form than the original burden.

This has important consequences for the imposition of affirmative duties on property owners. Professor Dagan himself defended his conception of long-term reciprocity precisely because "it allows the incorporation of social responsibility into the legal doctrine."<sup>50</sup> To see the community-minded aspects of this idea, contrast Dagan's view

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45. See, e.g., Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 344 (2007) ("The paradigmatic example [of reciprocity of advantage] is zoning: a homeowner is required to forego, say, commercial use of his property, but benefits from others in the area being restricted in the same way.").

46. 4 Cl. Ct. 237 (1983).

47. See Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 *N.Y.U. L. REV.* 354, 382–405 (2000); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 *YALE L.J.* 1311, 1390 (2002).

48. See Dagan, *Takings*, *supra* note 6.

49. *Id.* at 769–70.

50. *Id.* at 771.

from the role of reciprocal advantages proposed by Richard Epstein in his famous book on the Takings Clause.<sup>51</sup> According to Epstein, the government is only permitted to regulate property without explicit compensation when doing so confers “implicit in-kind compensation” that matches or exceeds the burdens imposed.<sup>52</sup> This is at the heart of Epstein’s libertarian opposition to government redistribution of property, and Epstein appears to require that, on balance, any particular government action not make people worse off.<sup>53</sup> Dagan’s requirement of average long-term reciprocity, instead of strict reciprocity deriving directly from the specific government action, recognizes the role of the State in smoothing both the benefits and burdens of community membership over time.<sup>54</sup>

Stepping back from the doctrinal details, Dagan’s account offers a general vision of property within the State. The State can enact regulations significantly restricting the use and value of property and can make affirmative demands of property owners, so long as there is a promise of long-term reciprocal benefits, at least in the average. Therefore, Dagan’s justification for property’s affirmative obligations is based on the overall benefits that property owners receive—or are promised to receive—from their membership in the community.

### *B. Alexander and Peñalver and Human Flourishing*

Professors Alexander and Peñalver offer a very different justification for the State to impose uncompensated affirmative obligations on property owners. Theirs is based on Aristotelian conceptions of human flourishing, building on work by Martha Nussbaum and Amartya Sen.<sup>55</sup>

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51. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

52. *Id.* at 195–97.

53. *Id.* at 195 (focusing on the “extent the restrictions imposed by the general legislation upon the rights of others serve as compensation for the property taken.”); see also John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1057–59 (2003) (arguing that government should be able “to regulate a discrete group of landowners without providing compensation, as long as the regulation is reasonably designed for the special benefit of those landowners.”).

54. “Thus, the strict proportionality regime underplays the significance of belonging, membership, and citizenship, and it therefore undermines social responsibility.” Dagan, *Just Compensation*, *supra* note 6, at 136; see also Eduardo M. Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2230–33 (2004) (criticizing narrow construction of implicit in-kind benefits).

55. See Alexander & Peñalver, *Properties of Community*, *supra* note 7, at 136 (citing, *inter alia*, AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000)).

The Alexander and Peñalver argument is subtle and contains many important nuances that cannot be easily captured here. Fortunately, the broad outline of their argument is easy enough to state, even if some of its persuasive power comes from the omitted details.

In general terms, Alexander and Peñalver argue that a thick conception of justice and fairness requires a commitment to human flourishing. As they articulate it, human flourishing demands the presence of basic human capabilities, including: life, freedom, practical reason, and sociality. These, in turn, require, at a minimum and among other things: membership in a society; and “the capacity to make meaningful choices among alternative life horizons . . . .”<sup>56</sup>

According to their account, membership in a society is not a luxury but is instead a precondition for human flourishing. We are social creatures, and society plays a crucial role in forming who we are as people.<sup>57</sup> At the same time, flourishing requires satisfaction of basic physical needs, as well as the means to set priorities in life without total dependence on others. What that means precisely depends on context and the relevant community, but it necessitates at least some minimal level of ownership and control over resources in the world. People without any property, who are dependent upon others for their survival, have no meaningful opportunity to engage in practical reasoning.<sup>58</sup>

From this, Alexander and Peñalver argue that our dependence on community means that we are morally obligated to promote the human flourishing of others within our community as well. As they put it, “If an individual, as a rational moral agent, values her own flourishing, then to avoid self-contradiction, she must appreciate the value of others as well.”<sup>59</sup> This is a strong claim, and hardly self-evident. But it is based on a kind of moral symmetry borne of our dependence on community for our own ability to flourish.<sup>60</sup>

The moral obligation to promote others’ flourishing translates directly into a community-minded conception of property and, at least in modern society, to the power of the State to compel some

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56. *Id.* at 135.

57. *Id.* at 138–40.

58. *Id.* at 147–48.

59. *Id.* at 141–42.

60. See Alexander, *The Social Obligation Norm*, *supra* note 6, at 769–70 (discussing various justifications for this obligation).

level of “sharing.”<sup>61</sup> Although they do not specify any particular level of sharing, Alexander and Peñalver argue that people with surplus property can be required to give access to (or otherwise share) at least some of that surplus if it is necessary to satisfy others’ need for “resources necessary for physical survival.”<sup>62</sup> But the State can go further, as well, and require sharing of surpluses to ensure that everyone in the community has access to those resources necessary to “participate at some minimally acceptable level in the social life of the community.”<sup>63</sup> The amount of redistribution the State can compel is unspecified and is socially and culturally contingent. But the important point for this discussion is that the commitment to human flourishing generates a “social obligation norm” that allows the State to make affirmative demands of property owners, at least to some extent.

This account of affirmative obligations is importantly different from Dagan’s and permits involuntary redistribution in more circumstances. Dagan’s account, based on reciprocity, requires that property owners’ affirmative obligations be balanced out with reciprocal benefits, at least in the average and over the long term.<sup>64</sup> Alexander and Peñalver’s account requires no such reciprocity. Indeed, it may well be that the most advantaged members of a community are required to give without an expectation of benefits in return, even over the long term. As Alexander explains, “The real basis of our obligation here is not reciprocity but dependence.”<sup>65</sup>

While Alexander and Peñalver are undoubtedly on the same side of the broader fight about property rights with Dagan—all three argue for the power of the State to compel some measure of property

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61. The role of the State in Alexander and Peñalver’s account is somewhat contingent. They recognize that it might be possible, in the abstract, to satisfy one’s moral obligations to others directly, without mediation by the State. However, they persuasively argue that “[a]t least within the modern capitalist economy . . . guaranteeing to individuals the necessary access to . . . [the] prerequisites for the capabilities [for flourishing] . . . is beyond the abilities of private, voluntary communities . . . .” Alexander & Peñalver, *Properties of Community*, *supra* note 7, at 146.

62. *Id.* at 146.

63. *Id.* at 148.

64. See Alexander, *The Social Obligation Norm*, *supra* note 6, at 760 (“[C]ommunities can only make demands of their members [under Dagan’s account] if those demands are likely to pay back each individual in the community in the long, if not the short, run.”).

65. See *id.* at 771.

redistribution—Dagan’s focus on long-term reciprocity is arguably the more parsimonious. Alexander and Peñalver recognize a social obligation norm whenever some members of society have surplus property and others have too little to foster even the most basic human capabilities necessary for human flourishing.

### III. SOCIAL OBLIGATION’S TWO-WAY STREET

The property literature focusing on social obligations—whether based in reciprocity or flourishing—has focused exclusively on the commitments that property imposes on owners vis-à-vis the broader community. It has been used primarily to justify governmental limits on property rights and the imposition of affirmative obligations. This is understandable because these conceptions of property are generally deployed in response to libertarian accounts, with their emphasis on freedom from government interference. But it is important to recognize that a more community-minded conception of property imposes generally unrecognized reciprocal obligations as well. The reasoning of theorists like Dagan, Alexander, and Peñalver extend naturally and even inevitably to obligations that the State owes to property owners. Property’s social obligations, in other words, are a two-way street. Exactly how, and to what extent, depends on the underlying theory. Dagan’s reciprocity-based account of affirmative obligations generates different outcomes than a theory based on human flourishing, and in many ways the differences between these theories are starkest in the context of the state’s own previously unexplored obligations.

#### *A. Reciprocity and the State’s Obligation to Property Owners*

In Dagan’s view, average reciprocity of advantage allows the government to impose significant obligations on property owners so long as those burdens can reasonably be expected to be offset in the average and over the long term. For Dagan, this reasoning justifies, at least in part, the result in *Penn Central Transportation, Co. v. New York*.<sup>66</sup> While the historic landmarking challenged in that case

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66. 438 U.S. 104 (1978).

undoubtedly worked a substantial hardship on the owners of Grand Central Terminal, reciprocal offsetting benefits were easy to foresee. The law was intended to promote New York's "tourist attractions, business, and industry, and . . . the use of such landmarks for the education pleasure and welfare of the people of the city."<sup>67</sup> As Dagan reasoned, those particular benefits "will accrue most generously for landowners in the concentrated geographic neighborhood around the [Grand Central] Terminal—the neighborhood where appellants' real estate holdings are clustered."<sup>68</sup> Indeed, the New York Court of Appeals—as opposed to the United States Supreme Court—sustained the landmarking ordinance by employing surprisingly similar reasoning.<sup>69</sup>

This view of reciprocity, however, demands an active role for the State. The State is, in a sense, responsible for smoothing the benefits and burdens of community membership over time. It can redistribute some of those benefits, but only with the promise of future repayment. That implicit promise creates an ongoing obligation on the State until the benefits are, in fact, repaid. Some—including, perhaps, Dagan himself—might object that enforcing reciprocity's promise in this way fundamentally misses the point. There should be no ultimate tallying of costs and benefits, no ledger that gets added up to see if everyone is made better off on some single scale of welfare. "Reciprocity of advantage," as a prospective test, is simply examining whether regulatory burdens are being placed on people who are likely to be excluded from most of the benefits of membership in the community. It is designed as an *ex ante* disincentive to burden the poor and politically powerless, and not as a continuing obligation that the State, in fact, needs to satisfy.<sup>70</sup>

But holding the government accountable for those average long-term benefits is entirely consistent with Dagan's underlying goals of pressuring governments to place regulatory burdens on those best

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67. Dagan, *Takings*, *supra* note 6, at 797 (quoting *Penn Central*, 438 U.S. at 109 (Rehnquist, J., dissenting)).

68. *Id.* at 797 (internal citations and quotation marks omitted).

69. *Penn Central Transp. Co. v. New York*, 42 N.Y.2d 324 (1977) ("It is no accident that much of the city's mass transportation system converges on Grand Central. . . . Without the assistance of the city's transit system . . . the property . . . would be of considerably decreased value. It is true that most city property benefits to some extent from public transportation, but the benefit is peculiarly concentrated and great in the area surrounding Grand Central Terminal.").

70. Dagan, *Takings*, *supra* note 6, at 791.



able to secure benefits from the government. Dagan's progressive view of the Takings Clause is a response to the otherwise overwhelming pressure to place regulatory burdens on the poor or politically powerless. Those progressive concerns do not disappear once a regulatory burden has been imposed. If anything, requiring the State to live up to its implicit promise of reciprocal benefits keeps the government honest. Viewing the test for reciprocity entirely prospectively would allow governments to promise future benefits too cheaply.

To make this intuition more concrete, return to *Penn Central*, but imagine, for a moment, that something changed dramatically to cut off the promise of long-term benefits that, for Dagan, justified the landmarking ordinance. What if, for example, increased storm surge cut off rail tunnels to Grand Central making it unusable for trains?<sup>71</sup> Or what if an "urban redevelopment" project (or some catastrophic environmental disaster) led the city to condemn much of the property around Grand Central and leave it vacant and uninhabited? These may be unlikely events, indeed we can hope they are, but they are not outside of the realm of possibility. And they would profoundly distort the reciprocity calculus that, for Dagan, justified landmarking Grand Central in the first place. Now, the long-term benefits of being a transportation hub in a major commercial and tourist destination would not come to pass and the burden from the landmarking ordinance would create a much greater hardship, on balance, than the Supreme Court originally believed. The State's ongoing and active role in allocating the burdens and benefits of membership in society might compel it to act to readjust those previous burdens if they had not yet been fully or even partly repaid.

This is admittedly at odds with the typical reciprocity analysis. Reciprocity of advantage is raised by the government as a defense to a takings claim at the time the regulation is enacted. As a result, courts have always examined reciprocity of advantage at the time the regulation was enacted and not after the fact.<sup>72</sup> Dagan, too, reasoned that a regulation imposing a substantial burden should not be a taking "if it is likely to be offset by benefits of similar magnitude enjoyed

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71. While this may be unlikely in the details, the threat that storm surge can pose to rail tunnels under the East River was on vivid display in 2012 with Hurricane Sandy. For a description, see, e.g., James Barron, *Storm Barrels Through Region, Leaving Destructive Path*, N.Y. TIMES, Oct. 29, 2012, at A1.

72. See, e.g., Oswald, *supra* note 44, at 1510–20 (discussing cases).

by the claimant from other public actions . . . .”<sup>73</sup> In other words, he implicitly assumed that the analysis would be forward-looking.

There is, however, no conceptual reason for that temporal limitation. Once the idea of reciprocity is expanded as Dagan suggests beyond those reciprocal benefits built inherently into the regulatory action, the government must continue to provide the reciprocal benefits that justified the regulation in the first place.

Notice, then, the difference between Dagan’s conception of property and a more libertarian one. Richard Epstein, recall, demands that reciprocity of advantage be narrowly defined, so that any reciprocal advantages are built directly and in a sense inherently into the regulation itself—the reciprocal benefits and burdens of zoning, for example.<sup>74</sup> That analysis can take place at the time the regulation is enacted. There is no need for a wait-and-see approach for those reciprocal benefits because the State’s allocation of burdens and benefits is contained entirely within the regulation itself. By expanding the temporal and regulatory frame—by allowing long-term, average reciprocal benefits from sources other than the regulation itself—Dagan implicitly anticipates the State’s ongoing production of benefits and burdens. And this, in turn, suggests ongoing obligations on the State.

The intuition, then, is simply this: if the government justifies a regulatory burden on grounds that the regulation will generate offsetting benefits in the long term, and those benefits are subsequently eliminated, it is as if the original regulation becomes retroactively problematic. The prospect of long-term reciprocity is no palliative to regulatory harms if benefits disappear. Yes, the government can ask a lot of property owners based only on the prospect of future benefits, but—where reciprocity is the justification for regulatory burdens—the government must readjust the allocation of benefits and burdens if the promise of long-term reciprocity goes unfulfilled.

Nothing in this account demands any particular response from the government. It might revisit its original regulation, revoking it or amending it to mitigate some of its burdens. It might offer some additional protection to the affected property owners, like creating alternative benefits to replace those that never appeared. Or, the

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73. Dagan, *Takings*, *supra* note 6, at 744.

74. *See supra* note 45 and accompanying text.

government might pay compensation either voluntarily or mandatorily through the Takings Clause. For purposes of this project, with its focus on the moral justifications for affirmative government obligations, I am agnostic about remedies, but it is important to recognize their breadth under Dagan's reciprocity-based account.

### *B. Human Flourishing and the State's Affirmative Obligations*

A similar but nevertheless distinct analysis flows from Alexander and Peñalver's theory of a social obligation norm in property. Their view, again, is not based on reciprocity at all, but instead on a commitment to human flourishing. People with excess resources can be asked to "share" their property with those who need it to facilitate their flourishing, in the Aristotelean sense.<sup>75</sup> As with Dagan, their writing focuses exclusively on the State's ability to burden property owners, not on obligations that the State may owe to property owners in return. But those obligations again follow naturally from their theory.

Even more than Dagan, Alexander and Peñalver articulate a dynamic vision of property. Rights are defined, not in the abstract or as a mere right to exclude, but in reference to the needs of the community—needs that change over time. Members of the community change, and reasonable conditions for flourishing change as well. Social obligations today can extend even to requiring landlords to provide air conditioning to tenants as part of the implied warranty of habitability, although the necessity of air conditioning to human flourishing is undoubtedly geographically and culturally contingent, and changes over time.<sup>76</sup>

Importantly, a commitment to human flourishing both justifies some State-imposed burdens on property, but also interposes some limits. One limit is "intrinsic to the norm itself."<sup>77</sup> The State cannot ask so much of property owners—in the interests of promoting others' human flourishing—that owners' capacity to flourish is crippled.<sup>78</sup>

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75. See *supra* note 51 and accompanying text.

76. See Alexander, *The Social Obligation Norm*, *supra* note 6, at 754.

77. *Id.* at 815.

78. See *id.* (discussing limits of social obligation norm and offering as an example that "autonomy interests will limit the social-obligation norm if no equivalently weighty countervailing interests are present").

A commitment to human flourishing requires protecting not only the community's but also the property owner's capacity to flourish.

The State, then, may ask property owners to promote the community, but only insofar as the demands do not implicate the owners' capacity to flourish. In contrast to Dagan, Alexander justifies landmarking Grand Central Terminal because:

Private ownership of those aspects of a society's infrastructure upon which the civic culture depends comes with special obligations. . . . The development of Grand Central Terminal . . . would have inflicted on the community of New York a significant loss of cultural meaning and identity. No compensation should be constitutionally required to prevent a private owner from inflicting . . . a loss that is fundamentally at odds with the obligations of the owner of that property.<sup>79</sup>

This is only true, though, because the landmarking did not eliminate the property owner's capacity for flourishing.<sup>80</sup>

But landmarking could implicate the burdened property owner's capacity to flourish. Consider historic preservation in the context of a smaller, more intimate factual setting involving the owner of a historically important single family home. Even there, the government may often make significant demands: to preserve the building, to maintain it in good repair, to preserve open space around it, and so forth. But what if the house is historically significant because the current owner's ancestor lived a notable but not remunerative life?<sup>81</sup> And, further, what if the current owner's only asset is the house itself, a building with historical but little financial value? Then, it would seem, the government should not be able to demand the preservation of the house to promote the community's flourishing when the owner's own flourishing—and perhaps even survival—depends upon

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79. *Id.* at 795–96.

80. It is hard to imagine what flourishing means in the context of the Penn Central Authority. Professor Alexander acknowledges the possibility of corporations flourishing, but does not explore it in any detail. *See id.* at 817 & n. 275 (“The status of collective entities such as corporations under a human flourishing moral theory is an extraordinarily difficult topic.”).

81. *Cf., e.g.,* Adelle M. Banks, *Malcolm X's Boyhood Roxbury Home and MLK's Birthplace, Sweet Auburn Named Endangered Historic Places*, HUFFINGTON POST (June 7, 2012, 8:34 AM), available at <http://huff.to/KWiue9> (describing preservation efforts for run-down homes).

putting the house to a more lucrative use.<sup>82</sup> Justifying preservation by reference to the flourishing of the community demands a reciprocal concern for the flourishing of the owner. And, indeed, many historic preservation laws contain a kind of escape valve if the burdens are too high.<sup>83</sup>

There is another limit, too. If the State justifies some burdens on property owners by others' needs, the people in need must actually stand to benefit. An owner is not morally compelled to share her property because others are in need unless the property will actually go to and be useful to them. Although benefits can perhaps be indirect, there must at least be some plausible benefit to the people whose capacity for flourishing justifies the regulatory imposition.

Notice, however, that both of these limits on the State's demands can change over time. As communities change, and as the conditions of property owners change, burdens that once were innocuous can implicate owners' capacity for flourishing or outlive their usefulness. In either situation, the once-appropriate regulatory burden can become unjustifiable at least on grounds of promoting human flourishing.

Consider, for example, beach access. Alexander discusses the expansion of the public trust doctrine through the lens of human flourishing. Beaches, he argues, can be more than a pleasant diversion for a community.<sup>84</sup> Instead, recreation in parks and on beaches can be vitally important for affiliation and for fostering sociability within a community. Alexander explicitly imagines "a single parent living in a public housing project in Camden" with no reasonable ability to get to the beach. That person's limited opportunities for recreation and sociability potentially justify—at least to Alexander—limits on littoral owners' right to exclude. The social obligation norm therefore extends to beachfront owners who must grant reasonable access to the public. And, indeed, a public easement granting access to the foreshore makes good sense.

But the content and extent of that easement takes on a decidedly different feel in the face of sea level rise. Beaches are no longer just

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82. This is not to suggest that historic preservation laws need to be evaluated by reference to the wealth of the current owner. There may well be alternative normative justifications for such laws that are indifferent to such concerns.

83. See, e.g., J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 *FORDHAM ENVTL. L. REV.* 313, 321–25 (2004).

84. See Alexander, *Social Obligation Norm*, *supra* note 6, at 806–07.

happy spots for communal recreation but can become an important buffer for storm surge. Some littoral owners may well seek to bolster protection of their property through a form of armoring. While hard-armoring—like sea walls—is often detrimental to adjacent property owners, soft-armoring—like the development of wetlands, tidal pools, and dunes, for example—can serve as important protection.

Imagine, then, a case in which a property owner's soft-armoring would interfere with the public's beach access. At the time that the public trust doctrine expanded to include public access to the beach, it imposed a relatively modest burden on littoral property owners. But with sea level rise, and the risk of storm surge, those burdens begin to look a lot more extreme if the effect is to prohibit valuable forms of soft-armoring. Indeed, the burden may—depending on the property—threaten the littoral owner's basic use of the property. This, in turn, could significantly burden the property owner's capacity for flourishing. In balancing the interests of the public's access to the beach against the interests of the property owner to protect her property from storm surge, the scales in this stylized example have shifted decidedly in favor of the property owner.

Or, to explore the second limit, imagine that buses stop running from Camden. In fact, the only members of the "public" using the beach are wealthy owners of luxury condominiums just a few blocks in from the water. While the burden of public access to the littoral owner has not changed, the beneficiaries have, and the "human flourishing" justification then loses much if not all of its persuasive force.

Stepping back, notice the important dynamic at work here, which extends beyond beach access. Changes in the world can eliminate the State's justification for a regulatory burden based on human flourishing. A permissible regulation can become impermissible over time as both the community's needs and the property owner's needs change. This, in turn, requires active State involvement in the ongoing obligations of property owners, and the State must either alter its regulatory burdens or pay compensation.

### *C. Affirmative Commitments to Protect Property*

These different justifications for imposing affirmative obligations on property owners suggest something important and quite novel about

the State's own obligations. In both Dagan's reciprocity-based account of social obligations, and in Alexander and Peñalver's Aristotelian one, the State expresses the community's demands of property owners. The State, therefore, both imposes the community's obligations, and repays them (under Dagan's theory), or uses them to promote the community's flourishing (under Alexander and Peñalver's).

This role cannot be filled by a State acting only as a neutral arbiter of the right to exclude, but requires a much more active role in constituting the content of property rights. The State here is the mediator of the competing demands of property owners and the community.<sup>85</sup> It is not a passive observer of private market transactions, but is integrally bound up in allocating the burdens and benefits of ownership. The State's role, then, does not end with some regulatory enactment. The benefits and burdens of ownership are always changing, as are the needs of society. To the extent private property rights are defined at least in part by those competing pressures, the State's active role persists.

This observation follows naturally if not inevitably from social obligation conceptions of property. For community-minded theorists, unlike libertarians, property is a dynamic institution that evolves as the world and the community changes. The State cannot, therefore, sit back and watch, but is instead part of the process of defining the content of property rights, or policing their outer boundaries.

This strand of property theory generates significant and previously unrealized consequences, however. Most importantly, the State cannot divest itself of responsibility for the allocation of burdens and benefits in society. The State's active role means it has active responsibilities. And that extends to readjusting those benefits and burdens if they are no longer normatively justified. Or, to put it in Alexander's terms, the commitment to human flourishing justifies the State's imposition of affirmative obligations, but only so long as they are, in fact, necessary (or at least useful) for promoting others' capacity to flourish. When the state formalizes or codifies the moral obligations that inhere naturally in property, the State's role is inherently dynamic because our moral obligations are inherently dynamic. As

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85. Cf. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 887–92 (1983) (discussing the State's role in land use disputes through lens of mediating competing interests).

needs change—either owners’ or the community’s—the content of the social obligation norm changes as well. And to the extent that the State has (implicitly) justified the imposition of legal obligations on grounds that they are consistent with moral obligations, those legal obligations must then also be dynamic. When the purpose served by the social obligation disappears, so too does the normative justification for the obligation. If the State nevertheless refuses to alter or remove the previously imposed obligation, the property owner can object that the State’s demands are no longer consonant with the rights and responsibilities of ownership.

And this, in turn, yields a dramatic conclusion: there are situations in which changes in the world alter the conditions for human flourishing, or cut off the possibility of reciprocal benefits, such that the State’s failure to readjust the content of property rights is itself a violation of those rights. A legal obligation that is justified and permissible at the time it is enacted because it is consistent with moral obligations may become impermissible over time, even if the content of the legal obligation does not change. And so the State, in that situation, may have an affirmative constitutional obligation to act in order to keep the content of its laws consistent with underlying moral obligations. In other words, and at the extreme, the State’s failure to respond to certain kinds of changes in the world can lead to a regulatory taking. To put it most dramatically, the Fifth Amendment Takings Clause therefore can impose an affirmative obligation on the State to act, and the State’s failure to act can be unconstitutional.

For many property scholars—at least for many progressive property scholars—this result is likely to seem unsurprising. But from a constitutional perspective, the claim is quite unorthodox. After all, the Constitution is generally viewed as constraining, not requiring, government action. Nevertheless, under social obligation conceptions of property, where rights are dynamic and defined at least partly by reference to community needs, the State is inextricably bound up with the content of those rights and cannot escape liability by claiming inaction. The State, then, has affirmative constitutional commitments when it comes to property rights, and not just negative ones.



## CONCLUSION

Theories of property reflecting property owners' obligations to their communities come with previously unrecognized reciprocal obligations on the State. The dynamic nature of property rights that these theories represent demands the active and ongoing involvement of the State in allocating the benefits and burdens of society. Just as owners' obligations do not end at the boundary of their property, the State's obligations do not end with the imposition of regulatory burdens.