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## Progressive Property Moving Forward

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## Progressive Property Moving Forward

Timothy M. Mulvaney\*

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### INTRODUCTION

In his recent article, *The Ambition and Transformative Potential of Progressive Property*, Ezra Rosser, in his words, strives to “pick a fight with progressive property scholars.”<sup>1</sup> Though I must admit my pacifistic tendencies,

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1. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101

I here offer a brief response to Rosser's provocative piece.

Rosser critiques select recent works by a small group of self-identified progressive scholars from their "left flank."<sup>2</sup> The primary targets of Rosser's inter-liberal critique include the 2009 Cornell symposium contributions of three preeminent property theorists, Gregory Alexander, Eduardo Peñalver, and Joseph Singer; the two-page *Statement of Progressive Property*, co-authored by Alexander, Peñalver, Singer, and Laura Underkuffler;<sup>3</sup> and a recent book, *The Meaning of Property*, authored by Jedediah Purdy.<sup>4</sup> Though Rosser's piece moves in several directions, his main contention is that, in the course of laying the foundations of a theory grounded in property's social nature in the above-listed works, these progressive scholars "gloss over" property law's continuing conquest of American Indian lands and the inheritance of privileges that stem from property-based discrimination against African Americans.<sup>5</sup>

I fully share Rosser's concerns regarding past and continuing racialized acquisition and distribution, if not always his characterization of the select progressive works he critiques. Where I will focus here, though, is on the fact that, in the course of articulating his claim that these select progressive works have failed to attend sufficiently to matters of acquisition and distribution, Rosser wavers on whether a system of private property has the *very capacity* to play even a small part in fostering meaningful progressive change.

After setting forth my understanding of Rosser's contribution in the first part of this essay, I use the remaining pages to express slightly more confidence than does Rosser in property's potential to serve a role in furthering a progressive society. If property is to serve in this role, however, I suggest that it seems important to redesign and reinterpret property in accordance with three themes—*transparency* about property rules' value-dependence, *humility* about the reach of human knowledge and the mutability of our normative positions,

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CALIF. L. REV. 107, 108 (2013).

2. *Id.* at 171.

3. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

4. JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010). Unlike the others, Purdy has not adopted the "progressive property" moniker. For examples of scholars suggesting that Purdy's work fits neatly alongside that of Alexander, Peñalver, Singer, and Underkuffler, see, e.g., Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1030 (2011); Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 924 n.12 (2010); John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 744 (2011). Not all scholars, however, agree. While Rosser described Purdy's *The Meaning of Property* as the "most extensively developed vision of progressive property," see Rosser, *supra* note 1, at 125, Eric Freyfogle has suggested that Purdy "situate[es] 'himself in the category of those who largely endorse atomistic, contractarian social views and who see individual freedom as the 'single master value,'" that Purdy fails to interact with "work by property scholars . . . who see property chiefly as a tool used by communities to foster their overall welfare," and that "Purdy's book [The Meaning of Property] will probably be satisfying to those who share his emphasis on liberal individualism and his belief that the actions of free-acting individuals will give rise, pretty much automatically, to sociable communities." Eric Freyfogle, *Book Review*, 29 LAW & HIST. REV. 327–328 (2011).

5. Rosser, *supra* note 1, at 107.

and a concern for the socioeconomic *identities* of those affected by resource disputes—themes that underlie a broader set of writings than Rosser considers within the contours of “progressive property scholarship” and on which I offer some very preliminary impressions.

## I.

### ROSSER ON PROGRESSIVE PROPERTY

In this part, I introduce the very basic structure of progressive property theory and offer a précis of Rosser’s critique thereof, before setting out Rosser’s conflicted position on property’s progressive potential.

#### A. *An Introduction to Progressive Property*

The progressive scholars Rosser critiques offer an alternative to what they see as the currently dominant conception of property that is heavily centered on coordinating economic transactions and for which standardized exclusion rights constitute ownership’s essential core.<sup>6</sup> While theorists supporting this alleged dominant conception often suggest that efficiency or utility maximization should be the drivers of property rules,<sup>7</sup> these more progressive property scholars assert that property institutions can be better designed and property conflicts more appropriately resolved by looking to the “underlying human values that property serves” and the social relationships it fosters.<sup>8</sup>

On this more progressive view, no single metric—efficiency, utility, or otherwise—is appropriate for crafting property rules, for property serves a diverse collection of values.<sup>9</sup> To serve this diverse collection of values requires

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6. Nicholas Blomley draws on performativity theory to question why this dominant conception persists if it is as flawed as these progressive property scholars suggest and, relatedly, why alternative models “remain marginal outliers, at best.” Blomley, *Performing Property: Making the World*, 26 CAN. J.L. JURIS. 23, 42–46 (2013). See also Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 232–33 (2002). Yet not all left-leaning property scholars concur with the descriptive claim that a conception of property grounded in economics predominates. See, e.g., Eric Freyfogle, *Private Ownership and Human Flourishing: A Critical Review* 24 STELL. L. REV. 430 (2013) [hereinafter Freyfogle, *Human Flourishing*].

7. Henry Smith is perhaps the most prominent modern theorist who perceives property as oriented solely by the principle of exclusion. See, e.g., Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012). In the paper discussed herein, Rosser largely leaves discussion of the orientation Smith supports to the side to concentrate on engaging in conversation within more progressive circles. See Rosser, *supra* note 1, at 109. I follow Rosser’s lead in this Essay.

8. Alexander, *supra* note 3, at 743. This summary admittedly paints with a quite broad brush what is a very complicated and fluid perspective on property. These progressive property scholars see “human flourishing” as both an inherent characteristic of the concept of property and as property’s moral foundation. See, e.g., Gregory Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451, 452 (2013) [hereinafter Alexander, *Obligations*]; Singer, *Property and Social Relations*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 11–12 (Charles Geisler & Gail Daneker eds., 2000). For a further, if still abbreviated discussion on the meaning of human flourishing, see *infra* note 10.

9. Rosser, *supra* note 1, at 110. Moreover, progressive theorists suggest that exclusion theorists do not pay sufficient heed to the reality that property regimes can produce ill effects, such as economic inequality and exploitation. On this issue, see *infra* note 22–25 and accompanying text.

considering economics *and many other lines of thought*, including socially-oriented politics and deep moral considerations that attend not only to the interests of owners but to the interests of nonowners, unborn generations, and the larger ecological community of which humans are a part. Only in that light, these progressive scholars suggest, is it possible to craft and continually update property rules in ways that promote widespread access to those resources and opportunities that enable people to “flourish,” i.e., to pursue life courses that are consistent with human dignity.<sup>10</sup>

### B. Rosser’s Critique

Rosser is sympathetic to the general slant of the progressive property literature he critiques.<sup>11</sup> However, he contends that these works rest too heavily

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10. Several of the scholars subject to Rosser’s critique label this conceptual and institutional foundation of property “human flourishing,” an interpretation of Aristotle’s term “*eudamonia*.” See ALEXANDER & PEÑALVER, INTRODUCTION TO PROPERTY THEORY 81 (2012); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). The interpretation builds on the insights of Amartya Sen, who asserts that flourishing is a matter of what a person is capable of doing rather than what possessions she holds. See AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); see also MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 416 (2001) (“[A] liberal political society is best advised to describe its basic entitlements as a set of capabilities, or opportunities for functioning . . . in some central areas of human life that are likely to prove important for whatever else the person pursues”). Calls for “widespread” access to these capabilities often are grounded in the iconic work of John Rawls. See generally JOHN RAWLS, A THEORY OF JUSTICE (1973); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS].

11. While Rosser’s sixty-five page piece eludes a concise summary, this footnote presents a rough overall picture for those who are perusing this Essay before having read the original paper to which it responds. In several instances, I restate and expand upon in the text several of Rosser’s examples that I outline here.

Rosser’s article proceeds in five segments. In the *first segment*, he conducts a work-by-work critique of the five pieces noted in the text for failing to pose radical-enough approaches to a litany of progressive causes and for focusing too intently on limitations to the right to exclude, as discussed in the likes of *State v. Shack* and *Matthews v. Bay Head*. In the *second segment*, Rosser leaves these works aside to highlight the past and continuing racialized acquisition and distribution of property. In the *third segment*, instead of returning to the works he critiqued at the outset, Rosser suggests that a recent book co-authored by Sonia Kaytal and Peñalver is “the best way” to understand the limited demands that Alexander, Peñalver, Purdy, Singer, and Underkuffler make on property law with respect to the acquisition of property.

In the *fourth segment*, Rosser returns to exclusion and access to suggest that progressive property scholars should “push even harder against the right to exclude” than they have to date. That Rosser dedicated more than a third of his article to this issue is somewhat surprising given his assertion that progressive scholars are overemphasizing exclusion. His explication of this “harder push” comes across as a series of three unrelated mini-essays. In the first, Rosser suggests that “traditional property” should gain the same weak protections generally afforded what Charles Reich famously labeled “new property.” In the second, he returns to *Shack* and *Matthews* to suggest that decisions offering public access rights across private property demonstrate the limitations of property law as a mechanism for progressive change. In the third, Rosser offers several examples that, in his view, exemplify situations where individuals have resisted social obligations: (1) he challenges the notion that common-interest communities socialize property; (2) he critiques the public outrage that followed *Kelo v. New London* as a “popular effort to curb the state’s ability to make collective demands” on owners; and (3) he admonishes white New Orleanians residing on high ground for “taking up arms in defense of their

on well-known access cases,<sup>12</sup> most prominently *State v. Shack*<sup>13</sup> and *Matthews v. Bay Head*.<sup>14</sup> To Rosser, these two decisions start from a baseline of exclusion and merely set out limited progressive exceptions thereto, namely affording (1) access onto a farm owner's land for federal aid workers seeking to visit privately with migrant employees living on the land, and (2) access onto portions of a privately-owned dry sand beach for non-owners hoping to enjoy the public trust waters of the Atlantic Ocean.<sup>15</sup> Concentration on the likes of *Shack* and *Matthews*, Rosser explains, stands in the way of "[a]n acquisition- and distribution-centered approach [that] would bring attention to prior wrongful acquisition and to related, currently experienced inequality."<sup>16</sup> Rosser's primary aim, then, is to encourage these progressive property theorists to expand their horizons and think more deeply than he suggests they have thus far about the past and continuing subordination of certain minority groups.

Curiously, though, Rosser does not discuss in much depth the many contributions that these progressive property scholars—most prominently, Singer—have made on issues of conquest and race over the past three decades.<sup>17</sup> Indeed, more broadly, Rosser merely references a small handful of

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property" in the wake of Hurricane Katrina instead of lending a helping hand to African American flood victims in more vulnerable parts of the city.

In the *fifth and final segment*, Rosser returns to acquisition and distribution to suggest that progressive property scholarship should stop focusing on what he addressed in the prior segment—exclusion and access—and remind the country that the current misdistribution of wealth across racial lines rests in part on past and continuing discrimination against American Indians and African Americans. He acknowledges here, however, that the authors of the progressive works he critiques actually have addressed issues of acquisition and distribution in earlier articles they have written, but suggests that because they have done so does not resolve the broader question about "the efficacy of 'property'-based progressive change."

As noted in the text, rather than engaging with Rosser on each of these discrete matters, I have chosen in this short response to focus on a thread that, on my reading, weaves through Rosser's piece: while Rosser gives myriad examples of property serving as a tool of oppression and constraint, he wavers on property's ability to serve as a tool of progressive change.

12. Rosser, *supra* note 1, at 117–18, 125, 152–58.

13. *State v. Shack*, 58 N.J. 297 (1971).

14. *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984).

15. As Rosser reads *Shack*, the New Jersey Supreme Court began from the premise that a landowner/employer had the right to exclude outsiders; only thereafter did the court carve out an exception that allowed federally-funded aid workers to meet privately with migrant farmworkers living on the land at a time that would not interfere with business operations. Rosser, *supra* note 1, at 152–56. In explaining *Matthews*, Rosser suggests that the same court worked from a baseline of oceanfront landowners' exclusionary rights, and adjusted those rights only in narrow instances where, for example, the owner has allowed public access in the past and publicly-owned beaches are not available nearby. *Id.* at 152–53, 156–58. There is an opposing—and more progressive—view of these types of access disputes that begins the conversation with a communitarian understanding and then carves out private-right exceptions—like the right to exclude—in those circumstances where those private rights can help further communal interests.

16. *Id.* at 107.

17. For a simple example, Rosser criticizes property textbooks for failing to include American Indian law cases beyond *Johnson v. M'Intosh*, 21 U.S. 543 (1823). Rosser, *supra* note 1, at 128–33. While that is true of Alexander's co-authored textbook, see DUKEMINIER, ET AL., PROPERTY (7th ed. 2009), Singer's single-authored text contains a significant section on "conquest," which includes five principal American Indian law cases and an analysis of the two cases—the U.S. Supreme Court's

these scholars' earlier seminal works in select footnotes,<sup>18</sup> and recurrently espouses the perspective that these authors' "progressive property scholarship" is confined to the 2009 Cornell symposium.<sup>19</sup> Such reasoning could be construed as failing to sufficiently acknowledge that the viewpoints presented in the symposium incorporate and build upon these authors' prior works and inform their works that have followed. More significantly, Rosser's approach lends support to the misleading notion that the Cornell symposium presented a grand, new progressive conception of property.<sup>20</sup> To the contrary, it seems the symposium more accurately can be described as seeking to give existing progressive conceptions of property new traction in legal scholarship and to encourage continuing work that delineates and clarifies the content of these conceptions in the present day.<sup>21</sup>

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decisions in *Tee-Hit-Ton v. U.S.*, 348 U.S. 272 (1955), and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)—that Rosser advocates should be included. See JOSEPH SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 97–125 (5th ed. 2010). Moreover, Rosser, in discussing *Tee-Hit-Ton*, agreeably quotes Singer's critique of the Supreme Court's opinion in that case, which denied an Alaskan tribe's claim for compensation when the government appropriated its land and timber. See Rosser, *supra* note 1, at 132 (citing Joseph Singer, *Reply Double Bind: Indian Nations v. the Supreme Court*, 119 HARV. L. REV. F. 1 (2005)). And, as for *City of Sherrill*, Rosser says "the academic commentary on [the Court's opinion that reacquisition of what were traditionally tribal lands did not restore tribal sovereignty to those lands] has been almost uniformly critical," for which he cites, among other scholars, Singer. See Rosser, *supra* note 1, at 133 (citing Joseph Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 609–10 (2006)). If Singer is glossing over the historical and continuing conquest of American Indian lands, Rosser has not provided evidence of such oversight.

18. See, e.g., Rosser, *supra* note 1, at 112 n. 15–16 (citing a small selection of Singer's many writings on American Indians and property law); *id.* at 170 n.397 (citing LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 146–49 (2003) [hereinafter UNDERKUFFLER, *IDEA OF PROPERTY*]; GREGORY ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997); JOSEPH SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000)).

19. See, e.g. Rosser, *supra* note 1, at 112 n.15 ("This not to say that these scholars are not concerned with distribution and acquisition, but in their progressive property scholarship such concern has taken a backseat."); *id.* at 115 n.31 ("It is worth emphasizing that my argument is based on the progressive property contributions of these authors and does not attempt the herculean task of surveying their many scholarly contributions."). Rosser veers from this approach only by discussing at some length Purdy's book and a book co-authored by Peñalver, EDUARDO M. PEÑALVER & SONIA K. KAYTAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010), without explaining why he considers those select writings to be part of those authors' progressive property scholarship while Purdy and Peñalver's other writings, or any works of Alexander, Singer, and Underkuffler outside of their 2009 symposium pieces, do not deserve such consideration.

20. Nestor Davidson accurately notes that "[t]he legal realists, particularly Felix Cohen, Morris Cohen, and Robert Hale, laid the groundwork for our modern understanding of the role of social relations in property." See Nestor Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 771 (2009).

21. If my description of the 2009 Cornell symposium's aim is accurate, it seems the symposium has succeeded in the sense that it has provided renewed momentum for progressive theorists. The authors of the *Statement of Progressive Property*, *supra* note 3, and other leading U.S. scholars have thoughtfully expounded upon the Statement's tenets in a variety of areas. See, e.g., Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012); Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017 (2011); Gregory S. Alexander, *Unborn*

### C. Rosser and Property's Potential

Despite these shortcomings, Rosser's piece offers a meaningful contribution to progressive property scholarship by presenting a fresh perspective on property's capacity to produce socially-ill and socially-beneficial effects. Rosser recounts several practical ways in which property, in his view, can and does promote and perpetuate oppression. For example, he explains how the subordination of Indian title to title conveyed by the U.S. government continues to underlie title to most of the country's real property.<sup>22</sup> For another, he discusses the reality that funding public education by local property taxes "almost guarantee[s] that the 'best' schools are in the 'best' neighborhoods," enabling "middle- and upper-class whites to secede from the challenges presented by urban black poverty."<sup>23</sup> For a third, he classifies the myriad state legislation prompted by the public outrage that followed the U.S. Supreme Court's decision in *Kelo v. New London*—which concluded that condemnation for economic redevelopment purposes is consistent with the Fifth Amendment's "Public Use" Clause—as a "popular effort to curb the state's ability to make collective demands" on owners.<sup>24</sup> As a final example, he critiques gated "common interest communities" as allowing member owners to "protect themselves against future obligations to the public" by congregating people of the same socioeconomic class and allowing them to opt out of public services.<sup>25</sup>

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*Communities* (Cornell Law Sch., Working Paper No. 110), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2241746](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241746); Eduardo Peñalver, *Property's Memories*, 80 FORDHAM LAW REVIEW 1071 (2011); Joseph W. Singer, *Property as the Law of Democracy*, 63 DUKE L.J., 1287 (2014); Joseph W. Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 83 (2011); Joseph W. Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141 (2012); Joseph W. Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013); Joseph W. Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in INDIAN LAW STORIES 229 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011); Laura Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. (forthcoming 2015) [hereinafter Underkuffler, *Property and Change*]; Laura Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363 (2010); Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917 (2010); Freyfogle, *Human Flourishing*, *supra* note 6; John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011); Marc Poirier, *Brazilian Regularization of Title in Light of the Right of Moradia, Compared to United States Understandings of Homelessness and Homeownership*, 44 U. MIAMI INTER-AM. L. REV. 259 (2013). Moreover, rising new scholars have offered skillful insight into the application, influence, and potential of progressive understandings of property in several specific contexts, including, for example, emergent property markets, *see* Rashmi Dyal-Chand, *Useless Property*, 32 CARDOZO L. REV. 1369 (2011); low-income housing, *see* Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109; atrocity, *see* Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635 (2012); and municipal bankruptcy, *see* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118 (2014).

22. Rosser, *supra* note 1, at 129–30.

23. *Id.* at 137.

24. *Id.* at 163.

25. *Id.* at 159–61. Paula Franzese recently offered a particularly compelling portrayal of common interest communities' propensity to segment people with regard to wealth. *See* Paula



After relating these and many other ways in which property can curtail widespread development of the capabilities that enable people to live dignified lives, Rosser draws on the words of Theodore Parker (and made famous by Dr. Martin Luther King, Jr.) in posing the threshold question underpinning the title to his piece: Just how significant is property's potential to bend the "arc of the moral universe" toward justice?

In answering this question, Rosser seems conflicted. In places, he seems to suggest property is quite capable of facilitating progress. For example, Rosser describes property not only as a tool of "oppression and constraint" but also one of "emancipation and freedom."<sup>26</sup> For another, he critiques a recent book co-authored by Peñalver as one of limited ambition, open only to "tweaking the rules" and "steer[ing] clear of [more progressive] changes."<sup>27</sup> Similarly, he contends that the conception of property offered in the principal contributions to the 2009 Cornell symposium "is too conservative,"<sup>28</sup> for it merely "nudg[es] against the exclusionary nature of current property law," "careful not to stray outside the lines."<sup>29</sup>

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Franzese, Presentation at AALS Annual Meeting: The Suburbs in Flux: Perspectives from Property and Real Estate Law (January 4, 2014). *But see* Alexander, *Governance Property*, *supra* note 21, (highlighting what the author sees as progressive qualities of common interest communities).

Beyond the select examples identified by Rosser, there are, of course, many other ways property can have oppressive and exploitative effects, most often of which are tethered to the income inequality effects private ownership can impose on non-owners. On the ways in which property is used to facilitate economic inequality, as well as maintain political power and control public discourse, *see* Freyfogle, *Human Flourishing*, *supra* note 6. *See also* JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 23 (2000) ("[U]se of one's property may be oppressive to others by constituting an exercise of undue power over them; at the same time, it is not the case that *all* uses of property are oppressive."); Frank Michelman, *The Property Clause Question*, 19 CONSTELLATIONS 152, 170 (2012), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1952051](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952051) ("[T]he constitution's directive to courts and policymakers should not be to act on the (false) premise that every state action redistributing asset values is liberally objectionable just as such, but rather to bear in mind that such actions can *sometimes*, unjustifiably, infringe on individual liberty or dignity in deeply objectionable ways").

26. Rosser, *supra* note 1, at 126.

27. *Id.* at 144.

28. *Id.* at 171.

29. *Id.* at 149. To critique the 2009 Cornell symposium contributions, Purdy's THE MEANING OF PROPERTY, *supra* note 4, and Kaytal and Peñalver's PROPERTY OUTLAWS, *supra* note 19, as merely "nudging against" the exclusionary nature of current property law seems to overstate the subject against which Rosser builds his case. And construing "progressive property scholarship as it exists so far," *see* Rosser, *supra* note 1, at 170, to include (as it must) the likes of those works referenced in notes 17-18 above, weakens even more considerably Rosser's assessment of progressive property scholarship as neglecting nearly wholesale matters of racialized acquisition and distribution. Rosser begins to acknowledge the same on the penultimate page of his article, writing, "[o]utside of the progressive property context, the writing of Alexander, Underkuffler, and Singer on acquisition and distribution include elements very much in line with the more robust version of progressive property I have been advocating." Rosser, *supra* note 1, at 170. That said, it seems worthwhile to consider whether any apparent conservatism on the part of these progressive property scholars subject to Rosser's critique, to the extent it exists, may be masking, whether intentionally or unintentionally, politically wise incrementalism.

Yet beyond broadly suggesting that property scholars pay greater heed to issues of acquisition and distribution, Rosser offers very little insight into how exactly property scholars should “stray outside the lines.” While the introduction to Rosser’s paper sounds as if he will offer property-based prescriptions—for instance, he admonishes the progressive property scholars he critiques as having “largely labored in the theoretical realm and . . . limited their practical explorations”<sup>30</sup>—a practical prescriptive message is largely absent in the body of Rosser’s piece.

This absence of a prescription may be attributable to the fact that, in many places, Rosser sees property as *getting in the way* of progress.<sup>31</sup> For instance, he argues that “scholars should tackle issues [outside of property law] where their efforts are more likely to make a difference.”<sup>32</sup> For another example, he flips Charles Reich’s “property solution” of affording “government largess” the same protection as “traditional property” (i.e., standard market assets) by proposing that the two should be equalized by affording *neither* the protection conventionally afforded traditional property.<sup>33</sup> Rosser further suggests that “strongly protecting private property could hinder the state’s ability to deliver on the promise of positive rights” in education, shelter, nourishment, and health care.<sup>34</sup> And relatedly, he speaks of property’s “conservative core,” and identifies *Shack*—which he terms “perhaps the most progressive decision found in the property law canon”<sup>35</sup>—as highlighting “the challenge of converting formal rules, even progressive rules, into meaningful substantive rights.”<sup>36</sup> To Rosser, even “broad[.] . . . understandings of progressive property raise the larger general question about the efficacy of ‘property’-based progressive change.”<sup>37</sup>

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30. Rosser, *supra* note 1, at 111; *see also id.* at 109 (calling for a “shift [of] scholarly attention from theoretical discussions of what property is to a discussion of how property law can help historically marginalized groups”).

31. One scholar, describing Rosser’s presentation of an early version of the paper I am responding to here, reported that Rosser “articulated the reasons for his pessimism about property law as a vehicle for progressive social change.” *See* James Kelly, *Rosser on Carbon Offsets*, LAND USE PROF BLOG (March 9, 2011), [http://lawprofessors.typepad.com/land\\_use/2011/03/rosser-on-carbon-offsets.html](http://lawprofessors.typepad.com/land_use/2011/03/rosser-on-carbon-offsets.html). In an early work-in-progress, Rosser goes even further by explicitly calling for the destabilization of property. *See* Ezra Rosser, *Destabilizing Property* (Jan. 3, 2014) (unpublished manuscript) (on file with the author). To the extent Rosser believes the progressive course involves destabilizing property, one could argue that this course runs counter to Rosser’s assertions about the strength of American Indian property claims.

32. Rosser, *supra* note 1, at 115.

33. *Id.* at 148–49. Taken to its logical end, it seems that Rosser would support expansion of the Supreme Court’s decision in *HUD v. Rucker*, 535 U.S. 125 (2002), which significantly limited property rights in public housing, to ownership interests that are not the product of government largess. Rosser, *supra* note 1, at 146–49.

34. Rosser, *supra* note 1, at 151.

35. *Id.* at 117.

36. *Id.* at 154; *see also id.* at 157–58 (speaking of “the limitations of contemporary property law as a mechanism for change”).

37. *Id.* at 170.

In sum, Rosser comes across as torn on the prospects of property serving an important role in fostering a progressive society. His tone both embraces and discards property as a means of enacting change. On the one hand, Rosser implores progressives to take more radical stances. On the other, he simultaneously seems to have abandoned hope in any property system—even a progressively tailored one—in furthering justice. In the pages that follow, I express slightly more confidence in property’s progressive bona fides than does Rosser.<sup>38</sup>

## II.

### PROGRESSIVE PROPERTY MOVING FORWARD

My optimism about property’s capacity to serve an important, if small, role in fostering a progressive society is dependent on a significant redesign and reinterpretation of property that is grounded in three themes. These themes have been referenced (if not always highlighted) within existing progressive property literature, when that literature is construed in broader terms than Rosser allows.<sup>39</sup> For organizational purposes, I label the themes *transparency*, *humility*, and *identity*. In this part, I offer some very preliminary impressions of these themes, drawing on works of the authors of the *Statement of Progressive Property* to which Rosser did not attend, as well as the recent scholarship of other leading progressive writers such as Eric Freyfogle, Jennifer Nedelsky, and Andre van der Walt. I attempt to illustrate the import of considering transparency, humility, and identity by referencing familiar U.S. Supreme Court property cases that have neglected these themes.

#### A. Transparency

By transparency, I am referring to forthright acknowledgement that property rules are never value-neutral.<sup>40</sup> Since lawmakers can define ownership

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38. I say “slightly more” out of sensitivity to Nestor Davidson’s reminder that “[i]t is important to avoid the simplistic temptation to think that tinkering with the structure of property can significantly change underlying individual and cultural norms.” Nestor Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 763 (2009).

39. This is not to suggest that Rosser’s piece does not periodically implicate at least subsets of or precursors to these themes. For instance, Rosser asserts that “progressive scholars need not be shy in suggesting that flexibility is preferable to ossified understandings of the law,” Rosser, *supra* note 1, at 169, a claim that could be construed to serve as a building block toward the understanding of humility that I outline below.

40. Eric Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 84 (2010) (“There is, in truth, no morally neutral place for the law to hide.”); Joseph Singer & Jack M. Beerman, *The Social Origins of Property*, 6 CAN. J. OF L. & JURIS. 217, 218 [hereinafter Singer & Beerman, *Social Origins*] (“property rights can and should be structured through instrumental and value-oriented reasoning”); Joseph Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 336 (2006) (suggesting that obligations imposed by regulation must be “just and fair,” and that “[t]he question of justice and fairness does not relieve us of the burden of judgment, and that—perhaps more than any other reason—explains why it is the right question”); LAURA UNDERKUFFLER, THE IDEA OF PROPERTY 16–33 (2003) [hereinafter UNDERKUFFLER, IDEA OF PROPERTY] (describing property as a “complex package of normative

in many ways,<sup>41</sup> fashioning rules or standards on the meaning of ownership therefore necessarily requires lawmakers to make value choices. On this view, continuing open conversations about the reasons for preferring one set of rules or standards over the alternatives are paramount.

In the oft-discussed takings case of *Lucas v. South Carolina Coastal Council*, the Supreme Court accurately noted that those regulations that harm the public and those that benefit it frequently could not be distinguished “on an objective, value-free basis.”<sup>42</sup> Unfortunately, though, the Court found this reality a justification to *eschew* value-focused analyses in adjudicating total regulatory takings cases.<sup>43</sup> In place of a value-focused analysis, the Court

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choices”); Laura Underkuffler, *When Should Rights “Trump?” An Examination of Speech and Property*, 52 ME. L. REV. 311, 321 (2000) (“The state—in creating and enforcing property rights—makes deliberate, binding, and final choices about who shall enjoy and who shall not. It necessarily and affirmatively grants the acquisitive claims of some people, and denies the same claims of others.”); Underkuffler, *Politics of Property and Need*, *supra* note 21, at 370 (“No societally recognized and enforced property right, which is ‘normatively neutral,’ actually exists.”); Eduardo Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2974 (2006) [hereinafter Peñalver, *Two Views of the Castle*] (“When owners prove unwilling or unable to sort out disagreements about . . . spillover effects on their own, the state [has] to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take[.]”); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517 (2003) (characterizing decision-making about maintaining or reforming property institutions as a normative process informed by human values); André van der Walt, *Property Theory and the Transformation of Property Law*, in MODERN STUDIES IN PROPERTY LAW 361, 376 (Elizabeth Cooke ed., 2005) (“[A] transformative property theory has to be a normative theory that justifies the balance between stability and change, in every individual context, on consideration of human values.”); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1406 n.34 (1991) (arguing “that rigid [takings] compensation practices derive from unreflective judicial allegiance to models of property law aimed at avoiding the courts’ role as expositors of human values”); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 1-3 (1990) (discussing the clash between the “changing meaning of property” in the modern welfare state and “the Framers’ concern with protecting property from democratic incursion”). Among others, scholars writing in the natural rights tradition generally take issue with this claim. *See, e.g.*, Eric Claeys, Kelo, *The Castle, and Natural Property Rights*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 47 (2008) (“In all but the most extreme cases, . . . the natural law refrains from picking and choosing among owners or land uses.”).

41. Eric Freyfogle writes, “Deep within many Americans may be a sense that property surely has some core meaning, recognized in all times and places. But in the case of land at least, the record says otherwise. Property regimes are almost infinitely varied.” Freyfogle, *Property and Liberty*, *supra* note 40, at 103. *See also* UNDERKUFFLER, IDEA OF PROPERTY, *supra* note 40; Joseph L. Sax, *Ownership, Property, and Sustainability*, 31 UTAH ENVTL. L. REV. 1, 2 (2011). For instance, a system in which landowners collectively “can develop joint plans for their landscapes can lead to far different land use patterns than one in which landowners can act only alone or in voluntary combinations.” Freyfogle, *Property and Liberty*, *supra* note 40, at 115. For other, more specific examples, one might consider (1) New York’s 1955 Limited-Profit Housing Companies Act, N.Y. PRIV. HOUS. FIN. LAW § 10 (1955) (under which households own shares in a building but the price at which they can sell those shares is limited for a specified period), *see also* *About the Mitchell-Lama Housing Program*, N.Y. ST. HOMES & COMMUNITY RENEWAL (Jan. 15, 2013), <http://www.nyschr.org/Programs/mitchell-lama/>, and (2) pooling and unitization schemes in oil and gas law, *see, e.g.*, Bruce M. Kramer, *Compulsory Pooling and Unitization: State Options in Dealing with Uncooperative Owners*, 7 J. OF ENERGY L. & POL’Y 255 (1986).

42. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

43. My critique of the *Lucas* Court here is not meant to suggest that harms and benefits alone

resorted to a rigid, definitional approach that tethers the meaning of property to “background principles” of the common law, as those principles were traditionally construed.<sup>44</sup> If this approach allows for continuing social and political reconstruction of property’s meaning, such a feature is concealed deep within any distinction that persisted under nineteenth century versions of nuisance and other common law rules. *Lucas*’s explicit effort to define property in value-free terms forecloses open conversation and increases the likelihood that prudent alternatives will go unaddressed.

Similarly, the factors considered in partial regulatory takings cases that the Supreme Court established in *Penn Central Transportation Co. v. New York City*<sup>45</sup>—diminution in value, investment-backed expectations, and character of the government action—may give the appearance of value-neutrality, but their application requires judgments about the legitimacy of the alleged property right at stake. For instance, determining the extent to which a property right has diminished in value depends on a previous definition of that property right.<sup>46</sup>

Value choices are inevitable because recognizing a property right necessarily has the effect of limiting other property rights.<sup>47</sup> For example, according landowners, like David Lucas and the Penn Central Transportation Company, increased legal power to intensify land uses unavoidably requires them to surrender their ability to halt activities by others that interfere with those uses.<sup>48</sup> Given that there are almost always property interests on both sides

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are sufficient measures by which to assess whether a regulation illegitimately singles out individuals to bear a burden that should be borne with or by others. As both early and modern-day progressive property scholars have highlighted, the extent and distribution of owners’ affirmative obligations also are central to the inquiry. *See, e.g.,* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 12, 26 (1927) (“[I]f the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest.”).

44. *See Lucas*, 505 U.S. at 1029.

45. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

46. *See, e.g.,* Singer & Beerman, *Social Origins*, *supra* note 40, at 220–22.

47. Other rights, such as free speech, are not “rivalrous” in this sense. For example, recognizing an individual’s speech right is unlikely to deprive others of their ability to speak; that is, with speech, scarcity is absent. Laura Underkuffler, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039; *see also* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1928) (“dominion over things is also imperium over our fellow human beings”). Indeed, property’s rivalrous nature helps explain why John Locke so wrestled with the task of justifying individual appropriations of nature’s commons: such appropriations would deprive all others of their pre-existing rights to the commons.

48. *See, e.g.,* Eric Freyfogle, *Taking Property Seriously*, in PROPERTY RIGHTS AND SUSTAINABILITY: THE EVOLUTION OF PROPERTY RIGHTS TO MEET ECOLOGICAL CHALLENGES 43, 50 (D. Grinlinton & P. Taylor, eds., 2011) [hereinafter Freyfogle, *Taking Property Seriously*] (explaining that, in such an instance, property rights do not increase overall but rather are “simply reconfigured”); Eloise Scotford & Rachael Walsh, *The Symbiosis of Property and English Environmental Law—Property Rights in a Public Law Context*, 76 MOD. L. REV. 1010, 1030 (2013) [hereinafter Scotford & Walsh, *Symbiosis of Property*] (“Private nuisance is . . . a doctrine that both protects and delimits property rights.”); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 17 (1993) [hereinafter Nedelsky, *Reconceiving Rights*] (“private rights’ always have social consequences”); Joseph Singer, *Property Law as the Infrastructure of Democracy*, in 11

when considering the meaning of ownership,<sup>49</sup> the unavoidable task for lawmakers is to decide which actions to safeguard and which actions to restrain.<sup>50</sup>

### B. Humility

By humility, I am referring to lawmakers' acknowledgment of the limited reach of human knowledge and the mutability of our normative positions. Peñalver's writings are instructive here. In what he describes as "initial and somewhat tentative thoughts," Peñalver suggests supplementing traditional cost-benefit calculations on land uses with the anti-Aristotelian "virtue of

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POWELL ON REAL PROPERTY WFL11-1 (Michael Allan Wolf ed., 2013) (citing the "principle of noncontradiction" that "all owners must be limited in what they can do on their land so that all owners can have quiet enjoyment of their land"); Joseph Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 111–12 [hereinafter Singer, *Something Important*] ("no meaningful fairness argument can be wholly nonconsequentialist"). For this reason, framing adjustments in property rules as "strengthening" or "weakening" individual property claims can be misleading and counter-productive. See e.g., Jonathan R. Nash & Stephanie M. Stern, *Property Frames*, 87 WASH U. L. REV. 449, 492–501 (2010). For a recent example of scholarship that skillfully walks this fine line, see Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 U.C. IRVINE L. REV. 101 (2012) [hereinafter Doremus, *Climate Change*]. Similarly, one must be particularly careful when suggesting that property disputes should be resolved by attempting to "balance" public and private owners' interests, so as to avoid clouding the very idea that the meaning of ownership is a product of public, democratic lawmaking, not separate and apart from it. Joseph Sax, *Ownership, Property, and Sustainability*, 31 UTAH ENVTL. L. REV. 1, 14 n.45 (2011); Eric Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77 103–06, 124 (1995); see also SINGER, *supra* note 25, at 6–12 (cautioning against both the idea of balancing interests and pitting regulation and deregulation, for a property regime supports "a vision of social life" and necessarily requires regulation to adjudicate competing property claims). Marc Poirier authored an exceptionally thoughtful article in this regard. See Marc Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43 (1997). Courts, of course, also express collective values on occasions where the legislature has not spoken or has spoken ambiguously. Nedelsky, *Reconceiving Rights*, *supra* note 48, at 4.

49. C.B. MACPHERSON, PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 201 (1978) (juxtaposing the "individual right to exclude" with the "individual right to equal access"); Sanne H. Knudsen, *Remedying the Misuse of Nature*, 2012 UTAH L. REV. 141, 151 (2012) (suggesting that addressing the "uncomfortable and unclear question" of "where to draw the line between [land] use and misuse" is "inevitable given that people and nature are intertwined"); Joseph W. Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 258 (2006) ("[R]egulations are generally designed to limit one person's freedom to protect another's freedom. In such cases, the question is not whether government should intervene but on whose behalf it should do so."). Singer thoughtfully details a prominent historical example, describing how prior to passage of federal public accommodations laws in 1964, the owner of a department store could call on the police to haul an African American customer out of the store, while after passage of the law, she could not. As Singer writes, "This new situation may seem to be a regulation of the owner's property rights, depriving her of the power to control access to her land. But of course, from the standpoint of the previously excluded customers, the change is a deregulatory one: they are now free to enter the store and seek service without fear of being hauled off to jail." *Id.* at 272. This means, says Singer, that "some of [the] sticks in the bundle are in fact owned by others and not the person we conventionally think of as the owner of the property." *Id.*

50. Of course, particularly when considering the theme of transparency in isolation (i.e., decoupled from the themes of humility and identity), legislatures and courts may promote values with which progressives disagree. However, nothing stops them from doing so now. It seems preferable to bring the articulation of and debate surrounding the values underlying legislative and judicial decisions to the fore.

humility” in light of the uncertain risk that intensive uses could create irreversible harms.<sup>51</sup> Because land has a “memory” (i.e., the consequences of land use decisions can stretch far into the future), Peñalver asserts that wise land use decisions are those that adhere to the oft-cited “precautionary principle.”<sup>52</sup>

There certainly are parallels between my explication of humility’s role in property theory and Peñalver’s discussion of humility—for example, Peñalver notes that, in terms of land’s tangible values, “even the best information, no matter how diligently gathered, will always be incomplete”<sup>53</sup>—and, indeed, I have drawn great inspiration from Peñalver’s work in this regard. However, the notion of humility I present arguably is broader than that offered by Peñalver. For instance, humility as I have described it suggests that even in situations where the content of the available information (say, on climate change science, to use one of Peñalver’s examples) remains the same, our normative positions regularly are subject to change for reasons unrelated to land’s tangible values but instead as the result of evolving social ideals.<sup>54</sup> Such self-acknowledgement necessitates generating space for creative reflection on, and the reconfiguration of, property rules as the extent of knowledge and the values attendant to it change.<sup>55</sup>

On this view, any particular configuration of rights recognized by the

51. Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 877, 884–86 (2009).

52. *Id.* at 884–85 (citing Douglas A. Kysar, *It Might Have Been: Risk, Precaution and Opportunity Costs*, 22 J. LAND USE & ENVTL. L. 1 (2006)). Peñalver develops this idea of land’s “memory” more fully in a recent essay. See Eduardo Peñalver, *Property’s Memories*, 80 FORDHAM L. REV. 1071 (2011).

53. See Peñalver, *Land Virtues*, *supra* note 51, at 885.

54. Implicit throughout this Essay also is a concern for humility on a slightly separate plane: humility about the weight of a property interest when it infringes, as it often must, on any number of other constitutionally recognized interests, such as free speech. In this regard, see, e.g., Frank Michelman, *Liberal Constitutionalism, Property Rights, and the Assault on Poverty*, 22 STELL. L. REV. 706 (2011). Thank you to Andre van der Walt for his direction on this point. A deeper exploration of this expansive conception of humility introduced here is fodder for future work. Indeed, the same could be said of transparency and identity.

55. See, e.g., Peter Byrne, *Green Property*, 7 CONST. COMMENT 239, 244 (1990) [hereinafter Byrne, *Green Property*] (“[N]ineteenth century law sought to disentangle absolute ownership of land from the lingering restrictions of a more communal, pre-industrial regime dating back to the medieval manor; the purposes of such reform included stimulation of wealth creation, enhancement of social mobility, and glorification of individual liberty.”); Freyfogle, *Taking Property Seriously*, *supra* note 48, at 55 (“If property has a foundational background principle, it is that lawmakers are free to redefine harm, generation upon generation.”). For numerous examples of property transitions in accord with social change, see, e.g., Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1447–48 (1992) [hereinafter Sax, *Property Rights and the Economy of Nature*]; ERIC FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY & THE COMMON GOOD* 37-99, 255-81 (2011) [hereinafter FREYFOGLE, *THE LAND WE SHARE*]; J.B. Ruhl & Michael C. Blumm, *Background Principles, Takings, and Libertarian Property*, 37 ECOLOGY L. Q. 805, 812–13 (2010). This is not to say that judges of the industrial era—or any other era, for that matter—were forthright that they were, indeed, reconfiguring property rules. See, e.g., Joel F. Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 431 (1974); Sax, *Property Rights and the Economy of Nature*, *supra* note 55, at 1452.

local, state, or federal governments is but a “snapshot” of the way that conflicting interests currently are squared.<sup>56</sup> “Any core values—even if determinable at this moment—are not cast in stone,”<sup>57</sup> and determining these values moving forward can only be accomplished with regard to contemporary understandings and appreciation of the limits implicit in those understandings.<sup>58</sup> Recognizing a baseline of established property interests and the societal values underlying those interests cannot explain in what circumstances that baseline must or should give way to the reality of changing and competing societal values.<sup>59</sup> When the established baseline eventually gives way, it often comes at the detriment of existing owners’ positions. However, this compromise of existing owners’ positions is not a negative, collateral consequence; rather, it is the very point of the exercise.<sup>60</sup>

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56. Underkuffler, *Property and Change*, *supra* note 21, at 2033-34; *see also* T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1715 (1988) [hereinafter Tideman, *Takings*] (“The idea of justice evolves as we become aware that our definitions and presuppositions lead to difficulties that can be avoided by an alternative framework.”); *Id.* at 1722; Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938) [hereinafter Philbrick, *Changing Conceptions*] (“[T]he concept of property never has been, is not, and never can be of definite content. . . . Changing culture causes the law to speak with new imperatives, invigorates some concepts, devalitizes and brings to obsolescence others.”).

57. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 40, at 80–81.

58. *Id.* at 80–81; Singer, *Something Important*, *supra* note 48, at 126. This is not to suggest that the pace of change is irrelevant to the conversation about societal values. *See, e.g.*, Eric Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENVTL. L. 279 (1998); Scotford & Walsh, *Symbiosis of Property*, *supra* note 48, at 1039.

59. Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 866–67 (2013). Rosser’s relating America’s history of conquest and racial discrimination counters the Nozickean assumption of a just initial distribution of property. Robert Nozick, *ANARCHY, STATE, AND UTOPIA* (1974). However, even taking this Nozickean assumption at face value leaves the possibility of later distributional imbalances that require adjustment to maintain what Rawls referred to as “background justice over time for all persons equally.” *See* RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 10, § 13.2 at 44; *see also* David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 440 (2003) (illustrating the principle of declining marginal utility by explaining that “the first dollar one receives is more important than the millionth. . . . [and] the extra brass and teak fittings on a gazillionaire’s yacht are likely to be less important to him than food or housing to a pauper”).

60. *See, e.g.*, Philbrick, *Changing Conceptions*, *supra* note 56, at 691 (“It is self-evident that neither the things recognized as objects of property rights nor the nature of these rights themselves could possibly be the same under a land economy of 1700 and our industrial economy of today.”). Laura Underkuffler asserts that any conception of property consists of four dimensions: theory, space, stringency, and time. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 18, at 16. Under what she refers to as the “common” conception of property, once the content of the theoretical, spatial and stringency dimensions are determined, a presumption—a “sphere of individual autonomy and control”—attaches, and this presumption cannot be overcome absent new extreme, urgent threats to public health or safety. *Id.* at 40; *see also* Laura Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURIS. 161, 176 (1996). Yet under an “operative” conception, property is “fluid in time, established and re-established” as new circumstances warrant. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 60, at 50 (internal citation omitted). In prior works, I have employed Underkuffler’s framework in analyzing the temporal features of property in the context of land use permit conditions. *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 279 (2011); Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 101 (2012).



Consider, again, *Lucas v. South Carolina Coastal Council*, which involved a prohibition on development in coastal areas particularly prone to erosion.<sup>61</sup> The *Lucas* Court feared that if it considered transformation of nature to a human use harmful, its decision potentially would render many previously lawful land uses illegitimate.<sup>62</sup> For this reason, according to Joseph Sax, the Court turned the discussion from one of (a) landowners' obligation to do no harm, to (b) landowners' "irreducible right" to development.<sup>63</sup> On the view set out in *Lucas*, vacant land merely is in waiting to be transformed. But an evolving society very well could take a different attitude with respect to owning nature—an attitude that appreciates "sentient landscapes"<sup>64</sup> and understands land as part of a far larger and significantly more complex ecological fabric than the lines of subdivision maps suggest.<sup>65</sup>

*Lucas* represents just one of many examples of modern takings decisions that could have benefitted from humility about the potential for moral and ecological perspectives to change and acknowledged the need to redefine the meaning of ownership in a manner that is consistent with those changes that do occur.<sup>66</sup> If previously justified property rules—based on what society, in a given moment, agreed upon—are not reconsidered and revised in light of changing conditions and changing human values, injustices in the existing distribution of entitlements will perpetuate.<sup>67</sup> This is not to suggest that such

61. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992).

62. See Joseph L. Sax, *Property Rights and the Economy of Nature*, *supra* note 57, at 1441.

63. *Id.*

64. See Thomas Heyd & Nick Brooks, *Exploring Cultural Dimensions of Adaptation*, in ADAPTING TO CLIMATE CHANGE 271 (2009).

65. See Singer & Beerman, *Social Origins*, *supra* note 40, at 238.

66. Examples of alterations in property rules without compensation are legion across American history prior to the modern infatuation with regulatory takings law. For a comprehensive survey, see FREYFOGLE, *THE LAND WE SHARE*, *supra* note 55. The emancipation of slaves is perhaps the most obvious instance. State, and later federal, prohibitions on slavery appropriated from slave holders property of immense market value without compensation. Such an alteration of the status quo did not signify a disregard for property rights; rather, it reflected the collective view that owning slaves had become immoral, and "it made no sense to pay to halt immorality." See Eric Freyfogle, *Property Law in a Time of Transformation*, at \*28 (forthcoming) (on file with author). Freyfogle asserts that, during this era, American lawmakers were not concerned that a rule change might conflict with an idea of ownership; instead, they embraced "an instrumental view of the law, a view that law is legitimately subject to change in the public interest." *Id.* at \*33; see also Byrne, *Green Property*, *supra* note 55, at 248 (asking, rhetorically, in 1990 "should the Czechs purchase the right to free elections from the Communist Party?"). At oral argument in *Koontz v. St. Johns River Water Mgmt. Dist.*, Chief Justice John Roberts recently echoed a refrain common in modern takings literature: the idea that the government's "los[ing] a *Penn Central* case" "doesn't happen very often." See Transcript of Oral Argument at 29:18-30:5, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). See also James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813, 861 (2008) ("as interpreted by the Supreme Court over the past century, [the Takings Clause] has seldom been an obstacle to governments' regulatory ambitions"). However, it is conceivable that the government might win a large percentage of *Penn Central* cases because of the government's timidity in regulating land uses. That a runner never gets even a minor injury does not mean he is doing the right thing - he might not be running enough or he might not be running fast enough.

67. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 18, at 45 ("What may have been an appropriate configuration of property rights in one era may be an undesirable or intolerable burden in

reconsideration comes easily; rather, in the words of Laura Underkuffler, it calls for “honest grappling with hard truth.”<sup>68</sup>

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another.”); Tideman, *Takings*, *supra* note 56, at 1714; Freyfogle, *Property and Liberty*, *supra* note 40, at 115 (“How private property’s effects are evaluated overall—what is considered a cost, what is considered a benefit, and how they all sum up—depends on the surrounding society, with its circumstances, values, and hopes. Change the society, change the circumstances and values, and a property system that once made sense might no longer do so.”); Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature’s Boundaries*, 73 S. CAL. L. REV. 927, 932 (2000) (“humans must continually reassess their impact on the foundation ecosystem in defining their norms, rules, and standards”); Singer & Beerman, *Social Origins*, *supra* note 40, at 243–44 (advocating an “ongoing commitment” to widespread access to valued resources); Mulvaney, *Foreground Principles*, *supra* note 59, at 848 n.43 (“It would seem that if the current distribution of property impedes acquisition of the resources necessary for human existence—either as the result of prior injustices or changing conditions that make an earlier just distribution no longer so—then individuals expecting a property system to produce fair results will suffer discouragement when takings compensation preserves that status quo.”).

68. Underkuffler, *Property and Change*, *supra* note 21, at 19–20. *See also* Laura Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1246 (2007) (“[W]hether a law or its operation is ‘just’ depends on both the advantages and disadvantages that one party derives from the operation of that law (or its absence), and the advantages and disadvantages that other parties experience. . . . When considering ‘justice’ in law, it is incoherent to evaluate the claims of one party without reference to the other.”); GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 199–248 (2006) (suggesting that property, as a socially contingent institution, demands constant reconsideration of (1) the values that underlie the decision to recognize a certain entitlement when initially established and (2) the values that contemporary society wants to promote and preserve).

The discussion herein does not directly address the political challenges that must be overcome should changing understandings and values call for significant alterations in property rules. On this issue, see, e.g., Doremus, *Climate Change*, *supra* note 48, at 1096 (“Changes in property regimes create losers as well as winners. If the losers have sufficient political power, change will not occur no matter how efficient it would be. Not surprisingly, there are circumstances in which individual property rights have not developed, or have substantially lagged the changes that made them necessary.”); Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 22 (2003) (“A perceived crisis or special alignment of the political stars is typically needed to overcome the barriers to legislative, or even regulatory, change. . . . We should worry more that the imposition of broad compensation obligations might stand as an additional barrier to adaptive change, than that narrow compensation requirements would make regulatory change too attractive.”); Tideman, *Takings*, *supra* note 56, at 1722–23 (“The attraction of pursuing justice through politics is limited by the susceptibility of legislative and bureaucratic processes to rent-seeking. . . . But . . . [b]ecause of our aversion to the perpetuation of undeserved privilege and our impatience with the slowness of [the constitutional amendment process], we accept the pursuit of justice through politics, subject to judicial oversight.”); Sax, *Property Rights and the Economy of Nature*, *supra* note 55, at 1444 (“The burst of concern for controlling industrial pollution . . . failed to propel nature’s economy onto the legal agenda.”); *see also* Arnold, *supra* note 75, at 353 n.354 (citing additional sources).

Singer and Beerman have suggested that it is not self-evident that requiring the government to compensate everyone harmed by regulation will enhance democracy, for allowing regulation without compensation to those “adversely affected in the short-run may . . . be democracy-enhancing because it better approximates the decisions that would be collectively reached by rational judgment free from the cognitive distortions caused by excessive focus on short-run costs.” Singer & Beerman, *Social Origins*, *supra* note 40, at 236–41. For a proposal addressing democratic accountability, *see* Nedelsky, *Reconceiving Rights*, *supra* note 48, at 24–26 (proposing the creation of a tribunal tasked with facilitating an ongoing “dialogue of democratic accountability” that is separate and apart from judicial review).

The foregoing discussion of transparency and humility strikes a positivist note—that is, it seemingly requires viewing property as an open, deliberative, human-created, evolving institution that reflects communal understandings of value and promotes societal interests.<sup>69</sup> But grounding a property system in transparency and humility alone does not necessarily avoid the potentially harsh consequences that affording private owners the power of the state can have on non-owners and marginalized people more generally.<sup>70</sup> In isolation, transparency may cut against progressive aims, for some progressive laws may only survive the legislative process because of a myth that those laws are value-neutral. Humility also, in isolation, can cut against progressive aims because a humble approach to property suggests that property is always changing with community values, even when those values lean anti-social. The final theme of identity adds a normative component that interacts with—and, at times, counteracts—the themes of transparency and humility.<sup>71</sup>

### C. Identity

By identity, I am referring to contextual concern for the current status—including the social, economic, and political needs—of the groups or

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69. As Eric Freyfogle explains, “[f]or centuries lawmakers have used private property as a tool to stimulate individual enterprise and economic growth[,] ... individual privacy[,] ... civic engagement[, and, more recently,] land health. ... [T]he goals themselves can be recast and redrawn, and over time they inevitably evolve.” Eric Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L.Q.* 574, 583–84 (1999). He continues, “[R]ights talk . . . needs to be understood for what it is: a rhetorical means . . . of challenging the wisdom of new laws. Wetlands restrictions are attacks on property rights only in the eyes of people who do not view the loss of wetlands as particularly disturbing.” *Id.* at 588–89 (suggesting that framing environmental issues—or any other issue for that matter—in terms of “individual rights clashing with individual rights” does not, as is evident in the ongoing debate surrounding abortion, illuminate the “real issues at stake”). However, progressive property theorists’ reliance on positivism is not unlimited. See, e.g., Joseph Singer, *Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity*, 86 *IND. L.J.* 763, 768–70 (2011) (“[M]oral claims are based, not on what is, but what should be. The law may declare me to be the owner of my house but that does not give us reason to think the law is just. . . . Perhaps the natural rights tradition stands us on firmer ground.”); Andre van der Walt, *Property and Marginality*, in *PROPERTY AND COMMUNITY* 81, 104 (Alexander & Peñalver, eds., 2010) (“marginal property analysis . . . requires awareness of dissent and contention rather than just focusing on apparent consensus”); Kevin Gray, *Human Property Rights: The Politics of Expropriation*, 16 *STELL. L. REV.* 398, 401 (2005) (noting the difficulty of identifying the “point at which the democratic ideal slides arguably into majoritarian tyranny”); FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 43 (1999) (asserting that democracy is “a substantive social norm—a prescription for how to treat people (as free to speak), in view of their interests (in self-government)”).

70. Morris Cohen famously explained that every property right is a delegation of state power. See Morris Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8 (1927); see also Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 *INT’L J. CONST. L.* 13, 23 (2003). For instance, an owner wishing to exclude a non-owner from her land can call on the police to remove that non-owner, even in some instances, if necessary, via the use of force.

71. The counteractive nature of the identity theme bears markings of John Hart Ely’s assertion that we live amidst “two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 86–87 (1980). Thank you to Stephanie Stern for her helpful correspondence on these issues.

individuals involved in particular resource conflicts.<sup>72</sup> Considering identity does not suggest simply attending to the notion that one party assigns a greater economic value to some land or personal effect than does a competing claimant (even after taking wealth effects into account) and for that reason should prevail. Rather, considering identity, as outlined here, suggests that focusing on

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72. Rosser criticizes Peñalver and Kaytal for failing to explore in *Property Outlaws* a “broader understanding of need” when discussing the doctrine of necessity, though Rosser does not engage in such an exploration himself. See Rosser, *supra* note 1 at 141–42. Most prominently, Underkuffler has begun to explore the meaning and role of identity, as it is generally defined here, in several recent essays. See, e.g., Laura Underkuffler, *Lessons from Outlaws*, 156 U. PA. L. REV. PENUMBRA 262, 266 (2007) (questioning whether “we have different ideas about the protection that property should afford, depending on the identities of the wrongdoers and the titleholders”); Underkuffler, *Politics of Property and Need*, *supra* note 21, at 375–76 (“‘Property rules’ are not simply ‘property rules’ that should apply regardless of the identities of property owners and property challengers. . . . They are crafted and applied in response to the politics of power, security, stability, greed, and a myriad of other aspects of human life. There is no legitimate reason not to explicitly count human need among them.”); Laura Underkuffler, *Kelo’s Moral Failure*, 15 WM. & MARY BILL RTS. J. 377, 377–80 (2006) (drawing from Frank Michelman’s writings on the “principle of equally respected participation” to highlight “the selective disregard of community”).

Underkuffler’s recent work on identity bears some very limited markings of Margaret Radin’s “personhood” theory, which in turn builds off of Hegel’s idea that dominion over material objects constitutes a key step in the process through which individuals become aware of the “Geist” or the concept of freedom, as well as Singer’s iconic writings on groups’ “reliance interests.” See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (focusing on a “strand of liberal property theory that focuses on personal embodiment or self constitution in terms of ‘things’”); RADIN, *CONTESTED COMMODITIES* 54–78 (1996) (setting forth a view of personhood “that does not conceive of the self as pure subjectivity standing wholly separate from an environment of pure objectivity”); RADIN, *REINTERPRETING PROPERTY* 35–97 (1993) (distinguishing between “personal” and “fungible” property and concluding that it is morally suspect for the institution of property to allow some people to use their fungible property in ways that overwhelm others’ use and enjoyment of their personal property); Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARVARD JOURNAL OF THE LEGAL LEFT 79 (2011).

Yet “identity,” as I am employing the word here and as Underkuffler typically has employed it in the past, refers not to the Radinian idea that irreplaceable property—like wedding rings and family residences—are so wrapped up in a person that they bolster the development of that person’s individual identity and thus should get more property protection than do replaceable assets; rather, I am using the word in a relational sense by asking, in short, what are the respective circumstances of the competing claimants? Andre van der Walt has offered multiple examples where identity, as I have described it here, could play a role in resolving property disputes, including the following: (1) he suggests that an investor’s sale of residential property to satisfy a mortgage debt must be justified in light of the circumstances, including consideration of the economic and social weakness of the affected family, and, even where justified, might, as a result of those same circumstances, be temporarily delayed; and (2) he contends that, in some instances, particularly where a tenant makes improvements to rectify shortcomings in a residential rental property, the tenant may be owed compensation by the landlord, secured by a lien (or perhaps even a “shift[] in land ownership”), despite the landlord’s lack of consent to those improvements. Andre van der Walt, *Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa*, 19 STELL. L. REV. 325, 328–41 (2008) [hereinafter van der Walt, *Post-Apartheid South Africa*]. In a 2009 book chapter, van der Walt intriguingly highlights what he coins “marginality,” which he defines as those “legal positions not characterized or dominated by the presence of rights, possessions, privilege, and power.” Andre van der Walt, *Property and Marginality*, in *PROPERTY AND COMMUNITY* 98 (Alexander & Peñalver, eds., 2010). van der Walt explores this idea of marginality in significantly more depth in a recent full-length book. ANDRE VAN DER WALT, *PROPERTY IN THE MARGINS* 1–26, 77–168 (2009).

the severity of one party's circumstance in relation to that of the competing claimant may prove sufficiently compelling to conclude that the former claimant carries the day.<sup>73</sup> Such an emphasis on identity intimates that property is most appropriately understood as a regime that, rather than shielding individuals from their communities, binds individuals to act in their communities' best interests in a way that goes *beyond*, for instance, maximizing that community's aggregate wealth, and *towards* promoting equality.<sup>74</sup> It follows that the community's social obligations and virtues that Alexander, Peñalver, and others advocate are not *informed by* definitions of property rights but rather necessarily *inform* those definitions.<sup>75</sup>

Such an approach does not completely denigrate the creation and protection of secure individual entitlements; indeed, such security in certain instances can afford many societal benefits, including encouraging investment and fostering economic growth.<sup>76</sup> But this approach does dissolve the baseline that private property exists primarily to advantage owners and create market gains (or, even, for that matter, to promote freedom<sup>77</sup>) in favor of a system of property that regularly realigns so that it remains justified in terms of the widespread benefits it offers to the collective. That is, taking identity into account somewhat paradoxically leaves open the prospect of what could be construed as disparateness in the application of property rules, for the sake of affording all human beings the resources and opportunities to live lives in accord with human dignity.<sup>78</sup>

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73. Underkuffler, *Politics of Property and Need*, *supra* note 21, at 367–68.

74. See, e.g., van der Walt, *Post-Apartheid South Africa*, *supra* note 72; Gregory S. Alexander, *The Ambiguous Work of "Natural Property Rights"*, 9 U. PA. J. CONST. L. 477, 479–80 (2007).

75. For critiques of obligation theories as bearing the rhetoric and essence of "rights" claims, see, e.g., Freyfogle, *Human Flourishing*, *supra* note 6, at 453 (suggesting that "private rights exist to the extent their recognition helps promote [the] public interest"); Nedelsky, *Reconceiving Rights*, *supra* note 48, at 24 (suggesting that rights-based reasoning can "blind one to the impact of disadvantage"); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 303–06 (2002).

76. Ben Barros, for example, has cautioned against adjustments in property rules that "appear[] to have a short term positive impact on the public welfare" when "consistent respect for property rights may better serve the public over the long term." See D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J. L. & LIBERTY 36, n.27 (2009). *But see*, e.g., Underkuffler, *Politics of Property and Need*, *supra* note 21, at 371 ("If tolerance of the appropriative needs of Western and urban squatters, civil-rights activists, AIDS patients, subsidized medical-insurance recipients, welfare recipients, and others has seriously undermined the stability of the American property regime and the expectations of owners, it is not obvious.").

77. There exists a large body of literature linking property and freedom. See Barros, *Property and Freedom*, *supra* note 76, at 37–38 n.1, 3–4 (2009) (collecting sources). Jed Purdy offers a recent, especially thought-provoking account. JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010).

78. Any charge that suggests such an approach affords lawmakers too much discretionary power to make value choices also must be leveled against private property more generally, for, as noted above, all existing property rights are value-dependent choices in the same sense that changes to those existing rights are value-dependent. See *infra* notes 47–56 and accompanying text. Any negative impact that considering identity might have on stability, investment, or confidence in the law's

Considering identity calls into question, for example, the Supreme Court's finding unconstitutional coercion where a California agency conditioned a landowner's permit to expand an oceanfront home on the provision of a public walking easement at the water's edge,<sup>79</sup> while finding no unconstitutional coercion where a New York agency conditioned receipt of aid to families with dependent children on the recipient consenting to home visits by a welfare worker.<sup>80</sup> These decisions could be read as disenfranchising certain communities by potentially allocating power in a manner that fosters class-based hardship (and perhaps race- and gender-based, as well), given the demographics of those fortunate enough to own coastal real estate and those dependent on the form of government aid at issue in the latter case.<sup>81</sup>

Suggesting that identity matters does not, of course, resolve whether a given governmental action has a coercive effect on or unfairly singles out a particular claimant. Rather it simply does not rule out considering, for instance, the possibility that a well-to-do coastal landowner might have alternatives to destroying an existing home in order to construct a larger new one, while an indigent family might have no alternative to succumbing to government demands to avoid a child's malnourishment.<sup>82</sup>

#### *D. Transparency, Humility, and Identity: A Brief Illustration*

In sum, the foregoing discussion lends support to a system of property in which lawmakers acknowledge that (1) all property rules reflect substantive values (transparency); (2) those values and the body of knowledge on which they are based change over time (humility); and (3) some property interests may enjoy more protection than others due to the plight of those persons implicated by a given declaration of a property right (identity). Looking at property through these lenses of transparency, humility, and identity can shed light on the types of important acquisition and distribution issues Rosser raises in *The Ambition and Transformative Potential of Progressive Property*. To illustrate, I will return to Rosser's position on the matter of *Kelo v. City of New London*.<sup>83</sup>

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authority simply must be part of this value-dependent calculus. Peter Gerhart recently authored a thorough manuscript on the related principle of equal freedom in the context of property rights. See PETER GERHART, *PROPERTY LAW AND SOCIAL MORALITY* (2013).

79. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

80. *Wyman v. James*, 400 U.S. 309 (1971).

81. For a thorough comparison of *Nollan* and *Wyman*, see Singer & Beerman, *Social Origins*, *supra* note 40, at 230–35.

82. Determining which individuals or institutions are to make such considerations (and how) is a challenging proposition that can serve as fodder for future work. It may be especially challenging—and, to many, impossible or improper—to consider the “identity” of corporate parties. See, e.g., Lua Yuille, Presentation at the 5th Annual Meeting of the Association for Law, Property, and Society: Corporations, Property & Personhood (May 3, 2014). Thank you to Benjamin Davy for raising this point in the course of my presenting a draft of this paper at the University of British Columbia.

83. *Kelo v. City of New London*, 545 U.S. 469 (2005).

In *Kelo*, a 5-4 Supreme Court concluded that the condemnation of non-blighted residential properties for purposes of creating jobs and improving the local tax base promoted a “public use,” as required by the Federal Constitution’s Fifth Amendment, despite the fact that some of the condemned properties would be leased to for-profit corporations for the construction of private mixed-use development.<sup>84</sup> The use of eminent domain to assist private entities in assembling land generated great public outrage, which prompted many state legislatures to swiftly approve statutory restrictions on condemnation. As noted above, Rosser critiques the outrage and legislation that followed *Kelo* as anti-social, a “popular effort to curb the state’s ability to make collective demands” on owners.<sup>85</sup> Yet attending to the aforementioned themes presents an opportunity to see other possibilities in—and other dimensions of—the reaction to *Kelo*.

Consider, first, *transparent* acknowledgement of the value judgments inherent in the eminent domain context. Eminent domain can provide important elements of what Alexander and Peñalver refer to as the “social infrastructure” (e.g., those roads, utility lines, hospitals, post offices, and libraries) necessary for individuals to develop the capacity to pursue life courses that are consistent with human dignity.<sup>86</sup> However, it would seem that not every conceivable element of social infrastructure is as necessary for this purpose as the next. Recognizing these differences, some might suggest, is especially significant given the long-standing societal recognition that owners have heightened privacy and autonomy interests within the confines of their homes—interests that in and of themselves are important to promoting human flourishing.<sup>87</sup>

And yet, in terms of *humbly* accepting the mutability of our normative positions, society may be reconsidering the importance it has long placed on home ownership—and perhaps even on individuals’ personal attachments to

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84. *Id.* at 483–87 (“The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community. . . . [A] one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot.”). Among many thoughtful writings in *Kelo*’s immediate wake, Marc Poirier’s account is particularly intriguing. See Marc R. Poirier, *Federalism and Localism in Kelo and San Remo*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 101 (Robin Paul Malloy ed., 2008). In reviewing Poirier’s chapter, Andrew Morriss asserts that “Poirier mounts a more articulate policy defense of the *Kelo* outcome than does Justice Stevens’ majority opinion.” See Andrew Petit Morriss, *Review: Private Property, Community Development, and Eminent Domain* (Robin Malloy, ed.), 19 LAW & POL. BOOK REV. 234–37 (2009).

85. Rosser, *supra* note 1, at 163.

86. GREGORY S. ALEXANDER & EDUARDO PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 177 (2012). Reassembling land parcels for redevelopment in dilapidated urban neighborhoods also can fend against costly and ecologically damning urban sprawl. See Eric Freyfogle, *Regulatory Takings, Methodically*, 31 E.L.R. 10313, 10321 (2001).

87. Peñalver, *Two Views of the Castle*, *supra* note 40, at 2973 (coining this understanding the “dignitary reading” of the metaphor “my home is my castle”); Laura Underkuffler, *Kelo’s Moral Failure*, *supra* note 72, at 383 (suggesting that homes are “more than simple shelters or wealth-generating investments”—they “provide the *spaces* we inhabit, the realities in which we live”). See also MARGARET JANE RADIN, REINTERPRETING PROPERTY 56–57 (1993); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 296 (1988).

their homes—in the wake of the subprime mortgage crisis.<sup>88</sup> Still, a reduction in the importance placed on the sanctity of homeownership is not the same as a reduction in the importance of established communities of resident and non-resident members, communities that quickly can be unraveled via condemnation.<sup>89</sup>

In terms of *identity*, eminent domain can bring depressed areas out of poverty and into prosperity by, say, providing more—and more adequate—housing for the benefit of many people, including the displaced,<sup>90</sup> however, eminent domain, if employed haphazardly, can perpetrate poverty-based and racialized segregation by repositioning land for upmarket development without concern for the evicted.<sup>91</sup> Considering identity, that is, demands inquiring who

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88. Stephen Schnably criticized Radin's emphasizing the personhood-developing aspects of irreplaceable goods, such as the family home, for ignoring fungible property's potential to develop the self. See Stephen Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993). Debate continues on the actual extent to which homeowners establish special, non-reductive connections to their homes. For thoughtful, largely contrasting perspectives, compare D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006), with Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 107 (2009). See also Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J. OF LAW & SOCIETY 580 (2002); Lee Ann Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008).

89. See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (Ryan, J., dissenting) (asserting that the majority's deference to state and local "public use" determinations would result in "sweeping away a tightly-knit residential enclave"); David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7 (2009) (assessing "the exercise of eminent domain that has the effect of excluding low-income households from an otherwise predominantly or entirely middle-class or wealthy neighborhood or locality"); Yxta Maya Murray, *Peering, available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2438284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438284) (critiquing courts for peering down on the poor in eminent domains decisions rather than seeing the poor as peers). This is not to suggest that any exercise of eminent domain that unravels established communities of residents is necessarily inappropriate, but rather only that the interests of those residents in established communities stand as an important consideration when evaluating property's effects.

90. In this regard, van der Walt assesses the South African case of *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and others (Centre on Housing Rights and Evictions and Community Law Centre, University of the Western Cape, amici curia)*, 2009 BCLR 847 (CC), which concerned the largely temporary eviction of residents from public land for the purposes of making land available for construction of improved social housing. Andre van der Walt, *Housing Rights in the Intersection between Expropriation and Eviction Law* 90–97, in *THE IDEA OF HOME IN LAW* (Lorna Fox O'Mahony & James A. Sweeney, eds. 2010) [hereinafter van der Walt, *Housing Rights*]. Of course, South African constitutional and statutory measures regarding the state's responsibilities with regard to housing its populace are distinct from, and arguably significantly more demanding than, those in the United States. See, e.g., Frank Michelman, *The Property Clause Question*, 19 CONSTELLATIONS 152, 162–63; GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 149–98 (2006).

91. In this light, cases such as *Kelo* have been contrasted with the likes of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which involved the state's exercise of eminent domain not for economic redevelopment but rather to correct what the state viewed as an insalubrious distribution of land holdings. See van der Walt, *Housing Rights, supra* note 92, 68–69, 79–80. For a recent decision echoing this distinction, see *Mount Laurel Township v. MiPro Homes, L.L.C.*, 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 910 A.2d 617, 620 (N.J. 2006) (upholding the condemnation of property for open space from an owner who planned to build large residential houses thereon because, among other reasons, "development of single-family homes that [would] be affordable only to upper-income families would not serve a comparable public interest").



is being displaced—including, in van der Walt’s terms, “the degree of [their] desperation”<sup>92</sup>—and who is filling their shoes.<sup>93</sup> While precise empirical data on the point is hard to come by, anecdotal evidence suggests that the state is far less likely to condemn residential properties in affluent neighborhoods to build environmental refuges, job training centers, or affordable housing<sup>94</sup> than it is to condemn residential properties in economically depressed (and often predominantly minority) neighborhoods to facilitate revenue-raising residential or commercial projects.<sup>95</sup> At least until that evidence suggests a clear trend to

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92. van der Walt, *Housing Rights*, *supra* note 90, at 89.

93. At least in hindsight, *Kelo* could be considered complicated in this regard. There was no guarantee at the outset that those initially affected by the displacement would benefit from it. *See, e.g.,* Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 30, 2005, at A29 (quoting an attorney for the New London Development Corporation as stating: “We need to get housing at the upper end, for people like the Pfizer employees. They are the professionals, they are the ones with the expertise and the leadership qualities to remake the city.”). However, while the lead plaintiff, Susette Kelo, purchased the subject two-story water-view home in 1997 for \$56,000 at a time when she was by many accounts of modest means, *see, e.g., Robert Meltz*, Property Rights “Takings,” Congressional Research Service, several years later she received \$440,000 from the state in compensation for the taking (more than \$300,000 above the appraised value, according to some reports), state-funded relocation of her house to a nearby lot, and a waiver of back rents owed the city from the date of the condemnation to the resolution of the litigation challenging it. *See* Peter Lattman, *Holiday Greeting Cards & the Law, Part I*, THE WALL STREET JOURNAL LAW BLOG (Dec. 21, 2006), <http://blogs.wsj.com/law/2006/12/21/holiday-greeting-cards-the-law-part-i/>; Scott Bullock, *Susette Kelo Lost Her Rights, but She Will Keep Her Home*, THE INSTITUTE FOR JUSTICE (Aug. 2006), <https://www.ij.org/a-long-road>. As van der Walt notes, however, “[e]ven though her house had been rebuilt on another plot, the neighborhood and the community had been broken up irreversibly.” *See* van der Walt, *Housing Rights*, *supra* note 90, at 81. For more dramatic examples, compare (1) *New Orleans Redevelopment Authority v. Burgess*, 16 So.3d 569 (La. Ct. App. 4 Cir. 2009), involving the condemnation of a vacant lot owned by an individual who had been absent for more than five years and owed \$37,000 in taxes and penalties, a lot the municipality subsequently transferred to the nonprofit home-building organization Habitat for Humanity, as discussed in John A. Lovett, “Somewhat at Sea”: *Public Use, Third Party Transfer Limits and Compensatory Justice in States Responding to Economic Crisis and Natural Disasters* \*30–31 (forthcoming 2014) (draft on file with author), with (2) the English case of *Smith & Ors v. Secretary of State for Trade and Industry*, [2007] EWHC 1013 (Admin.), involving London’s eviction of caravans of Romani Gypsies and Irish Travellers to make way for the 2012 Summer Olympics, as discussed in van der Walt, *Housing Rights*, *supra* note 90, at 70–74.

94. Indeed, there are reported cases involving situations where the state allegedly has condemned properties to *prevent* their use for integrated housing, low-income housing, or rehabilitation facilities. *See, e.g.,* *Deerfield Park District v. Progress Development Corp.*, 174 N.E.2d 850 (Ill. 1961); *Pheasant Ridge Assocs. v. Town of Burlington*, 506 N.E.2d 1152 (Mass. 1987); *Borough of Essex Falls v. Kessler Inst. For Rehab., Inc.*, 673 A.2d 856 (N.J. Super. Ct. Law Div. 1995). One scholar curiously minimizes these situations displacing “undesired” uses onto low-income communities by suggesting that “even the wealthiest community will run out of funds to buy out every noxious use to which it objects” and “economic markets . . . likely [will] resolve many [such] conflicts . . . before they ever arise.” Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 73–74 n.143 (2008).

95. Among others, Matthew Parlow suggested soon after the Supreme Court’s decision that, in *Kelo*’s wake, municipalities would be even more inclined to condemn properties for revenue-raising purposes than to create affordable housing. *See* Matthew Parlow, *Unintended Consequences? Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841 (2006). Andre van der Walt critiques exercises of eminent domain akin to that at issue in *Kelo* for disregarding “the socio-economic context, the personal circumstances of the occupiers or the effect that eviction may have on the occupiers.” van

the contrary (and perhaps even after that point), the identities of presumptive condemnees seem important to consider when determining the meaning of—and the limitations and vulnerabilities attendant to—property ownership.<sup>96</sup>

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This highly abbreviated discussion of eminent domain through the lenses of transparency, humility, and identity does little to resolve whether New London's exercise of eminent domain was appropriate under the specific facts at issue in the *Kelo* litigation.<sup>97</sup> However, it does reveal that opposing *Kelo* does not require one to deny categorically (as Rosser suggests it must) the state's ability to make collective demands via the power of eminent domain in furtherance of a broadly construed common good. More generally, it suggests that such a vantage point can foster open democratic contemplation in a host of contexts far beyond eminent domain on the intricate ways in which a property regime can curtail *and promote* access to those resources and opportunities that enable people to pursue the myriad life courses that are consistent with human dignity. In this sense, the fact that Rosser comes across as torn regarding just how significant is property's capacity to serve an important role in fostering a progressive society is far from a flaw of *The Ambition and Transformative Potential of Progressive Property*; rather, Rosser's skepticism stands as a highly meaningful contribution to an important debate that presumably will continue within progressive property scholarship moving forward.

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der Walt, *Housing Rights*, *supra* note 90, at 61. However, Underkuffler suggests that such exercises of eminent domain perhaps are even more disturbing than van der Walt allows for the very reason that they *do* selectively account for the personal situation of the occupiers. See Underkuffler, *Kelo's Moral Failure*, *supra* note 72, at 386–87 (asserting that “the owners of luxury shore-front homes do not quake after *Kelo*” and questioning the practical verity of Justice O'Connor's claim in her *Kelo* dissent that “all private property is now vulnerable to being taken and transferred to another private owner”). All that said, some contend that discussions regarding the condemnation of residential properties is one of a particularly narrow focus. See, e.g., Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Development* 34 ELQ 1 (2007) (“The exercise of eminent domain rarely involves condemnation of residential uses.”).

96. Eric Claeys has suggested that “the state should not condemn the property of the not-very-rich (proverbial ‘home’ owners) using any grounds it would not use against the rich (‘castle’ owners). The state should not take or condemn by regulation homes on any grounds different from the narrow grounds it would probably cite to take or condemn castles.” Eric Claeys, *Kelo, The Castle, and Natural Property Rights* in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 36 (2008). This Essay raises the possibility that perhaps it may be appropriate for the state to condemn castles on broader grounds than it condemns homes.

97. Nor does it address the Supreme Court's role in policing the appropriateness of the state's exercise of the eminent domain power in terms of its “public use” jurisprudence. On that point, though, it seems important to consider that eminent domain was used primarily for economic redevelopment purposes in the 19th century, there are few if any public purposes that are of greater priority for most governments today than economic development, and municipalities have few if any politically viable options beyond eminent domain to acquire the resources necessary to provide and improve public services given that property taxes currently fund such services.