

# Property, Sovereignty, and the Public Trust

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*Generally, in liberal democratic systems, it is assumed that government should forbear from interference with existing individual property entitlements. It is assumed that existing individual property entitlements should be respected, with government reluctant to interfere. Despite the ubiquity of this assumption, the theoretical underpinning for it is not obvious. A sovereign must respond to the needs of all of the members of the greater community for which it speaks. In view of this obligation, irrevocably assigning property rights to some, and not to others, is an inherently troublesome proposition. In this Article, the reasons for this state of affairs are examined. The conclusion is reached that conventional theories advanced by courts and commentators for government forbearance — such as protecting individual reliance interests, or advancing other independent policies — fail to explain the forbearance phenomenon. A more convincing reason can be found in a public fiduciary theory of government. However, recognition of this reveals that the property/sovereignty relationship is far more complex than a simple forbearance model would dictate. In fact, it mandates — in some circumstances — government nonforbearance, as well.*

## INTRODUCTION

When one thinks of property and sovereignty, in the sense of individual property entitlements and the exercise of government power, one generally thinks of the use of sovereignty to create property rights and to enforce them thereafter.<sup>1</sup> When considered in this context, property and sovereignty are seen as synchronous or mutually reinforcing forces.

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1 There are, of course, other understandings of property and sovereignty, such as the conferral of power by private property on individuals over the fates of

There is, however, a different relationship between property and sovereignty that is an antagonistic and particularly contentious one. Individual property, once created, fulfills critical human needs for the assertion of self and the control of one's environment.<sup>2</sup> However, there are circumstances under which previously conferred property rights are changed by exercise of the sovereign power. Under these circumstances, property and sovereignty are not mutually reinforcing — they are bitter antagonists. Attempting to determine when and how change to previously existing property rights should be accomplished by sovereign power is one of the most critical functions of law.

When one considers this question, as an abstract or broad notion, it is generally assumed that government should forbear from interference with existing property entitlements. Whether as a matter of expressed cultural understanding, or of constitutional guarantee or other legal presumption, it is generally and strongly assumed that existing individual property entitlements should be respected, with government reluctant to interfere.<sup>3</sup>

Yet the theoretical underpinning for this assumption is not obvious. A sovereign must respond to the needs of all of the members of the greater community for which it speaks.<sup>4</sup> Irrevocably assigning property rights to some, and not to others, is an inherently troublesome proposition. Individual property rights in external, physical, finite, non-sharable resources are a zero-sum game. Property in resources of that kind involves — in each of its manifestations — an exclusive claim with a concurrent defeat of rival claims.<sup>5</sup> As a matter of fact, if government respects existing entitlements in land,

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others. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

2 *See* LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 1-4 (2003).

3 In Western democratic systems, there is a pervasive cultural and legal assumption that property identifies and protects individual interests against collective power. To quote Frank Michelman, property is believed to be that “private sphere of individual self-determination securely bounded off from politics by law.” Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1626 (1988); *see* UNDERKUFFLER, *supra* note 2, at 39.

4 *See* RICHARD JOYCE, *COMPETING SOVEREIGNTIES* 4 (2013) (arguing that a sovereign must justify its actions to the community — and only to the community — for which it claims authority to speak).

5 It is for this reason that it is often argued that the core characteristic of property is the right to exclude. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (“[T]he right to exclude is more than just ‘one of the most essential’ constituents of property — it is the sine qua non [of it].”).

conventional chattels, or other physical resources, the entitled individual's claim is necessarily recognized and protected at the expense of others.

What, in fact, are good reasons for the sacrifice of sovereignty in the service of the protection of individual property? In this Article, I examine the reasons that support the ubiquitous assumption that in a contest between sovereignty and established property rights, the latter should be strongly favored to prevail. First, in Part I, I examine the conventional theories advanced by courts and commentators for the general principle of government forbearance toward existing property entitlements. I conclude that the most prominent theories cited for government forbearance are flawed, or at best partial in their justifications for this phenomenon. Then, in Part II, I suggest that a more convincing reason for the presumption of government forbearance can be found in a public fiduciary theory of government. However, this theory reveals that the property/sovereignty relationship is far more complex than a simple forbearance model would dictate. In fact, it mandates — in some circumstances — government *nonforbearance* as well.

## I. CONVENTIONAL ARGUMENTS FOR GOVERNMENT FORBEARANCE

### A. The Vindication of Other Public Policies

One of the most common justifications for a general principle of government forbearance toward existing property entitlements is that forbearance is necessary to achieve certain public policy objectives. For instance, it is argued that respect for existing property entitlements is necessary to encourage individual investment or enhance social stability. It is claimed that failure to protect existing individual property entitlements will discourage individuals from property investment and related productive activities, because there will be no assurance that the fruit of their labor will be protected. In addition, if existing property entitlements are not off limits to government action, there might — in extreme cases — be uncontrollable individual frustration and resultant social instability.<sup>6</sup>

As a threshold matter, there is no doubt that these concerns should be considered when conflicts between existing property entitlements and the exercise of sovereign powers (on behalf of others) arise. If government is considering the elimination of existing building rights, or the taking of wealth through taxation, or changes to other property entitlements, demoralization

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6 See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32-35 (4th ed. 1992); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

and frustration costs for affected individuals might well be involved and should therefore be a part of the public policy calculation.<sup>7</sup> It is undoubtedly true that failure to consider such secondary effects might often endanger the effectiveness of the primary public policy proposal.

There is a gap, however, between that kind of incidental consideration of competing public policy considerations and the kind of broadly presumed duty of government forbearance that now pervades our culture and law. The fact that there are competing public policy considerations does not mean that the deck should be presumptively stacked in favor of property rights, or — to put it another way — that property rights should be seen in all cases as having *prima facie* power.<sup>8</sup> This is particularly true when we remember, as noted above, that property rights in external, physical, finite, non-sharable resources are rivalrous in nature. Intrinsic to the idea of property is the fact that honoring one person's claim to such resources necessarily means the denial of the same claim by others. The costs of upsetting established expectations or denying claims to the full "fruit" of labor might well be prudently considered when the claims of propertied individuals and others clash. But is the fact of "prior possession" or "prior entitlement" sufficient to justify a presumption of victory, when approaching the question of property rights across-the-board?

Consider, for instance, the variable relevance of property preservation to the achievement of other societal objectives. The achievement of societal goals such as the encouragement of productive activities or the prevention of social unrest might be truly at stake in some situations, but of little or no relevance in others. Particular property entitlements might be linked to productive behavior, and collective taking of particular property might lead to an intolerable level of individual frustration or social instability, but there are many situations and many instances of property protection that do not seriously implicate those concerns. For instance, an individual who makes no productive use of his land at all for years is as protected in his title as someone who does; and across-the-board notions of property protection — even for the very rich, or for multinational corporations — is not something motivated by realistic fears of sparking outrage in the populace. In addition, as noted above, the protection of property is always a two-way street, with losers for every winner. For every instance in which the protection of property enhances the productivity and satisfaction of one person, it precludes the productivity and exacerbates the frustration of those whose competing desires for that property are denied.

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7 See, e.g., Michelman, *supra* note 6.

8 For a more extensive discussion of this model of property, see UNDERKUFFLER, *supra* note 2, at 65-70.

Apart from fear of the consequences of individual upset, there is another kind of “stability” argument that is often made. It is this: that stability in property entitlements should be maintained for its own sake. In this view, we value stability in the rules that govern property, as an abstract matter, and impairing the presumptive power of property entitlements will impair that value. In other words, it might be that existing property entitlements are unwise, or unfair, or nonproductive, or otherwise undesirable from a societal point of view; but there is something about the institution of property, itself, that makes the consideration of change in the usual scheme of things too costly.<sup>9</sup>

Again, there might be circumstances in which this is true. Predictability and certainty in individual wealth is necessary for the smooth functioning of a market economy. However, it can hardly be true with the invariability that the presumed power of property entitlements entails. Indeed, existing compelled transfers of individual wealth through government educational programs, welfare programs, Social Security payments, health insurance programs, agricultural subsidies, and virtually every other expenditure of tax-collected funds are testament to the fact that our cultural and governmental systems tolerate considerable uncertainty in the protection of property entitlements and the distribution of individual wealth. Granted, the impact of these programs is marginal, and there is undoubtedly a point of societal tolerance beyond which redistributive laws would go too far. However, this limitation does not support an across-the-board presumption of government forbearance toward all existing wealth or property holdings.

When considering arguments for the preservation of property “for its own sake,” it also must be remembered that property is — in a sense — a very hollow concept. When we think of “property” as a casual or abstract notion, we tend to think of it as something concrete, objectively understandable, and well justified in its origins. However, the idea of property as an abstract notion has very little content.<sup>10</sup> Its essence is simply the protection of individual (or collective) interests, as previously determined by an accretive societal process. It is prior societal recognition and protection of individuals’ rights in land or rights in chattels or rights in any other identified source of wealth. In view of this idiosyncratic and haphazard origin, we must seriously ask ourselves: is this process, and its products, now so sacrosanct that it should be shielded from future decision making of the same kind that created it — *just because it is so?*

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9 See, e.g., *id.* at 41 (arguing that under the common conception of property, “[o]nce property rights . . . are defined and recognized, they establish an area of individual autonomy and control; they cannot – consistently with this understanding — be subject to collective change thereafter”).

10 See *id.* at 11-15.

Most human rights have content — some intrinsic core — that is truly “pre-political” in a substantive sense, and that elevates those rights above the simple statement that “they have always been, thus they must be so.” There is a meaning to free speech, freedom of religion, and liberty of the person that transcends the whims of prior political forces or other historical accidents. Property is different. “Property,” as an idea, is simply “protection” (of something) and nothing more.<sup>11</sup> What it protects is simply the product of prior societal decisions, over time, of the same kind as now considered. To argue that property should now metamorphose into a “thing” — in which its origins are obscured and which, because of its “thing-ness,” is now somehow immune to the very processes that created it — is not particularly persuasive.

One might think of other public policies that forbearance toward existing property entitlements might serve. However, in every case the idea of forbearance has only situational relevance: in some cases the presumed protection of existing property entitlements might advance the chosen public policy, but in other cases it will not. We must look elsewhere for a foundational explanation or justification for the across-the-board forbearance phenomenon.

## B. Reliance Arguments

The most prominent theory advanced for government forbearance in American judicial accounts is reliance. In this view, government should forbear in order to protect an individual’s justified reliance on previously existing property entitlements. This argument, in its pure form, is not rooted in consequentialist theory; it is not rooted in the idea that government should forbear because — if it does not — certain negative consequences will follow. Rather, it is rooted in the quasi-moral, common, and intuitively powerful idea that government should forbear because the individual *deserves to be protected* against changes in the rules of the property-entitlement game.

This conviction can be found throughout American takings law.<sup>12</sup> A citizen, these accounts argue, must have some protected understanding of what is hers — of the property entitlements on which she can rely. In service of this idea, the United States Supreme Court has advanced many articulations of how property, in this function, should be understood.<sup>13</sup> For instance, property for

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11 *See id.* at 16-33.

12 The Fifth Amendment to the United States Constitution states: “No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.” U.S. CONST. amend. V.

13 *See generally* UNDERKUFFLER, *supra* note 2, at 19-20 & nn.16-31 (discussing reliance theories in American constitutional law).

constitutional purposes has been defined as state-law rules and understandings;<sup>14</sup> “traditionally” or “commonly” recognized rights to possess, use, sell, transfer, and exclude;<sup>15</sup> the “fundamental attribute[s] of ownership”;<sup>16</sup> the protection of one’s “reasonable,” “investment-backed,” or “historical” expectations;<sup>17</sup> and so on.

This approach to government forbearance is not simply a mechanical one, in which a particular legal definition of a protected zone is identified and enforced; it is that, but it is more. It is a *quasi-moral* one. The underlying conviction is that government forbearance from interference with property entitlements is required because of the injustice to the individual that would otherwise occur.<sup>18</sup> The individual is seen as the victim in the case, and the government as the aggressor. The moral imperative is the rectification of the injury caused by this wrong.

For an example of this treatment, consider the Supreme Court’s discussion in the famous *Lucas* case.<sup>19</sup> In that case, the State of South Carolina prohibited the development of shorefront land for environmental reasons. The question was whether a landowner — who was impacted by this law — was entitled to compensation by virtue of that sovereign act. In its analysis of the question, the Court discussed how this law brought the landowner’s plans “to an abrupt halt,” and severely impacted him financially.<sup>20</sup> It concluded that a landowner should be forced to accept uncompensated loss of this kind only if the restriction should have been “expected” by him, or was a “part of his title to begin with.”<sup>21</sup> Barring such a finding, the landowner’s reliance on prior law was justified, and compensation by government was owed.

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14 See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

15 See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 496 (1987) (right to “economically viable use”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“Property rights in a physical thing” include the rights to “possess, use and dispose of it.”) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

16 See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

17 See *Keystone*, 480 U.S. at 499 (“[F]inancial-backed expectations.”); *Loretto*, 458 U.S. at 441 (protection of “historically rooted” expectations).

18 See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (determining that the Takings Clause of the United States Constitution was “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

19 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

20 See *id.* at 1008-10.

21 See *id.* at 1027.

Does this reliance theory provide an intellectually satisfying reason for the general assumption of government forbearance? *If* the individual is indeed the victim, and government the aggressor, then there would — presumably — be a need to forestall the government action and invoke the principles of compensatory justice. However, this begs the initial question: how do we know that this particular victim/aggressor relationship is what the case in fact involves?

Let us consider, for instance, the *Lucas* case. Lucas could build, and then he could not build. The change of rules by government can be seen as aggression of a sort. However, the government acted for articulated reasons; those reasons involved the stopping of unwise development that could jeopardize the stability of the beach/dune system, accelerate erosion, and endanger adjacent property.<sup>22</sup> The actions of Lucas, in other words, had consequences of their own. Does this mean that Lucas was the aggressor, and the public and neighboring landowners the victims of his conduct?

The problem with the reliance model is that it depends upon normative assessments — of the government *and* individual conduct — before its premises of aggressor, victim, and just results can be ascertained. Until we know more about the impacts and circumstances of all conduct, we cannot be certain of the characterizations of aggressor, victim, and unjust outcomes upon which the reliance theory depends. Put another way, the fault line between government action and inaction does not necessarily correlate with independent notions of aggressors, victims, and a morally based need to rectify injury. Such concerns might work to compel government forbearance in one case; but they might well work to compel action by government, in another.

Another reliance theory attempts to avoid such contextuality by shifting the focus to the *idea of property itself*. Under this approach, there is no need to explore the moral underpinnings of particular situations because the idea of property itself definitively establishes the boundaries of justified individual reliance, and therefore the realm of required government forbearance. In other words, once we determine what property *is*, then the duty of government forbearance inexorably follows. As a result, there is no need to consider other complex factors that are involved in morally based theories. Property — with concrete, defined boundaries — establishes the realm of legitimate individual reliance; and that reliance — because it is legitimate — determines the parameters of required government forbearance.

The most unequivocal advocate for this idea in American Supreme Court jurisprudence has been Justice Antonin Scalia. In a series of cases, Scalia assumed that the legal definition of property itself determines the area of justified

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22 *Id.* at 1008-09, 1021 n.10.



individual reliance, and thus the area of required government forbearance.<sup>23</sup> Although this was characterized as the implementation of “justice” ideas, there is no depth to that inquiry. “Justice” is achieved, under this approach, because the individual has justifiably relied on previously defined property rights.<sup>24</sup> *Why* that reliance is justified, and what to do with the competing interests of others, are not pursued.<sup>25</sup>

It is possible, of course, to declare any formula as determinative of property/sovereignty conflicts; one could advance a formula which, when mechanically implemented, means continual government forbearance, no forbearance, or any outcome in between. The problem is that a formula, chosen arbitrarily, gives no reasons for those results. If we are looking for a *reason* for an assumption of government forbearance, such formulas add little.

Indeed, if we reflect upon it, the idea that the definition of property itself can be used to answer the property/sovereignty question is internally convoluted. Existing property rights, by definition, assume the existence of the legal *status quo*; they cannot, of themselves, answer the question of when a change in that *status quo* is justified. One could imagine an idea of property that is fluid, and incorporates the idea of collective change within it,<sup>26</sup> but that idea of property is not what these reliance theorists have in mind. Obviously, a “fluid” conception of property would completely undermine property as something “concrete,” and on which the individual can rely, to begin with.

There is a final form of reliance theory that one sometimes encounters in attempts to explain the duty of government forbearance. Under this theory, when addressing *why* (in a particular case) government should forbear, the answer that is offered is a contractual one. Government must forbear because the individual and government are in a *contractual* relationship. Government must forbear because it has voluntarily undertaken the forbearance obligation. This theory of government forbearance is not rooted in lofty notions of “justice” and individual loss. Rather, it is rooted in the idea of a tacit agreement between

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23 See, e.g., *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Protection*, 560 U.S. 702, 713-15 (2010) (plurality opinion); *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 343-54 (2002) (Rehnquist, J., joined by Scalia, J., and Thomas, J., dissenting); *Palazzolo v. Rhode Island*, 533 U.S. 606, 636-37 (2001) (Scalia, J., concurring); *Lucas*, 505 U.S. at 1020-32.

24 See, e.g., *Stop the Beach Renourishment*, 560 U.S. at 713-15 (plurality opinion); *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring); *Lucas*, 505 U.S. at 1030-31.

25 Indeed, in one case, Scalia dismissed the need to consider other interests as an attempt to “giv[e] the malefactor the benefit of its malefaction.” *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

26 See UNDERKUFFLER, *supra* note 2, at 46-51 (discussing such an idea of property, and problems in its implementation).

the affected individual and government that the rules of the game — once established — will not be altered. Although this variation in reliance theories promises a straightforward reason for government forbearance, its premises are complex and troubled. To begin, there is the question of when it applies — a far from simple issue.

The most obvious case of potential application exists when there is an express contract, of some kind, between the individual and government. Consider, for instance, a procurement contract between government and a private entity, under which the government is committed to buy arms. Assume, further, that the government — as the result of legislative or executive remorse — later attempts to void the contract, or interpret the contract in a way that contradicts its terms. In this case, there is no question but that an individual/government contract exists. Government has expressly agreed to perform in a particular way, regarding this particular individual, and the individual has relied upon that promise. In such a case, the government has acted like any private party in an express contractual relationship. Accordingly, the law — and common sense — dictate that government must be held to the same responsibilities that any private party in a similar situation would incur.<sup>27</sup> As a result, claims that government retains an inherent sovereign ability to repudiate the existence or terms of express contracts have rarely been successful.<sup>28</sup> In cases like this, government is not free to simply change the rules to which it has agreed.

A different question is presented when an individual and government have entered into a contract which is express in some ways, but has open or possibly implied terms in others. In such cases the law is more complex, and the exercise of sovereign powers more protected. For instance, under the “unmistakability doctrine” in American law, no sovereign power of government

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27 *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 914 (1996) (Breyer, J., concurring) (“[O]rdinary government contracts are typically governed by the rules applicable to contracts between private parties.”). Indeed, any other rule would “produce the untoward result of compromising the Government’s practical capacity to make [such] contracts.” *Id.* at 884 (plurality opinion).

28 *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130, 134 (1810) (holding that an attempt by the Georgia Legislature to annul land grants to individuals, which it previously authorized, was void. It was decided that a state cannot “vacate a contract thus formed,” and be “absolved from those rules of property which are common to all citizens of the United States.”). Exceptions to this rule, under the reserved powers doctrine, have been recognized in the exercise of police power (narrowly defined), *see Stone v. Mississippi*, 101 U.S. 814, 817 (1879), and the power of eminent domain, *see West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-32 (1848).

will be deemed surrendered unless done so in unmistakable terms.<sup>29</sup> Neither the passage of time nor a history of dealing will generally alter this principle, or create protected expectations on the part of the private party involved.<sup>30</sup>

However, express individual/government contracts are rarely involved in the general run of forbearance cases. When we think about property holdings and government forbearance toward them, there is almost never an express contract at issue between the individual and government that is claimed to inhibit the exercise of government power. Rather, the theory is that there is *an implied contract*, of some kind, that precludes government's doing what it would otherwise have the power to do.

The idea of an implied contract (of sorts) between individual entities and government bodies has seen some success, politically — if not legally — in some situations. For instance, the idea of an implied contract between private entities and government was raised by heavily regulated utilities which claimed protection for their businesses from subsequent government deregulation. Utilities that enjoyed monopoly status under prior regulatory regimes made claims for “stranded costs,” monopoly-status investments that were now difficult or impossible to recover in a market-based environment. The core of their claims was reliance: that they had relied on their regulated

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29 See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547 (1837).

30 See *id.* at 549-53. There is one recent case which appears, superficially, to contradict this doctrine. In *Winstar Corp.*, 518 U.S. at 839, Congress changed its accounting rules after federal regulators induced healthy banks to take over failing “thrifts” (savings and loan institutions). Whether this was a risk that the healthy banks took, under the takeover agreements, was unclear. A plurality of the Court declined to apply the unmistakability doctrine in this case, on the ground that the complaining banks sought only “insur[ance] . . . against . . . losses,” not the power to preclude Congress from changing the law. See *id.* at 887 (plurality opinion). This distinction is unconvincing. As the plurality itself acknowledged, forcing the public to indemnify private parties will just as surely deter government regulation by increasing its costs. See *id.* at 883 (plurality opinion). A more compelling explanation for the result arises from the government's conduct in the case. A federal agency induced healthy banks — in individual contracts — to take over failing thrifts in order to avoid the FSLIC deposit insurance liability that the agency would otherwise have borne. Then, once the deals were done, it knowingly changed federal accounting rules, to the serious detriment of those induced. This smacked too strongly of a deliberate double-cross. See Laura S. Underkuffler, *Individual Reliance and Government Forbearance: A Tale of Five Cases*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 141, 147-51 (2014).

monopoly status, previously enconced in regulatory practice, and government had unfairly taken their “property” by changing the rules of the game.<sup>31</sup>

These claims gained little legal traction,<sup>32</sup> although they did garner some sympathy in political arenas.<sup>33</sup> The problems with such claims are apparent. First, in contrast to executed-contract cases, the complaining parties in cases of this kind had to convince skeptics that a particular regulatory history — without more — was enough to establish an enforceable contractual relation. In addition, even if a regulatory relation could be deemed a “contract” of sorts, the companies had to demonstrate that the “contracts” contained the desired terms — that is, that they shifted the risk of loss from regulatory change from themselves to the public. The only plausible reason that they advanced for that conclusion was that a prudent utility would have assumed that such risk was shifted before embarking on investment.<sup>34</sup> The skeptic might reply that these sophisticated industries and their lawyers were well aware of the intensely regulated environment in which they operated, and also of the fact that their arrangements contained no guarantees. In this more cynical view, the utilities accepted the long-term risk as a part their plan to make short-term profits.

In any event, the claim of an “implied contract” as the basis for a general duty of government forbearance in ordinary property cases is even more strained. Regulated utilities, at least, had *something* in the way of a history of express, personal transactions between themselves and government which they could cite in support of some kind of implied-contract claim. This is not the situation in the vast run of cases in which individuals claim reliance and the consequent protection of existing property entitlements.

Consider, for instance, a garden-variety claim that is rooted in reliance arguments: the idea that if building restrictions are placed on land, for

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31 See, e.g., *Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1180 (9th Cir. 1997); J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES* (1997); Susan Rose-Ackerman & Jim Rossi, *Disentangling Regulatory Takings*, 86 VA. L. REV. 1435, 1457-60 (2000).

32 See, e.g., Rose-Ackerman & Rossi, *supra* note 31, at 1463; William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1045-46 (1997).

33 See Rose-Ackerman & Rossi, *supra* note 31, at 1458-59 (regulated utilities persuaded state legislative bodies to provide more than one hundred billion dollars in relief, with the costs — in most cases — passed on to customers as “transition costs”).

34 See, e.g., *Winstar*, 518 U.S. at 863-64.

environmental reasons, property (“value”) has been unjustly taken.<sup>35</sup> In these cases, and others like them, the individual can claim no express contract with government, or even a history of individual transactions with government from which an implied contract of some sort could possibly be inferred. Rather, the claim is simply that he (the landowner) was previously the holder of certain rights; that those rights have been changed; and that he is entitled to rely on the prior legal *status quo*.

Whatever the sympathies that might be generated in a particular case, it is apparent that this implied contract theory cannot support a general presumption of government forbearance toward existing property entitlements. It cannot be that some kind of contract exists between every individual and government, which justifies reliance on existing law. The only evidence to which a complaining party can point in the event of change is that the law was previously “X” and now it is “Y.” Why should that be *presumed* to be an unacceptable change, with the owner entitled to compensation?

In addition, the claim that the existence of the legal *status quo* is enough to create individual “property” and a duty of government forbearance is not a practical conclusion. Just as the number of cases involving express contracts — or regulated utilities, with intense industry/government dealings — is relatively small, and at one end of the spectrum, the universe of cases involving “reliance on the legal *status quo*” is limitless, and at the other. Every statute, regulation, and local ordinance articulates some rule of existing law. Indeed, virtually *any* individual act or omission that we can imagine is dealt with somehow by the legal *status quo*: it is either expressly or impliedly permitted, or prohibited. As a result, any individual whose wealth is affected by any change in existing law could claim this theory. Does this mean that government must forbear from action on any subject, because of the duty to protect the “reliance” and “quasi-contractual” understandings of citizens?

## II. THE GOVERNMENT AS FIDUCIARY

The pervasive presumption that government should forbear, when it comes to existing property entitlements, is not adequately captured by any of the

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35 There are many cases of this type that have reached the United States Supreme Court. In addition to the *Lucas* case, discussed in text accompanying *supra* notes 19-22, see *Koontz v. St. John’s River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

conventional theories examined so far. Particular societal policies — such as the need to encourage investment, to enhance social stability, or to avoid the costs of change — might be important in some cases, but do not explain the across-the-board presumption that the forbearance idea involves. Nor can ideas of individual reliance — whether “quasi-moral” or “contractual” in nature — explain our entrenched and ubiquitous belief in the forbearance command. The idea of the individual as justified “victim” in these cases is generally a simple, assumed assertion, with no explanation of why that is the case. And the idea that government has “agreed” to forbearance, by explicit or implied contract, is either too narrow in its application to be useful, or so broad that it has no limits.

In this Part, I suggest that the presumption of government forbearance is best explained on a different ground. It has a different root — one that inheres in the nature of the government/citizen relationship itself. In particular, I argue that government *necessarily* has a fiduciary relationship to its citizens, and that its fiduciary responsibilities generate the forbearance command.

The idea of government as fiduciary is an old idea in Anglo-American law. Suggestions of a fiduciary dimension to the state/citizen relationship can be found in medieval English law, and by the middle of the seventeenth century references to a fiduciary relationship had become an established part of legal thought.<sup>36</sup> Among legal thinkers, John Locke, Jeremy Bentham, and Edmund Burke wrote of a fiduciary aspect to political power, and the responsibility of sovereign authority to heed its position of authorization and trust.<sup>37</sup> In subsequent centuries, the idea of government fiduciary responsibilities has persisted. As Paul Finn has observed, “the core idea of trusteeship — that government exists to serve the interests of the people and that this has a limiting effect on what is lawfully allowable to government — has remained an undertone, if not more, in [the] common law . . . itself.”<sup>38</sup>

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36 See Paul Finn, *A Sovereign People, A Public Trust*, in *ESSAYS ON LAW AND GOVERNMENT, VOL. I: PRINCIPLES AND VALUES* 1, 10-13 (Paul D. Finn ed., 1995) [hereinafter Finn, *Sovereign*]; Paul Finn, *The Forgotten “Trust”: The People and the State*, in *EQUITY: ISSUES AND TRENDS* 131, 131-35 (Malcolm Cope ed., 1995) [hereinafter Finn, *Forgotten*].

37 See, e.g., EDMUND BURKE, *ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS* (David Bromwich ed., 2000); JEREMY BENTHAM, *View of a Complete Code of Laws*, in *THE WORKS OF JEREMY BENTHAM* 157 (John Bowring ed., 1843); John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 3 (Sir Ernest Barker ed., 1947) (1690).

38 See Finn, *Sovereign*, *supra* note 36, at 13.

In recent years, the fiduciary theory of sovereignty and government has been rediscovered by contemporary theorists.<sup>39</sup> The most extensive work is by Evan Fox-Decent, and in the discussion below I primarily use his work to sketch the outlines of this theory. In *Sovereignty's Promise: The State as Fiduciary*,<sup>40</sup> Fox-Decent argues that fiduciary responsibilities “flow . . . from a particular kind of . . . factual circumstances that trigger the fiduciary principle.”<sup>41</sup> That circumstance is one in which the vulnerable interests of one person are entrusted, by law, to the discretionary authority of others.<sup>42</sup> In particular, Fox-Decent identifies three fundamental conditions that underlie fiduciary relationships. They are that:

- (i) the fiduciary has administrative power over the beneficiary or certain of her interests; (ii) the beneficiary is incapable of controlling the fiduciary's exercise of power, or is incapable in principle of exercising the kind of power held by the fiduciary; and (iii) the relevant interests of the beneficiary are capable of forming the subject of a fiduciary obligation.<sup>43</sup>

If these circumstances are met, fiduciary obligations are imposed.

There are, of course, other responses that our legal system might have to these circumstances. For instance, we could simply empower the weaker party to seek redress (under ordinary tort principles) against the stronger party, in the

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39 See, e.g., EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* (2011); Matthew Conaglen, *Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias*, PUB. L., Spring 2008, at 58; Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Finn, *Forgotten*, *supra* note 36; Finn, *Sovereign*, *supra* note 36; Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013); Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Constitution*]; Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013); Lorne Sossin, *Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law*, 66 SASK. L. REV. 129 (2003).

40 FOX-DECENT, *supra* note 39.

41 *Id.* at 41.

42 See *id.*

43 *Id.* at 93-94.

event that injury is sustained. However, we have chosen to impose fiduciary duties in certain situations that involve relationships between stronger and weaker parties. These are situations in which the stronger party is imbued with power by virtue of a structured, institutional, hierarchical relationship, with all of the opportunities for overreaching which that relationship involves.<sup>44</sup> In addition, the weaker party's vulnerability must have some element of incapacity about it. For instance, the stronger party might "have a margin of discretionary authority to decide how best to further the . . . [weaker party's] interests."<sup>45</sup> Coupled with this, the weaker party might be barred *de jure* from controlling the stronger party's actions.<sup>46</sup> Underlying all of these arrangements are ideas of the beneficiary's consent (on some level) to the structure, and the idea of trust.<sup>47</sup>

The government/citizen relationship is an easy match for these characteristics. The sovereign relationship, which government enjoys, is one in which citizens "entrust the specification, administration, adjudication, and vindication of their rights" to government.<sup>48</sup> In return, "private parties have a juridical incapacity . . . and . . . vulnerability to state power."<sup>49</sup> "Private parties have no authority to make the judgments or exercise the powers" that government commands; "they do not get to make laws that apply to others, nor decide legal disputes."<sup>50</sup> It is this confluence of public power and the juridical incapacity of the beneficiary to which the fiduciary principle responds.<sup>51</sup> As Finn observes, "the most fundamental fiduciary relationship in our society is . . . that which exists between the community (the people), and the state, its agencies, and officials."<sup>52</sup>

If the state has fiduciary responsibilities toward those it governs, what — in practical terms — does this mean? In Fox-Decent's view, fiduciary principles require that "public power [is] . . . constrained by moral and structural features

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44 *See id.* at 27-30, 89-90, 98-101. As Henry Smith has observed, fiduciary obligations are imposed in situations that afford structured opportunities for opportunism. *See* Henry E. Smith, *Why Fiduciary Law Is Equitable*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 261, 261-62 (Andrew S. Gold & Paul B. Miller eds., 2014).

45 FOX-DECENT, *supra* note 39, at 101.

46 *See id.* at 102-03.

47 *See id.* at 105-11.

48 *Id.* at 111.

49 *Id.*

50 *Id.*

51 *See id.*

52 Finn, *Sovereign*, *supra* note 36, at 10.



[that are] intrinsic to legal order.”<sup>53</sup> This includes the duties of “fairness and reasonableness,” the “moral and structural features . . . of the rule of law.”<sup>54</sup>

The extent to which Fox-Decent’s conception of public fiduciary theory actually dictates the content of laws is unclear. At times it seems that he assumes that it does, such as when he describes government’s fiduciary responsibilities in terms that involve attention to citizens’ human rights and wellbeing.<sup>55</sup> However, at other times he seems to assert that his public fiduciary theory eschews such issues, and extends only to certain procedural guarantees.<sup>56</sup> Other attempts by scholars to describe the meaning of the government as fiduciary are often similarly muddled. For instance, some theories seem to devolve, in the end, to little more than an obligation of public officials to follow the law, and that public officials must avoid the subordination of public goals to their own private interests.<sup>57</sup>

It seems to me that public fiduciary theory must have content apart from such general principles of “good governance,” and that this content is dictated by the idea of the fiduciary relation itself. Fiduciary obligations are imposed when the relation between the parties is structured in a way that renders the beneficiary incapable of controlling the fiduciary’s exercise of power. When it comes to the government/citizen relation, the vulnerability that triggers the fiduciary obligation is the juridical incapacity of the citizen to challenge government’s laws, whether those laws involve procedure or content. As stated by one theorist, the fiduciary obligation of government extends to

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53 See FOX-DECENT, *supra* note 39, at 1.

54 See *id.* at 1, 25, 34-37.

55 See, e.g., *id.* at 21 (“[T]he sovereign is entrusted with the commonwealth’s peace and security.”); *id.* at 26 (“[A] further necessary condition of legality [is] that the *content* of law must respect human rights.”); *id.* at 204 (“The fiduciary principle requires decision-makers . . . to take account of fundamental values.”); *id.* at 224 (as public fiduciaries, “tribunals and judges are . . . required to . . . interpret statutes in a manner solicitous of the well-being of the people subject to them”); see also Finn, *Sovereign*, *supra* note 36, at 7 (public sovereignty must regard the individual as “an object of worth, respect, and civic entitlement”); *id.* at 20-21 (government, as a sovereign under public fiduciary duties, cannot arbitrarily impair fundamental rights).

56 See FOX-DECENT, *supra* note 39, at 37 (arguing that the fiduciary conception of the rule of law has “no commitment to a particular substantive or distributive theory of justice, nor reliance on the kinds of arguments and justifications that attend” such theories).

57 See, e.g., Natelson, *Constitution*, *supra* note 39, at 1136-68.

“what is fundamental to us.”<sup>58</sup> As such, it must extend not only to matters of procedure, but to matters of the content of laws as well.

The question, then, is what the content that is imposed by public-fiduciary theory might be. The difficulty involved in abstractly describing that content undoubtedly contributes to the equivocation of public-fiduciary theorists as to its existence. There are some guidelines, however, which should be noncontroversial. Fiduciaries must be “other-regarding;”<sup>59</sup> it is the duty of the fiduciary “to act with due regard for the [beneficiary’s] best interests.”<sup>60</sup> In the government/citizen context, this must mean, I would argue, that government at the very least must engage in serious reckoning with individual citizens’ (as well as collective) interests. Put simply, the interests of individual citizens — in a substantive sense — cannot be ignored.

What does “serious reckoning” mean? In my view, it means that *individual interests must be considered, seriously, in sovereign decision-making*. It does not mean that individual interests — if they conflict with collective interests — must always prevail. As Fox-Decent has observed, “[s]olicitude to the vulnerable interests of an affected individual does not entail indifference to the public interest.”<sup>61</sup> Rather, what is required is that fundamental individual interests that pertain to human wellbeing must be taken seriously in the evaluation of collective/individual conflicts.<sup>62</sup> This is not as radical a proposition as it might seem. An implicit acknowledgment of government’s fiduciary duty toward citizens underlies many of our visceral responses to government conduct. For instance, in the United States there have been intense recent controversies over police brutality and race.<sup>63</sup> The outrage that we feel is more than the violation of particular legal constitutional or statutory constraints. The chant “Black Lives Matter” is rooted in the conviction that the interests of black citizens are not being considered seriously by government. Indeed, one could argue that it is from a fiduciary obligation on the part of government that we derive the well-nigh universal acknowledgment (in some form) of classic individual human rights.

How does this relate to government forbearance, and property? The fiduciary theory of government provides a good reason for the pervasive belief that government should forbear when it comes to the change of individual property

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58 Finn, *Forgotten*, *supra* note 36, at 141.

59 See FOX-DECENT, *supra* note 39, at 112, 114.

60 See *id.* at 22.

61 *Id.* at 225.

62 See *id.* at 204.

63 See, e.g., John Eligon, *One Slogan, Many Methods: Black Lives Matter Enter Politics*, N.Y. TIMES, Nov. 19, 2015, at A1.

entitlements. Of all conceivable human interests, none is more fundamental than the ability to appropriate and retain property. It is a stark biological fact that of all commonly asserted human rights, property claims are among the most essential to human life. Without the appropriation of food, water, medicine, shelter, and other resources, human beings die. Indeed, the ability to live — and to appropriate property to do so — is assumed by any other human right of which we can conceive. When it comes to property, the stakes could not be higher. In other words, government forbearance toward existing property entitlements is *rooted in property's substantive function, and its required guarantees*.

Consequently, when the goals of sovereign government conflict with existing individual property entitlements, the fiduciary responsibility of government requires that government must proceed cautiously, and reckon with those consequences. When meeting its other-regarding obligation, government must seriously consider what previous property allocations mean to individuals and what a change in property entitlements will cause. This is a part of the role of government as fiduciary, and is what the nature of the state/citizen relation demands.

I would suggest that it is this fiduciary intuition that truly lies beneath our belief that government should forbear when it comes to existing property entitlements. Citizens and their property holdings are, in fact, vulnerable to government. Property holdings are critical to real and imagined human survival in the world. As a result, we implicitly place government under a fiduciary obligation to be other-regarding, that is, to seriously reckon with the consequences — to individuals — of collective abrogation of previously recognized property rights. This is not because change to all existing property entitlements will trigger the dire consequences that property deprivation can involve; it is because property entitlements represent individual security (and ultimate physical survival) against the laws of government, laws that the individual — by reason of the government/citizen relationship — cannot challenge.

The identification of a fiduciary basis for government forbearance is interesting, but leads to another question. Does the discovery of this basis for government forbearance matter? One could argue that “forbearance is forbearance,” and whether it is grounded in conventional theories or fiduciary theories makes no difference.

In fact, I would argue, there are consequences of a fiduciary grounding for government forbearance that immediately come to mind. First, the forbearance obligation of government under a fiduciary theory might well be more variable than that which is assumed (for instance) by *carte blanche* “stability” theories, reliance theories, or theories that assume “implied contracts” or “property

rights” held by all citizens in the legal *status quo*. A theory that is rooted in the substantive function of property for particular individuals requires a deeper consideration of the meanings and functions of particular property holdings, and the resultant obligation of government to forbear. A forbearance belief grounded — explicitly — in a fiduciary theory of government would therefore require a more nuanced and meaningful discussion of what property actually means, in context, and its variable roles in human life.

There is, in addition, another profound consequence that inheres in the recognition of a fiduciary grounding for government forbearance — one that is grossly missing from conventional “public policy” and “reliance” accounts. The core of fiduciary obligations is that the actor charged with them must seriously consider the interests of all beneficiaries. In the property context, this injunction has special meaning. Property claims, as noted above, are different from the general run of human rights. Property claims in external, physical, finite resources are rivalrous in nature. The very nature of these resources, and of individual claims to them, means that the extension of property protection in such resources to one person necessarily and inevitably denies the same rights to others.

As a result, the role of government when it deals with property claims is completely and essentially different from that which it occupies regarding other commonly recognized human rights. In the cases of freedom of conscience, freedom of speech, due process of law, and so on, the state’s role is simply to recognize or curtail such rights as an abstract and equally applicable proposition. Although one person’s exercise of conscience might conflict with that of another person, such conflicts are relatively rare and are not at the core of meaning of the exercise of that right. A claim to property is different. Exclusion of others from possession of the coveted resource is at the core of that right. As a result, where rights to external, physical, finite resources are recognized and enforced by government, that is — itself — a necessarily and unavoidably allocative act.

Fiduciaries, by reason of the demands of the fiduciary obligation, are obligated to all of their beneficiaries equally. There is no basis, in fiduciary theory, to rule in — at the outset — the claims of some beneficiaries, and to rule out the claims of others. Government as a fiduciary must reckon seriously not only with the needs of its beneficiaries who own property, but also with the needs of those who do not. Just as the fiduciary obligations of government are deeply implicated when claims to preexisting property entitlements are asserted by individuals, so the fiduciary obligations of government are deeply implicated when it comes to the conflicting claims of others.

The practical implications of a fiduciary basis for evaluating property/sovereignty conflicts — with its mandated focus on the meaning and role of

property in particular lives, and in the lives of owners *and* nonowners — can be easily illustrated in routine cases. Consider, for instance, the *Lucas* case, mentioned above.<sup>64</sup> In that case, an individual purchased two lots on which he planned to build homes.<sup>65</sup> After his purchase, the legislature of the State of South Carolina enacted a law that (by its terms) prohibited building on a broad swath of South Carolina’s coastline.<sup>66</sup> The purpose of this law was to protect the beach/sand-dune coastal system from development which, it was found, could jeopardize the coastline’s stability, accelerate erosion, and endanger adjacent property.<sup>67</sup>

The landowner challenged this action, claiming that it was an unconstitutional taking of property without compensation.<sup>68</sup> The issue, the majority of the United States Supreme Court held, was not whether South Carolina’s action was justified on environmental grounds; this was assumed by the Court to be true.<sup>69</sup> Rather, the issue was whether government must forbear (or pay) because the reliance interests of the landowner were impaired. In the majority’s view, that question could be answered solely by whether the new environmental restrictions were “part of his title to begin with.”<sup>70</sup> If they were, the landowner had no protected reliance interest. If they were not, government was required to forbear, or to pay the landowner for the new restrictions on his land.<sup>71</sup> (The practical cost of such payoffs — multiplied by thousands of shorefront parcels in the state — was not considered.)

What is striking about the Court’s holding in this case is its complete and superficial focus on the interests of the landowner alone. There was no consideration in the opinion of the need for or function of the challenged environmental regulations, either to protect neighboring landowners or the general public’s interest in the preservation of shoreline areas. The question of government forbearance was seen solely in “reliance” terms; and that reliance was limited to the interests of the previously entitled landowner. Fiduciary duties — indeed, duties of any kind — to other affected parties were not a part of the equation.

The idea that the claimant’s loss is determinative of the forbearance question has been assumed by the Court in many takings cases.<sup>72</sup> In *Eastern*

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64 See text accompanying *supra* notes 19-22.

65 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006-07 (1992).

66 See *id.* at 1007-08.

67 See *id.* at 1021 n.10.

68 See *id.* at 1009.

69 See *id.* at 1021-22.

70 See *id.* at 1009, 1027.

71 See *id.* at 1025-29.

72 Other cases involving the regulation of land and exclusive focus on the landowner’s

*Enterprises v. Apfel*,<sup>73</sup> for instance, Eastern Enterprises — a former coal operator — objected to a law passed by Congress that attempted to stabilize pension plans established for the benefit of the nation’s retired coal miners.<sup>74</sup> Under the law, coal operators were assessed premiums to be paid to the plans on the basis of their prior employment of now-retired miners.<sup>75</sup> Eastern claimed that this law was not expected or agreed to by it; that it imposed obligations based on past conduct; that it permanently took its assets; and that it was, for all of those reasons, a taking of property without compensation.<sup>76</sup> A plurality of the Court agreed, holding that this social-welfare law unconstitutionally impaired Eastern’s reliance interests. No consideration was given to the interests of the beneficiaries of the law, who had worked for years in Eastern’s mines and were crippled in their later years by that employment.<sup>77</sup> The case was — in the plurality’s mind — a simple one, involving disruption of Eastern’s existing property interests.

The impact of a public-fiduciary theory in a different way is illustrated by the now famous case of *Kelo v. City of New London*.<sup>78</sup> In that case, use of a fiduciary theory would have *enhanced* protection of the property interests of the landowner. The United States Supreme Court upheld a city’s taking of modest, well-kept, waterfront homes for the purpose of commercial and upscale residential economic development.<sup>79</sup> The reason for the exercise of eminent domain was not to reverse blight, but because it was determined that the city as a whole “was sufficiently distressed to justify a program of economic rejuvenation.”<sup>80</sup>

The outrage that followed this decision was rooted in the conviction that there was something fundamentally unfair about the government’s destruction of modest but well-kept homes for the simple objective of replacing them

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reliance and loss include *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21, 723 (1999) (focusing on whether Del Monte Dunes was “denied all economically viable use of the property”); and *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (focusing on the claimant’s “loss of her ability to exclude others”).

73 *E. Enterprises v. Apfel*, 524 U.S. 498 (1998).

74 *See id.* at 514, 517.

75 *See id.* at 514.

76 *See id.* at 518-19.

77 *See id.* at 529-37.

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

79 The “integrated development plan” featured a waterfront conference center, hotel, marinas, office and retail spaces, condominiums, and other tax-enhancing structures. *See id.* at 473-74.

80 *See id.* at 483.

with higher-tax-generative commercial and residential projects.<sup>81</sup> In particular, what “stuck in the craw” was that no consideration was given by the Court to what the destruction of these homes and this community meant to the mostly elderly residents who lived there.<sup>82</sup> The Court assumed that owning property is simply an economic calculation, and that the money paid to those who lost their homes was — by definition — sufficient compensation for what they lost.

Had the question of government action and individual property rights in this case been viewed through a public-fiduciary lens, the outcome in *Kelo* might well have been different. Had the Court recognized the fiduciary obligation of state and local governments to all citizens, it would have been far more difficult for the Court to simply ignore what losing homes meant to the affected individuals. Different kinds of property play varied roles in individual human lives. Indeed, recognition of this truth was the core of state legislative reforms enacted in the wake of the *Kelo* decision.<sup>83</sup> From a “reliance” or “implied contract” point of view, one might assume (as the Court assumed) that owners of all property — from parking lots to warehouses to primary homes — are in the same basket, and that adequate compensation is provided by market value payment.<sup>84</sup> From a fiduciary point of view, however, the question becomes more complex. When one is forced to consider the nature and function of property in human lives, the outcome can be quite different.

Similar issues, on a national scale, can be found in attempts to reconcile individual property rights, regime change, and claims of historical injustice. For example, when the barrier between East and West Germany fell in 1989, claims for the return of land were made by West Germans who had abandoned land in the East years before. Claiming that they fled to escape political oppression, these former owners of East German land demanded restitution of their property that was now in the hands of the East German government and citizens. Current occupants of that property, on the other hand, claimed that their occupancy, labor, and reliance interests over a period of decades — as well as recognition of their rights by the former East German government — made the contested property theirs. In sorting out these claims, the unified political authority did not simply invoke ideas of “title” or “reliance” or

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81 See Laura S. Underkuffler, *Kelo's Moral Failure*, 15 WM. & MARY BILL RTS. J. 377, 377-78 (2006).

82 See *id.* at 383-87.

83 See, e.g., Elaine B. Sharp & Donald Haider-Markel, *At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the Kelo Decision*, 38 PUBLIUS 556 (2008).

84 See Underkuffler, *supra* note 81, at 382-83 (discussing the failure of reliance theories to capture the interests of the evicted owners in the *Kelo* case).

the promotion of industrious behavior. Rather, it engaged in a complex and contextual examination of the varied histories and functions of claimed property for differently situated individuals.<sup>85</sup>

A similarly wide-ranging approach is reflected in the treatment of land restitution claims in post-apartheid South Africa. Article 25 of the South African Constitution, adopted in 1996, provides that when adjudicating restitutionary claims, the sovereign power must consider the current use of the property, the history of the acquisition and use of the property, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and other factors.<sup>86</sup> Public interest considerations include the nation's commitment to land reform and the achievement of equitable access of citizens to the nation's natural resources.<sup>87</sup>

In both contexts, what was taken was essentially a public-fiduciary approach. Individual interests — all individual interests — were seriously considered in government decision-making; and those interests included consideration of the quite variable meaning and function of property in individual human lives.

Finally, recognition of government's fiduciary obligation helps to explain what otherwise seems to be a peculiar anomaly in government's usual posture of forbearance toward individual property. The presumed duty of government forbearance coexists uneasily with state actions that are — purely and simply — redistributive transfers.<sup>88</sup> The apparent ease with which wealth can be taken from one citizen and transferred to others (through taxation and welfare programs) seems facially inconsistent, at least, with the presumption of government forbearance. Our often grudging but persistent urge to tolerate such laws is, however, a recognition of the fiduciary obligations of government. On some level, we recognize that redistribution of property — to some extent at least — is not merely a discretionary, altruistic, or “feel good” obligation; it is a fundamental obligation that arises from the government/citizen relation.

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85 For instance, restitution and compensation schemes depended on whether the property was currently residential or commercial; the history of use of the property; whether the property was urgently needed for general economic benefits, such as the creation of jobs or housing; and other factors. See PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 128-44 (1997).

86 S. AFR. CONST., 1996 (as amended), <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf>.

87 See *id.*

88 See UNDERKUFFLER, *supra* note 2, at 117-22.



## CONCLUSION

Recognition of the role of fiduciary theory in our ideas of government forbearance will not simply “resolve” property/sovereignty conflicts. Decisions about when government should change — or not change — existing property entitlements will remain among the most difficult that we face. However, recognition of the role of public fiduciary theory will serve to illuminate the fuller context in which these questions arise. We will understand more of why we do what we do. And we will be better reminded of the very complex obligations of government.

