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REVIEW SYMPOSIUM

The ambitions of liberal property

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1 Introduction

In *A Liberal Theory of Property*, I argue that in a liberal polity, the primary commitment to individual autonomy dominates the justification of property, founding it on three pillars: carefully delineated private authority, structural (but not value) pluralism and relational justice. A genuinely liberal property law, I claim, meets the legitimacy challenge confronting property by expanding people's opportunities for individual and collective self-determination while carefully restricting their options of interpersonal domination.

This paper responds to reviews by Gregory Alexander, Marija Bartl, David Dana, Elmien du Plessis, Douglas Harris, Cathy Sherry and Rachael Walsh, which helpfully investigate the precise normative, jurisprudential, pragmatic and thematic ambitions of *A Liberal Theory of Property*. It refines my reasons for rejecting both perfectionist accounts of autonomy and value pluralism; clarifies the significant role that law plays in structuring our proprietary affairs and the implications of the rule of law and of a legal system's institutional design on property theory; elaborates on liberal property's prescriptions for some real-world dilemmas faced by the doctrines governing property transitions and condominium; and highlights the significance of the background regime that is crucial for liberal property's actual success.

2 Liberal property

In *A Liberal Theory of Property* (Dagan, 2021a), I argue that in a liberal polity, the primary commitment to individual autonomy, which must dominate property's justification, also shapes its constitution and thus grounds its most fundamental legal contours.

Property both empowers people and disables them, enhances their self-determination while also rendering them vulnerable. Therefore, property requires constant vigilance. A genuinely liberal property law meets the legitimacy challenge confronting property by expanding people's opportunities for individual and collective self-determination while carefully restricting their options of interpersonal domination. Appreciating both property's autonomy-enhancing service and the vulnerabilities that it generates is key to the three pillars of liberal property – the features that distinguish it from property *simpliciter*: carefully delineated private authority, structural pluralism and relational justice.

This ideal of liberal property is very different from the Blackstonian conception of 'sole and despotic dominion'. Liberal property, I claim, requires law to facilitate in each important area of human action and interaction a diverse set of stable frameworks of private authority (property types, as I call them) so that people can set up – on their own or with the co-operation of others – long-term plans. Property law can be legitimate and just, I further argue, if (1) the private authority of these property type is properly circumscribed in line with their service to people's autonomy; (2) they all comply with relational justice; and (3) law's background regime both assures ownership for everyone and secures to us all the material, social and intellectual preconditions of self-authorship (Dagan, 2021a, pp. 23, 244).

I am indebted to Gregory Alexander, Marija Bartl, David Dana, Elmien du Plessis, Douglas Harris, Cathy Sherry and Rachael Walsh for their thoughtful discussions of the book.[1] Their generous and

[1]See Alexander, Bartl, Dana, du Plessis, Harris, Sherry and Walsh, all in this issue.

important responses push me to clarify the precise ambitions of *A Liberal Theory of Property* on four fronts: normative, jurisprudential, pragmatic and thematic.

3 Autonomy for liberal property

3.1 Autonomy without perfectionism

As Gregory Alexander writes, my mission in this book is 'to base property, as both a concept and an institution, on personal autonomy'. Alexander focuses on this mission, delving into some recent philosophical literature on autonomy, in order to refine the understanding of autonomy that informs *A Liberal Theory of Property* by comparing it to alternatives. Eventually, Alexander concludes that the book offers 'a new understanding of what liberalism means'. This may be an overgenerous conclusion; but it correctly implies that it is hard for me to fully identify with any of the dominant positions that he discusses. To explain why, I begin with Alexander's propositions that I can happily embrace, and then turn to those that I would rather refine or qualify.

Alexander correctly distances my account from the view in which autonomy is only a matter of competency and authenticity, so that 'the agent's relationships with others are relevant only in a negative sense'. On that view, which we both reject, the commitment to autonomy only requires that 'the agent is free from constraints that others place upon him such that he is unable to form or act upon desires that are genuinely his'. Therefore, this commitment remains agnostic (because 'it is value-neutral') regarding 'the substantive content of one's choices or actions or the reasons for them'.

A Liberal Theory of Property, as Alexander observes, conceptualises autonomy very differently. It highlights the human condition of interdependence and personal differences, which necessarily implies that 'a free self-governing agent' is always situated 'within her social environment'. Being relational in this sense, Alexander further correctly maintains, need not commit one to substantively incorporate the value of caring into one's understanding of autonomy. Rather, a theory of 'relational autonomy' can be value-neutral. And it can also endorse values other than caring as 'necessary conditions to autonomy', in line with the various schools of perfectionist liberalism.

Given liberal property's third pillar of relational justice, Alexander reads my account as 'a substantive relational view of autonomy'. Relational justice implies a 'substantive constraint' on 'our behaviour with respect to others', he writes. Therefore, an action that violates relational justice – as in the case of an owner's bigoted exclusion of 'undesirable' others – 'lacks autonomy in the more robustly relational sense that Dagan lays out for us'. Hence, while noting my insistence that autonomy remains neutral regarding conceptions of the good life and my efforts to distance my position from some versions of perfectionist liberalism, Alexander concludes that

> 'the version of perfectionism to which Dagan must commit himself appears to be one holding that at least one value – non-subordination – is valid independently of our acceptance of it and one that we ought to pursue in our relations with others.'

I would put the claims in this last paragraph somewhat differently. Because we apply our *right to* self-determination (or autonomy), which is the ultimate right we have qua persons, in an interdependent world in which others are also entitled to this very same right, we are all entitled that others respect that right and be constrained by this very same maxim of respect for others' self-determination. This constraint surely implies that the right to autonomy is not content-neutral and, moreover, that it cannot plausibly justify *every* authentic action as long as it does not constrain others. Respect for others' self-determination is more demanding than respect for others' independence. But this constraint derives from the universality of the right to self-determination – every person qua person is entitled to that right; it need not rely on any additional substantive commitment (and Alexander is surely right in insisting that it does not hang on people's preferences).

These clarifications are significant, I think, for two reasons – one specific and the other more general. The specific reason is that while subordination is certainly a form of relational injustice, relational

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justice is not exhausted by the maxim of non-subordination. First, there are forms of wrongs that do not amount to subordination while still violating relational justice, as they fail to respect another person's self-determination. Second, the neorepublican ideal of non-subordination (or, as neorepublican political theorists put it, non-domination) is strikingly similar to the Kantian account of independence (Dagan, 2021a, pp. 115, 280) and is thus more generally less demanding, at least insofar as our interpersonal relationships are concerned, than relational justice.

Furthermore, although, as noted, my view of the right to autonomy is indeed robust, it is not perfectionist, at least not in the way that term is usually understood by contemporary political theorists.[2] Perfectionist views offer accounts of the good life and thus perceive self-determination as one, albeit typically an important, means for securing such a life of human excellence. Thus perceived, autonomy does not stand in a necessarily privileged position vis-à-vis other values; and it is valuable only when exercised in the pursuit of valuable ends.[3] This is why, as Alexander implies, the perfectionist prescriptions unashamedly go beyond the way we treat others: they often relate also to how we treat ourselves. In other words, they are also – necessarily – paternalist.

My account of autonomy stands in sharp contrast to all of these propositions: 'an autonomy-based property law is committed to empowering individuals to form and pursue *their own* conception of life as long as it does not disparage others' and it is thus 'not implicated in any form of (potentially disrespectful) paternalism' (Dagan, 2021a, pp. 77–78). Furthermore, although – as with perfectionist liberalism – autonomy does not do all the normative work on my account of liberal property, it is emphatically not on a par with any other value that matters to property.

3.2 Against foundational value pluralism

This last point is the key to my response to the main concern that David Dana raises, which pertains to 'the utility of "individual autonomy" as a concept to explain and guide property law and property institutions'. This concern seems to be shared by Douglas Harris, who mentions that some 'will seek to spread' the 'burden' I place on autonomy 'among a broader set of values'. As Dana puts it:

> 'the fact that so much property ownership and so many property law institutions and debates have an attenuated connection to individual autonomy is problematic for any project that, as does Dagan's, posits individual autonomy as the central theoretical basis for property.'

His main supportive exhibits relate to the properties of 'very rich people' and of 'large corporations and other legal persons', where '[t]he autonomy rationale just does not mesh all that well'. Therefore, Dana suggests that '[my] "liberal" theory of property might be better dubbed as a "pluralist" theory of property', adding, however, that this 'may be only quibbling about semantics'.

I do not think that it is only a semantic matter; as Marija Bartl insists, there are important differences between the structural pluralist vision of *A Liberal Theory of Property* and a vision of 'pluralism of foundational values'. I should thus clarify why – notwithstanding liberal property's second pillar of structural pluralism – it might be confusing to describe liberal property as pluralist. This clarification, in turn, helps refine the limited, but nonetheless crucial, work of individual autonomy once it is situated (to use Dana's words) 'at the core of [my] liberal conception of property'.

Pluralist is not an adjective I failed to consider in working on *A Liberal Theory of Property*. Quite the contrary: I deliberately grounded property's structural pluralism 'on the monistic commitment to autonomy' in order to signal my departure from some of my earlier work. That work not only highlighted the

[2]Katy Wells has recently interpreted *A Liberal Theory of Property* as representing comprehensive anti-perfectionist liberalism (Wells, 2022).

[3]Matthew Kramer dubs this dominant view of perfectionist liberalism 'edificatory' and contrasts it with a minority position (that he favours), which he calls 'aspirational' (Kramer, 2017). For an application of edificatory perfectionism in the related context of contract theory, see Kimel (2003, ch.5).

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multiple values that inform property institutions and debates, but also implied a foundational value pluralist position in which autonomy is indeed only one of property's values (Dagan, 2021a, p. 89).

Property cannot and must not rely on foundational value pluralism, I have come to realise, because foundational value pluralism obscures property's awesome legitimacy challenge. Sure, as I have claimed prior to *A Liberal Theory of Property*, property can vindicate people's independence, facilitate arrangements for common governance and secure means for preference satisfaction. But in and of themselves these happy features are not responsive to – they do not even address – the most pressing question property law must continuously face: What justifies sanctioning the authority of owners (and other holders of property rights) and, furthermore, the recruitment of the coercive power of the law on their behalf? Foundational value pluralism obscures this 'urgent and ongoing challenge to property's legitimacy', and is thereby 'alarmingly quietist' (Dagan, 2021a, pp. 37, 89).

However, while neither independence nor community or utility can face this challenge, property can be legitimate if it carefully relies on its service to people's right to self-determination, because this is a right that the liberal state is required to promote *and* other people are obligated to respect. This makes autonomy property's ultimate value; but it does not imply exclusivity: liberal property acknowledges, indeed celebrates, the key role of independence, community and utility in shaping the animating principles of the various property types it fosters (Dagan, 2021a, pp. 81–82, 89–90). And it is no coincidence that these are important property values: independence and community are constitutive of the value of self-determination; utility, in turn, is instrumental to it (Dagan, 2021a, pp. 46–58).

So the burden I place on autonomy is limited, but its role is nonetheless essential. In sharp contrast to a property regime that relies on foundational value pluralism, liberal property properly called 'is *resolutely committed* to self-determination and fends off any threat to this ultimate value and to its steadfast consequences for property law's justification and design' (Dagan, 2021a, p. 37).

This injunction is consequential in its guidance to the kind of pluralism to which liberal property must adhere: law must proactively facilitate property's structural pluralism not simply by adding property types, but more specifically by ensuring a sufficient repertoire of partial functional substitutes for each sphere of human action and interaction. They need to be adequate substitutes because choice is not enhanced with alternatives that are orthogonal to each other; on the other hand, their substitutability should not be too complete because types that are too similar do not offer meaningful choice (Dagan, 2021a, pp. 92, 102–104).

Autonomy's status as property's ultimate value also implies that autonomy serves as a side constraint (Dagan, 2021a, pp. 58–59), namely that no property type, irrespective of its specific DNA, can authorise owners' authority that either goes beyond its service to their self-determination or that sanctions relational injustice. These limitations are not external impositions on property; compliance with these first and third pillars of liberal property is germane to its legitimacy qua property. And they are again consequential.

Consider first relational justice. Autonomy's privileged status explains why, whereas liberal law is obligated to instantiate a variety of commons property types that facilitate various forms of collective self-determination (Dagan, 2021a, pp. 51–55), it must not tolerate property types that violate relational justice. Liberal law must either reform or eradicate property types that, in order to solidify people's communities, allow owners to apply their powers to sell or admit in a discriminatory fashion, instantiate an oppressive governing regime or unduly undermine people's right to exit and start afresh (Dagan, 2021a, pp. 131–34, 142–146, 261).

These prescriptions may help explain why I find it crucial to uphold liberal property's 'individualist framework' notwithstanding Bartl's challenges. Bartl claims that my 'individualism as the starting point for reflection' undermines the viability of structural pluralism by subverting people's willingness to engage in 'collective forms of ownership and action' even where law offers a sufficient range of such forms. 'If the starting point for imagining the world is "me",' she asks, 'how can a "me" even start contemplating a collective that puts the same "me" at peril?' My response is that maybe it should not.

There are many collective forms of ownership and action that play important roles in people's self-determination, and they must be properly fostered as structural pluralism indeed prescribes. Because people 'cannot be the sole authors of their lives' – since they 'are partly constituted by their

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participation' in collectivities – liberal property is particularly obligated to proactively support property types that facilitate *collective* self-determination (Dagan, 2021a, pp. xii, 4, 6, 51–55). All these commons property types imply relinquishing some private authority and accepting some dependence on others. Engaging in *such* property types is surely risky – like any other meaningful plan we make while writing our life story, they involve risk-taking. But no such plan should undermine our role as the *ultimate navigators* of our own lives. Liberal property should indeed be careful not to facilitate collective forms of ownership and action that have *this* intention or effect.[4]

Finally, autonomy's status as property's ultimate value also provides the appropriate lens for addressing Dana's complaint that rich people's properties and those of large corporations do not easily fit 'the autonomy rationale'. Both categories, while empirically prevalent in contemporary law and society, are – exactly as Dana implies – neither core to liberal property, nor should they be. In the former category, this is the case since 'the marginal autonomy-enhancement of each additional unit of property is likely to be diminishing' (Dagan, 2021a, p. 38); in the latter, because – like all other commercial property types – large corporations' contribution to people's self-determination is only indirectly connected to autonomy: they allow people to secure their welfarist interests by pooling resources, limiting their liability and enlisting others for managing their money, and thus to be free 'to focus on projects they may view as more intrinsically valuable' (Dagan, 2021a, pp. 69–70).

Neither qualification justifies dismissing the service of these categories of property to autonomy or renders them a priori illegitimate. But both generate some of the most crucial lessons of *A Theory of Liberal Property*. The former (re. rich people's properties) offers a property-based justification – one that goes beyond the Rawlsian obligation to support just institutions – for imposing the lion's share of the costs of maintaining a viable autonomy-enhancing background regime for all on those who are particularly well-off rich (Dagan, 2021a, p. 38). The latter qualification (re. the properties of large corporations) undergirds the claim that a genuinely liberal regime must prescribe rather demanding limits to the managerial authority that corporate ownership of the means of production can imply (Dagan, 2021a, pp. 70, 195–209; also Dagan and Heller, 2022). Dana would be right to remind us that existing law – especially American law[5] – is yet to (fully) follow this lesson. But this only emphasises liberal property's role as a lodestar for the law, rather than a comforting account that reaffirms the status quo.

4 Liberal property and the law

I turn now from liberal property's normative ambitions to its jurisprudential ones. Although none of the book reviews here raises this perspective directly, clarifying these ambitions is required in order to address Bartl's critique of liberal property's structural pluralism. It is also necessary in anticipation of some of the pragmatic concerns that I consider next.

4.1 The (transformative) power of law

So first, back to Bartl. In addition to her resistance to the autonomy-based foundation of my account, Bartl criticises its excessive reliance on 'legal institutions' and inadequate attention to the 'supportive "cultural infrastructure"' that is required in order to 'make[] a choice for collective modes of life meaningful and valid'. People, she writes, 'need to see *why* [*it*] *is a meaningful thing*' (emphasis in original) to 'establish workers' cooperatives, share property or hold certain types of property in commons' and on this front, she argues, *A Liberal Theory of Property* fails.

[4]The text implicitly responds to a question that Elmien du Plessis raises in a footnote as to the space liberal property theory would find appropriate to make 'for other modes of being – such as rights in customary law that are typically socially embedded in the community, although the rights themselves are arguably individually held'. Insofar as the legal infrastructure that is required for these minoritarian forms to flourish complies with the humanist injunction the text highlights, liberal property surely allows – more: requires – its instantiation (Dagan, 2021a, pp. 78, 246).

[5]See e.g. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (US Supreme Court).

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A theory that reduces cultural preconditions to individual autonomy, choice, and exit, Bartl claims, is hardly conducive to generating *values*, and subsequently institutions, necessary to foster collective forms of ownership and action. For structural pluralism to come about, we need a 'cultural framework' that foregrounds not autonomy, but rather 'values of solidarity, co-operativism, mutualism, collective action, class struggle and public ownership, action and responsibility'.

There are two ways to read these propositions. One reading echoes my earlier reference to Bartl's critique, namely that the problem is autonomy's privileged role in liberal property. Insofar as this is the crux of the matter, it may be enough at this stage to re-emphasise two points: (1) autonomy on my understanding is a robust concept, which is thoroughly relational and embraces – indeed, requires – a significant commitment to justice as well as a proper appreciation to collective forms of self-determination; (2) discarding autonomy as our ultimate value opens the door to practices in which some 'larger' goods – such as a state's aggregate welfare or the fabric of a cultural community – are authorised to overwhelm the right of each person to determine (and redetermine) their own course.

Because many of the values Bartl mentions can, and some indeed should, be accommodated within a liberal system founded on personal autonomy as either constitutive of or instrumental to personal self-determination, I suspect that there is another reading of her qualms that focuses on my emphasis on law. The question here is thus whether – given that, as Bartl claims, we have unfortunately lost some of the cultural infrastructure that is needed for structural pluralism to flourish – a liberal property *law* could possibly be adequate for its reinvigoration. I think that it could, and for two reasons: law's material implications and its cultural effects (Dagan, 2021a, pp. 96–100).

A status quo in which property is perceived in Blackstonian terms and its cultural framework downgrades the intrinsic meaning of joining forces may be difficult to change. But even if this portrayal fairly describes our era, Bartl's conclusions are too quick and overly bleak. People know that joining forces is good for them instrumentally – forms of joint ownership and joint ventures flourish regarding almost every resource that is an object of property nowadays. And many people do find meaning in collective forms of action: our sociability is too ingrained in our humanity to be effaced or marginalised. Therefore, even in a cultural environment that is relatively 'hostile' to collective forms of ownership and action, law can make a real difference.

Rashmi Dyal-Chand's close study of 'co-operative capitalism' in American cities offers a vivid example for these propositions. The behaviour of market participants in these inner-city locations, she reports, 'literally breaks or defies the rules of capitalism as most Americans understand it' since their 'key characteristic' is 'the level of sharing of key resources'. They share 'training and vocational education, labor, financing, market data, suppliers and supplies, management expertise, and physical space', and they use 'local ties to instill a strong connection to a local community'. These enterprises, Dyal-Chand reports, 'succeeded not only in growing competitive businesses in supposedly failing markets, but also in providing a stable source of income for the workers involved in those businesses' (Dyal-Chand, 2018, pp. 5, 8, 71).[6]

And yet Dyal-Chand claims that these success stories should not obscure the current difficulties. The problem, she observes, is one of 'regulatory failure'. These heterodox forms, she shows, 'are not well supported by the current regulatory framework', and '[w]hile regulation cannot fully fill this gap, supportive laws, policies, and investment especially at the state and local levels can make an enormous difference'. Such a 'supportive regulatory framework', she persuasively concludes, need not erase existing practices. Rather, it should recognise and support these alternatives, and thus 'create more space for the proliferation of a broader spectrum of business activity involving residents in the urban core' (Dyal-Chand, 2018, pp. 7, 71, 207, 226).

The sheer introduction of law may not suffice, Bartl may still sensibly retort, to attract 'a sizeable number of people' to experiment with such heterodox forms. There are two aspects to this worry. The more specific one involves the entry barrier that new property types, especially of the minoritarian and

[6]Interestingly, in certain contexts, the instrumental benefits of the commons have become *more* salient with the decline of the welfare state. See Vriens and De Moor (2020).

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utopian kind, are likely to face until they are sufficiently prominent socially. This impediment to liberal property's structural pluralism explains why I have argued that law 'should treat these property types on a par with infant industries' and grant them, during this transitory stage, special protection or subsidies (Dagan, 2021a, p. 107).

The more general aspect relates to the cultural power of law and the vision of liberal property. Recall that Bartl's complaint is that a cultural infrastructure that celebrates individual autonomy, choice, and exit is hardly conducive to generating *values*, and subsequently institutions. But there are, I think, two errors in this charge.

First, the relationship between the generation of values and that of legal institutions is more dialectical: law – and specifically property law – is not just a repository of pre-existing values; it also affects our cultural horizons (Dagan, 2021a, p. 98). Elmien du Plessis's report of the effect of the debate of the past four years in South Africa as to its constitutional property clause, which I address below, provides one illuminating example. The process 'placed land reform and its issues in the public imagination' and thus '[m]any people who would previously insist that "just and equitable" [compensation] can *only* be market value will concede that it might at least entail something *less* than market value, if not *nil*' (emphases in original). Similarly, there is no reason to a priori dismiss the transformative potential of a gradual introduction and support of minoritarian and utopian property types, as liberal property prescribes.

The second mistake goes back to the crucial difference between autonomy and independence, and the central role of communitarian and egalitarian values in the constitution of an autonomy-based property law. Liberalism, properly understood, is dramatically distinct from libertarianism. Therefore, liberal property carries within its normative DNA the cultural infrastructure that may help transform our world in the humanistic spirit that Bartl and I share.[7]

4.2 Substance, form, institutions

Most of the reviews in this Symposium focus on my accounts on specific property issues and these matters will be at the centre of my discussion of property on the ground shortly. But before we get there, I need to add a few clarifications on the book's jurisprudential ambitions. The previous section referred to the power of law; the following paragraphs are triggered by the concluding remarks of Rachael Walsh's review as per the need to develop 'local, context-specific applications of the autonomy-facilitation theory' as well as by hers and Dana's discussion of the line-drawing difficulties that judges face in addressing questions of legal transitions.

The starting point here is that theories of the type I develop in *A Liberal Theory of Property*, which aspire to apply across time and place, necessarily leave room for local adjustments based on the pertinent doctrinal landscape and the broader social, cultural and economic circumstances, as well as – and no less significant – democratic prescriptions. This means, as Walsh implies, that the remaining indeterminacy between the theory's 'broad strictures of a justifiable system of property' and the concrete answers to (to use Dana's term) 'as-applied, real-world questions' is a feature, rather than a bug.

One implication of this proposition is that the theory as such is, at least to some extent, agnostic institutionally. To be sure, I have made some effort to explain why judges should not be excluded from the task of property law-making (Dagan, 2021a, pp. 149–159); and Cathy Sherry's discussion of the contribution of judge-made law in guarding against private communities' overreach of regulating people's homes further vindicates this proposition. But the choice among the pertinent legal actors for carrying the burden of translating the theory's prescriptions into law – legislators, judges and regulators – remains largely orthogonal to the substantive theory of property, to which the book is dedicated. The institutional question is by and large local, as it 'requires attention to the relative strengths and weaknesses of varied institutions in applying and evaluating different kinds of considerations as well as to the putative bases of their respective legitimacy' (Dagan, 2021a, pp. 130, 158–159).

[7]On the viability of the ideal of liberal property to serve as the lodestar of property reform, see Dagan (2021b).

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The other – and last – jurisprudential point is not fully orthogonal. The rule of law, which requires, in John Locke's words, that 'both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds' (Locke, 1689, p. 378), is surely a trans-substantive legal concern, which I take to heart not only in property matters (Dagan, 2018b, pp. 133–136). But these prescriptions of providing duty-owers effective guidance and constraining the powers of public officials are of particular significance insofar as property is concerned; and because they are intimately connected to people's autonomy, they are also intrinsic features of *liberal* property. Here, as elsewhere, these rule-of-law requirements demand that law's daily affairs (as opposed to its 'paradigm shifts') should be governed by relatively precise rules or by informative (as opposed to open-ended) standards (Dagan, 2021a, pp. 33–35, 159–173).

In certain contexts, this commitment to the rule of law also entails institutional implications. Thus, where the task of prescribing rules for a given property doctrine 'requires complicated, and at times not fully principled, determinations of both line-drawing and detail', legislatures and regulatory agencies enjoy a comparative institutional advantage over judges. Regarding these categories, liberal property would be more easily implemented where at least part of the burden of property law-making is carried by legislators and regulators (Dagan, 2021a, pp. 154–155).

5 Liberal property on the ground

With these clarifications of the normative and jurisprudential ambitions of *A Liberal Theory of Property* in place, I can turn to its pragmatic ambitions. Three reviewers focus their specific comments and concerns on my discussion of the law of property transitions (notably eminent domain and regulatory takings) and two others discuss the way condominium law fits into, and is informed by, liberal property theory. So I take these two important topics in turn.

5.1 Property transitions

The core claim of Chapter 8, which focuses on property transitions and is co-authored with Michael Heller, is that a liberal property law endorses a principled bifurcation of the universe of property transitions, which it dubs 'the liberal property pact'. The basic argument is simple. Sudden dramatic changes undermine the contribution of property to people's ability to plan and should thus be treated as compensable takings. Moderate and gradual regulatory changes, by contrast, can be seamlessly accommodated since they do not threaten property's autonomy-enhancing function. The cost of these property transitions may justifiably remain on property owners as required by their (both Rawlsian and property-based) obligation to support the maintenance of the background regime necessary for property to face its ongoing justificatory challenge.

This prescription leaves, as usual, a wide space for contextual adaptation. To be sure, liberal property theory insists that not all property pacts are legitimate: overly rigid transition regimes might undermine property's continuous legitimacy; and overly loose ones might sabotage its autonomy-enhancing *telos*. But in between these extreme unacceptable positions, many forms can fit into the broad strictures of the liberal property pact (Dagan, 2021a, p. 214). This means that there is plenty of room for democratic choice and – as du Plessis intimates – for democratic revisions of the pact. Indeed, as she maintains, discussions and contestations regarding the proper shape of the property pact serve 'a vital function in the quest for legitimising property'. (The answer to the question of whether a given revision is to take place at the constitutional level or the statutory one depends on the type of change at hand and the structure of the pertinent legal system.)

With these preliminary points – and postponing the discussion of the *boundaries* of the liberal property pact to the last part of this section – I can turn to Dana's and Walsh's comments on this scheme, which share one general concern. Property transitions, as Walsh writes, 'illustrate the challenge of using autonomy as property's *telos* to provide more precise guidance for property decision-making'; and while 'the idea of a "property pact" – of some community-level consensus about the

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appropriate distribution of the costs of property rule changes – vividly captures [its] core dilemma', it leaves open its proper resolution.

To be sure, judges, who 'are tasked with working out the nature and scope of such a "property pact"' continuously 'struggle to generate determinate or definitive "tests" to address that [distributive] question'. But their success is, Walsh correctly observes, quite limited. 'To date, judicial decisions have not provided … [much] clarity', since the rules they have set up tend to be ambiguous and inconsistently applied. The task of drawing the line between 'moderate and incremental changes' to 'sudden and dramatic' ones as per the property pact does not seem much easier (and the answer may depend on the question's framing), which may explain Dana's admonition that – *pace* my reluctance – an ad hoc approach is, after all, unavoidable given the incredible heterogeneity of property disputes.

To this general difficulty, Walsh and Dana add five main specific queries[8]: (1) Which actors or institutions should determine the specific content of the property pact and how should, if at all, cultural views and political attitudes, affect its formulation? (2) Should the property pact be only about the availability of compensation, rather than 'the permissibility of legal change'? (3) Shouldn't 'the *degree* of change', and not, or not only, 'the *rate* of change', affect the compensability of a property transition? (4) Is it really enough to focus on the rate of *regulatory* change, given that relative predictability of changes *simpliciter* is what matters to people's ability to plan? (5) Is it plausible to set up in this context one scheme for 'a middle-class person who pours all their savings into a new beachfront condo building' and to 'a sophisticated billionaire developer who builds using big bank loans and a raft of liability-shielding LLCs' (Dana, in this issue)?

These specific concerns, as well as the more general one regarding the possibility of avoiding ad hocism, are all important and they would certainly have to be addressed if the liberal property pact sketched in Chapter 8 is to be implemented. Doing so requires, as my comments in the previous section suggest, close attention to specific features of the pertinent jurisdiction. Thus, the judicial difficulties in proper line-drawing imply that a satisfying rule-of-law-respecting doctrine – namely one that resists ad hocism – is admittedly much harder to imagine where there is no general statutory scheme mediating between the constitutional language, which is typically broad, and the measures of specific property transitions. Similarly, first-best answers to these (and other) constitutional property questions may depend (as I presently show) on the availability of certain doctrinal tools, such as the proportionality test (that prevails in many modern constitutions, but is not part of American takings law: Walsh, 2021, chapter 5) or the possibility of partial compensation (that is recognised only in a few jurisdictions: Dagan, 2015).

Like the other parts of *A Liberal Theory of Property*, Chapter 8 uses American law as its laboratory, seeking to show both the possible legacy of a liberal property pact in both common law tradition and US Supreme Court jurisprudence as well as the pact's potential contribution to the tortuous doctrines of eminent domain and regulatory takings. I believe that working out even further the details of this discussion may help, at least partly, to address the challenges at hand in that particular, and particularly challenging, context. But this Journal does not limit itself to that jurisdiction, and this Symposium happily includes commentators from six different jurisdictions. So let me take the liberty and assume we can start from scratch, facing the task of devising a property transition regime that follows the guidelines of the liberal property pact and addresses both the concerns and the queries mentioned above. The following paragraphs offer a sketch, based on a more elaborate treatment elsewhere, of what it would look like.[9]

This regime will take seriously the *judicial* difficulties in elaborating a principled and clear scheme for a heterogeneous set of contexts. But it would nonetheless avoid settling on open-ended standards, because ad hocism in this context is particularly objectionable. Not only that ad hocism in property transitions law gives rise to the rule of law and property-based deficits addressed in the previous

[8]The first three points are Walsh's; the other two are Dana's.

[9]The following paragraphs heavily rely on, and to some extent simplify, my earlier discussions in Dagan (2011; 2015, pp. 359–365; 2018a). Cf. Dagan (2005); Walsh (2021, pp. 107–108, 122–124, 194, 227–230).

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section, but it is also alarmingly regressive, since it implies that injured landowners are required to spend significant resources on legal advice, and thus creates a built-in advantage for repeat players and other strong parties.

Accordingly, noting that these judicial difficulties typify modern complex societies, my recommended regime would follow the footsteps of the (institutional) path of the law in facing analogous challenges and recruit the legislature to design a simple[10] set of rules or informative standards that rely on tangible and relatively simple variables, which can serve as (by definition imprecise) proxies for the normative concerns that inform the liberal property pact.

The first set of such rules would address the question of eminent domain permissibility. The focus of this stage should be – as American jurisprudence on the public-use requirement teaches us – not on investigating government ends, but rather on limiting its permissible means. Here a proportionality analysis is called for, and its application should be, as Walsh implies, particularly rigorous where the transition at hand is literally taking someone's home. Such an analysis not only examines the rationality of using the measure at hand for the pertinent end. It also, more pointedly to the task at hand of scrutinising the imposition of private cost for public benefit, ensures that the property rights at hand are impaired as little as possible given that end, while examining the alternatives (including the possibility of targeting other properties) for its attainment.

I now turn to the compensability of permissible takings, where the challenge is to introduce into the doctrine the considerations of owners' ability to plan vs. their obligation to incur some costs of the legal change. The main doctrinal tool for that is the option of partial compensation. Adding this possibility facilitates the consideration of two important variables: (1) the nature of the affected property: the more directly connected it is (as in the case of the home) to people's self-determination, the stronger their claim is, as we have already seen; and (2) the question of whether the project at hand benefits the affected owner's local community – in which case a heightened degree of property-based social responsibility is in place – or rather the broader society or another subset thereof. These distinctions call for the following scheme of compensation:

1 The clearest case for the application of partial compensation is one in which the beneficiary of the public project at hand is one's local community and the expropriated land had been held as an investment, meaning that the owner had held it as fungible property.
2 By contrast, where the affected land is part of a larger (such as a regional or state) governmental project and had previously served its owner as her home or some such, full compensation should be awarded.
3 Between these two extreme categories are cases in which such 'constitutive' land is affected for purposes that benefit its owner's local community and cases in which the use of fungible land benefits the broader society. These intermediate types of cases should trigger the award of intermediate measures of recovery.

Similar rules can apply to regulatory takings cases by utilising the familiar diminution of value test, which conditions compensation on the extent (the percentage) of the diminution of value of the property in question – for example, the extent of the loss caused by the public action relative to the pre-existing value of the affected property. (So the extent of change *does* matter; its predictability as such, by contrast, need not sanction it if its burden goes beyond what can justifiably be expected from the affected owner to incur (Dagan, 2021a, p. 218).) This scheme would establish fixed minimum thresholds of diminution in value that a regulatory taking must exceed before the government is obligated to provide compensation. Thus, if the diminution in value from a regulation is below the appropriate threshold, no compensation is required. By contrast, if the diminution in value surpasses the threshold,

[10]The requirement for simplicity is important because a thick cluster of complicated rules is subject to many of the difficulties of a vague standard.

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compensation for the entire diminution in value would be due. The pertinent thresholds and the categories in which they apply should be aligned with those of eminent domain cases mentioned above.

In order for these strictures to operate in a rule-of-law-friendly fashion, they need to be entrenched with much more specificity, which should be based, as noted, on both democratic choices and contextual considerations. Rather than 'constitutive land', law should include, perhaps using existing legal determinations in other branches of property law (or its taxation) that are also sensitive to the first distinction, a list of land uses that are deemed to fall into this category (home, for sure; but also, maybe, a farm or a small business). Likewise, instead of a 'local community' or a 'larger' one, such a scheme may resort to the jurisdiction's administrative subdivision to make case classification as simple as possible. Finally, rather than directing courts to engage with (in Walsh's words) 'the "how much" or "how far" dilemma that underpins, and at times bedevils, constitutional property law', this statutory framework would prescribe specific percentages for partial compensation of both the first or the third category mentioned above.

Alongside this wide local latitude, this scheme ensures compliance with the basic thrust of the liberal property pact and its underlying autonomy-based commitments. The proxies it applies separate out the sudden and dramatic from the moderate and gradual with an eye to the mission of assessing the reasonableness of summoning particular owners (with normatively different types of property claims) to contribute to the public good (to which they are variously obligated). Moreover, although this scheme is agent-neutral, it is happily attentive (again, via its proxies) to Dana's important concern regarding the different autonomy implications of affecting the properties of different categories of owners. The targeting of owners of constitutive land (usually middle-class people) in eminent domain cases is, per these rules, more expensive than that of owners of fungible land (typically real-estate holding corporations and wealthy individuals). Similarly, employing the proposed version of the diminution of value test in regulatory takings cases is likely (at least at the margin) to discourage the public authority from choosing inexpensive (and usually small) parcels, which are typically owned by the less well-off.

Du Plessis's discussion of the South African proposed new Expropriation Act suggests another possible refinement regarding eminent domain cases, which a liberal property regime should probably embrace. While the pertinent bill leaves intact the rules for 'especially productive property', it singles out for reduced (in fact, possibly nil) compensation for land whose owner fails 'to exercise control over it' or 'is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value'. Hoarding land has justifiably troubled economists, past and present (Posner and Weyl, 2018, pp. 36–43, 93, 255). But it is also quite consequential for liberal property, since benefitting from the sheer appreciation of land's market value – like the accumulation of capital more generally – 'must not be sanctioned or supported as an end' (Dagan, 2021a, pp. 55–56). Landowners' claim with respect to *these* uses is particularly remote from their self-determination and is thus indeed particularly weak (although probably not nil).

Du Plessis documents the voices in South Africa that, relying on the classical liberal notion of property, insist that expropriation must not be 'a tool of justice' and that compensation for any expropriation – even in cases of land reform – must be the property's fair market value, so that owners' 'economic position must in principle be the same after the expropriation as before'. This may be the position of some systems that embrace the Blackstonian conception of property. But as I argue in *A Liberal Theory of Property*, that conception is indefensible from liberal principles, properly construed. And indeed, as du Plessis writes – and as I have argued thus far – 'not all changes, even if they detrimentally affect some of an owner's property rights, … [run counter to] the liberal idea of property'.

This is particularly true, as du Plessis further notes, in cases of a land reform or other radical changes of the property pact, especially those that aim to remedy a clearly unjust – and indeed unjustifiable – pre-existing property regime. This type of property transition does not involve the (either practical or normative) *maintenance* of a legitimate background regime, but rather an attempt to remove the *illegitimate injustices* of a pre-existing one. Hence, it invokes one important boundary

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of the liberal property pact: the pact's protection against 'legal avulsions' must not serve 'as a sanctuary allowing legitimation of property rights that were unjust to begin with'. Indeed, 'especially given the intrinsic normative difficulty of any claim to private authority, the liberal property pact unapologetically destabilizes holdings of morally tainted entitlements' (Dagan, 2021a, pp. 232–233). Du Plessis correctly interprets my following (brief) reference to South Africa's constitutional property regime (Dagan, 2021a, p. 234) to suggest that post-apartheid redistributive land reforms clearly fall within this framework.

Indeed, measures intended to ameliorate historical injustices from the apartheid era – or its equivalents, even if not as horrific – which aim at making access to land more equitable, need not be moderate and gradual. While not all expropriations related to land reform should be covered by this important exception to the liberal property pact, those that clearly serve to remove unjustifiable property entitlements must not be bound to the pact's limitations (Dagan, 2015, p. 349; cf. Van der Walt, 2011, pp. 1, 518; Munzer, 1990, p. 422). As du Plessis writes, 'property unjustly acquired cannot be legitimised by liberal property'.[11]

5.2 Condominium

Both Harris and Sherry focus their reviews on the property type of condominium. A condominium, as Harris notes, 'packages a private interest to an individual unit in a multi-unit development with an undivided share of the common property and a right to participate in governing the whole'. The enormous force of urbanisation in property development implies, as Sherry remarks, that the rise of these multi-owned properties – often in the form of high-rise residential buildings that may 'soar 150 storeys into the air; include complex plant, equipment and facilities; and house hundreds of residents' – is the most significant change in modern property landscapes in a century, which 'will eventually affect tens of millions of people'.

Some of the challenges that condominium law faces relate to the condominium's foreign affairs. Sherry discusses two such challenges and in both cases seems to embrace liberal property's prescriptions. First, Sherry rightly condemns the prevalent 'practice of developer-made contracts binding associations that must be paid for by ultimate homeowners'. As she notes, this practice runs counter to liberal property's focus on 'owners' right to determine their own lives and the management of their homes' as well as its qualitative distinction between interests that are constitutive to people's self-determination and those that are instrumental to it. After a limited period of such a bind that may be justified for stabilising the early days of a condominium, owners should be entitled – as the right to start afresh, which is ingrained in liberal property's innermost autonomy-enhancing DNA, prescribes – to rethink the best way of managing their own (collective) affairs.[12]

The second matter of foreign affairs that Sherry mentions relates to the doctrinal uncertainty in Australia as per 'the application of discrimination law to private communities' given that it 'has no Bill of Rights at Federal and most state levels'. Elsewhere, Sherry documents the judicial dilemmas that this predicament prompted and the disappointing steps made thus far on that front (Sherry, 2020).[13] For liberal property, as she implies here, the correct legal answer – that the antidiscrimination norm indeed applies to the operation of condominium governing associations – is again ingrained in liberal property's innermost DNA, this time its animating principle of relational justice.

In addition to these and similar questions relating to the condominium's external interactions, the condominium – which 'embeds relations between owners into the fabric of the property interest it

[11]As du Plessis adds, this proposition opens the door to difficult and contested inquiries as to who the legitimate owners of the land are. Furthermore, '[v]alid questions are also often raised about current bona fide owners who acquired their land in the open market'.

[12]The same prescription applies to the analysis of the pertinent contractual aspects. See Dagan and Heller (2020).

[13]Towards the end of her review, Sherry questions my celebration of the judicial creation (in the US) of common-interest communities. I assume that her concerns relate to another type of negative externality, which unfortunately is indeed not properly addressed by American law: their efforts to secede – socially and even legally – from their surrounding environment.

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creates', as Harris puts it – is a prime example for liberal property's emphasis of the internal life of property and thus of the significance of property governance (Dagan, 2021a, pp. 82–87). Both Sherry and Harris are interested in the ability of liberal property to navigate the difficult conflicts within the condominium – conflicts *between* owners whose goals or preferences collide.

Sherry refers to two issues: one relating to owners' homes, the other to the common facilities. On the former, she correctly concludes that – especially given the fact that in many high-density cities, 'for many people, condominiums are also the *only* possibility for a home' (emphasis in original)[14] – liberal property implies that owners' control over others' private homes must be carefully circumscribed. A property regime, founded as it must be (if property is to be legitimate) on people's right to self-determination, must ensure that 'all homeowners, whether living in freestanding houses or high-density condominiums, must be accorded the ability to live their lives consistently with their own values'. Overreaching condominium regulation of people's homes of the kind Sherry discusses must be, as she claims, strictly scrutinised so as to ensure, as liberal property's first pillar requires, that no private owner's authority includes 'the right to undermine others' self-determination'.

Turning to the facilities, Sherry notes that alongside 'the most egregious abuses of these communities, such as racial discrimination', other, 'trickier questions' come up. Specifically, she asks whether communities should be able to 'require religious dress of all residents or COVID-19 vaccinations as a condition for the use of facilities or even occupation'. While some subtleties may be, as she notes, 'necessarily culturally specific', the basic answers are not. Liberal property, as the recent *Cooper* case she approvingly cites prescribes, requires that an association has no power to make any rule that regulates behaviour that has no meaningful effect on others. Requiring vaccination or at least testing as a condition to using facilities clearly complies with this entailment of the fundamental maxim of reciprocal respect for self-determination. Limiting the choice of owners' clothing based on the majority's views of the proper dress code, by contrast, seems to go beyond respecting the majority members' right to self-determination. As Ronald Dworkin implies, giving credence to the majority views regarding the way *others* handle themselves in public violates, rather than vindicates, 'the right of everyone to be treated with equal concern and respect' (Dworkin, 1977, p. 275). Liberal property cannot authorise such a rule.

Harris, in turn, focuses on one high-stakes topic – the emerging line of cases dealing with attractive purchase offers for a collective sale of deteriorating buildings to an enterprising developer. As Harris reports:

> 'an increasing number of jurisdictions have shifted from a presumption that a collective sale (and thus the termination of private interests within a condominium) requires the consent of all owners to a presumption that it may proceed on the strength of a supermajority vote.'

Although 'the sale will be compensated, and handsomely so … given the developer's premium', it is clearly, as he notes, a 'private taking'. Can a liberal theory of property, grounded in autonomy, sanction it? And if so, does it provide any helpful lessons as to the proper form of what 'is probably the single most important decision in the lifecycle of a condominium development' (Harris, 2021, p. 39)?

Addressing these questions is helpful in demonstrating the interplay between the general prescriptions of liberal property writ large on the one hand and the more specific prescriptions of the particular property type, which are always, as per liberal property's structural pluralism also informative for specific property dilemmas (Dagan, 2021a, pp. 6–7, 24, 90) on the other. It also shows the limits of the theory: as with property transitions, these prescriptions still leave some room for contextual differences that may well vary from one jurisdiction to the other.

The first general set of prescriptions emerges from my discussion of eminent domain in the previous section, which implies that the dynamic context in which private property is embedded

[14]Sherry's observation that this fact 'has more to do with land economics, neoliberalism and the physical reality of high-rise buildings than any positive desire on the part of residents to live in collectively regulated buildings/communities' is somewhat ironic given Bartl's critique discussed in section 4.1.

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necessarily opens up the contingency that its temporal horizons may be limited. As we have seen, for liberal property, this is not an outrageous conclusion given the awesome justificatory burden of owners' claims of private authority. But liberal property is, as noted, particularly alarmed where the property at hand is one's home. Thus, an acceptable scheme for these conflicts – where property rights are invoked by both sides – would justifiably eliminate owners' veto rights (thus overcoming anti-commons tragedies: Dagan and Heller, 2001, pp. 590, 610); but, in line with my blueprint for property transitions, it should – as Harris writes – devise its rules so as to give some weight to the question of 'whether the property interest … [of an opposing owner] is protecting investor expectation or home'.

There is another general liberal property prescription that applies here, but its introduction must await those of the particular property type at hand, which emerge from the fact that for a condominium, being a species of the liberal commons, property governance is, as noted, front and centre. Accordingly, condominium law must pay close attention to both the scope of *majority jurisdiction* and the pertinent *procedural rules* to which majority rule must be subject (Dagan and Heller, 2001, pp. 591–595).

The scope of majority jurisdiction is, of course, the most crucial question. And in order to address it, we need to appreciate the condominium's distinctiveness, where, as Harris explains elsewhere, 'the private interests are inseparable from the common property interests; their ownership cannot be severed from the accompanying rights to undivided shares of the common property' (Harris, 2021, p. 30). Add to this legal characteristic the empirical fact that with the coming-to-age of the condominium in many jurisdictions, an increasing number of developments that deploy this type deteriorate and require extensive and expensive renovations, and you can understand – and approve of – the emerging statutory shift from a unanimity regime to one of supermajority vote (Harris, 2021, pp. 39–40). (I deliberately mention that this has been a legislative development: prescribing a *specific* threshold for such a supermajority – Ninety? Eighty? Seventy-five? Depending on the age of the building? etc. – is both extremely important and particularly ill-fitting for adjudication.)

The resultant burden imposed on an opposing owner is indeed considerable, but in this context seems unavoidable. This and other, albeit less dramatic, decisions that are subject to majority rule – such as the imposition of special levies, where needed – leave owners with a dominion that is not as extensive as with the fee simple absolute. But they are, as noted, ingrained in the DNA of this property type and as long as its flourishing does not imply the eradication or marginalisation of the fee simple absolute (Dagan, 2021a, pp. 100–102) – as long as these property types remain partial functional substitutes (Dagan, 2021a, pp. 102–103) – these burdens and vulnerabilities do not necessarily threaten property law's liberal credentials.

For this to be the case, however, law should put its spotlight on the predicament of the opposing owner and rigorously follow, as Harris implies, the injunctions of relational justice, liberal property's third pillar. Harris rightly mentions in this context that there should be 'an opportunity for opposing voices to be heard'; but there are further procedural and possibly substantive requirements that should be obtained. On the procedural front, for such a hearing to be fair and for group deliberation to be meaningful, they must follow a proper disclosure of all the relevant facts and the pertinent alternatives. Likewise, 'minority complaints of due process deprivations or substantive exploitation should be capable of triggering mediation or judicial intervention' (Dagan and Heller, 2001, p. 595). Moreover, for some categories of cases, even these procedural safeguards – and the available handsome compensation – may not be sufficient. Certain types of homeowners, particularly the elderly and people with diminished physical, mental or cognitive capacities, are likely to experience such forced sales in a manner that is qualitatively different than others. Therefore, in line with the prescriptions of relational justice in other sections of the law (Dagan and Dorfman, 2016, pp. 1431–1434),[15] condominium law should set up proper accommodations that can ameliorate these difficulties.

[15]The text also implies that while in general justified, the new rules that provide remedies against an owner whose behaviour has been chronically antisocial may need to be refined so as to provide *some* accommodation where the owner at hand suffers from a mental disorder. Cf. Harris (2021, pp. 33–35, 43 n. 28).

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6 The state of liberal property

Most of the propositions of this Symposium's participants relate to the normative, jurisprudential and pragmatic ambitions of *A Liberal Theory of Property*. But one short comment by Harris and a more extended treatment by Bartl address what may be described as its thematic ambition. Both are sufficiently significant so as to make it apt to conclude with a few observations on that front.

Harris writes that some 'will find that … [I am] overreaching the precinct of property', implying, I assume, that some of the comments I offer in the book regarding areas that are typically (and correctly) not classified as subfields of property, such as antitrust or tax, are misplaced. Bartl pushes in the other direction. She claims that I am 'too optimistic about markets, and too suspicious of the state'. Bartl highlights the fact that *A Liberal Theory of Property* includes 'a chapter on "just markets", but no chapter on a "just state" or "just public institutions"'. She finds this omission both telling and troubling: 'Given the importance of state and public authority in creating conditions for structural pluralism', specifically insofar as 'collective forms of ownership' are concerned, 'the most striking element of the theory of liberal property is its deep-seated distrust of public institutions'.

Harris is correct in noting that *A Liberal Theory of Property* goes beyond pointing out to antitrust, tax and the like as legal fields whose work supplements that of property law; the book indeed includes short – but quite opinionated – propositions regarding the direction that these neighbouring doctrines need to take. This is not a slip of the pen. One of my main propositions is that for property law to deliver its ideal of enhancing people's self-authorship, it *must* rely on a just background regime – a 'just state' or 'just public institutions', if you will – that affords everyone the material, social and intellectual preconditions, which are necessary to enable people to become and remain self-determining individuals. This is why the book's defence of the liberal ideal of property is explicitly qualified: property is fully justified only in a genuinely liberal polity, and its legitimacy is necessarily contingent on the performance of the background legal regime that supports along these lines the enhancement of autonomy (Dagan, 2021a, pp. 39–40, 72).

Chapter 7 of *A Liberal Theory of Property* articulates a vision of just markets not due to the laudable operation of existing markets. Rather, a chapter that offers a competing rationale to that which currently governs markets, and thus an outline of their necessary reform, is needed because 'property is a – if not *the* – major source of many autonomy-reducing features of existing labor [and other] markets', such that it is impossible to address the justice of property without considering the possibility of a just market (Dagan, 2021a, p. 179). Because the autonomy-enhancing vision of market is laudable, while the performance of existing markets is deeply troublesome, we need to be suspicious of the latter and aspire to the former.

I approach the state with a similar attitude. The state should not be treated as a straightforward benevolent panacea – concentrated power must always be a concern for us humanists – which explains, and I think justifies, Chapter 8's suspicion towards public authorities in the context of property transitions that triggered Bartl's critical remarks. But the amalgam of doctrines and rules to which I refer in *A Liberal Theory of Property* testifies, I think, that I am no enemy of the state, whose function is indispensable in ensuring – as I note early on – people's health, education and means of subsistence, which are more basic than property to personal self-determination (Dagan, 2021a, p. 2). Moreover, although the book does not include a chapter on the 'just state' – property theory is not a theory of everything – the prerequisites that liberal property imposes on property's background regime are, *pace* some of Bartl's suggestive remarks,[16] very far afield from any deregulatory agenda.

Thus, for example, while *A Liberal Theory of Property* does not attempt to settle the debate as to whether the state should ensure that everyone has sufficient or rather equal substantive opportunities for self-determination, it does prescribe that property's legitimacy depends on the degree to which the legal system that it belongs to complies with the requirement for justly distributing property's potential empowerment (Dagan, 2021a, p. 74). Likewise, although property theory need not articulate a

[16]Bartl suggests that my account is quite reminiscent of the European Commission, which justifies most of its trade and (de)regulatory policies as support to small and medium size enterprises.

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blueprint for antitrust law, the theory of liberal property insists that such a blueprint must depart from the prevalent exclusive focus on consumer welfare and target concentrations of private power (Dagan, 2021a, p. 71). Moreover, liberal property similarly points away from – rather than towards – the neoliberal agenda, which rightly bothers Bartl, in a wide range of further fields, such as choice of law, the environmental, systemic racism, monetary policy (Dagan, 2021b) and (the one topic I wrote about some years ago) political money (Dagan, 2009). Rather than neoliberal, the state envisioned by liberal property looks much more like – as du Plessis comments – a social democratic one.

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