

Beyond the State-Owner Binary: Repositioning the State's Property-Resource Responsibilities with Respect to All Community Members (Including Property Owners)

Author : Lorna Fox O'Mahony

Date : March 9, 2018

Laura S. Underkuffler, [Property, Sovereignty, and the Public Trust](#), 18 *Theoretical Inquiries L.* 329 (2017).

Laura Underkuffler's recent article, *Property, Sovereignty, and the Public Trust*, is part of a special issue of *Theoretical Inquiries in Law*. The collection as a whole is an important read for anyone interested in the relationships between individual property rights claims and the role and remit of the state in the "private property" sphere. The twelve articles collected in the special issue offer insightful and wide-ranging contributions to these important debates and, both individually and collectively, will hold much interest for Property section readers.

Underkuffler's contribution examines the theoretical basis for what she describes as the ubiquitous assumption in liberal democratic systems that government should forbear from interference with existing individual property entitlements. Her starting point is the sovereign's duty to respond to the needs of all members of its community, and from this position she describes the concept of forbearance as "an inherently troublesome proposition." (P. 330.)

In the course of the article, she examines the core arguments of conventional theories of government forbearance from interference with existing individual property entitlements—for example, for protecting individual reliance interests, or for public policy reasons like encouraging investment or enhancing social stability, or through the tautology that the idea of property itself determines the requirement of government forbearance.

Yet, Underkuffler concludes that each of these arguments offers insufficient reasons, on its own terms, to adequately explain the "forbearance phenomenon." She offers an alternative lens through which government forbearance can be explained, rooted in the "fiduciary relationship" between a government and its citizens. Fiduciary theory offers an interesting frame for thinking about the structured, institutional, hierarchical power dynamics of relationships between the state and its citizens, and offers a fresh concept for giving content to the state's responsibilities towards property owners.

Crucially, this fiduciary duty applies not only to property owners but to all citizens. Through this move, Underkuffler repositions the same state obligation that mandates government forbearance from interference with individual property rights on the basis of potentially overreaching power as also applying to non-owners. By widening the population to whom this state duty is owed to include *all* citizens, Underkuffler shifts the focus away from *whether* the state should act with respect to private property, to *how* the state should carry out its all-citizen duty.

Her answer, applying Evan Fox-Decent's theory of "the state as fiduciary,"¹ focuses on the fiduciary's responsibility to be "other-regarding" and "to act with due regard for the [beneficiary's] best interests." (P. 346.) In this context, the "beneficiaries" of the state's power include *all* individual citizens, and the existence of the fiduciary duty demands that "government at the very least must engage in serious

reckoning with individual citizens' (as well as collective) interests." (*Id.*)

Through this move, Underkuffler extends the property/sovereignty debate beyond the state-owner binary, to take account of the interests of other members of the community, who live "outside the bubble" of property ownership. She is careful to emphasize that this does not imply that the interests of private property owners should not be valued and protected by government forbearance; indeed, she argues that the individual interests of property owners "must be considered, seriously, in sovereign decision-making." (*Id.*)

Nevertheless, her approach opens up space for arguing that—where these individual property-owning interests conflict with collective interests—the individual claim will not, and should not, always prevail. Through the fiduciary lens, Underkuffler simultaneously recognizes the government's obligation to check its potentially overreaching powers with respect to property owners, and that:

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.

(P. 348.)

The idea that the state acts under a duty to give "serious reckoning" to competing claims is not unknown in property systems beyond the United States.

Underkuffler refers to the framework constructed under the South African Constitution of 1996 (P. 352) for the purposes of enabling the newly remade state to carry out this duty, and to the national constitutional provisions adopted in Germany after reunification in 1989 (Pp. 351-52).

Indeed, the case law triggered by property reallocation following German reunification included a further test of the "fair balance" struck by the German state when the dispossessed owners appealed to the Grand Chamber under Article 1 of the First Protocol to the European Convention on Human Rights², with that court concluding (in the exceptional circumstances of reunification) that the "deprivation" of property without compensation was in accordance with law, "in the public interest," and had struck a fair balance between the general interests of the community and the requirements of the protection of individual rights. Underkuffler describes these balancing processes—between the interests of property owners and "the public interest"—as a "public-fiduciary" approach.

In seeking to "illuminate the fuller context in which these questions arise" (P. 353), Underkuffler emphasises the importance of the property resource to human life:

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...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 towards existing property entitlements is *rooted in property's substantive function, and its required guarantees.*

(P. 347, emphasis in original.)

As the passage above demonstrates, Underkuffler moves among property-as-resource, property claims, and property rights, while also touching on the suggestion that property (in the form of property rights) is the “guardian” of other human rights—a proposition that has been challenged in debates about the relationship between the right to property and other (human) rights claims. For example, Andre van der Walt, writing from the South African context, argued that property is *not* “the saviour, the knight on the white steed, the guardian of every other right,” and that positioning property law in that guardian role makes property—and property rights – *too central* to debates about the governance of property-as-resource in the interests of the whole community.³ It will be interesting to track how this crucial distinction is advanced in future scholarship developing the “state-as-fiduciary” approach to property and sovereignty.

Underkuffler’s article—and this special issue as a whole—is likely to be of considerable interest to property scholars, and to provoke much further discussion—within the United States and beyond—about the frameworks we use to think and talk about the relationship between owners and non-owners, and the role of the state in governing the valued resource of property in the public interest.

1. Evan Fox-Decent, **Sovereignty’s Promise: The State as Fiduciary** (2011).
2. *Jahn & Others v. Germany* (2005) (applications nos. 46720/99, 72203/01 and 72552/01).
3. AJ van der Walt, [The Modest Systemic Status of Property Rights](#), 1 **J. L. Prop. & Soc’y** 15 (2014). See also [my jot](#) on that article.

Cite as: Lorna Fox O'Mahony, *Beyond the State-Owner Binary: Repositioning the State’s Property-Resource Responsibilities with Respect to All Community Members (Including Property Owners)*, JOTWELL (March 9, 2018) (reviewing Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 **Theoretical Inquiries L.** 329 (2017)), <https://property.jotwell.com/beyond-state-owner-binary-repositioning-states-property-resource-responsibilities-respect-community-members-including-property-owners/>.