Re-imagining Takings Law

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May 23, 2007

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INTRODUCTION

Takings law, composed of the law of eminent domain and the regulatory takings doctrine, is correctly understood as one of property's most defining features. As such, it attracts the attention not only of lawyers and judges but also of property theorists and political philosophers. This thick literature tends to fall into rather predictable and, I argue, quite disappointing camps. Libertarian authors maintain that compensation should be required each time the taking's impact on the owner is disproportionate to the burden, if any, carried by other beneficiaries of the intended public use of the public action at hand. Their liberal opponents, who hold that property should serve not only liberty but also such values as social responsibility and distributive justice, seek to restrict the range of takings law as much as possible. They imply that the connection between takings and these competing values is simple: social responsibility and distributive justice are better served when the doctrines of eminent domain and regulatory takings become increasingly limited. This debate is now deadlocked.

This essay seeks to re-imagine a truly liberal takings doctrine, which deviates dramatically from the positions of both camps. Unlike the former, it disputes the desirability and even the intelligibility of both the notion that ownership should only promote individual liberty and the strict takings doctrine said to follow this libertarian utopia. Unlike the latter, it insists that takings law should not fall back to a doctrine of no, or almost no, compensation that, I will argue, is counter-productive to the very commitment to social responsibility and distributive justice. Rather, in order to

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successfully integrate social responsibility and distributive justice into takings doctrine, and also other important property values such as autonomy, personhood and utility, we need to opt for a regime of partial and differential compensation, drawing careful (and rule-based) distinctions between types of injured properties and types of benefited groups.

I. Avoiding the Extremes

Although the academic discourse of takings is rich and complex, presenting it as falling into two main paradigms is probably safe, even if slightly simplistic.[1] Libertarians advocate strong property rights and tough review of their regulation, whereas their liberal opponents defend the state ability to regulate property and seek to limit the reach of the just compensation requirement as far as possible. In this section, I argue that both camps are misguided, although their mistakes are of different types: the former holds an indefensible normative goal and the latter articulates means that consistently undermine its own (commendable) normative commitments.

A. Against Strict Full Compensation

Libertarians argue that compensation should be required every time a taking's impact on the landowner is disproportionate to the burden, if any, carried by other beneficiaries of that public use. This rule of proportionality dictates that the claimant's net burden should not be disproportionately heavy in comparison to that sustained by other beneficiaries of the public action. It disallows any changes (except, perhaps, a *de minimis* one) in the proportional economic *status quo* in the course of implementing the pertinent public project, activity, or regulation. Thus, this rule bars any public actions leading to some owners being worse off due to some of their economic value being transferred to the public or to other individuals. It preserves the prevailing distribution of assets, legal rules,

[1] At least one more group of scholars, lawyer-economists, generated important insights as to the welfare implications of competing compensatory regimes. Their main lessons are integrated into the discussion below.

and wealth (although it may still "translate" people's assets or other entitlements into wealth without their consent).[2]

This strict proportionality rule is attuned to some of private property's most important social functions: shielding the individual from claims by other persons and from the power of the public authority to redefine our property, and hence our interpersonal relations. It helps to create an untouchable private sphere, which in turn facilitates personal freedom, security, and autonomy.[3] But the strict proportionality rule and the libertarian conception of property on which it is premised—Blackstone's notorious description of ownership as "sole and despotic dominion"[4]—are both normatively impoverished and analytically incoherent.

The normative difficulty derives from the indifference of this absolutist understanding of property to some important values that property can and should serve alongside its important role as a bastion of negative liberty. A commitment to these values need not, and in fact does not, entail a wholesale rejection of the protective role of property, but does require resisting both the absolutist conception of property and its attendant strict proportionality rule.

Appreciating the role of property in promoting public welfare necessitates rejecting the Blackstonian conception of property because market failures and the physical characteristics of the resources at stake often require curtailing an owner's dominion so that ownership can properly serve the public interest.[5] A similar lesson emerges from the robust economic analysis of takings law.[6] This literature indeed shows that compensation

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[2] *See, e.g.,* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 4, 204-209 (1985); Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v Robins, 64 U. CHI. L. REV. 21, 27-28 (1997).

[3] *See, e.g.,* MILTON FRIEDMAN, CAPITALISM AND FREEDOM ch. I (1962); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW, 139-42, 238 (1998).

[4] WILLIAM BLACKSTONE, 2 COMMENTARIES *2.

[5] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32–39 (6th ed. 2003); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972). Similarly, Harold Demsetz, in his classic defense of private property, acknowledges the costs of this regime and the need to balance these costs with benefits in order to secure welfare maximization. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). *See also* Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975).

[6] The brief analysis that follows is based on my more detailed account in Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 748-56 (1999).

is at times required to prevent under-investment in their property by risk-averse landowners and to create a budgetary effect that, assuming public officials are accountable for budget management, forces governments to internalize the costs of their planning decisions. These considerations are particularly pertinent to private homeowners, who are not professional investors and who have purchased a small parcel of land with their life-savings, as well as to members of a marginal group with little political clout. But providing private landowners and public officials with proper incentives also implies that, in other cases, full compensation should not be granted. Where a piece of land is owned as part of a diversified investment portfolio, full compensation may lead to inefficient over-investment, while the possibility of an uncompensated investment is likely to lead to an efficient adjustment of the landowner investment decisions, commensurate with the risk that the land will be put to public use. Similarly, landowners who are members of powerful and organized groups can use non-legal means to force public officials to weigh their grievances properly. An indiscriminate regime of full compensation may therefore distort the officials' incentives by systematically encouraging them to impose the burden on the non-organized public or on marginal groups, even when the best planning choice would be to place the burden on powerful or organized groups.

The absolutist conception of property and the strict proportionality takings regime are also anathema to the most attractive conceptions of membership and citizenship, which insist on integrating social responsibility into our understanding of ownership. The absolutist conception of property expresses and reinforces an alienated culture, which "underplays the significance of belonging to a community, [and] perceives our membership therein in purely instrumental terms."[7] In other words, this approach "defines our obligations *qua* citizens and *qua* community members as 'exchanges for monetizable gains,' . . . [and] thus commodifies both our citizenship and our membership in local communities."[8] To be sure, the impersonality of market relations is not inherently wrong; quite the contrary, by facilitating dealings "on an explicit, quid pro quo basis," the

[7] Dagan, *id.*, at 771.

[8] *Id.* at 772 (citing MARGARET JANE RADIN, CONTESTED COMMODITIES 5 (1996)).

market defines an important "sphere of freedom from personal ties and obligations."[9] A responsible conception of property can and should appreciate these virtues of the market norms. But it should still avoid allowing these norms to override those of the other spheres of society. Property relations participate in the constitution of some of our most cooperative human interactions. Numerous property rules prescribe the rights and obligations of spouses, partners, co-owners, neighbors, and members of local communities. Imposing the competitive norms of the market on these divergent spheres and rejecting the social responsibility of ownership that is part of these ongoing mutual relationships of give and take,[10] would effectively erase these spheres of human interaction. In other words, erasing the social responsibility of ownership would undermine both the freedom-enhancing pluralism and the individuality-enhancing multiplicity that is crucial to the liberal ideal of justice.[11]

Blackstonian property and strict proportionality takings law are not only normatively disappointing; they are also suspicious on their own terms. To see why, consider the most appealing individualistic justifications of private property on which they could rest: personal liberty and personhood. These justifications typically rely on the role of ownership in providing control over the external resources that are necessary for individual autonomy[12] and over the resources that constitute personhood.[13] Neither of these values, however, can justify the law's enforcement of the rights of property owners, if the law does not simultaneously guarantee necessary as well as constitutive resources to non-owners.[14] Likewise, private ownership cannot be justified by invoking power-spreading (decentralizing decision-making power) as a prerequisite for individual

[9] ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 145 (1993).

[10] *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 55–56, 234–36, 274–75 (1991).

[11] *See generally* ANDERSON, *supra* note 9, at ch.7; DON HERZOG: HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 156, 166–68, 173–75 (1989); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

[12] *See, e.g.,* JOHN RAWLS, POLITICAL LIBERALISM 298 (1993).

[13] *See, e.g.,* Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957 (1982). Another individualistic justification of property, which is also sometimes mistakenly presented to support the libertarian conception of ownership, is reward for labor. *See* Hanoch Dagan, *Property and the Public Domain*, 17 YALE J.L. & HUMAN. 84, 90–91 (2006).

[14] *See* JEREMY WALDRON, *Homelessness and the Issue of Freedom*, *in* LIBERAL RIGHTS 309 (1993); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 377–378, 384-386, 429, 444 (1988).

liberty,[15] without remembering that concentrations of private property (i.e., private power) may, in themselves, become "sources of dependency, manipulation, and insecurity."[16] Since the same property rights that guarantee individual liberty are also, by definition, the source of other people's duties and liabilities,[17] a credible conception of property as the guardian of liberty must always endorse the dialectic of retention and distribution. This conception finds proportionality an overly-simplistic and one-sided rule. Instead, it requires "an *ongoing* commitment to dispersal of access" and insists that we design our property system so that it dynamically ensures that "lots of people have some" property and that "pockets of illegitimately concentrated power" (*i.e.*, property) do not re-emerge.[18]

B. Against No (or Almost No) Compensation

The libertarian recommended takings law is indeed disagreeable. But the prescriptions of some of its opponents, which seek to minimize the constitutional protection of property, are no less objectionable. Some progressive authors argue that an injury to individual property that benefits the public, even while disproportionately burdening a specific individual with the weight of public interest, is legitimate as long as it can be justified by "general, public, and ethically permissible policies."[19] According to this approach, most government injuries to private property should be perceived as ordinary examples of the background risks and opportunities assumed by property owners.[20]

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[15] *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM ch. I (1962); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW, 139-42, 238 (1998); Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV 907, 914-15 (1993).

[16] *See* Frank Michelman, *Tutelary Jurisprudence and Constitutional Property, in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 139 (Ellen Frankel Paul & Howard Dickman eds., 1990); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319–20 (1987).

[17] *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-14 (1927); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[18] Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURISP. 217, 228, 242-45 (1993); *see also* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 342-44, 347 (1996); Joseph William Singer, *Rent*, 39 B.C.L. REV. 1, 37-39 (1997).

[19] C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 765 (1986).

[20] *See* Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 69 (1997).

This is a troublesome approach. It celebrates the possibility of subverting the economic status quo in the pursuit of worthy social causes but underestimates the risks latent in this option. Changes in the distribution of resources in a society implemented through law are, by definition, a result of government action. As such, they endanger property holders of all sorts, rich and poor. Moreover, both central and local governments may be corrupt despite attempts to structure them in the spirit of civic virtue. In our non-ideal world, corruption of public-spiritedness can take various forms, and some of the more troubling manifestations of this phenomenon are not necessarily crude infirmities of the administrative process but more systemic and subtle problems, such as strong interest groups capturing the public authority.[21] Therefore, if we wish to make a credible claim for social solidarity and responsibility we need to remember that property owners who belong to strong and organized groups will typically defend themselves even in the absence of legal protection. As we have seen, the danger of injury from government action in the absence of such protection is greater the weaker the property owner in question. Those endangered include isolated individuals as well as individuals belonging to marginal groups lacking political power. [22]

A naïve dismissal of property's protective role may thus lead to the systematic exploitation of weak property owners and to a cynical abuse of social solidarity, subverting the very aims it intends to further. In light of this disappointing conclusion, some skepticism about the disproportionate contribution to the community's well-being is appropriate, particularly when contributions are required from politically weak or economically disadvantaged landowners. Similar caution also may be warranted when the injured owner is not part of an organized interest group, and particularly if either the

[21] *See* CAROL M. ROSE, *Ancient Constitution versus Federalist Empire: Antifederalism from the Attack on "Monarchism" to Modern Localism, in* PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 71, 87, 90-91 (1994); EPSTEIN, *supra* note 2, at 263–65.

[22] *See also Saul* Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 305-11 (1990); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 361, 366-67 (1997). The Israeli experience concerning the government's application of land expropriation laws to serve the interests of the Jewish majority at the expense of the Arab minority confirms the insight that the weak and the "other" require the protection of the law. *See, e.g.,* Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landowner 1948 – 1967*, 33 N.Y.U. J. INT'L L. & POL. 923 (2001).

direct beneficiaries of the public project or the parties who successfully diverted the loss away from their own land enjoy significant political or economic power.[23]

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The challenge of takings law is to device a regime which is sensitive to both property's distributive dimension and property's functions in promoting social welfare and social responsibility, without undermining the effects of ownership in protecting individuals, particularly politically weak individuals, from the power of government. This regime must beware of both extremes. It must reject both the conservative approach of full (cash or in-kind) compensation "for all government regulations of property" on the one hand, and a self-defeating progressive approach, which "call[s] for eviscerating the property clause in the interest of distributive justice," on the other.[24]

Elsewhere I have suggested that the guiding principle of a takings doctrine which seeks to avoid these extremes must be long-term reciprocity. This maxim implies that a public authority need not pay compensation "if, and only if, the disproportionate burden of the public action in question is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magnitude to the landowner's current injury that she gains from other—past, present, or future—public actions (which harm neighboring properties)."[25] This prescription, which also guides me in the following pages, captures the subtle feature of a credible norm of social responsibility, one that is always wary of sliding into excessive (and potentially self-defeating) injury to private interest, but nonetheless rejects strict short-term accounting in order to recognize, preserve, and foster the significance of membership in a community not only as a source of mutual advantage, but also as a locus of belonging.[26]

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[23] *See* MARGARET JANE RADIN, *Diagnosing the Takings Problem, in* REINTERPRETING PROPERTY 146, 159 (1993).

[24] GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY 59 (2006).

[25] Dagan, *supra* note 6, at 769–70.

[26] *Id.* at 773

II. RETHINKING TAKINGS

Most reconstructive efforts of takings law begin with the existing doctrine of a specific jurisdiction. Legal theorists, like other lawyers, tend to show that their favored scheme can serve as the next and better chapter of the law of the land. This is an understandable and often desirable strategy, because law is an unfolding drama that never starts from a clean slate.[27] Demonstrating the fit between a proposal and the current state of the law increases the chances of the proposal's adoption into law, meaning the probability of it making a difference in the real world. But this evolutionary strategy also involves costs. Notwithstanding the malleability of existing doctrine, starting from a given legal structure is, at least to some extent, constraining. The constraints are not necessarily embedded in the language of the pertinent constitutional or statutory instruments, and could instead rest on underlying legal and political traditions and on the institutional context.[28] The downside of evolutionary constructivism is that it may limit our legal imagination by obscuring possible legal architectures, only because they lack real life precedents. This does not mean that we should always resist legal tradition; the evolutionary nature of the law is too valuable to be discarded.[29] It does mean, however, that we should occasionally suspend our respect for tradition and search for innovative ways to improve the law, looking outside the box of our doctrinal convention for means of social advancement.

This is the approach I have adopted in this part of the essay. Although some of my suggestions are inspired by existing bits and pieces of American, German, and Israeli law, I will not bother to delve into the details of either legal system.[30] Rather, I present my proposal as if meant for a newly established legal system. I begin with a few fundamental conceptual propositions and normative prescriptions that I can only stipulate here rather than defend, followed by the doctrinal techniques that can best implement them.

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[27] This important jurisprudential insight is usually associated with RONALD DWORKIN, LAW'S EMPIRE 52-53, 164-258 (1986). I trace it back to the legal realist legacy. *See* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. *, * (forthcoming Spring 2007).

[28] *See* ALEXANDER, *supra* note 24, at 26-27.

[29] *See* Dagan, *supra* note 27, at *.

[30] I have done so elsewhere. For American law, see Dagan, *supra* note 6. For German Law, see Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. * (2007). For Israeli law, see HANOCH DAGAN, PROPERTY AT A CROSSROAD ch.3 (2005) [Heb.].

A. Foundations

The most foundational premises of the proposal below relate to my understanding of property.[31] Rather than a uniform bulwark of exclusion or a formless bundle of rights, I believe that property should be construed as it actually is in law and in life: a set of institutions, each constituted by a particular configuration of rights. More precisely: the meaning of property, the content of an owner's entitlements, varies according to the categories of social settings in which it is situated, and according to the categories of resources subject to property rights. Indeed, property institutions both construct and reflect the ideal ways of human interaction in a given category of social contexts (e.g., market, community, family) and regarding a given category of resources (e.g., land, copyright, patents). Therefore, the values served by property institutions are, at least potentially, as diverse as the values served by legal institutions at large. In particular, as already implicit in the discussion above, property institutions serve or should serve individual liberty and personhood, as well as aggregate welfare, social responsibility, and distributive justice. At least ideally, the composition of entitlements that constitute each such property institution is determined by its character and thus its underlying normative commitments, namely, its local balance of property values.

Because the two most important dimensions that distinguish property institutions from one another are the nature of the resource and the type of human interaction at hand, these two dimensions should also entail differential constitutional protection to property.

1. The Nature of the Resource

Consider first how the personhood value of property helps to understand the heterogeneity of property institutions and can thus provide corresponding guidelines for a truly liberal takings law. According to personhood theory, our attachment to the resources we hold is explicated and justified to the extent that those resources reflect our identity. Because society regards different resources (such as land, chattels, copyright, and patents) as variously constitutive of their possessors' identity, the law treats them

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[31] This paragraph summarizes my extended discussion in Hanoch Dagan, *The Craft of Property,* 91 CALIF. L. REV.1517 (2003).

differently and subjects them to different property configurations.[32] Correspondingly, the appropriate level of the constitutional protection ensured to property should also depend on this dimension: takings law should treat constitutive property, which implicates its holder's personhood, differently from fungible property, which is wholly instrumental.[33] This should not mean that even wholly fungible property, wealth as such, should have no constitutional protection.[34] Such an extreme position is lacking on at least two counts: it ignores the simple truism that self-development also requires a degree of wealth, and it exposes all owners—rich and poor, strong and weak—to the risk of being sacrificed for the public good.[35] Therefore, instead of granting blanket immunity from constitutional scrutiny to the power to tax, a much more refined approach is required. This approach acknowledges the qualitative difference between constitutive and fungible property, and is also mindful of the unique role of tax law as the body of rules distinctly designed to redistribute from the better-off to the worse-off. This approach, however, rejects the view that perceives the power to structure and allocate tax burdens as unlimited. It founds the legitimacy of current tax practice not on any kind of *a priori* immunity, but on its compliance with acceptable principles of distributive justice.[36]

2. *The Social Context*

Property institutions also differ from one another because of the type of human relationship they help structure and regulate. This spectrum of human interactions goes from arm's-length relationships between strangers (or market transactors), through

[32] *See* HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 40-49, 63-108 (1997).

[33] *See* RADIN, *supra* note 23, at 153-56. *See also* ALEXANDER, *supra* note 24, at 103 ("Property interests whose function is primarily or even exclusively economic … receive minimal protection under German constitutional law," while interests that "implicate the owner's dignity and self-realization interests and her opportunity to practice self-governance receive strong protection.")

[34] *Contra* ALEXANDER, *supra* note 24, at 103, 127, who celebrates the German law prescription because "private wealth-creating property interests . . . . are viewed as not immediately implicating the fundamental values of human dignity and self-realization," under German constitutional law, "the property clause does not protect wealth as such."

[35] And recall that, in some contexts, this risk may be particularly real and potentially alarming to members of the unorganized public, even more so to those belonging to the weak segments of society.

[36] *But cf.* Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004), who argues that the almost limitless power to tax is impossible to reconcile with existing regulatory takings law, and that such incoherence calls for a narrow understanding of the Takings Clause.

relationships between landlords and tenants, members of the same local community, neighbors, and co-owners, to intimate relationships between family members. Correspondingly, while some property institutions are structured along the lines of the Blackstonian conception of property, others (such as marital property) are dominated by a much more communitarian view of property, in which ownership is a locus of sharing. And many property institutions, governing relationships between people who are neither strangers nor intimates, lie somewhere along this spectrum from atomistic to communitarian norms.[37] Takings law should follow suit. Rather than imposing the same demand of social responsibility in all contexts, takings law should adjust its expected level of social responsibility to the scope of the social unit benefited from the public action at stake. Although aspiring to the coexistence of mutual advantage and belonging at the macro level of citizenship may be a worthy aim, we must concede that it is far more likely to be sustained at the micro level of our local communities, where our status as landowners also defines our membership. Thus, a distinction should be drawn between imposing constraints on private property to benefit the community to which the property owner belongs, and prescribing injurious regulations to benefit the public at large.[38] The more the constraint resembles the former type of cases, the higher the threshold of social responsibility that should be implemented (thus legitimizing the imposition of constraints or uncompensated harms as part of the meaning of ownership), and vice-versa.[39] This formula is also responsive to the maxim of long term reciprocity: the larger the scope of the benefited unit, the more attenuated the notion that its effects on the injured individual are likely to be offset in the long-term.

B. Technique

The main doctrinal tool for introducing these two determinative factors into the compensatory formulae of takings law is that of partial compensation.[40] Adding the

[37] Dagan, *supra* note 31, at 1559-60.

[38] For the purpose of this essay, I take the geographical divisions set by land use law as a given. Characterizing the desirable size (and other features) of a geographical community is a significant normative question of land use law as a whole, and thus beyond the scope of this essay.

[39] *See* Dagan, *supra* note 6, at 774-76.

[40] Here I borrow from German and South-African law. *See* ALEXANDER, *supra* note 24, at 239.

option of partial compensation to the familiar binary repertoire of full or no compensation introduces a degree of flexibility that, as I demonstrate below, allows fine tuning of the doctrine responding to the prescriptions outlined above.

Partial compensation can be applied in two ways: as a license for ad-hoc judicial discretion[41] or as a technique for the promulgation (by either legislatures or high courts) of more-or-less bright line rules. I strongly opt for the latter alternative. To explain why, I need not recapitulate the vast literature on the choice between bright line rules and vague standards.[42] For my purposes, mention of three normative considerations that weigh against an ad hoc approach to takings cases will suffice.[43] The first two are rather familiar: vague standards upset predictability, and therefore undermine efficiency[44] as well as liberty.[45] The third consideration, equality, may be more surprising, and is particularly important for those interested in the social responsibility of ownership.[46] Rule-based regimes promote equality by reducing the (sometimes unconscious) possibility of bias in the application of officials' discretion.[47] Contexts such as land-use and planning law, in which undue influence by the rich and powerful is a real concern, underscore the importance of this virtue. Moreover, since vague standards do not self-authenticate, they require injured landowners to spend significant resources on legal

[41] Gregory Alexander reports that this is the way it is used by German courts and approves – even applauds – this practice. *See* ALEXANDER, *supra* note 24, at 4, 135, 147, 196, 217.

[42] For some important accounts, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994).

[43] *See also* Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697 (1988) ("even a very imperfect, but clearly articulated, formal takings doctrine is likely to be superior to open-ended balancing").

[44] The inefficiency of vague standards derives both from their adverse effects on planning ability and their excessive administrative costs. *See, e.g.*, *id.*, at 1702–07.

[45] By conferring discretion on officials, vague standards subject citizens to other people's authority. *See*, *e.g.*, FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 80–81 (1944); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.CHI. L. REV. 1175, 1179 (1989).

[46] Like with liberty and efficiency, this claim is obviously limited to form. The substance of a rule may be more or less egalitarian (or friendly to liberty or efficiency). But other things being equal from a substantive point of view, clear and simple rules are, I argue, more socially progressive.

[47] *See*, *e.g.*, Sullivan, *supra* note 42, at 62.

advice and, therefore, tend to generate regressive outcomes.[48] The reason for this unfortunate result is that heavy dependence on legal advice creates a built-in advantage for repeat players and other strong parties; ordinary citizens and certainly members of weaker sections of society cannot afford long and expensive legal battles.[49] For all of these reasons, my proposed takings doctrine opts for using clear and rather simple rules.[50]

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Table 1 below outlines my proposal for eminent domain cases, which responds to the two distinctions discussed above: the distinction between fungible property and constitutive property, and the distinction between projects that benefit the injured landowner's local community and those that benefit the broader society or other communities.[51] It prescribes three bright-line rules:

(1) When the beneficiary of the public project at hand is one's local community and the expropriated land had been held as an investment, meaning the owner held it as fungible property, compensation will be calculated as only x% (say 80%) of the fair market value.

(2) By contrast, when the land is expropriated as part of a larger (e.g., regional or state) governmental project and had previously served its owner for constitutive purposes (a home or maybe also a farm or small business), full compensation (fair market value) will be awarded.

(3) In between these two extreme categories are cases in which constitutive land is expropriated 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

[48] *Cf.* Lawrence Lessig, *Re-crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 58–59 (2006) (arguing that "[u]nless the freedoms of the public domain are self-authenticating, they will be unequally distributed").

[49] *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. & SOC'Y REV. 95 (1974).

[50] The requirement of simplicity is important because a thick cluster of complicated rules is subject to many of the difficulties of a vague standard: it both upsets predictability and undermines equality, because it requires a specialist to orient the uninitiated in the legal labyrinth.

[51] For a different suggestion of differential compensation based on the first consideration, see D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 298 (2006). Admittedly, neither the distinction between local communities and larger governmental bodies, nor the distinction between constitutive and fungible properties, is in itself clear. But I believe that rule-conscious judges can use the rather thick body of property law that already resorts to these distinctions in order to integrate them into takings jurisprudence in a rule-based form.

should both trigger the award of intermediate measures of recovery: y% of the fair market value where x% < y% < 100% (say 90%).

TABLE 1: ***Differential Compensation for Eminent Domain***

		Identity of Beneficiary	
		Local Community	**Broader Society**
Type of Resource	**Fungible Property**	x% of Fair market value	y% of fair market value
	Constitutive Property	y% of fair market value	fair market value

This proposed scheme should also prove distributionally sensitive, since it makes the targeting of owners of constitutive land (usually ordinary citizens with limited political influence), more expensive than that of owners of fungible land (typically real estate holding corporations and wealthy individuals).

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Takings law could employ a very similar regime for regulatory takings cases, as shown in Table 2. The basic thrust of this scheme applies the familiar diminution of value test, [52] 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. But unlike current doctrine, my alternative scheme is both rule-based and sensitive to the normative distinctions discussed above. This scheme establishes fixed minimum thresholds of diminution in value that a regulatory taking must exceed before the government is obligated to provide compensation.[53] In correspondence to the doctrine proposed above for eminent domain cases, the threshold applied would depend on whether the type of property at issue is fungible or constitutive and on the identity of the beneficiary of the regulation, so that uncompensated harms are better tolerated when fungible rather than

[52] The diminution of value test originated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[53] If the diminution in value from a regulatory taking is below the appropriate threshold, the government is not obligated to compensate the property owner. If, by contrast, the diminution in value surpasses the threshold, the government must provide compensation for the entire diminution in value.

constitutive properties are at stake and when public action results from the work of local rather than larger government bodies. Thus, the thresholds would be set, relative to the fair market value of the property, at a%, b%, and *de minimis* (0%), where a=(100–x) and b=(100–y). Finally, the reference point for measuring the percentage of the claimant's loss in this proposed doctrine is the value of the parcel as a whole[54] and, in the event that the claimant owns other parcels within the relevant local community, the total value of these holdings.[55]

TABLE 2: ***Differential Threshold for Regulatory Takings***

Type of Resource		Identity of Beneficiary: Local Community	Identity of Beneficiary: Broader Society
	Fungible Property	a% of fair market value	b% of fair market value
	Constitutive Property	a% of fair market value	*De minimis*

Where a= (100–x)>b= (100–y)>*de minimis* and x and y correspond to the values in Table 1.

If, as I think it should, this doctrine remains aligned with that of eminent domain, and assuming that the figures I mentioned above are adopted, then x here should represent 20% and y should represent 10%.

This scheme too is distributionally sensitive,[56] because a given loss of absolute dollar value resulting from a specific public need may be very substantial if imposed on an inexpensive parcel and much less so if imposed on a more costly one.[57] Employing this

[54] In this scheme, then, a strategy of "conceptual severance," be it horizontal, vertical, or functional, is disallowed. For a critique of conceptual severance, see, e.g., ALEXANDER, *supra* note 24, at 78–80.

[55] For this refinement, see Dagan, *supra* note 6, at 783.

[56] Although, as always happens when clear rules serve as proxies for underlying normative commitments, sensitivity will not necessarily be found. Specifically, the effect described will not always apply because the physical configuration of the parcels may also influence the diminution of their value in the event that public action affects them.

[57] This will be true whenever the required injury is fixed, irrespective of the injured parcel's value.

version of the diminution of value test will therefore (at least at the margin) discourage the public authority from choosing inexpensive (and usually small) parcels. Instead, all things being equal from the planning perspective, this test will encourage the public authority to impose the required burden on landowners of more costly (and usually larger) parcels. Insofar as owners of inexpensive parcels are generally less well-off than owners of more costly ones, this bright line rule will in all likelihood lead to desirable results.

CONCLUDING REMARKS

Property is a complex and heterogeneous legal construct, which regulates a wide range of human relationships. This heterogeneity explains why the institutions of property bear only a family resemblance. Property law, in its wisdom, has always tailored different configurations of entitlements to different property institutions so that they fit both the social context and the nature of the resource at stake. In this way, each property institution is, at least ideally, designed according to the balance between property values best suited to it.

This conspicuous characteristic of property is not echoed in takings law, which may explain why this important doctrine has so long been struggling for coherence with so little success. Implanting the wisdom of property law into takings law requires a rather radical reshaping of its doctrines. But the exercise is worthy because only in this way can we break away from both the normatively disappointing blueprint advocated by the right and its analytically self-defeating counterpart celebrated by the left.