

## ESSAY

### THE SOCIAL RESPONSIBILITY OF OWNERSHIP

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#### INTRODUCTION

Gregory Alexander's new book, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*,<sup>1</sup> (hereinafter *The Global Debate*) provides a unique opportunity to reflect on the functions of comparative law and the nature of ownership. This Essay highlights the role of comparative law in upsetting law's tendency to turn contingency into necessity, but also warns against using comparative law to yield normative conclusions without an independent and critically constructive legal inquiry. The Essay offers such an inquiry in order to substantiate Alexander's call to adopt the German constitutional model of incorporating social responsibility into the concept of property. It studies the reasons in favor of incorporating a social responsibility norm as well as the potential risks that such a move entails, and outlines the contours of a takings doctrine that deliberately incorporates the social responsibility of property owners.

*The Global Debate* is an exciting book because it is the first to devote sustained, profound, and sophisticated attention to comparative law in the important context of takings law. Alexander's journey around the globe—to Germany, South Africa, India, and Canada—is well worth his and our attention. His mastery of these comparative materials yields many illuminating insights of which two, one concep-

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<sup>1</sup> GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006).

tual and the other normative, stand out. The most important conceptual claim of the book is that creating a constitutional right to property does not entail any specific doctrinal or policy outcomes.<sup>2</sup> Rather, these outcomes depend on the interpretation of the constitutional text, which in turn depends on the underlying legal and political traditions and on the institutional context.<sup>3</sup> At the normative level, Alexander's most important recommendation is to explicitly recognize the social-obligation dimension of ownership.<sup>4</sup>

This Essay focuses on the normative claim<sup>5</sup> of *The Global Debate* and aims to be a friendly critique. It is a critique because it exposes the limits of Alexander's method. To be sure, comparative law can be a powerful component of normative legal theory.<sup>6</sup> Comparative law can serve, as it often does in Alexander's book, to complicate cases that seem easy from a narrow municipal perspective and to open our legal imaginations to viable new possibilities.<sup>7</sup> But comparative law, in and of itself, can never yield a thick normative recommendation. The gist of my critique, then, is that Alexander's comparative method in *The Global Debate* falls short as a buttress for the normative prong of his book's message.

This critique is nonetheless friendly because one way of reading this Essay—the way I hope it will be read—is as a supplement to *The Global Debate*. Part I of this Essay discusses the reasons for incorporating a robust commitment to social responsibility into the concept of ownership; Part II considers the potential risks of pursuing such a worthy cause; and Part III addresses the means by which law can and should realize such a paradigm shift. The divergence between these doctrinal means and some of Alexander's comparative findings is the most concrete evidence of the inadequacy of comparative law for this task. This Essay thus fills a gap in the normative prong of the argument in *The Global Debate* and pushes Alexander's normative claim further than his comparative method allows.

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<sup>2</sup> See *id.* at 26.

<sup>3</sup> See *id.* at 26–27.

<sup>4</sup> *Id.* at 21.

<sup>5</sup> I concur with many of Alexander's conceptual claims. See generally HANOCH DAGAN, UNJUST ENRICHMENT (1997) (discussing the importance of “particularistic cultural investigation” in studying legal problems).

<sup>6</sup> See ALEXANDER, *supra* note 1, at 20–21.

<sup>7</sup> See Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 412, 447–48, 454–55 (1985); Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 106–07, 114–15 (1989).

I  
REASONS

One of Alexander's most important recommendations is that American takings jurisprudence should adopt "a social-obligation norm."<sup>8</sup> This recommendation relies heavily on the German example, specifically on section 14(2) of the German Basic Law (*Grundgesetz*), which provides that "[o]wnership entails obligations. Its use should also serve the public interest."<sup>9</sup> Chapter Three of *The Global Debate* describes German jurisprudence in some detail and celebrates its achievements.<sup>10</sup> That chapter also notes that the German understanding of property is rooted in the most fundamental principle of the German Constitution: human dignity.<sup>11</sup> Its point, therefore, "is not to create a zone of security from a powerful and threatening state but to make it possible for individuals to realize their own human potential."<sup>12</sup> This understanding of property facilitates the efforts of German law to practically mediate "individual liberty and social welfare" and "'promot[e] the virtue of social responsibility.'<sup>13</sup>

The thick description of German constitutional norms cannot, in and of itself, persuade readers to follow the German example. They can use the German experience as a source of "self-knowledge and self-understanding," realizing that what they currently take for granted is in fact contingent,<sup>14</sup> and yet refuse, upon reflection, to borrow the social-obligation norm. This refusal need not be based on *a priori* resistance to the idea of constitutional borrowing, or even on a more contingent judgment as to the feasibility of such transplantation.<sup>15</sup> Even if readers are, as they should be, open to the possibility of borrowing, and even if they are convinced that enough traces of a social-obligation norm are in American takings jurisprudence to make this borrowing feasible,<sup>16</sup> they may still prefer the status quo if the German model is normatively unattractive. They *could* go for it, but why *should* they?

Alexander seems to be aware of this rejoinder. He realizes that "[a] fully developed social-obligation norm requires some social vision, that is, some substantive conception of the common good that serves as the fundamental context for the exercise of the rights and

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<sup>8</sup> See ALEXANDER, *supra* note 1, at 223–35.

<sup>9</sup> The text of this law is excerpted in the endnotes of Alexander's book. See *id.* at 275 n.2.

<sup>10</sup> See *id.* at 97–147.

<sup>11</sup> See *id.* at 110–11.

<sup>12</sup> See *id.* at 113.

<sup>13</sup> *Id.* at 146 (alteration in original) (citation omitted).

<sup>14</sup> See *id.* at 8.

<sup>15</sup> See *id.* at 10–11.

<sup>16</sup> See *id.* at 77, 223–28, 233–35.

duties of private ownership.”<sup>17</sup> He rejects the thin, minimalist view of the social obligation of property that replicates the libertarian conception of ownership and instead adopts a thicker model of social responsibility in which owners “are under a continuing duty to . . . provide the society of which [they are] member[s] those benefits that the society reasonably regards as necessary and that have some reasonable relationship with ownership of the affected land.”<sup>18</sup>

This model poses two problems. The first is the vagueness of these open-ended statements, which I address in the last part of this Essay. For now, I want to focus on the second difficulty. If the thin and thick conceptions are merely competing interpretations of “inevitably contestable”<sup>19</sup> questions that are bound to remain “the central locus of an ongoing and irreducible tension,”<sup>20</sup> the problem of persuasion recurs: why concur with Alexander’s preference for one rather than the other?

Readers should join Alexander’s conclusions because, and this is in my view the only credible answer to this question, he is not merely expressing a preference. For Alexander, the German model is not just a competing option that enables us to see the contingency of the American system, but a normatively superior alternative<sup>21</sup>—it is not just good for Germans, it is good, period.

Establishing this normative superiority solely on underlying legal and political traditions is nonsensical, at least for Alexander. The point of Alexander’s work is to use constitutional borrowing as a “catalyst for [improving] preexisting legal cultures.”<sup>22</sup> However, Alexander’s attempt to rely on general ontological propositions, according to which “[m]embership in political and social communities is an inevitable product of the human condition”<sup>23</sup> so that “merely by virtue of our inherent embeddedness in communities, we owe obligations to others,”<sup>24</sup> is also doomed to fail. The conceptual contribution of *The*

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<sup>17</sup> *Id.* at 230.

<sup>18</sup> *See id.* at 231.

<sup>19</sup> *Id.* at 230.

<sup>20</sup> *Id.* at 218.

<sup>21</sup> *See generally id.* at chs. 3, 5 (examining the German constitutional model in Chapter Three and applying the lessons that comparative analysis provides to American takings jurisprudence in Chapter Five).

<sup>22</sup> *See id.* at 245. For a more general critique of over-reliance on existing prevailing values, see ROBIN WEST, *Adjudication Is Not Interpretation*, in NARRATIVE, AUTHORITY, AND LAW 89, 106–08 (1993). For the ways in which normative analysis develops legal tradition, see, for example, RONALD DWORKIN, *LAW’S EMPIRE* 52–53, 164–258 (1986); and KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 36–38, 44, 49, 60, 194–95, 222–23 (1960).

<sup>23</sup> ALEXANDER, *supra* note 1, at 231.

<sup>24</sup> *Id.*

*Global Debate*—its persuasive account of the variety and contingency of the constitutional conception of ownership—defies such a strategy.<sup>25</sup>

Fortunately, good normative reasons exist to support an explicit constitutional social-obligation norm. Put differently, making “social responsibility . . . a constitutive component of the conception of ownership”<sup>26</sup> is not a matter of preference or tradition, but rather of justice. A theory of property that excludes social responsibility is unjust. Its injustice can be approached in two ways: first, by exposing its incompatibility with the most common justifications of ownership and second, by highlighting its disagreement with the best conceptions of citizenship and membership.<sup>27</sup>

Each of these tasks could occupy a separate volume, but for the purposes of this Essay, a rough sketch of both will suffice. First, consider how even the most traditional justifications of property reject Blackstone’s description of ownership as “sole and despotic dominion,”<sup>28</sup> and necessitate incorporating some dimension of social responsibility into the concept of property. Thus, advocates of property as a means of promoting public welfare, including many students of the economic analysis of law, explicitly or implicitly acknowledge that 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.<sup>29</sup> More significantly, personal liberty and personhood, the more individualistic justifications of private property, also imply a dimension of social responsibility. These justifications typically rely on the role of ownership in providing control over the external resources that are necessary for individual au-

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<sup>25</sup> This point is merely a contextual manifestation of a more general critique of the attempt to rely on ontological communitarianism as the foundation of normative conclusions. See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 701–05 (1992).

<sup>26</sup> Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 772 (1999).

<sup>27</sup> Notice the difference between these types of arguments: the former merely show that the most canonical defenses of property implicitly assume some dimension of social responsibility; the latter more directly defend the importance of incorporating social responsibility into our conception of property.

<sup>28</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES \*2.

<sup>29</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32–39 (1972); 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 the system’s benefits in order to secure welfare maximization. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 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) (using the history of the American West to develop a more rigorous account of the benefits and costs of private property rights definition and enforcement activity).

tonomy<sup>30</sup> and over the resources that constitute personhood.<sup>31</sup> Therefore, neither of these values can justify the law's enforcement of the rights of those who have property if the law does not simultaneously guarantee necessary—as well as constitutive—resources to those who do not.<sup>32</sup>

Not only does the social responsibility of ownership comply with the most compelling justifications of private property, it also corresponds to, and is indeed required by, the most attractive conceptions of membership and citizenship. The absolutist conception of property expresses and reinforces a culture of alienation that “underplays the significance of belonging to a community, [and] perceives our membership therein in purely instrumental terms.”<sup>33</sup> 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.”<sup>34</sup> 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 market defines an important “sphere of freedom from personal ties and obligations.”<sup>35</sup> A responsible conception of property can and should appreciate these virtues of the market norms, but should still avoid allowing these norms to override those of the other spheres of society. Property relations constitute 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 ongo-

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<sup>30</sup> See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 298 (1993).

<sup>31</sup> See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982) (discussing the relationship between the justification of control over external resources and their role in constituting personhood). Another individualistic justification for 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*, 18 *YALE J.L. & HUMAN. (SUPPLEMENT)* 84, 90–91 (2006).

<sup>32</sup> See respectively Jeremy Waldron, *Homelessness and the Issue of Freedom*, in *LIBERAL RIGHTS* 309 (1993); and JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 377–78, 384–86, 429, 444 (1988). Furthermore, there is no way of justifying private ownership that invokes power spreading (decentralizing decision-making power) as a prerequisite for individual liberty without remembering that concentrations of private property (i.e., private power) may, in themselves, become “sources of dependency, manipulation, and insecurity.” See Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, in *LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* 127, 139 (Ellen Frankel Paul & Howard Dickman eds., 1990) [hereinafter Michelman, *Tutelary Jurisprudence*]; Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1319–20 (1987).

<sup>33</sup> Dagan, *supra* note 26, at 771.

<sup>34</sup> *Id.* at 772 (quoting MARGARET JANE RADIN, *CONTESTED COMMODITIES* 5 (1996)).

<sup>35</sup> See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 145 (1993).

ing mutual relationships of give-and-take<sup>36</sup> 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.<sup>37</sup>

## II

### RISKS

These last comments imply an attendant risk to incorporating social responsibility into our conception of property. Pursuing this (desirable) avenue incautiously—overextending the social responsibility aspect of ownership by eliminating or excessively weakening the market rules which govern the production, circulation, and valuation of economic goods—may threaten the integrity of the economy and thus undermine our economic freedom.

Another risk comes from expansive interpretations of property's social responsibility aspect which minimize the constitutional protection of property. In these interpretations, an injury to individual property that benefits the public, even while disproportionately burdening a specific individual with the weight of public interest, is legitimate if "general, public, and ethically permissible policies" can justify it.<sup>38</sup> According to this approach, we should perceive most government injuries to private property as ordinary examples of the background risks and opportunities that property owners accept.<sup>39</sup>

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 possibility. 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

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<sup>36</sup> See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 55–56, 234–36, 274–75 (1991) (discussing the various ways in which neighbors, friends, and family engage in reciprocal relationships that do not conform to traditional economic relationships).

<sup>37</sup> See generally ANDERSON, *supra* note 35, at ch. 7 (reasoning that the basis of a liberal society is pluralism); DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 156, 166–68, 173–75 (1989) (discussing the various ways in which multiple societal roles "leak" into each other and allow the individual to make free choices about who they are and how they want to interact with the world); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) (reasoning that the freedom to structure different communities, political arrangements, and choice of currencies form the basis of distributive justice).

<sup>38</sup> See C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 764–65 (1986).

<sup>39</sup> 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).

structure them in the spirit of civic virtue. In our nonideal world, corruption of public spiritedness can take various forms; 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 interest groups capturing the public authority.<sup>40</sup> Therefore, if we wish to make a credible claim for social solidarity and responsibility—to uphold “the bonds of civic mutuality” against the systemic threat of “corrosion by the privatization . . . of politics”<sup>41</sup>—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. The danger of injury from government action in the absence of legal protection is greater the weaker the property owner in question.<sup>42</sup> Those endangered include isolated individuals as well as individuals belonging to marginal groups with minor political clout.<sup>43</sup>

Hence, the naïve version of the social-responsibility school may lead to the systematic exploitation of weak property owners and to a cynical abuse of social solidarity, subverting the very aims that the social responsibility ideal 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.<sup>44</sup> Similar caution also may be warranted when the injured owner is not part of an organized interest group, particularly if either the 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.<sup>45</sup> When incorporating social responsibility into our understanding of property,

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<sup>40</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 263–65 (1985); CAROL M. ROSE, *Ancient Constitution Versus Federalist Empire: Antifederalism from the Attack on “Monarchism” to Modern Localism*, in *PROPERTY AND PERSUASION* 71, 87, 90–91 (1994); cf. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145 (1977–1978) (discussing different models of local governance and how these models explain the practice of governance).

<sup>41</sup> Michelman, *Tutelary Jurisprudence*, *supra* note 32, at 138.

<sup>42</sup> See 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 & 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).

<sup>43</sup> See *supra* note 42 and accompanying text.

<sup>44</sup> See MARGARET JANE RADIN, *Diagnosing the Takings Problem*, in *REINTERPRETING PROPERTY* 146, 159 (1993).

<sup>45</sup> See *id.*

the challenge is to show that the concept of property can encompass social responsibility without destabilizing the effects of ownership in protecting individuals, particularly politically weak individuals, from the power of government.

In theory, Alexander is well aware of these risks and the challenge they pose. He explicitly distances himself from “a highly deferential approach that is premised on a naively benign view of government.”<sup>46</sup> Thus, he rightly endorses a “balanced approach . . . that steers between the two extremes”<sup>47</sup> of a “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.<sup>48</sup> I believe that this understanding explains Alexander’s support of the approach that I have proposed elsewhere, under which the social responsibility of ownership should not be one-sided but based on long-term reciprocity.<sup>49</sup> This prescription 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).<sup>50</sup>

I obviously have no complaints against these theoretical propositions. My difficulty lies elsewhere. As I will show below, some of the more specific doctrinal details of the German takings law that Alexander appears to endorse do not sufficiently comply with the balanced approach that both of us share.

### III MEANS

Normative endorsement of the German view of the constitutive role of social responsibility does not require the perfunctory adoption of the doctrinal means that German law uses for furthering this conception of property. Quite the contrary, we must carefully examine this doctrine against both the reasons for and the risks of supporting the social responsibility of ownership. We should consider whether the German doctrine indeed corresponds to the balanced approach to property. If it does not, we need to offer an improved doctrine that is better able to cope with this formidable challenge. Thus, in this

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<sup>46</sup> See ALEXANDER, *supra* note 1, at 68.

<sup>47</sup> *Id.* at 59.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 232.

<sup>50</sup> Dagan, *supra* note 26, at 769–70.

Part of the Essay, I critically examine three salient features of the German takings doctrine: its distinction between constitutive and fungible property, the significance it accords to other people's dependence on the property at stake, and its practice of partial compensation.<sup>51</sup> I then outline an alternative to the German approach.<sup>52</sup>

#### A. Constitutive and Fungible Property

The German Constitutional Court relies on a purposive and contextual approach to the constitutional protection of property.<sup>53</sup> It "recognizes that the institution of property has multiple potential purposes" and that "different types of particular property interests" serve different purposes.<sup>54</sup> Accordingly, it prescribes that the level of constitutional protection depends on the "nature of the asserted property interest in terms of its type and function."<sup>55</sup> "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."<sup>56</sup>

This "sliding scale approach to evaluating . . . the social obligation and the social function of property"<sup>57</sup> is indeed desirable. It understandably insists on bypassing conceptualism and instead adopts the realistic methodology of contextual normative analysis.<sup>58</sup> This approach also justifiably resists analysis at the overly heterogeneous level

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<sup>51</sup> A fourth and particularly problematic feature is the weight German and South African courts accord to the significance of the public interest underlying the government action that led to individual loss. Alexander approvingly mentions this feature. See ALEXANDER, *supra* note 1, at 115, 147, 159–61, 240. But this feature does not withstand critical scrutiny.

Reliance on the importance of the public interest involved as an ameliorating factor in an uncompensated injury to property may be intuitively appealing, but is not normatively justified. It is intuitively appealing because, the more important a project, the more we may feel the government is justified to pursue it even if it undermines the entitlements of individual property owners. This intuition may well be correct insofar as it is invoked in the context of the legitimacy of the government action at hand. Whether courts should strike out such actions if they deem their purposes insufficiently important is a separate and quite complex matter. But the importance of public action is, in any event, hardly relevant to the owner's grievances concerning the project's monetary consequences. After all, a sufficiently important project usually justifies imposing its cost on the public purse.

<sup>52</sup> The intriguing South African doctrine of positive duties that the social responsibility of ownership entails also deserves elaborate discussion, but is beyond the scope of this Essay. See ALEXANDER, *supra* note 1, at 181.

<sup>53</sup> See *id.* at 102.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 139.

<sup>56</sup> *Id.* at 103.

<sup>57</sup> *Id.* at 138.

<sup>58</sup> See generally Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007) (reconstructing the realist approach to law).

of property.<sup>59</sup> Finally, it correctly insists that the appropriate level of constitutional protection of property depends on the distinction between constitutive property, which implicates the personhood of its holder, and fungible property, which is wholly instrumental.<sup>60</sup>

The German doctrine, however, takes this approach too far. The Federal Constitutional Court categorically prescribes that, for constitutional purposes, property means “discrete, concrete assets, not wealth or value.”<sup>61</sup> Because “private wealth-creating property interests . . . are viewed as not immediately implicating the fundamental values of human dignity and self-realization,”<sup>62</sup> under German constitutional law, “the property clause does not protect wealth as such.”<sup>63</sup>

A *per se* rule of this type, which leaves money without constitutional protection, is unfortunate for at least two reasons: 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.<sup>64</sup> Therefore, instead of granting blanket immunity from constitutional scrutiny to the power to tax, takings law requires a much more refined approach. I propose such an approach below. 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. However, it rejects the view that perceives the power to structure and allocate tax burdens as unlimited. It bases the legitimacy of current tax practice not on any kind of *a priori* immunity, but on its compliance with acceptable principles of distributive justice.<sup>65</sup>

## B. Dependence or Community

Alexander reports that German law “inquires whether and to what extent other persons are dependent on the use of the owner’s

<sup>59</sup> Cf. Hanoach Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1532–33 (2003) (discussing the liberating effect of the “bundle of sticks” metaphor for conceptualizing property).

<sup>60</sup> See RADIN, *supra* note 44, at 153–56.

<sup>61</sup> ALEXANDER, *supra* note 1, at 127.

<sup>62</sup> *Id.* at 103.

<sup>63</sup> *Id.* at 127.

<sup>64</sup> And recall that in some contexts, this risk may be particularly real and potentially alarming to members of the unorganized public, and even more so to those belonging to the weak segments of society.

<sup>65</sup> *But cf.* Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004) (arguing that there is no way to reconcile the almost limitless power to tax with existing regulatory takings law and that such incoherence calls for a narrow understanding of the Takings Clause).

property.”<sup>66</sup> Greater dependence implies a greater social function and thus lesser constitutional protection.<sup>67</sup>

Dependence touches on an important intuition, but is ultimately the wrong test. Although dependence is surely not always socially desirable, dependence may nonetheless be relevant insofar as it denotes the need of someone other than the owner because need-based concerns play an important role in the justification of property.<sup>68</sup> But relying on the need of another to justify an uncompensated infringement of property irrespective of the other’s position vis-à-vis the owner seems arbitrary because the mere existence of such a need does not in itself address the crucial question of whether the owner or the public should incur the cost.

Therefore, instead of looking at the dependence of another party (or parties), I suggest focusing on the nature of the relationship between the dependent party and the owner whose property is diminished in value. This focus follows from my insistence on social responsibility as a reciprocal relationship in the long term, a view that Alexander shares.<sup>69</sup> A focus on long-term reciprocity, as described above, captures the subtle feature of a credible social-obligation norm, one that is always wary about sliding into excessive and potentially self-defeating injury to private interest.<sup>70</sup> Caution against inordinate utopianism about membership or citizenship demands rejecting a regime of complete noncommodification (no compensation). However, “[b]y insisting that there should be no strict short-term accounting, [long-term reciprocity] tries to recognize, preserve, and foster the noncommodified significance of [membership] alongside this calculated, thus commodified, aspect of it.”<sup>71</sup> Long-term reciprocity urges us to adhere to our plural and ambivalent understandings of membership as both a source of mutual advantage and a locus of belonging.<sup>72</sup>

Appreciating the significance that membership and long-term reciprocity hold for a rigorous conception of social responsibility helps clarify the role that the scale of the benefited social unit plays in determining property owners’ expected level of social responsibility.<sup>73</sup> Although aspiring to the coexistence of mutual advantage and belonging at the macro level of citizenship may be a worthy aim, “we must

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<sup>66</sup> ALEXANDER, *supra* note 1, at 135.

<sup>67</sup> *See id.*

<sup>68</sup> *See* Jeremy Waldron, *Property, Justification, and Need*, 6 CAN. J. L. & JURISPRUDENCE 185, 206–10 (1993). *But cf.* Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989) (arguing that need-based concerns have no place in the concepts of private law).

<sup>69</sup> *See supra* notes 25–31 and accompanying text.

<sup>70</sup> *See supra* notes 39–44 and accompanying text.

<sup>71</sup> Dagan, *supra* note 26, at 773.

<sup>72</sup> *See id.*

<sup>73</sup> *See id.* at 774–75.

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.”<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

### C. Partial Compensation

Perhaps the most vital doctrinal tool that German and South African courts use for incorporating the purposive and contextual approach to takings law is the possibility of awarding partial compensation.<sup>77</sup> In his discussion of compensation practices,<sup>78</sup> Alexander recommends the adoption of this “via media between the two extremes of total compensation (that is, full fair market value) and no compensation whatsoever”<sup>79</sup> because it “reflects the social dimension of the constitutional property right.”<sup>80</sup>

Part of the reason for Alexander’s support of these compensation practices is the discretion they openly confer on the adjudicating courts. Alexander applauds German courts for rejecting “any sort of categorical approach”<sup>81</sup> to takings law. He associates the preference for rules with formalism, in contrast to an approach that affords courts the authority to do what “their constitutions’ commitments to property require in the immediate case,”<sup>82</sup> which he associates with purposive realism, and favors the latter over the former.<sup>83</sup> Furthermore, because Alexander believes that “[t]he precise parameters of the owner’s obligations to [the] other members of the community . . . could not be predefined,”<sup>84</sup> he endorses a “dynamic” approach to the

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<sup>74</sup> *Id.* at 774.

<sup>75</sup> For purposes of this Essay, I take the geographical divisions set by land use law as 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.

<sup>76</sup> *See* Dagan, *supra* note 26, at 776.

<sup>77</sup> *See* ALEXANDER, *supra* note 1, at 239.

<sup>78</sup> *See id.* at 235–43.

<sup>79</sup> *Id.* at 98.

<sup>80</sup> *See id.* at 99.

<sup>81</sup> *Id.* at 147.

<sup>82</sup> *Id.* at 217.

<sup>83</sup> *See id.* at 215–17.

<sup>84</sup> *Id.* at 196.

constitutional protection of property.<sup>85</sup> In this view, we should openly admit that “courts are constantly distributing . . . property”<sup>86</sup> because property “is always in flux.”<sup>87</sup>

Partial compensation indeed stands as a powerful tool for developing a more nuanced takings doctrine than the one currently available. It also represents, as I will explain shortly, a valuable instrument for incorporating into the doctrine 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. And yet here again I cannot fully join Alexander in his celebration of German law. His endorsement of ad hoc application of constitutional commitments and ex post adjustment of property rights is unjustifiable. Fortunately, it is also unnecessary in order to achieve his (and my) goals.

The vast literature on the choice between bright line rules and vague standards need not be recapitulated here.<sup>88</sup> For my purposes, mention of three normative considerations that weigh against an ad hoc approach to takings cases will suffice.<sup>89</sup> The first two are familiar: vague standards upset predictability and therefore undermine efficiency<sup>90</sup> as well as liberty.<sup>91</sup> The third consideration, equality, may be more surprising but is particularly important for those interested in the social responsibility of ownership.<sup>92</sup> Rule-based regimes promote equality by reducing the (sometimes unconscious) possibility of bias in the application of officials’ discretion.<sup>93</sup> Contexts such as land-use

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<sup>85</sup> See *id.* at 135.

<sup>86</sup> *Id.* at 4.

<sup>87</sup> *Id.*

<sup>88</sup> For some important analyses of this choice, 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); and Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994).

<sup>89</sup> See Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697 (1988) (“[E]ven a very imperfect, but clearly articulated, formal takings doctrine is likely to be superior to open-ended balancing.”).

<sup>90</sup> 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.

<sup>91</sup> 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).

<sup>92</sup> As 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.

<sup>93</sup> See, e.g., Sullivan, *supra* note 88, at 62.

and planning law, in which undue influence by the rich and powerful is a real concern, underscore the importance of this virtue. Moreover, because vague standards do not self-authenticate, they require injured landowners to spend significant resources on legal advice and therefore tend to generate regressive outcomes.<sup>94</sup> 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.<sup>95</sup>

For all of these reasons, proponents of including a social-responsibility norm in the meaning of ownership should support clear and simple<sup>96</sup> rules rather than vague standards.<sup>97</sup> By the same token, our conception of ownership should incorporate social responsibility through the means of ex ante refinements of the regime that governs compensation for takings, rather than through ex post adjustments of people's entitlements.<sup>98</sup>

#### D. An Alternative

The existing German takings doctrine thus disappoints in both form and substance. However, other ways of instilling social responsibility into takings law are still viable. In other words, comparative law should not be allowed to, somewhat paradoxically, limit our legal imagination by obscuring possible legal architectures only because they lack real-life precedents. As always, respect for tradition should not block the search for innovative ways to improve the law, thus providing means for social advancement.<sup>99</sup>

In what follows, I integrate the lessons of the previous sections into a doctrinal framework adopting the insight, gleaned from German law, that partial compensation can provide a means for integrating social responsibility into takings law. Unlike the German doctrine,

<sup>94</sup> Cf. Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. (SUPPLEMENT) 56, 58–59 (2006) (arguing that “[u]nless the freedoms of the public domain are self-authenticating, they will be unequally distributed”).

<sup>95</sup> See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

<sup>96</sup> 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).

<sup>97</sup> For reasons I cannot delve into here, I also believe that legal realism, at least in its best light, is in fact rule oriented. See Dagan, *supra* note 58, at Section III.B.2.a.

<sup>98</sup> Furthermore, ex post adjustments may be inhospitable to interpersonal trust and cooperation—the most fundamental features of community—because when the rules of the game are uncertain, parties tend to be suspicious of one another.

<sup>99</sup> As Benjamin Cardozo wrote, law is an “endless process of testing and retesting,” which aims to remove mistakes and eccentricities and preserve “whatever is pure and sound and fine.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

however, this alternative doctrine opts for using clear and simple rules. It also draws on the distinction between types of benefited communities rather than on the issue of dependence. Finally, although my suggested doctrine distinguishes between constitutive and fungible property, it avoids the dangerously naïve approach that leaves fungible property without constitutional protection.<sup>100</sup>

Table 1 below outlines this proposal for eminent domain cases. It prescribes three rules. First, 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, takings law will fix compensation at only  $x\%$  (say 80%) of the fair market value. Second, 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, such as a home or maybe also a farm or small business, the government will award full compensation in the form of fair market value. Third, between these two extreme categories lie 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 should both trigger an award of intermediate measures of recovery:  $y\%$  of the fair market value (say 90%) where  $x\% < y\% < 100\%$ .

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

<sup>100</sup> Admittedly, neither the distinction between local communities and larger governmental bodies, nor the distinction between constitutive and fungible properties is in itself crystal clear. But I believe that rule-conscious judges can use the rather thick body of property law that already resorts to these distinctions to integrate them into takings jurisprudence in a rule-based form.

This proposed scheme should also prove distributionally sensitive, since it makes the targeting of owners of constitutive land, who are usually simple citizens without major political clout, more expensive than that of owners of fungible land, who are typically real estate holding corporations and wealthy individuals.

Takings law could employ a very similar regime for regulatory takings cases, as shown in Table 2. The basic thrust of this scheme, which develops ideas I have suggested elsewhere,<sup>101</sup> applies the familiar diminution of value test,<sup>102</sup> 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 that the public action caused 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 must provide compensation.<sup>103</sup> Similar 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. This would ensure that uncompensated harms are better tolerated when fungible rather than 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  $b = (100 - y)$ .<sup>104</sup> Finally, it is important to note that 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<sup>105</sup> and, in the event that the claimant owns other parcels within the relevant local community, the total value of these holdings.<sup>106</sup>

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<sup>101</sup> See Dagan, *supra* note 26.

<sup>102</sup> The diminution of value test originated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>103</sup> 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.

<sup>104</sup> See *infra* tbl. 2.

<sup>105</sup> In this scheme, then, a strategy of “conceptual severance,” be it horizontal, vertical, or functional, is disallowed. For a critique of conceptual severance, see, for example, ALEXANDER, *supra* note 1, at 78–80.

<sup>106</sup> For this refinement, see Dagan, *supra* note 26, at 783.

TABLE 2: DIFFERENTIAL THRESHOLDS FOR REGULATORY TAKINGS

		Identity of Beneficiary	
		Local Community	Broader Society
Type of Resource	Fungible Property	a% of fair market value	b% of fair market value
	Constitutive Property	b% of fair market value	<i>De minimis</i>

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 *a%* here should represent 20%, and *b%* should represent 10%.

This scheme is also distributionally sensitive<sup>107</sup> because a given loss of absolute dollar value, resulting from a specific public need, may be substantial if imposed on an inexpensive parcel and much less so if imposed on a more costly one.<sup>108</sup> Employing this 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 likely produce desirable results.

#### CONCLUDING REMARKS

Looking at constitutional property through the global debate about its meaning and implications is an extremely valuable endeavor. Comparative law provides a powerful tool for a critical examination of

<sup>107</sup> However, as always happens when clear rules serve as proxies for underlying normative commitments, this sensitivity will not necessarily be perfect. Specifically, the effect described in the text 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.

<sup>108</sup> This will be true whenever the required injury is fixed in absolute cost, irrespective of the injured parcel's value.

the familiar, which has a special importance in the tormented context of takings law. In particular, Alexander's voyage may help domesticate the seemingly awkward but eminently justified notion that social responsibility does not constrain the right to property, but rather represents one of its constitutive features.

But the use of comparative law should be limited and careful. Judges in other jurisdictions, like judges more generally, tend to inadequately elucidate the normative underpinnings of their prescriptions. Therefore, despite the normative attraction of another legal system's main doctrinal point, that system's specific rules should be scrutinized with some care. Comparative law should not absolve lawyers from undertaking critical normative work. Thus, although German law can inspire a takings doctrine that seriously considers the social responsibility of ownership, American law still should not follow many of its more specific prescriptions. A rule-based regime that draws careful distinctions within types of injured properties and types of benefited groups is much more capable of successfully integrating social responsibility into takings doctrine.

