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The Social Responsibility of Ownership

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Abstract

Gregory Alexander's new book *The Global Debate over Constitutional Property* provides a unique opportunity to reflect upon the functions of comparative law and the nature of ownership. This Comment highlights the role of comparative law in upsetting law's tendency to turn contingency into necessity, but also warns against the illusion that comparative law can yield normative conclusions without an independent and critically constructive legal inquiry. The Comment 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 as well as the potential risks entailed by such a move, and outlines the contours of a takings doctrine that takes the social responsibility of property owners seriously.

THE SOCIAL RESPONSIBILITY OF OWNERSHIP

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ABSTRACT

Gregory Alexander's new book *The Global Debate over Constitutional Property* provides a unique opportunity to reflect upon the functions of comparative law and the nature of ownership. This Comment highlights the role of comparative law in upsetting law's tendency to turn contingency into necessity, but also warns against the illusion that comparative law can yield normative conclusions without an independent and critically constructive legal inquiry. The Comment 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 as well as the potential risks entailed by such a move, and outlines the contours of a takings doctrine that takes the social responsibility of property owners seriously.

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*The Global Debate over Constitutional Property*¹ is an exciting book, the first to devote sustained, profound, and sophisticated attention to comparative law in this important context. Alexander's journey around the globe — to Germany, South Africa, India, and Canada — is well worth his and our while. His sure mastery of his comparative materials yields many illuminating insights of which two — one conceptual and the other normative — stand out. The most important conceptual claim of the book is that the sheer fact of constitutionalizing property does not entail any specific doctrinal or policy outcomes. 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. At the normative level, Alexander's most important recommendation is to recognize the social-obligation dimension of ownership explicitly (20-21).

This Comment focuses on the normative claim² of *The Global Debate* and aims to be a friendly critique. It is a critique because the discussion that follows will expose the limits of Alexander's method. To be sure, I fully agree with the view that comparative law can be a powerful component for normative legal theory. Comparative law can help — as it often does in Alexander's book — to problematize cases deemed easy from a narrow municipal perspective, and to open up our legal imagination to new viable possibilities.³ But comparative law, in and of itself, can never yield a thick normative recommendation. The gist of my critique, then, is that Alexander's tools in *The Global Debate* fall short as buttresses for the normative prong of his book's message.

But my critique is friendly because another way of reading this Comment — and indeed the way in which I hope it will be read — is as a supplement to *The Global*

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¹ GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* (2006).

² I share many of Alexander conceptual claims. See HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1997).

³ See Gunter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 447-48, 454-55 (1985); Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OX. J. LEGAL STUD. 101, 105-07, 114-15 (1989).

Debate. The following pages discuss the reasons for incorporating a robust commitment to social responsibility into the concept of ownership, the potential risks of pursuing such a worthy cause, and finally, the means by which such a paradigm shift can and should be realized. The divergence between these doctrinal means and some of Alexander's comparative findings is the most concrete evidence of comparative law's inadequacy for this task. This Comment is thus intended to fill a gap in the normative prong of the argument in *The Global Debate* and to push Alexander's normative claim further than his comparative method allows.

REASONS

One of Alexander's most important recommendations is that American takings jurisprudence adopt "a social-obligation norm." This recommendation relies heavily on the German example, specifically on section 14(2) of the German Basic Law (*Grundgesetz*), which provides that "Ownership entails obligations. Its use shall also serve the public interest" (275). Chapter Three of *The Global Debate* describes German jurisprudence in some detail and celebrates its achievements, showing that the German understanding of property is rooted in the most fundamental principle of the German constitutional order: human dignity. Its point, therefore, "is not to create a zone of security from powerful and threatening state, but to make it possible for individuals to realize their own human potential" (110-13). Helpful examples further illuminate the ways in which the law can practically mediate "individual liberty and social welfare" and "promot[e] the virtue of social responsibility" (146).

The thick description of German practice cannot, in and of itself, persuade readers to follow suit. They can respectfully 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 (8), and yet refuse, upon reflection, to borrow the social obligation norm. Their 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 (10-11). Even if we are (as we should be) open to the possibility of borrowing, and even if we are furthermore convinced that there are enough traces of a social-obligation norm in American takings jurisprudence to make this borrowing

feasible (77, 223-28, 234-35), we may still prefer to stay put if the German model is normatively unattractive. We *could* go for it, but why *should* we?

Alexander seems to be aware of this possible 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 rights and duties of private ownership” (230). He rejects the thin, minimalist conception that replicates the libertarian conception of ownership and adopts in its stead a thicker conception of social responsibility, in which owners “are under a continuing duty” to provide the society of which they are members “those benefits that the society reasonably regards as necessary and that have some reasonable relationship to the ownership of the affected land” (231).

These propositions pose two problems. One is the vagueness of these open-ended statements, which I address in the last part of this Comment. For now, I want to focus on a second difficulty: if the thin and thick conceptions are merely competing interpretations of “inevitably contestable” questions that are bound to remain “the central focus of an ongoing and irreducible tension” (230, 248), the problem of persuasion recurs: why concur with Alexander's preference for one rather than the other?

Because, and this is in my view the only credible answer to this question, he is *not* merely speaking of a preference. For Alexander, the German model is not just a competing option enabling us to perceive the contingency of the American one, but a normatively superior alternative. It is not just good for Germans, it is good, period.

Establishing this normative superiority on underlying legal and political traditions obviously makes no sense. The very point of Alexander's work is to use constitutional borrowing as a “catalyst for changing preexisting legal culture [for the better]” (245). By the same token, Alexander's attempt to rely on ontological propositions, according to which “[m]embership in political and social communities is an inevitable product of the human condition” so that “merely by virtue of our inherent embeddedness in communities, we owe obligations to others” (231), is also doomed to fail. The conceptual

contribution of *The Global Debate*, its persuasive account of the variety and contingency of the constitutional conception of ownership, defies such a necessitarian strategy.⁴

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”⁵ is not a matter of preference or tradition, but rather of justice. A conception of property that excludes social responsibility is unjust. Its injustice can be approached in two ways: exposing its incompatibility with the most common justifications of ownership, and highlighting its disagreement with the best conceptions of citizenship and membership.

Each of these tasks can, indeed needs to, occupy a separate volume, but for our purposes a rough sketch of both may suffice. First, consider how even the most traditional justifications of property reject Blackstone's description of ownership as “sole and despotic dominion,”⁶ and necessitate the incorporation of some dimension of social responsibility into the concept of property. Thus, advocates of property as a means of promoting public welfare, who currently number many students of the economic analysis of law, explicitly or implicitly acknowledge that market failures and physical characteristics of the resources at stake often require curtailing the owners' dominion so that ownership can serve the public interest properly.⁷ Even more significantly, the more individualistic justifications of private property – personal liberty and personhood – also imply a dimension of social responsibility. These justifications typically rely on the role of ownership in providing, respectively, control over external resources that are necessary

⁴ 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 Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 701-05 (1992).

⁵ Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 772 (1999).

⁶ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1765-69).

⁷ See respectively Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32-39 (6th ed., 2003). Similarly, Harold Demsetz's classic defense of private property acknowledges the costs of this regime and the need to balance these costs with its benefits in order to secure welfare maximization. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAP. & 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).

for individual autonomy, and control over resources that are constitutive of personhood.⁸ Therefore, neither of these values can justify the law's enforcement of the rights of the haves, if the law does not simultaneously guarantee the necessary (and/or the constitutive) resources of the have-nots.⁹

Not only does the social responsibility of ownership agree with the most compelling justifications of private property, but it also corresponds to, and is indeed demanded by, the most attractive conceptions of membership and citizenship. 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.”¹⁰ In other words, “this approach defines our mutual commitments *qua* citizens and *qua* members of a community as ‘exchanges for monetizable gains,’” and thus commodifies “both our citizenship and our membership in local communities.”¹¹ To be sure, there is nothing inherently wrong in the impersonality of market relations; 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.”¹² A responsible conception of property can and should appreciate these virtues of the market norms, but should still avoid the mistake of allowing these norms to override those of the other spheres of our social life. 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

⁸ See, e.g., respectively BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 71-76 (1977); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982). Another individualistic justification for property, which is also sometimes mistakenly presented as supportive of the libertarian conception of ownership, is desert for labor. I discuss the fallacy of this conventional wisdom elsewhere. See Hanoah Dagan, *Property and the Public Domain*, 17 *YALE J.L. & HUMAN.* 84, 90-91 (2006).

⁹ See JEREMY WALDRON, *Homelessness and the Issue of Freedom*, in *LIBERAL RIGHTS* 309 (1993); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 377-78, 385-86, 429, 444 (1988). Furthermore, there is no way of justifying private ownership invoking 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.” 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). See generally Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1319 (1987).

¹⁰ Dagan, *supra* note 5, at 772.

¹¹ *Id.* (citing MARGARET JANE RADIN, *CONTESTED COMMODITIES* 5, 118 (1996)).

¹² ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 145 (1993).

members of local communities. Imposing the competitive norms of the market on these divergent spheres and rejecting the social responsibility of ownership that is constitutive of these ongoing mutual relationships of give and take,¹³ would erase these divergent spheres of human interaction. It would, in other words, undermine both the freedom-enhancing pluralism and the individuality-enhancing multiplicity so crucial to the liberal ideal of justice.¹⁴

RISKS

These last remarks imply one risk of incorporating social responsibility into our conception of property. Overextending the social responsibility of ownership through the erasure or excessive weakening of the market logic rules governing the production, circulation, and valuation of economic goods may threaten the integrity of the sphere of commodities, thus undermining the economic ideal of freedom.

Another and even more pertinent risk to the context of constitutional property comes from some expansive interpretations of the social responsibility of property, which lead to an unfortunate minimization of the constitutional protection of property. In these views, 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.”¹⁵ 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.¹⁶

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

¹³ See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 55-56, 234-36, 274-75 (1991).

¹⁴ See generally ANDERSON, *supra* note 12, 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).

¹⁵ C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 764-65 (1986).

¹⁶ 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).

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.¹⁷ Therefore, if we wish to make a credible claim for social solidarity and responsibility – if we indeed wish to uphold “the bonds of civic mutuality” against the systemic threat of “corrosion by the privatization ... of politics”¹⁸ – we need to remember that property owners who belong to strong and organized groups can typically be expected to defend themselves even in the absence of legal protection, while the danger of injury from government action in the absence of such protection is greater the weaker the property owner in question. This is true for isolated individuals and also (and even more so) for individuals belonging to marginal groups with minor political clout.¹⁹

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 it was meant to further. In light of this disappointing conclusion, some skepticism about the disproportionate contribution to the community’s well-being is in place, particularly when contributions are required from politically weak

¹⁷ 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); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 264-65 (1985). Cf. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 INDIANA L.J. 145 (1977-1978).

¹⁸ Michelman, *supra* note 9, at 138.

¹⁹ 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 and Incentives*, 49 STAN. L. REV. 305, 361, 366-67 (1997). The Israeli experience concerning the government’s application of land expropriation laws in order 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., Alexander (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).

or economically disadvantaged landowners.²⁰ Similar caution may also be warranted when the injured owner is not part of an organized public, and 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. When incorporating social responsibility into our understanding of property, the challenge is to show that social responsibility can be contained within the concept of property 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 naïvely benign view of government” (68). Thus, he rightly endorses a “balanced approach” that “steers between the two extremes” of a “conservative approach” of full (cash or in-kind) compensation “for all government regulation of property” on the one hand, and a self-defeating “progressive” approach, which calls for “eviscerating the property clause in the interest of distributive justice,” on the other (59). I believe that this understanding explains Alexander's support of the approach I have proposed elsewhere, whereby the social responsibility of ownership should not be one-sided but based on long-term reciprocity (232). 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).”²¹

I obviously have no complaints against these theoretical propositions. My difficulty lies elsewhere. As shown 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 both of us share.

²⁰ MARGARET JANE RADIN, *Diagnosing the Takings Problem*, in REINTERPRETING PROPERTY 146, 159 (1993).

²¹ Dagan, *supra* note 5, at 769.

MEANS

Normative endorsement of the German view about the constitutive role of social responsibility does not require the perfunctory adoption of the doctrinal means German law uses for furthering this conception of property. Quite the contrary: this doctrine must be carefully examined against both the reasons 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 better able to cope with this rather formidable challenge. This is my task in this part of the Comment, where I engage in a critical examination of three salient features of the German takings doctrine,²² and then outline an alternative.²³

Constitutive and Fungible Property. The German Constitutional Court resorts to a purposive and contextual approach to the constitutional protection of property. It “recognizes that the institution of property has multiple potential purposes” and that “different types of particular property interests” serve different purposes (102). 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” (139). “Property interests whose function is primarily or even exclusively economic ... receive minimum 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” (103; see also 219).

²² A fourth and particularly problematic feature is the significance of the public interest involved. Alexander approvingly mentions that, in considering the entitlement of injured landowners to compensation, German (and South-African) courts accord some weight to the significance of the public interest served by the government action that led to individual loss (115, 147, 159-60, 240). Such an emphasis, however, 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 it is justified for the government 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.

²³ The intriguing South African doctrine of positive duties entailed by the social responsibility of ownership (181) also deserves elaborate discussion, which is beyond the scope of this Comment.

This “sliding scale approach to evaluating the social obligation of property” (138) is indeed desirable. It understandably insists on bypassing conceptualism and adopting the realistic methodology of contextual normative analysis in its stead.²⁴ It justifiably resists analysis at the overly heterogeneous level of property.²⁵ It correctly insists that the appropriate level of constitutional property depends on the distinction between constitutive property, which implicates the personhood of its holder, and fungible property, which is wholly instrumental.²⁶

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 value or wealth” (127). Because “private wealth-creating property interests... are viewed as not immediately implicating the fundamental values of human dignity and self-realization” (103), under German constitutional law, “the property clause does not protect wealth as such” (127).

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.²⁷ Therefore, instead of granting the power to tax blanket immunity from constitutional scrutiny, 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. And yet, this approach rejects the view that perceives the power to structure and allocate tax burdens as unlimited. This approach founds the legitimacy of current tax

²⁴ See generally Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J.* (forthcoming 2007).

²⁵ See Hanoch Dagan, *The Craft of Property*, 92 CALIF. L. REV. 1517, 1532 (2003).

²⁶ See RADIN, *supra* note 20, at 153-56.

²⁷ 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.

practice not on any kind of a priori immunity, but on its compliance with acceptable principles of distributive justice.²⁸

Dependence or Community. German law, we learn, also “inquires whether and to what extent other persons are dependent on the use of the owner's property.” Greater dependence implies a greater social function and thus lesser constitutional protection (135).

Dependence touches on an important intuition, but is ultimately the wrong test. Dependence denotes the need of someone other than the owner. Need-based concerns do play an important role in the justification of property.²⁹ But relying on another's need to justify an uncompensated infringement of property irrespective of the other's position vis-à-vis the owner seems arbitrary, because the existence of such a need does not address the crucial question of whether the owner or the public should incur the cost.

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. 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. Caution against inordinate utopianism about membership (or citizenship) demands rejecting a regime of complete non-commodification (no compensation). However, “by 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.” Long term reciprocity urges us to adhere to our plural and

²⁸ *But cf.* Eduardo M. Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004) (arguing there is no way to reconcile a limitless power to tax with existing regulatory takings law, and that such incoherence call for a narrow understanding of the Takings Clause).

²⁹ See Jeremy Waldron, *Property, Justification, and Need*, 6 CAN. J. L. & JURISP. 185 (1993). *Contra* Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989).

ambivalent understandings of membership as both a source of mutual advantage and a locus of belonging.³⁰

Appreciating the significance that membership and long-term reciprocity hold for social responsibility clarifies the role that the scope of the benefited social unit plays in the determination of the property owners' expected level of social responsibility. 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."³¹ Thus, a distinction should be drawn between imposing constraints or limiting entitlements to private property for the sake of benefits to the community to which the property owner belongs, and prescribing injurious regulations for the purpose of benefiting the public at large.³² The more the constraint or the limitation 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.³³

Partial compensation. A significant, and possibly the most vital doctrinal tool used by German (and South African) courts for incorporating the purposive and contextual approach to takings law is the possibility of awarding partial compensation (239). Alexander recommends (235-43) the adoption of this "via media between the two extremes of total compensation (that is, full fair market value) and no compensation whatsoever" because it "reflects the social dimension of the constitutional property right" (98-99).

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 their rejection of "any sort of categorical approach" to our context (147). He

³⁰ Dagan, *supra* note 5, at 773.

³¹ *Id.*, at 774.

³² For the purposes of this Comment, 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 Comment.

³³ Dagan, *supra* note 5, at 776.

associates the preference for rules with formalism, and the approach that accords courts the authority to do what “their constitutions’ commitments to property require in the immediate case” with purposive realism, and favors the latter over the former (215-17, 15). 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” (196), he endorses a “dynamic” approach to the constitutional protection of property (135). In this view, we should openly admit that “courts are constantly distributing property” so that property “is always in flux” (4).

Partial compensation is indeed a powerful tool for developing a more nuanced takings doctrine than the one currently available. It is also, as I will explain shortly, a valuable instrument for incorporating into the doctrine the two distinctions I have discussed above: between fungible property and constitutive property, and 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 of ex post adjustment of property rights is unjustifiable. Fortunately, it is also unnecessary to achieve his (and my) goals.

The literature on the choice between bright line rules and vague standards is vast³⁴ and need not be recapitulated here. For my purposes, mention of three normative considerations that militate against ad hoc approach to takings cases will suffice.³⁵ The first two are rather familiar: vague standards upset predictability, and therefore undermine efficiency³⁶ as well as liberty.³⁷ The third consideration, equality, may be

³⁴ 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, *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).

³⁵ See similarly Suzan Rose-Ackerman, *Against Ad-Hockery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988) (“even a very imperfect, but clearly articulated, formal takings doctrine is likely to be superior to open-ended balancing”).

³⁶ The inefficiency of vague standards derives both from their adverse effects on the ability to plan and from their excessive administrative costs. See, e.g., Sullivan, *supra* note 35, 1702-07.

more surprising and is particularly important for those interested in the social responsibility of ownership. Rule-based regimes promote equality by reducing the (sometimes unconscious) possibility of a biased application of officials' discretion.³⁸ This virtue is particularly important in contexts such as land-use and planning law, in which undue influence by the rich and powerful is a real concern. Moreover, the fact that vague standards are not self-authenticating means that they require injured landowners to spend significant resources on legal advice and therefore tend to generate regressive outcomes.³⁹ 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.⁴⁰

For all these reasons, friends of the social responsibility of ownership should support clear rules rather than vague standards. (For reasons I cannot delve into here, I also believe that legal realism, at least in its best light, is in fact rule-oriented.⁴¹) By the same token, the proper means for incorporating social responsibility into our conception of ownership are the *ex ante* refinements of the regime governing compensation for takings rather than the *ex post* adjustment of people's entitlements.⁴²

An Alternative. The existing German takings doctrine is thus disappointing in both form and substance. Ways can still be found, however, of instilling social responsibility into takings law. In other words, comparative law should not be allowed to (somewhat paradoxically) limit our legal imagination by obscuring possible legal architectures only

³⁷ 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 (1944); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.CHI. L. REV. 1175 (1989).

³⁸ *See, e.g.,* Sullivan, *supra* note 34, at 62.

³⁹ *Cf.* Lawrence Lessig, *Re-crafting a Public Domain*, 17 YALE J.L. & HUMAN. 56, 58-59 (2006). Admittedly, a thick cluster of complicated rules can generate similar results, where a specialist is needed in order to orient the uninitiated in the legal labyrinth.

⁴⁰ *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. & SOC'Y REV. 95 (1974).

⁴¹ *See* Dagan, *supra* note 24, at *.

⁴² *Ex post* adjustments may furthermore 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.

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.⁴³

The lessons of the current discussion can be integrated into a doctrinal framework adopting the insight, gleaned from German law, that partial compensation can be a means for integrating social responsibility into takings law. Unlike the German doctrine, however, this alternative doctrine opts for using clear and rather simple rules. It also draws on the distinction between the types of benefited communities rather than on the issue of dependence. Finally, while my suggested doctrine distinguishes between constitutive and fungible property, it avoids the dangerously naïve approach that leaves fungible property without constitutional protection.

Table 1 below outlines this proposal for eminent domain cases. It prescribes three 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 it was fungible property in its owner's hands, 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 project enunciated by a larger (e.g., regional or state) government body, 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 where fungible land is used for purposes that benefit the broader society. These intermediate types of cases should both trigger the award of intermediate measures of recovery: y% of the fair market value where $x\% < y\% < 100\%$ (say: 90%).

⁴³ As Benjamin Cardozo put it, law is an “endless process of testing and retesting,” which is aimed at removing mistakes and eccentricities and preserving “whatever is pure and sound and fine.” See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

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, 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.

A very similar regime can work for regulatory takings cases, as shown in Table 2. The basic thrust of this scheme, which develops ideas I have suggested elsewhere,⁴⁴ is to apply the familiar diminution of value test⁴⁵ in a way that is both rule-based and sensitive to the normative distinctions discussed above. It conditions compensation on the extent (the percentage) of the diminution of value of the property in question, i.e., the extent of the loss caused by the public action relative to the pre-existing value of the affected property. The reference point for measuring the percentage of the claimant’s loss in the proposed doctrine is the value of the parcel as a whole⁴⁶ and, in the event the claimant owns other parcels within the relevant local community, the total value of these holdings.⁴⁷ Finally, as with the doctrine proposed for eminent domain cases, the threshold here is set differentially, according to the type of resource and the beneficiary’s identity. Uncompensated harms are better tolerated when fungible rather than constitutive properties are at stake, and when public action is the work of local rather than larger government bodies.

⁴⁴ See Dagan, *supra* note 5.

⁴⁵ The diminution of value test has its origins in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁴⁶ 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 1, at 78-80.

⁴⁷ For this refinement, see Dagan, *supra* note 5, at 783

TABLE 2: Differential Threshold for Regulatory Takings

		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	<i>De minimis</i>

when $x > y > de\ minimis$.

If, as I think we should, we wish to keep this doctrine aligned with that of eminent domain, and assuming that the figures I mentioned above are adopted, then x here should be 20% and y – 10%.

This scheme too is distributionally sensitive.⁴⁸ The reason is that 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.⁴⁹ Employing this version of the diminution of value test will therefore typically discourage the public authority from choosing inexpensive (and usually small) parcels and, instead, all things being equal from the planning perspective, encourage it 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 is likely to 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 the familiar, which is especially important in the tormented context of takings law. In particular, Alexander's voyage may help domesticate

⁴⁸ Although, as is always the case with clear rules that serve as proxies for underlying normative commitments, sensitiveness will not necessarily be found. Specifically, the effect described in the text below will not always apply because the physical configuration of the parcels may also affect the diminution of their value in the event that they are affected by public action.

⁴⁹ This will be true whenever the required injury tends to be fixed, irrespective of the injured parcel's value.

the seemingly awkward but eminently justified notion that social responsibility is not a constraint of the right to property, but rather one of its constitutive features.

But the use of comparative law should be limited and careful. Judges in other jurisdictions, like judges generally, are not too likely to adequately elucidate the normative underpinnings of their prescriptions. Therefore, even when the main point in a doctrine of another legal system is normatively attractive, its specific rules should be scrutinized with some care. Comparative law should not absolve lawyers from normative critical work. Thus, although German law can provide inspiration for a takings doctrine that takes the social responsibility of ownership seriously, many of its more specific prescriptions should still not be followed. 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.