Expropriatory Compensation, Distributive Justice, and The Rule Of Law

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Abstract

This Essay examines the possible justification for providing less than full (fair market value) compensation for expropriation. One obvious justification applies in cases of public measures, where the burden is deliberately distributed progressively, namely, where redistribution is the desired goal of the public action or, at least, one of its primary objectives. Beside this relatively uncontroversial category, two other explanations are often raised: that partial compensation is justified by reference to the significance of the public interest, even if it is not redistributive, and that it can serve as a means for adjusting the amount of the compensation to the specific circumstances of the case. This Essay criticizes both justifications, arguing that the former is normatively impoverished while the latter affronts the rule of law. The notion of partial and differential compensation, however, can serve as a powerful tool for developing a nuanced expropriation doctrine that serves important property values, and also targets the potentially regressive effects of a uniform rule of full market value. The proposed doctrine draws careful, rule-based distinctions between types of injured property (fungible vs. constitutive) and types of benefited groups (local communities vs. the broader society).
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INTRODUCTION

Many constitutional property regimes make full (fair market value) compensation a precondition for accepting the valid use of public power to expropriate private property. Others recognize some exceptions to this rule and authorize using state power to take, even if only partial (and at times even no) compensation is provided. This Essay studies the latter category, examining possible justifications for partial compensation.

One justification applies in cases of public measures, where the burden is deliberately distributed progressively, namely, where redistribution is the desired goal of the public action or at least one of its primary objectives. A prime example of such easy cases is the South African Constitution of 1996, which sanctions public measures intended to ameliorate historical injustices from the apartheid era, making access to land more equitable. Other, albeit less obvious, examples relying on this justification are measures primarily meant to “achieve greater social justice”. The progressive distribution of the burden in such measures is deliberate, and their aim would be thwarted if full (rather than partial or possibly no) compensation was required. More often, however, the primary goal of the public action that prompts the expropriation is not redistribution. In these cases, justifying partial compensation faces a far harder challenge: if redistribution is a by-product of a public project, activity, or regulation, can it ever be justified?

In addressing this challenge – my focus in these pages – courts and commentators invoke two rationales. As I argue in Part I, however, neither one is convincing. Partial compensation is at times justified by claiming public interest. But whereas the importance of a public project can justify taking the land that it requires, it can hardly justify – except for deliberately distributive expropriations – imposing its

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3 Id., at 504, 512

4 James v. United Kingdom, ECHR (1986), Series A, No, 98, Para. 54.


costs on the owner of the land. The second rationale adduced to justify partial compensation, claiming it is a means for adjusting its amount to the specific circumstances of the case, is no more successful. Ad hoc discretion, namely, an open-ended authorization to do justice, threatens both aspects of the rule of law: the requirement that law be capable of guidance, and the prescription that law not grant officials unconstrained power. If partial compensation is to be justified, it must be formulated either as clear rules or as informative standards.

The failure of these conventional rationales for partial compensation could tempt us to conclude that the better rule (at least outside the category of deliberately redistributive measures) is one of uniform fair market value compensation, on the lines of the prevailing American law of eminent domain. But as I show in Part II, this rule too confronts serious problems. In indiscriminately compensating landowners for the fair market value of their land, such a rule entails regressive effects. Given that differences in wealth correlate with, or are translated into, differences in political power, applying this rule makes it systemically more difficult to expropriate the land of the haves than the land of the have nots, even when the former is just as, or possibly more, suitable for the project at hand. In addition to its disappointing distributive consequences, a uniform rule of full compensation fails to properly vindicate other important property values, notably those dealing with the role that some property institutions play in the constitution of our personhood, and the function of others as community-building fora.

If partial compensation could assume only the form of discretionary authority for an ad hoc adjustment, we might have justifiably concluded that these consequences are the unavoidable result of our commitment to the rule of law. But partial compensation can also assume another form, compatible with both the guidance and the constraint aspects of the rule of law. As I show in Part III, legislatures – and maybe even courts – can adopt a rather simple set of bright line rules (or informative standards) that address the challenge of systemic regressivity and can fortunately be framed so as to be responsive to other important property values as well: liberty, personhood, utility, and social responsibility.

I. CRITICIZING PREVAILING RATIONALES FOR PARTIAL COMPENSATION

Both German and South African constitutional property clauses mention that compensation should reflect “an equitable balance between the public interest and the interest of those affected”. The latter further mentions “the purpose of the expropriation” as one of the (five) important factors to be considered in striking such a balance.\(^7\) This reference has led courts in both countries to hold that, where the

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The significance of the pertinent public purpose may certainly be relevant when examining the legitimacy of the expropriation as such. The question of compensation, however, is different. The role of this constitutional guarantee is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”9 The core of the compensation requirement is thus distributive. Hence, the challenge posed by expropriations that are not deliberately distributive and wherein redistribution is by definition a by-product is to justify why the landowner rather than the community that benefits from this public use (i.e., the taxpayers of that jurisdiction), should incur any portion of the burden of the public project, activity, or regulation at hand. The sheer significance of the public interest, then, can hardly be viewed as a persuasive answer to this challenge.10

As Andre Van der Walt indeed argues, whereas “expropriation related to land reform should or could be treated with greater understanding and accommodation”, the sheer lawfulness of the expropriation because of public interest cannot “justify a reduction of the compensation amount” in cases that have “no bearing on land reform or the transformation of land rights or greater access to land rights”. Such cases, which represent the vast majority of expropriation cases under ‘normal’ circumstances, do not on their face justify deviation from the normal rule requiring spreading the pertinent burden “among citizens through taxation and other measures from which compensation can be paid for unequally distributed burden”. The conclusion that public interest in the use of the property at hand is particularly large does not seem to make a difference.11 Furthermore, even where “the purpose of expropriation is land reform”, a result of no compensation or partial compensation should not automatically follow, absent an underlying distributive foundation that can serve as its justification.12

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10 This critique is also relevant to claims that make the significance of the public interest a relevant factor in answering the question of when a regulation of land is no longer a mere regulation but a regulatory taking, which requires compensation. See, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 136-38 (1978).

11 Van der Walt 2011, p. 515.

12 See Id., p. 518.
The second prevalent attempt to justify partial compensation in expropriations that are not deliberately distributive claims it is a means for adjusting compensation to the specific circumstances of the case. Thus, Van der Walt argues that

all the relevant circumstances (including the [factors] mentioned in [the Constitution] but not restricted to them) should be considered together in deciding whether it should be just and equitable to pay no compensation (or [partial] compensation …) in a specific case.13

In a similar spirit, Gregory Alexander commends the way German courts use partial compensation to determine “the amount of compensation … under the facts of the specific case”, that is, by judging the weight of “the property’s market value and the owner’s financial loss … according to the immediate circumstances”.14 In this view, the “flexible and contextualized” measure of partial compensation is justified by and requires reference “to all relevant circumstances”, a doctrinal hook for “a contextualized judgment with due regard for individual property interests”.15

These observations imply that partial compensation needs to take the form of a license for ad-hoc judicial discretion.16 This presupposition seems intuitive: given the lack of a “precise method for calculating values that are based on considerations of equity and justice or of weighing [them] against each other”, the outcome of each case must be determined in its particular circumstances.17 If this intuition was conclusive, so that case-by-case adjudication was indeed the only way of incorporating considerations of distributive justice into expropriatory compensation doctrine in non-deliberately-distributive expropriation cases, this possibility would be normatively dubious. Two main aspects of the rule of law are compromised in it: the requirement that law be capable of guiding its subjects’ behaviour, and the prescription that law not confer on officials the right to exercise unconstrained power.18

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13 Id., p. 506. The language of the South African Constitution grants this position some support by requiring “regard to all relevant factors”.


15 Van der Walt 2011, pp. 509-510. See also Alexander 2006, pp. 147, 217.


Ad hocism contravenes the conception of the rule of law associated mostly with Joseph Raz, stating that the rule of law must provide people effective guidance.\(^\text{19}\) Though seemingly thin, the guidance conception of the rule of law is intimately connected with people’s autonomy, understood as self-authorship. By requiring that “government in all its actions [be] bound by rules fixed and announced beforehand”, the rule of law enables people “to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan [their] affairs on the basis of this knowledge”.\(^\text{20}\) Only a relatively stable and predictable law can serve as a “safe basis for individual planning”, which is a prerequisite of people’s ability to “form definite expectations” and plan for the future. Law’s participation in securing stable “frameworks for one’s life and action” increases “[p]redictability in one’s environment”, and therefore “one’s power of action”, thus facilitating people’s “ability to choose styles and forms of life, to fix long-term goals and effectively direct one’s life towards them”.\(^\text{21}\)

Case-by-case adjudication similarly threatens another well known conception of the rule of law, which views it as a constraint. The rule of law stands here for “the absence of arbitrary power on part of the government”,\(^\text{22}\) through the imposition of “effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims”.\(^\text{23}\) Unrestrained power is objectionable, both because of its potential devastating burdens and because it renders us mere objects, dominated by the power-wielder.\(^\text{24}\) The rule of law addresses these grave concerns by prescribing “a particular mode of the exercise of political power: governance through law”. More specifically, the rule of law requires that

people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.\(^\text{25}\)

Both aspects of the rule of law resist open-ended standards allowing judges to consult the law’s underlying commitments in each case they must settle, preferring instead clear rules that translate “the implications of normative values into concrete


\(^{21}\) Raz 1979, pp. 220, 222.


prescriptions”, “sufficiently determinate” to be followed by their appliers. To be sure, the rule of law does not always prescribe the use of bright-line rules. At times, commitment to the rule of law implies allowing, or even preferring, that the social practice of a legal topic be formed around a vague but informative standard. This may be the case either because the alternative would be a complex set of technical and non-intuitive rules, or because the standard at hand is guidance-friendly and constraining-friendly, so that its addressees (or their lawyers) are able to figure out its intended content and thus predict its future unfolding and realm of application, monitoring or modifying their behaviour accordingly. Hence, standards that refine the regulative principle actually governing a specific area of law along these lines – informative standards, as I call them – are generally unobjectionable. By contrast, open-ended references to justice, fairness, good faith, or reasonableness as interpreted by the presiding law applier given the specific circumstances of the case at hand, fail to ensure proper predictability or properly constrain law appliers. They should therefore be criticized as an invitation to ad hoc discretion, which affronts the rule of law.

Open-ended discretion poses another problem, which returns us to the context of expropriation. Legal regimes that endorse clear and simple rules (or informative standards) promote equality by reducing the – at times unconscious – possibility of bias in the application of official discretion. Contexts such as land use and planning laws, in which undue influence by the rich and powerful is a real concern underscore


the importance of this virtue. Since vague standards do not self-authenticate, they require injured landowners to spend significant resources on legal advice, thus tending to generate regressive outcomes. 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.

II. THE PROBLEMS WITH FULL COMPENSATION

My argument, viewing open-ended discretion in setting partial expropriatory compensation as deeply troublesome, could be read as vindicating the position insisting that partial compensation should have no room outside the realm of deliberately redistributive measures. But this position, which echoes the prevailing American law of eminent domain (and its counterpart in many commonwealth jurisdictions), is also problematic. While a compensatory regime of uniform fair market value compensation may seem liberty-friendly, efficient, and distributionally neutral, it entails regressive effects that undermine its apparent commitment to liberty and efficiency. It also fails to properly vindicate other important property values.

Friends of an across-the-board rule that compensates for the fair market value of the expropriated property argue that the full compensation rule, and the Blackstonian conception of ownership as “sole and despotic dominion” on which it is premised, are essential in order to shield individuals from claims by other persons and from the power of the public authority to redefine our property, thus facilitating personal freedom, security, and autonomy. Only such a rule, they further claim, makes landowners indifferent to the possibility of their land being taken, so that no one has any reason to exert any pressure on the public authority. Neutralizing the objections of pertinent landowners is important because – assuming that democratic mechanisms make public officials accountable for their budget management – it helps to realign with the public interest the incentives to those officials making the crucial expropriation decisions. Therefore, so the argument goes, a bright-line rule of full compensation is tantamount to a built-in mechanism that verifies the authority is free

33 This claim is obviously limited to form: the substance of a rule (or a standard) may be more or less egalitarian but, other things being substantively equal, a clear and simple doctrine is more socially progressive.
to reach optimal planning decisions, and everyone gets the same level of compensation, thus making it both efficient and just.\textsuperscript{37}

This position might be persuasive if receiving the fair market value of their expropriated land were to make all landowners indifferent to the possibility of public action infringing on their property. This assumption, however, is too far fetched. In some cases, fair market value may well measure the utility lost by the landowner due to the public action at hand. Reality, however, will often be different: transaction costs and subjective preferences may lead landowners to prefer the status quo, which includes the possibility of voluntary realization, to the forced transfer of their proprietary rights against its fair market value.\textsuperscript{38} Therefore, a regime of fair market value compensation for all is likely to lead landowners to try to shift the impact to other people’s land. The results of these efforts will likely be neither just nor efficient.

Consider, for example, Robert Caro’s description of the successful efforts of New York City’s “robber barons” during the late 1920s to induce Robert Moses, the enormously powerful city planner, to change the route of the planned Northern State Parkway so as to avoid interference with their estates. The original route went through the middle of one millionaire’s private golf course and touched the estates of several others. The plan would have taken effect under the prevailing norm of American eminent domain law, which provides uniform full compensation for the affected parties. The robber barons lobbied anyway, through efforts that included a sizeable “donation” to the Park Commission. New York City planners rerouted the Parkway through several small farms, depriving many farmers of their livelihoods.\textsuperscript{39}

This vivid example demonstrates the systemic distortion in a compensation regime of fair market value for all. Full compensation is often necessary in order to address the concern that public officials are under-responsive to private costs unless those costs are properly internalized: where the injured party is part of the non-organized public (an ‘occasional individual’) or of a marginal group with minor political clout, under-responsiveness is a genuine danger that in many cases can only be mitigated by compensation.\textsuperscript{40} This, however, is not always the case. Public action may also necessitate imposing costs on members of powerful and organized groups, which can be reasonably assumed to ensure adequate representation to the landowner’s interest, even in the absence of required compensation. The implication

\begin{itemize}
  \item \textsuperscript{40} That is why I have argued against the tendency of progressive authors to subscribe to a “no (or almost no) compensation” rule (at least in the context of regulatory takings law), since such a rule not only undermines liberty unduly but is also inefficient and regressive. See H. Dagan, \textit{Property: Values and Institutions}, Oxford University Press, New York, 2011, pp. 97-98, 142-144.
\end{itemize}
is that, ex post an expropriation, even if such a landowner eventually suffers a loss due to the public use, this loss is often offset by a quid pro quo elsewhere, either in planning issues or in other matters. This asymmetry also has an ex ante implication: unless the compensation regime interferes with the effort to balance the pressures confronting the public authority at the stage of choosing the tract of land that would be expropriated for the public project, the lobbying efforts of strong landowners will probably be far more effective than those of weaker ones. An indiscriminate regime of full compensation may distort the officials’ incentives by systematically incentivizing them to take land from members of the non-organized public or of marginal groups, even though the best planning choice would have been to place the burden on powerful or organized groups.41

Hence, although a rule of full compensation across-the-board seems the perfect vindication of property law’s commitment to aggregate efficiency and individual liberty, it actually undermines both. By distorting the decisions of the public authority, such a rule is likely to impede allocative efficiency. 42 Moreover, appreciating this incentive effect demonstrates the inevitable distributive dimension of property’s function in spreading power (decentralizing decision-making) in order to preserve individual liberty. The same property rights that guarantee individual liberty are also the source of other people’s duties and liabilities. Therefore, a credible conception of property as the guardian of liberty necessarily requires “an ongoing commitment to dispersal of access”, and also demands that we design our property system so that it dynamically ensures that “lots of people have some” property and that “pockets of illegitimately concentrated power” (i.e., property) do not re-emerge.43 In order for property to serve its important role as a bastion of negative liberty, we must keep in mind that concentrations of private property (i.e., private power) may, in themselves, become “sources of dependency, manipulation, and insecurity”.44

The prescription of securing wide access to property while preserving its protective role confronts property law with a complicated challenge. A uniform rule of full compensation threatens law’s ability to respond to this challenge, partly

41 For a more detailed analysis and some responses to critics, see id., pp. 92-94, 123-137.
42 A full compensation rule is also likely to hinder efficiency by distorting owners’ incentives. More specifically, compensation is required to prevent risk-averse landowners – such as private homeowners, who are not professional investors and have purchased a small parcel of land with their life-savings – from under-investing in their property. By contrast, when a piece of land is part of a diversified investment portfolio, it may lead to inefficient over-investment. The possibility of an uncompensated investment is thus likely in the latter type of cases to lead to an efficient adjustment of the landowner’s investment decisions, commensurate with the risk that the land will be put to public use. See id., pp. 90-92.
because this rule and its corresponding absolutist conception of property leave no room for social responsibility in our understanding of ownership.\textsuperscript{45} An across-the-board full compensation rule preserves the economic status quo in the course of implementing the pertinent public project, activity, or regulation, although it may ‘translate’ people’s assets into wealth without their consent. It thus underplays the significance of belonging to a community, and perceives our membership therein in purely instrumental terms. It defines our obligations qua citizens and qua community members as exchanges for monetizable gains, and thereby commodifies both our citizenship and our membership in local communities.\textsuperscript{46} 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”.\textsuperscript{47} A responsible conception of property can and should appreciate these virtues of the market norms. It should still avoid allowing these norms to override those of the other spheres of society, wherein property relations participate in the creation of some of our most cooperative human interactions, obliterating the sense of ownership as a locus of not only rights but also obligations.

The most attractive promise of partial compensation in non-deliberately-distributive expropriations is, as Gregory Alexander suggests, as a “via media between the two extremes of total compensation (that is, full fair market value) and no compensation whatsoever”, which can properly reflect this “social dimension of the constitutional property right”.\textsuperscript{48} The task of expropriatory compensation law is thus to devise a regime of partial compensation that complies with the rule of law and is also sensitive to property’s distributive dimension and to its functions in promoting social welfare and social responsibility. In so doing, however, this regime should not undermine the effects of ownership on the protection of individuals from the power of government, particularly those politically weak or economically disadvantaged. To accomplish this task, we need to consider two other property values – personhood and community – that are marginalized in a uniform compensation regime. Accommodating these property values into a principled regime of partial compensation is also the key for addressing the difficulties involved in the full compensation rule and the pitfalls of an ad hoc discretionary norm of partial compensation, which were discussed above.


III. PARTIAL COMPENSATION AND PROPERTY VALUES

To appreciate the significance of personhood and community to property and to see how these values can and should affect expropriation law, I need to briefly restate my understanding of property. This understanding may differ from the dominant voices in the field, but is still loyal to the practice of property. This view, which I defended in my book, *Property: Values and Institution*, rejects the misleading binarism of property as either a monistic form structured around Blackstone’s formula of “sole and despotic dominion”, or a formless bundle of rights. Instead, it conceptualizes property as an umbrella for a set of institutions bearing a mutual family resemblance. Normatively, my conception of property resists the tendency to discuss property through the prism of only one particular value, notably efficiency. It argues that property can, and should, serve a pluralistic set of liberal values.

Rather than a uniform bulwark of exclusion or a formless bundle of rights, the meaning of property, the content of an owner’s entitlements, varies according to the categories of social settings in which it is situated and according to the categories of resources subject to property rights. I do not argue that the categories on either dimension are in any sense natural or inevitable. In fact, I assume that they are legal artifacts. Their artificiality, however, by no means derogates from their normative significance. After all, all legal concepts and rules, including the concept of property itself, are artifacts and, as long as we do not essentialize them in a way that obfuscates the operation of the doctrine or inhibits its normative scrutiny, their artificiality is not, in and of itself, a condemning argument. Property institutions both construct and reflect the ideal ways of human interaction in a given category of social contexts (e.g., market, community, family) and regarding a given category of resources (e.g., land, copyright, patents). Therefore, the values that property institutions serve are, at least potentially, as diverse as the values served by legal institutions at large. In particular, property institutions serve or should serve individual liberty and personhood, as well as aggregate welfare, social responsibility, and distributive justice. At least ideally, the composition of entitlements that constitute each such property institution is determined by its character and thus its underlying normative commitments, namely, its local balance of property values.

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

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Consider first how the personhood value of property helps to understand the heterogeneity of property institutions and may thus provide corresponding guidelines for the law of expropriatory compensation. According to personhood theory, our attachment to the resources we hold is explicated and justified to the extent that those

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49 See Dagan 2011.
resources reflect our identity. Because society regards different resources (such as land, chattels, copyright, and patents) as variously constitutive of their possessors’ identity, the law treats them differently and subjects them to different property configurations. Whereas the law vigorously vindicates people’s control of their constitutive resources, the more fungible an interest, the less emphasis property law needs to place on its owner’s control.⁵⁰

To be sure: describing a human phenomenon does not necessarily justify its entrenchment in law, especially if we assume that the law has some expressive effect which would thus further reinforce it.⁵¹ Hence, while the role some property institutions play in the constitution of our personhood is manifested psychologically, the personhood function of property is not (merely) a matter of empirical investigation.⁵² Rather, its significance hangs on its normative validity. Personhood theory attempts to capture the way the objects we purposefully work to change, and even resources we simply possess or the places in which we live,⁵³ foster our moral development. As Jeremy Waldron explains, changing an object – and, we may add, integrating a resource (like our home) into our lives by shaping or organizing it in line with our conception of self and our private needs, inclinations, and desires, our own life-plans – makes a difference not only to the object. It also, and more significantly, registers the person’s will. The resource becomes a medium through which people identify themselves, an essential element of their self-consciousness. Modifying something in the external world, or even living with an object or in a place for a period of time, demonstrates a kind of responsibility. It imposes some sort of consistency, permanence, and stability on the resolutions, plans, and projects of the


will. Moral development is thus fostered: our will becomes more self-disciplined and mature, and our abilities and self-conceptions are sustained and developed.  

Appreciating the moral significance of the personhood value of property suggests that the appropriate level of constitutional protection ensured to property should also depend on this dimension: expropriation law should treat constitutive property, which implicates its holder’s personhood, differently from fungible property, which is wholly instrumental. The implications of this prescription turn out to be quite complicated. Thus, the distinction between fungible and constitutive property should not imply that wholly fungible property, wealth as such, should have no constitutional protection. Such an extreme position ignores the simple truism that self-development also requires a degree of wealth, and exposes all owners – rich and poor, strong and weak – to the risk of being sacrificed for the public good. In some contexts, this risk may indeed be particularly real and potentially alarming to the unorganized segments of society, and even more so to the weak ones. 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 wealth. It rejects, however, the view that the power to structure and allocate tax burdens is unlimited. It founds the legitimacy of current tax practice on its compliance with acceptable principles of distributive justice rather than on any kind of a priori immunity.

Nor does the distinction between fungible and constitutive property render fair market value an unacceptable measure in compensating for the expropriation of constitutive property. As Brian Lee has recently argued, because the market price follows “transactions that included each seller’s entire ‘subjective’ value, it … reflects the property’s typical subjective value”. Furthermore, providing “full compensation for idiosyncratically large amounts of subjective value in property that is taken for public use” is distributively unjust since it “imposes on other community members unreasonable burdens” and disregards the owners’ social duty of “not standing too

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56 Contra Alexander 2006, pp. 103, 127, who celebrates the German law prescription whereby “the property clause does not protect wealth as such” because “private wealth-creating property interests … are viewed as not immediately implicating the fundamental values of human dignity and self-realization”.
much in the way of the public good”.

And yet, expressing the qualitative difference between constitutive and fungible property in the compensation regime governing expropriations (by making the condemnation of a home, for example, more expensive than the condemnation of an equivalent real estate that is not an individual’s principal residence), is nonetheless important, both intrinsically and instrumentally. Insisting on a non-negligible difference between these two cases serves as a public vindication of this distinction’s moral significance, and provides a credibility check ensuring that legal recognition of it does not end up as hollow rhetoric. This expressive dimension also entails important ex ante effects because, without a price tag on the expropriation of homeowners’ land as opposed to that of fungible land (typically owned by real estate corporations and wealthy individuals), the latter’s excessive political power is likely to lead to the systemic targeting of the former.

The translation of the fungible/constitutive divide into legal doctrine should focus on the moral significance of constitutive resources; it should also beware of generating regressive outcomes or undermining the social responsibility of property. The former prescription implies that the practice, recently adopted in some American states, of adding fixed percentage bonuses to the fair market value where the expropriated land is constitutive is inappropriate, because it makes the difference between fungible and constitutive contingent upon the value of the land. As Lee claims, “the personhood of all owners, whether rich or poor, has equal value” and, therefore, rather than a fixed percentage of fair market value, its vindication “should be equal across all condemnees”, that is, it should take the form of “a fixed-dollar-amount compensation for each condemnee”. To avoid a rule that encroaches upon owners’ social responsibility (as per the latter prescription), expropriation law should avoid using bonuses that render compensation larger than fair market value. It is at this point that partial compensation becomes particularly helpful because it opens up a space for two measures of recovery – full and partial compensation – while preserving the status of fair market value as a cap. Thus, full compensation can apply to all (and only to) expropriations of constitutive property, while partial compensation applies only to expropriations of fungible property (and to all such cases).


59 On its face, by making the content of rights dependent on the identity of their holders, this approach may put undesirable restraints on alienation. But expropriations are sufficiently infrequent in order to make this effect rather marginal.


61 Lee 2013, pp. 636-39, 645, 649. Lee’s critique of fixed percentage bonuses corrects a mistake incurred by many commentators, including this one. See Dagan 2011, p. 149.
Property institutions also differ from one another because of the type of human relationship they help to structure and regulate. This spectrum of human interactions goes from arm’s-length relationships between strangers (or market transactors), through relationships between landlords and tenants, members of the same local community, neighbours, and co-owners, up to intimate relationships between family members. Correspondingly, while some property institutions are structured along the lines of the Blackstonian conception of property, others (such as marital property) are dominated by a much more communitarian view of property, in which ownership is a locus of sharing. Many property institutions, governing relationships between people who are neither strangers nor intimates, lie somewhere along this spectrum from atomistic to communitarian norms.62

As noted, property law, at least at its best, prevents market norms from overriding the norms prevalent in other social spheres. Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. Imposing the market’s impersonal norms on these divergent spheres might effectively erase or marginalize these spheres of human interaction and human flourishing. On its face, these types of interactions can be facilitated by contractual arrangements between despotic owners.63 But as is the case more generally in private law, contractual freedom, however significant, cannot replace active legal facilitation. Lack of legal support could undermine more cooperative types of interpersonal relationships, for two reasons: (1) Many of these relationships rely on sophisticated governance mechanisms to overcome various types of transaction costs, such as information costs, cognitive biases, and heightened risks of opportunistic behaviour that generate the endemic vulnerabilities of participants in these cooperative interactions. (2) Our property institutions play an important cultural role; like other social conventions, these institutions serve a crucial function in consolidating our expectations and in expressing normative ideals regarding the core categories of interpersonal relationships they participate in constructing.64

Again, takings law (and, for my current purposes, the law of expropriation) should follow suit. As I have argued,65 the main conceptual tool for this task is the maxim of long-term reciprocity, which is a prominent feature of American regulatory takings law. Long-term (and rough) reciprocity of advantage implies that a public authority need not pay compensation if, and only if, two conditions prevail. The first is that the disproportionate burden of the public action in question is not overly

62 See generally Dagan 2011, Pt. III.
65 See Dagan 2011, pp. 103-107, on which the following three paragraphs largely rely.
extreme. The second is that this burden is offset, or is highly likely to be so, by
benefits accruing from other – past, present, or future – public actions that harm
neighbouring properties similar in magnitude to the landowner’s current injury. This
prescription subtly captures a credible norm of social responsibility that, on the one
hand, is always wary of sliding into excessive (and potentially self-defeating) injury
to private interest. On the other, however, it rejects the strict short-term accounting of
the full compensation norm and thus recognizes, preserves, and fosters the non-
commodified significance of membership in a community, alongside the more
calculated, and thus commodified, aspect of it.

Long-term reciprocity reminds us that injured landowners are members of a
community and, as such, enjoy various social benefits for which they are not required
to pay directly. Land ownership, like ownership at large, is thus perceived not merely
as a locus of rights, but also as a social institution that creates bonds of commitment
among landowners and between landowners and others who live, work, or are
otherwise affected by the landowners’ properties. Hence, landowners should also bear
obligations toward their communities. In some cases, this responsibility implies
certain constraints regarding what they can do with their property, especially
regarding uses that threaten or hinder quality of life for other members of their
community. In other cases, it requires some uncompensated disproportionate
impact on the distribution of burdens as a result of public actions meant to enhance the
community’s well being. Admittedly, reciprocity of advantage does not establish a
regime of complete non-commodification, meaning no monetary compensation,
which might accord some ideal of citizenship (or membership). Reciprocity of
advantage is cautious and not too utopian about citizenship, acknowledging the
detrimental consequences of a no-compensation regime in our non-ideal world, hence
requiring long term rough equivalence of burdens and advantages. By rejecting strict
short-term accounting, however, it stabilizes the coexistence of our plural and
ambivalent understandings of citizenship as both a source of mutual advantage and as
a locus of membership and belongingness.

Rather than imposing the same demand of social responsibility in all contexts,
expropriation law should adjust its expected level of social responsibility to the scope
of the social unit benefiting from the public action at stake. Here again, the possibility
of divergent degrees of compensation is significantly helpful. Although aspiring to the
coexistence of mutual advantage and belongingness at the macro level of citizenship
may be a worthy aim, this coexistence is far more likely to be sustained at the micro
level of our local communities, where our status as landowners also defines our
membership.66 Local communities bound solely by a geographic common
denominator may not be as strong as communities held together by bonds of ancestry
or a common ideology. But even in our global, mobile, and interdependent world,

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66 For the purposes of this Essay, I take the geographical divisions set by land use law as a
given. Characterizing the desirable size – and other features – of a geographical community is
a significant normative question of land use law as a whole.
geographic communities are quite significant. Many localities genuinely differ and offer their residents competing lifestyle options. Many people choose a specific locality, at least to some degree, according to the compatibility of its specific peculiarities with their own ambitions, goals, and needs. Insofar as we believe that structuring our geographic localities into such local communities fulfils an important human need and facilitates the pursuit of worthy civic virtues, we need to incorporate this vision into our legal rules as well as into the legal rhetoric that accompanies the invocation of these rules.

Expropriatory compensation law, like land use law more generally, has a share in structuring our relationships as members of such localities. It shapes our conception of what it means to own land within a geographic locality and thus reinforces, modifies, and shapes our vision of our relationships as landowners in a particular locality. It can help to structure our localities, which would otherwise be merely the geographic locations where we happen to reside, as communities. One way of doing this is by drawing a distinction between expropriations of lots of land that benefit the public at large, and those benefitting the community to which the property owner belongs, so the latter lead to less than full compensation. The reduction, which should take the form of a fixed percentage rather than a fixed dollar amount, would serve to convey a heightened degree of responsibility towards one’s local community. It would also be justified because the smaller the scope of the benefited unit, the stronger the notion that its effects on the injured individual are likely to be offset in the long-term.

CONCLUDING REMARKS

The discussion so far should be read as an attempt to offer a preliminary outline for a doctrine of partial compensation for expropriations, which avoids the form of open-ended discretionary authority and thus abides by the rule of law. This doctrine, like most of property law, relies on the foundational normative commitments of property, that is, on the property values of liberty, personhood, community, aggregate welfare, and distributive justice, all of which point to severe pitfalls in a uniform rule of full market value. Although the precise meaning of these values is in dispute, their invocation creates a situation that is fundamentally different from an open-ended

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68 Arguably, this rule should *not* apply where as a result of the expropriation the landowner ceases to be a member of the pertinent community.

69 This would be the case unless, as it is at times argued, localities are particularly vulnerable to factionalism, agency capture, and extreme majoritarianism. I tend to be suspicious of this extreme cynicism about localism and hold it to be normatively desirable to encourage reciprocity, especially in local settings.
contextual judgment of the justice and equity of each particular case. To avoid the drawbacks of ad-hocism and comply with the rule of law requirement that law be capable of guidance and with its prescription that law not grant unconstrained power to officials, the resulting legal architecture should attempt to go even further. It should translate the injunctions of these normative concerns into a simple set of rules or informative standards that rely on even more tangible and somewhat less controversial variables, which serve as – by definition imprecise – proxies for these underlying normative distinctions. (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 upsets predictability and thus the rule of law; and it requires a specialist to orient the uninitiated in the legal labyrinth, thus undermining distributive justice.)

The two most important variables identified above are the nature of the expropriated property (constitutive or fungible), and the question of whether the project at hand benefits the injured landowner’s local community, or rather the broader society or another subset thereof. Although neither variable mentions distributive justice, this important concern is significantly integrated in any compensation doctrine that, as noted, makes the targeting of owners of constitutive land – usually ordinary citizens with limited political influence – more expensive than that of owners of fungible land – typically real estate holding corporations and wealthy individuals. Admittedly, the distinctions between constitutive and fungible properties or between local communities and larger governmental bodies are not entirely clear. Given their prominence in other branches of property law, however, rule-of-law conscious legislators (or even judges) can use the thick body of law that already resorts to these distinctions to integrate them into the law of expropriatory compensation.

Once this step is properly implemented, the above analysis suggests the following scheme of compensation:

(1) The clearest case for the application of partial compensation is one where the beneficiary of the public project at hand is one’s local community and the expropriated land had been held as an investment, meaning that the owner had

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70 In Ronald Dworkin’s famous distinction, the difference at hand is between discretion in the weak sense and discretion in the strong sense. See R. Dworkin, Taking Rights Seriously, Harvard University Press, Cambridge MA, 1977, pp. 31-33, 69-71.


72 Interestingly, these variables may be understood as specific interpretations of two of the five factors mentioned in the South African Constitution, namely: “the current use of the property”, and “the purpose of the expropriation”. See Constitution of South Africa 1996, s 25(3)(a), 25(3)(e). The remaining two factors, in addition to “the market value of the property” (id., s 25(3)(c)) – seem specific to the South African post-apartheid context.
held it as fungible property. In this type of cases, both a fixed percentage (as per the former concern) and a fixed dollar amount (as per the latter) should be deducted from the property’s fair market value.

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

(3) Between these two extreme categories are cases where constitutive land is expropriated for purposes that benefit its owner’s local community and cases where the use of fungible land benefits the broader society. These intermediate types of cases should trigger the award of intermediate measures of recovery where, respectively, either the fixed percentage deduction or the fixed dollar amount applies.