PROPERTY THEORY, ESSENTIAL RESOURCES, AND THE GLOBAL LAND RUSH

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Abstract

Recent large scale transnational transfers of land threaten members of rural communities in the developing world who rely for food and shelter on access to land they lack formal title to. Contrary to some of the conventional wisdom, this Essay argues that liberal property theory provides important inroads for addressing this challenge. Properly interpreted, property requires an ongoing (albeit properly cautious) redefinition of existing property institutions as well as the design of new ones, in light of changing circumstances and in response to the liberal property values of personal independence, labor, personhood, aggregate welfare, community, and distributive justice. These property values imply that the new, transnational land market must accommodate a property institution for essential resources that secures the individual and collective rights of pre-existing users. Securing these rights does not require that we reject the logic of competitive markets. Quite the contrary. One promising path for realizing these rights is to strengthen competition through properly designed auctions that ensure the members of local communities choices between outright sale offers and equity investment in local cooperatives.
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Recent large scale transnational transfers of land threaten members of rural communities in the developing world who rely for food and shelter on access to land they lack formal title to. Contrary to some of the conventional wisdom, this Essay argues that liberal property theory provides important inroads for addressing this challenge. Properly interpreted, property requires an ongoing (albeit properly cautious) redefinition of existing property institutions as well as the design of new ones, in light of changing circumstances and in response to the liberal property values of personal independence, labor, personhood, aggregate welfare, community, and distributive justice. These property values imply that the new, transnational land market must accommodate a property institution for essential resources that secures the individual and collective rights of pre-existing users. Securing these rights does not require that we reject the logic of competitive markets. Quite the contrary. One promising path for realizing these rights is to strengthen competition through properly designed auctions that ensure the members of local communities choices between outright sale offers and equity investment in local cooperatives.

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INTRODUCTION

Securing access to essential resources is a major human rights concern. It also is, or at least should be, a major concern of property law and theory as straightforward as it is urgent. As Olivier DeSchutter and Katharina Pistor insist, “drinking water, adequate food or the means to produce food, and shelter” as well as land (insofar as access to it is necessary for growing food or drawing water, as is the case for many rural households in the developing world) are all “indispensable for survival.” Depriving people from access to such resources violates their basic needs and is thus “morally repugnant”; hence “the tragedy of exclusion” (DeSchutter and Pistor, forthcoming).

DeSchutter and Pistor pose three main challenges: conceptual, normative, and programmatic. They argue that we need “to re-think the concept of property in relation to [essential] resources.” They urge us to move beyond the concern of ensuring “the increased productivity” of such resources, taking seriously both the goal of “fair access” (or “distributional equity”) and that of “sustainability” (or “resource preservation”), and further considering the addition of a fourth goal: focusing on “the collective right of communities to self-determine their way of life.” Finally, they acknowledge the programmatic challenge of translating these conceptual and normative prescriptions into concrete policy measures, laying stress on two main problems. One touches on the potential conflicts between these three (or four) normative goals, which require devising strategies able to ensure their proper accommodation. The other derives from competition, which they perceive as a lingering impediment to success. DeSchutter and Pistor therefore invite us “to rethink the scope of market mechanisms and the use of defensive mechanisms against the potentially erosive effects of market forces on access to essential resources” (ibid.).

My approach in addressing these challenges is interpretive. At least insofar as essential resources are concerned, I agree that the conventional conceptual map of property is inadequate, that welfare maximization should not be our sole guide, and that the current structure of developing transnational markets is troublesome. But I claim we can face all the three challenges—conceptual, normative, and programmatic—by reclaiming the (Western) conception of property and enlisting the market. Rather than rejecting property or shunning competition, then, I suggest adopting a charitable reinterpretation of them. In what follows, I hope to demonstrate the promising yield of this exercise for members of rural communities whose reliance on access to land is threatened by large scale transfers of land they do not hold formal title to.

I claim that, properly interpreted, our conception of property is a loose framework for an array of institutions governing a diverse set of interpersonal relationships regarding different types of resources. Thus, property itself invites a dynamic re-imagination of
these institutions’ contours. I also argue that, notwithstanding the prevailing tendency to discuss property through the prism of only one particular value, notably aggregate welfare and independence, property can, should, and in fact does serve a pluralistic set of liberal values that also includes labor, personhood, community, and distributive justice. I further argue that all these property values weigh heavily in favor of recognizing the rights of those whose (individual and collective) identity, and even survival, depend on access to essential resources. Finally, I maintain that subscribing to the value and structural pluralism of property may be crucial in addressing both these programmatic difficulties. Deciphering the possible underpinnings of property’s pluralism can point to proper strategies for addressing conflicts of values, and recognizing this multiplicity may point out how market alienability can be recruited for enhancing, rather than hindering, the proper governance of access to essential resources.

My approach is not risk-free, so I begin by acknowledging its possible drawbacks. The history of property is complicated. Against optimistic examples of synthesis and accommodation that I will highlight, property also obstructed the realization of the liberal values just mentioned, notably by neglecting the interests of the have-nots and by its tendency to put everything up for sale. Embracing property—that is, our Western way of thinking about property—may therefore be perceived as too conservative. More specifically (and critically), taking cues from the internal structure of property institutions may entrench established social practices and unduly marginalize radical innovations. It may end up as an apologetic exercise, co-opting the hegemonic way of thinking about collective action problems as if they inevitably need to be addressed with “modest pessimism about human motivation,” thus possibly exacerbating our blindness to more utopian alternatives (Purdy, 2013).

I do not deny these possible risks, but the alternative of discarding our accepted ideals of property and markets is onerous as well. By neglecting the possibility of mining these ideals for happier practices, champions of the access to essential resources cause—I count myself as a fellow traveler—may allow the practitioners and beneficiaries of “land grabbing” to capture the powerful brand names of property and markets, thus undermining their own goals.¹ In other words, given the cultural power of property and markets, losing the battle over their proper interpretation would, by default, needlessly exacerbate our predicament. The alternative I offer is very different from accepting the (largely corrupt) manifestations of property and markets ideals in contemporary transnational markets. Quite the contrary, unpacking the ideals underlying these contingent social practices is potentially challenging because it requires, at the very least,

¹ This by no mean implies that thinking about our subject matter in terms of other human rights (DeSchutter, 2011) is wrong or redundant. Rather, my claim is that defenders of the right to access to essential resources should supplement, rather than supplant, their current line of argument with property reasoning.
a respectable universalistic façade. This idealized picture can be, and often is, a fruitful source of social criticism by setting standards that our current practices do not necessarily live up to. The idealism of our social world, even if hypocritical, is a significant source in any critical engagement (Dagan, 2011, ch.4; see also Radin, 1993; Walzer, 1987).

I. STRUCTURES

The standard conceptual apparatus of property offers a well-worn trilogy of ownership forms. Private property is defined “around the idea that contested resources are to be regarded as separate objects each assigned to the decisional authority of some particular individual (or family or firm)” (Waldron, 1996, at 6). Common property designates resources that are owned or controlled by a finite number of people who manage the resource together and exclude outsiders (Ostrom, 1990, at 222, n. 23). Finally, state (or collective) property stands for a regime in which, “in principle, material resources are answerable to the needs and purposes of society as a whole” (Waldron, 1996, at 40). Property theorists acknowledge that neither of these ideal types is present in pure form, and use them only as placeholders for their justificatory and normative debates. But this trilogy has become so entrenched as to seem almost natural, beyond serious contestation or elaboration (Dagan and Heller, 2001, at 555).

Property law, however, never complied with this architecture. To be sure, many property theorists try to explain (or explain away) the numerous hybrid forms as variations on a common theme or peripheral exceptions to a robust core (e.g., Penner, 1997; Merrill and Smith, 2007). But as I have argued elsewhere, the multiplicity of property can be suppressed or marginalized along these lines only if, somewhat arbitrarily, we set aside large parts of what constitutes property law, at least as evident in the conventional understandings of the case law, the Restatements, and the academic discourse. Rather than complying with this canonical tripartite straitjacket, property exemplifies the structural pluralism of private law through a large number of distinct institutions, each governing a specific social context or resource and typified by a particular configuration of owners’ entitlement, with a particular property value or a balance of values serving as its regulative principle (Dagan, 2012).

Thus, some property institutions, such as the fee simple absolute, are structured along the lines of the Blackstonian view of property as “sole and despotic dominion.” These institutions are atomistic, competitive, and vindicate people’s negative liberty. Liberal societies justifiably facilitate such property institutions, which serve both as a source of personal well being and as a domain of individual freedom and independence. In other property institutions, such as marital property, a more communitarian view of property may dominate, with property as a locus of sharing. There are many others along the strangers-spouses spectrum, and shades and hues of these property institutions will
thus be found. In these various categories of cooperative property institutions, both liberty and community are of the essence, and the applicable property configuration includes rights as well as responsibilities. This variety is rich both between and within contexts: it provides more than one option for people who want, for example, to become homeowners, engage in business, or enter into intimate relationships (Dagan, 2011, at chs. 1, 3–4, 8–10; Dagan, 2012).

Alongside more atomistic property institutions, property law supports a wide range of institutions that facilitate the economic and social gains made possible by cooperation. Some of these institutions, such as a close corporation, are mostly about economic gains, including securing efficiencies of economies of scale and risk-spreading, with social benefits merely a (sometimes pleasant) side-effect. Others are more (or at least equally) about interpersonal relations, with the attendant economic benefits perceived as helpful by-products rather than as the primary good of cooperation. Either way, the whole point of the elaborate governance structures these doctrines prescribe is to facilitate cooperative, rather than competitive, relationships. Not surprisingly, then, the exclusion conception of property is particularly inapt for understanding these important property institutions.

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially affect its productive use. Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion. The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors’ identity. Accordingly, resources are subject to different property configurations: whereas the law vigorously vindicates people’s control of their constitutive resources (such as homes), the more fungible an interest, the less emphasis property law places on its owner’s control.

The pluralist understanding of property law is, at least in its common law rendition, inherently dynamic (Dagan, 2011, at ch. 1). While existing property institutions are often the starting point of analysis, they are never frozen. Rather, as institutions structuring and channeling people’s relationships, they are subject to ongoing, albeit properly cautious, normative and contextual re-evaluation and to possible reconfiguration. The conservative baseline of this approach derives not only from the pragmatic reality that existing rules cannot be abandoned completely, but also from the recognition that existing law represents a cumulative judicial and legislative experience that deserves respect. In turn,

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2 As Karl Llewellyn described the common law method, it is typified by “a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need,” mediating between “the seeming commands of the authorities and the felt demands of justice” (Llewellyn, 1960, at 37-38).
the forward-looking perspective of this endeavor is premised on an understanding of law as a dynamic enterprise. Its content unfolds through challenges to the desirability of the normative underpinnings of our private law institutions, their responsiveness to their social context, their effectiveness in promoting their contextually examined, normative goals, and the sufficiency of the repertoire that property law offers for any given type of human pursuit.

At times, this process helped to fill gaps in the law by prescribing new rules that further bolster and vindicate these goals. At other times, it pointed out “blemishes” in the existing doctrine, rules that undermine the most illuminating and defensible account of such a property institution, which should be reformed so that it lives up to its own ideals. This reformist potential has yielded different types of legal reforms throughout the history of property. In some cases, the reform was relatively radical—the abolition of a property form (as was the case, for all practical purposes, with the fee tail form) or an overall reconstruction of its content (as with leaseholds or marital property). More moderate options are sometimes in order, such as restating the doctrine pertaining to a property form in a way that brings its rules closer to its underlying commitments and, in the process, removes indefensible rules (the best example here probably comes from the gradual transformation of servitudes).

Property’s pluralism, and the dynamic adjustment of the repertoire of property institutions to the pertinent social context and the relevant resource, reveal an ambiguity in our conceptual task. In one sense, we surely need to rethink property in order to face the enormous (and vastly important) challenge of governing access to essential resources. And yet, we do not need to rethink the concept of property. Properly interpreted, property as we know it already implies that, once we identify essential resources as a distinct category and further appreciate the distinctiveness of social context for the development of the transnational markets in which this category is situated, we should indeed develop a new property institution properly tailored for the tasks at hand. At its best, property calls for, or at least responds to rather than rejecting or resisting, such institutional innovation.3

It may be instructive to compare our challenge with the most important development in American land law in the last century: the emergence of common interest communities, a property institution that is by now a major form of land ownership. After some resistance in the courts and some adjustment of people’s expectations, common interest communities are the fastest growing property institution in America. This property institution has already dramatically changed the reality of property for millions since it typically entails features alien to the traditional fee simple absolute, notably the

3 In this sense, the extremity and saliency of the recent wave of transnational land transfers would serve as an important trigger to what may well have been called for in earlier, less extreme or less salient circumstances.
collective management of important aspects of a real-estate development, and the thick layer of rules regarding the use of individual units. It also includes recognition of severe limitations on the exclusionary prerogatives of property owners, insofar as they exhibit unacceptable discriminatory practices (Dagan, 2013; Dagan, forthcoming). The success of common interest communities in departing from the pre-existing commonsensical understanding of what it means to have a home demonstrates the potential of new property institutions.

II. VALUES

My discussion of the structure of property implies that the various property institutions are quite stable in their daily operation, and can thus (properly) serve both as a premise in people’s expectations and as a constraint on the lawmakers’ power (Dagan, forthcoming). It also implies that at “property’s constitutional moments” (when existing property institutions are changed or eliminated, or when new institutions are put in place) property values are involved, often implicitly, in shaping or reshaping the particular configuration of the property institution at hand. Unlike the frequent portrayal of the (Western) conception of property suggested by both defenders and critics of the status quo, however, property does not serve only owners’ independence and aggregate utility but also other important values. These other values are relevant when assessing property rights in rural communities, whose members’ reliance on access to land is threatened by large-scale transfers of land they do not hold formal title to.4 (As one report documents, in many of the recent large-scale land acquisitions in developing countries, “those who are selling or leasing land are not the ones who are actually using it,” a situation often generating displacements [Anseeuw et. al, 2012, at 39, 41].) Appreciating the significance of these values, therefore, is crucial for a property-informed prescription of the appropriate baseline in the developing transnational markets where these transfers take place.

The leitmotif of the following discussion is that our property values—the very values used to justify many of our existing property institutions—point to substantial if well-circumscribed limits on the owners’ right to exclude, as well as to important reasons for recognizing the corresponding rights of non-owners. This point is not only theoretical. In (Western) domestic law, these reasons are often translated into legal rules limiting the owners’ right of exclusion. In fact, the right of non-owners to be included and exercise a right of entry is even typical of certain property institutions such as, for example, the law of public accommodations or the fair use doctrine in copyright law (Dagan, 2011, at 4).

4 In this respect my account reinforces the claim that informal occupancy should not always be viewed as lawlessness, because it is also a recurring feature of the development of property (Peñalver and Katyal, 2010).
ch.2). To be sure, every property right involves some power to exclude others from doing something, but this is a modest truism with hardly any practical implications. Private property is always subject to limitations and obligations, and “the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions” (Cohen, 1954, at 362, 370–74, 379).

Consider first the most traditional liberal property value, desert for labor, which still enjoys strong popular appeal in contemporary Western societies. Property, in the most charitable rendition of this view, is a reward for productive labor. It stands for people’s efforts, perseverance, and risk-taking, as well as the application of their innate intelligence and creativity, despite some daunting philosophical problems in this regard. Laborers merit a reward for purposeful activities directed to useful ends such as the preservation or comfort of our being because, by engaging in value-creating activities, they contribute to the betterment of the human predicament (Buckle, 1991, at 149–52; Munzer, 1990, at 255–56, 285–87).

Note that desert theory implies all labor is good. Because it is concerned with the intrinsic value of labor, desert does not discriminate between the first and the subsequent labor expanded on a resource or, for that matter, between the labor of the resource’s owner and that of another person, such as that of a tenant farmer working on someone else’s property (Waldron, 1988, at 203–04). Modern liberal law does not always go that far though at times it does, such as in cases of adverse possession. Even in less extreme circumstances, however, our property law shows concern for people who invested work in someone else’s land. The doctrine is complex but one approach, which typifies the “Betterment Acts” enacted in most U.S. jurisdictions, gives the owner a choice between paying the value of the improvement and selling the land to the improver at its unimproved value, a rule that seems particularly appropriate for absentee owners who hold the property purely for investment (Dagan, 2004, at 83).

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5 Other examples of the right to entry include the law of common interest communities mentioned above, as well as the right to public access to beaches, including privately owned dry sand portions of beachfront property (Alexander, 2009, at 801-10); the right to roam over privately owned wilderness or similar sorts of undeveloped land (Lovett, 2011), and the compulsory licensing of patents (Adelman, 1977).

6 As the text implies, this version of the labor theory of property is different from Locke’s famous account, which was aimed to establish the legitimacy of pre-political robust private property rights. But Locke’s account is fraught with difficulties. Notable among them are the tortuous path from the no-spoilage proviso to an endorsement of full-blown money economy; the (implicit) dubious claim that non-owners have no right to complain about appropriations even if they suffer non-material harms as long as enough, and as good, means of subsistence remains; and the feeble contention that, by mixing one’s physical labor with an object that belongs to everyone in common, one is able to obliterate others’ rights to that object and establish absolute ownership of it (Sreenivasan, 1995; Waldron, 1988, at 137-252).
Similar and perhaps more pointed conclusions emerge from the personhood value of property. Whereas ownership of a fungible property plays a purely instrumental role in an owner’s life, holders of constitutive resources are personally attached to their properties, since and insofar as these resources reflect their owners’ identity as external projections of their personality (Radin, 1982). These differences are morally significant because perceiving resources as an extension of the self fosters people’s moral development by imposing consistency and stability on their resolutions, plans, and projects, thus facilitating a sense of self-discipline, maturity, and responsibility (Waldron, 1988, at 370–377).

And indeed, (American) law responds to these distinctions largely by according differing degrees of protection to resources (socially) perceived as variously constitutive of their possessor’s identity. Thus, the more closely a resource is attached to its holder’s identity in her society, the greater the emphasis that the law places on negative liberty. By contrast, when resources are viewed as merely valuable assets without direct bearing on their holders’ identity, the law’s focus shifts to the social standpoint and adherence to the vindication of owners’ exclusivity is correspondingly diminished (Dagan, 2004, at 216). Indeed, the same property value that is particularly strict about curtailing a non-owner’s claim to a constitutive resource, such as someone’s home, may be almost indifferent regarding a fungible resource. In some cases, the position of the personhood value of property is almost reversed. When a resource is fungible for its owner but constitutive for another (say, its long-term lessee), the personhood value of property is particularly suspicious of the owner’s claim to exclude that particular other (Radin, 1986).

The personhood value of property may be significant for my current discussion because, alongside desert-for-labor, it may serve as a normative foundation for the claims of non-owners to certain (property!) rights in land that they have improved and on which their personal identity (as well as their communal one, as I will argue shortly) is constituted (Narula, forthcoming, at 66). The personhood value of property is relevant for an additional reason. Personhood and personal liberty are general, right-based justifications of property. Unlike collective justifications, such as aggregate welfare, they rely on an individual interest, and unlike special, right-based justifications, such as desert, they rely on the importance of an individual interest as such rather than on a specific event. These property values, then, entail significant distributive implications: none of them can justify the law enforcing the rights of property owners unless the law simultaneously guarantees necessary as well as constitutive resources to non-owners (Waldron, 1988, at 115–117, 377–378, 384–386, 423, 429–39, 444–45; Waldron, 1991).

This claim of non-owners is surely relevant vis-à-vis the government. It requires “an ongoing commitment to dispersal of access” and insists that we design our property system so that it dynamically ensures that “lots of people have some” property and that “pockets of illegitimately concentrated power” (i.e., property) do not re-emerge (Singer
and Beermann, 1993, at 228, 242–45). But non-owners’ claim to access may also be pertinent vis-à-vis private owners. To see why, consider property’s role in protecting people’s negative liberty. Private property is often justified by reference to its function in protecting people’s independence and security through the spread or decentralization of decision-making power (Friedman, 1962, at 14–16; Barnett, 1998, at 139–42, 238). But this protective role, rather than universally significant, is particularly important to members of the non-organized public or of marginal groups with little political influence (Michelman, 1987; Michelman, 1990). The special significance of providing non-owners access to property, together with the inverse relation between owners’ wealth and power and the importance of safeguarding their right to exclude, point to categories of cases such as those mentioned above wherein our commitment to personal liberty entails the non-owners’ claim to entry rather than the owners’ claim to exclusion (Dagan, 2011, at ch.2).

I have thus far argued that the conception of property, in its familiar liberal rendition, relies not only on the values of aggregate welfare and personal independence but also on the property values of labor, personhood, and distributive justice. In turn, in different ways and in potentially differing circumstances, these values also support the claims of rural communities whose members face possible large-scale transfers of the land on which they had relied. These non-owners’ rights of inclusion, I claim, are not an embarrassing conceptual aberration. Inclusion is indeed less characteristic of property than exclusion, and in the limiting case of inclusion—universal equal access—there is no owner at all. Manifestations of inclusion are still as intrinsic to property as exclusion because many limitations and qualifications of exclusion, and thus the corresponding rights of non-owners to be included, rest on the very same property values that justify our legal system’s support for the pertinent property institution.

Moreover, in addition to its support of fair access, and again in sharp contrast to its frequent depictions (or distortions), property is also community-friendly. Property relations participate in the creation of some of our most cooperative interactions. Numerous property rules prescribe the rights and obligations of spouses, partners, co-owners, neighbors, and members of local communities. A significant part of property law, as noted, is not about vindicating the rights of autonomous excluders cloaked in Blackstonian armours of sole and despotic dominion, but rather about creating a governance regime for the resource’s stakeholders in order to facilitate the potential economic and social gains of cooperation. These property institutions can, and often do, create an institutional infrastructure that facilitates the long-term cooperation necessary for successful communities. Their sophisticated governance regimes regulate decisions about consumption, investment, management, and allocation. At their core are mechanisms for collective decision-making aimed at aligning individual and group goals by aggregating individual preferences or objectives. Such conflict-transforming mechanisms range from democratic participatory institutions, such as simple majority rule, to representative
apparatuses, such as a condominium board in a common interest community (Dagan & Heller, 2005).

These features of property may be relevant to rural communities facing large-scale transfers of land, insofar as their informal practices of cooperation in the operation, maintenance, and improvement of the land they rely upon are significant to their constitution as communities (Lehavi, 2004). This communal dimension is even stronger when the sites at issue are inherent in the collective personhood of these communities, as evident in the recent discussion about the functions of cultural property for indigenous peoples (Carpenter et. al., 2009). Neither claim necessarily implies the entrenchment of the status quo. The informal customary management of commons regimes may unduly privilege insiders at the expense of non-group members and, even within the group, may particularly benefit powerful leaders (Foster, 2012; Jaffe, 1937). Corrupt communal structures of this type should be reformed or dismantled rather than entrenched. But insofar as community and personhood are valid, indeed important, property values, claims based on these values in the context of developing transnational markets are endogenous to property; rather than claims against property, these are property claims.

III. CONFLICTS

Property, I argue, is a loose framework of separate property institutions that regulate diverse resources in different social contexts, each one according to its own distinct balance of property values. I also claim that, in shaping a property institution for essential resources, the property values of labor, personhood, and distributive justice support and refine the normative goal of fair access. Moreover, I claim that the community value of property implies that fair access should, in proper cases, rely not only on the rights of individuals but also on the collective rights of their communities. DeSchutter and Pistor’s two additional goals of productivity and sustainability are also covered by existing property theory because, at least in a humanist framework, they are two aspects of the same property value—aggregate social welfare. Thus, in a charitably reading, property theory supplies not only the conceptual framework but also the normative underpinnings for this endeavor. This conclusion, as noted, is significant because it implies that supporters of property should join the cause of securing access to essential resources.

I turn now to the programmatic challenge, starting with the difficulty of accommodating the various values that should inform the new property institution of essential resources. Different property values are not necessarily in conflict. For example, community and welfare are often mutually reinforcing because interpersonal capital facilitates trust, which leads to economic success, and, in turn, to the strengthening of trust and mutual responsibility (Pettit, 1995, at 209–10). But this is not always the case, and where property values clash, we need to devise a way to accommodate them.
Identifying the proper strategy for this task requires some attention to the choice between freestanding and autonomy-based pluralism (Dagan, 2012).

Freestanding or foundational value pluralists rely on the observation that human life is replete with irreconcilable competing values and with legitimate wishes that cannot be truly satisfied (Berlin, 1969). Worthwhile and potentially incompatible human projects and goods are many, diverse, and qualitatively different. They are governed and evaluated by distinct sets of norms, and monism does violence to these differences (Anderson, 1993, at 1, 5, 14). Freestanding value pluralists do concede the difficulty posed by the entailed incommensurability, but they insist that value conflicts can be addressed if we are properly attuned to the values that are internal to, and constitutive of, the pertinent practice (ibid., at 49). They may admit that, in some cases, such a contextual normative inquiry may lead to a standoff but they nonetheless insist that, in many (most?) others, the explicit requirement to apply judgment, which needs to be normatively and contextually justified, entails quite sharp doctrinal teeth (Singer, 2009).

Another and more secure foundation of value pluralism is the modestly perfectionist liberal commitment to autonomy, understood as people’s ability to be the authors of their own lives, choosing among worthwhile life plans and being able to pursue their choices (Raz, 1986). The rich mosaic of our structurally pluralist domestic property law relies here on the state’s obligation to facilitate a sufficiently diverse set of robust frameworks for people to organize their lives (Dagan, 2012). Likewise, the different property values that are variously balanced by these divergent property institutions derive from, and rely on, the ultimate value of individual self-authorship. And because personal independence, labor, personhood, community, aggregate welfare, and distributive justice are valuable because they are crucial for people’s autonomy, their accommodation should be guided by this ultimate value.

In many domestic property contexts, this prescription simply reinforces the structural pluralist requirement of multiplicity, so that people can choose their favorite property institution. Domestically, then, the prescriptions of autonomy-based pluralism tend to converge with those of freestanding pluralism in pointing to the regulative principle of the property institution at hand as the local arbiter for the resolution of value conflicts (Dagan, 2012, at 1424). Furthermore, both autonomy-based and freestanding pluralism sharpen the commitment of our law to structural pluralism since they imply that property law should react favorably to innovations based on minority views and utopian theories, insofar as they have the potential to add valuable options for human flourishing that significantly broaden people’s choices (ibid., at 1425–26).

But multiplicity does not always dispel conflicts and is certainly not a panacea insofar as essential resources are concerned. In most cases, acknowledging the role of autonomy as the ultimate commitment from which all property values derive implies that, in “vertical conflicts,” autonomy must trump. Thus, since economic development is
important “precisely because [and thus also only insofar as] it enables human beings to flourish” (Alvarez, 2011, at 62), if aggregate welfare threatens to undermine people’s self-authorship, autonomy should take priority (Smith, 1995). Autonomy must similarly prevail whenever communitarian demands of loyalty might impede members’ voice or their ability to exit (Green, 1998). These pristine prescriptions may occasionally seem inappropriate. Sometimes, determining when welfarist or communitarian demands undermine autonomy requires a complex analysis of their overall effect on people’s self-authorship that also takes into account their positive effects. Other cases are more difficult because they may involve tragic tradeoffs, given the significant welfarist or communitarian price of strict adherence to autonomy. I must thus recognize that, though a rare possibility, the presumption that autonomy trumps may be overridden if, and only if, its costs in terms of welfare, community, and the like pass a sufficiently high threshold (Zamir and Medina, 2010, at 1–8, 79–104).

Either way, the claim that autonomy should be the ultimate value of the property institution of essential resources may alarm progressive readers given that a large proportion of the people who are to be subject to, or affected by, this institution do not accept the prescriptions of autonomy. They may find my suggestion unacceptable because it fails to comply with the injunction of equally respecting the dignity of all persons as ends (Nussbaum, 2011; Quong, 2011). Exploring the validity of this critique of perfectionist liberalism (or rather the thin version of it I endorse), or the sustainability of the alternative position—political liberalism—advocated by the critics, exceeds the scope of the present inquiry. For my purposes, it will suffice to highlight that, by sanctioning (in passing) legal practices that combat practices of (women) subordination and ensure people’s ability “to leave one view and opt for another” (Nussbaum, 2011, at 29, 36), these critics end up subscribing to the (modest) perfectionist position they purportedly condemn. This inconsistency is not a contingent flaw. We can hardly envisage a plausible meaning of equal respect that downgrades people’s right to choose their path or authorizes their systemic subordination. The injunction of respecting all persons equally, which underlies political liberalism’s insistence that not all just states of affairs can be legitimately pursued by the state’s coercive apparatus (law), requires enabling each individual person to choose, or at least discover, his or her life plan.7

Not surprisingly, then, the prescriptions of my autonomy-based approach for the resolution of value conflicts in property broadly converge with the progressive blueprint for accommodating conflicting values when addressing the global land rush that triggers

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7 As Leslie Green claims, the position that grounds freedom in self-authorship and the view that the value of freedom is founded on authenticity “are not completely distinct,” because the former must recognize the significance of the “unchosen features of life” that “friends of authenticity” emphasize as “means to, or constituent parts of, various life plans,” whereas the latter must recognize the significance of choice associated with “friends of autonomy,” if not “in order to choose one’s path in life, then in order to discover it” (Green, forthcoming).
our concern with essential resources. Both prioritize the democratization of the rural poor’s access to land over considerations of overall efficiency, and both caution against capture by local elites to the detriment of “female-headed households” and others, “such as newly arrived members of the community” (DeSchutter, 2011, at 528, 532, 538). Revisiting the implications of the property values discussed above and interpreting all property values, including efficiency, as subservient to autonomy, further vindicates two additional elements of this blueprint. First, that even where land users lack formal title, their just claims, which are backed by property values, must be recognized and secured before any other measure is adopted (ibid., at 521, 524, 551). Second, that there should be some preference to small-scale farmers over larger production units, and that insofar as significant land transfers are concerned there should be limits on the maximum length of land leases so that the rights of future generations would not be unduly discounted (DeSchutter, 2011, at 529, 547–48; Narula, forthcoming, at 58). And yet, one but quite significant exception to this happy convergence remains, focusing on the attitude to competition and markets, to which I now turn.

IV. MARKETS

Competitive market forces are often viewed as a threat to “poor rural households, which depend on access to land for farming, gathering wood or water, or grazing cattle.” This attitude, and the entailed requirement of “defensive mechanisms” against the market’s “erosive effects . . . on access to essential resources” seem unassailable. The worry is that “competition can drive up the price for land, water, food, or shelter beyond the reach of many—and the more scarce these resources are, the higher the price.” The recent history of the “rising global demand for arable land and its resources, leading to deprivation of [local populations from] essential resources,” reinforces this theoretical concern (DeSchutter and Pistor, forthcoming).

And yet, I want to cast doubt on the seemingly inevitable split between guaranteeing the rights of the rural poor and competitive markets (Narula, forthcoming). I argue that the current failings, which are surely unacceptable, are contingent rather than essential to the logic of the market. Indeed, some even result from an abuse of this logic. I further

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8 I do not raise this convergence as a way of “tempting” progressives to join forces but as an exercise in “mini-reflective-equilibrium,” which aims to sharpen theoretical commitments by confronting them with our normative intuitions about the fairness of some of their concrete implications.

9 Recall that, in its formative era, antitrust was perceived as a cure for the “multiplicity of economic, social, and political evils” of wealth and economic power concentrations (May 1989, 290).

10 Similar duration limitations may also be appropriate for cooperative solutions insofar as they are adopted in such cases as per the mechanism suggested below.
contend that competition, properly designed, can and should be enlisted for securing access to essential resources.

DeSchutter and Pistor identify three major problems in the current transnational land markets: (1) they rely on an impoverished conception of property, which is enshrined in the prevailing “transnational property regimes” and “effectively prevents the development” of more appropriate (“thick”) understandings of property; (2) “property deals are made typically not in transparent, liquid markets but in private deals characterized by asymmetries in information and power”; (3) such large-scale land transfers are often subject to severe problems of capture and unrepresentativeness of both (or either) local elites and (or) governments, which are “effectively unaccountable to their people” (DeSchutter and Pistor, forthcoming; DeSchutter, 2011, at 528). Based on these significant concerns, Deschutter prefers foreign investments that do not involve land transfers. More specifically, he advocates constraining “investment sales” by limiting land marketability and, instead, encouraging investment in local cooperatives. With proper public assistance (via such measures as “tax incentives [or] preferential treatment in public procurement schemes or in access to loans”), these cooperatives can secure the pre-existing rights of the land’s local users and also increase efficiency, given their inherent advantages of economies of scale and risk-spreading (DeSchutter, 2011, at 531, 547, 549–551; DeSchutter, 2010, at 319–323).

As my discussion makes clear, I subscribe to DeSchutter and Pistor’s view on the inadequacy, indeed the unjustifiability, of the Blackstonian conception of property at the transnational level and I endorse their hope that a better one (perhaps the one articulated in these pages?) will replace it. I also firmly support the claim that private deals characterized by asymmetries of power and information, as well as subject to severe political economy concerns, are unlikely to allay the normative concerns discussed thus far. Finally, I find the cooperative solution potentially appealing, because “[c]ooperatives that function according to democratic principles, work for their members, distribute costs and benefits equitably and design and improve clear business plans, can be extremely beneficial to their members” (DeSchutter, 2011, at 550).

My difficulty begins with the observation that this happy scenario is contingent on a correspondingly pleasing internal governance regime, and possibly on the public support mentioned earlier as well. I do not argue that these conditions cannot obtain, but I insist that they are threatened by the same political economy concerns that render property deals problematic in the first place. I do not contend that the threat posed by the

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11 Smita Narula seems to argue that “the market approach” further ignores the baselines issue (Narula, forthcoming). But even the staunchest defenders of the market acknowledge that its working relies on the prescription of baselines. The question of how to set such baselines, then, precedes the controversy over the workings of the market, and I therefore addressed it in previous sections of this Essay.
cooperative route is necessarily more immanent or severe than that posed by investment sales (though I think we cannot confidently argue in favor of the inverse proposition\textsuperscript{12}). Rather, I claim that the choice between these options should not be made by a global social engineer or by the contingent (and not merely coincidental) inertia that tends to perpetuate the Blackstonian model. This crucial decision should be made by the people who will be most affected by it.\textsuperscript{13} They are entitled to consider both alternatives and choose whichever is best for them, and a transnational property law committed to an autonomy-based structural pluralism must be designed to ensure that they can effectively make this choice. Finally, a market mechanism can, and should, be set up for this significant task. If properly calibrated to ensure competition rather than inhibit it, this mechanism could eventually help to overcome, or at least alleviate, the persistent difficulties caused by considerations of political economy and by asymmetries of power and information.

To see how this could be the case, consider the following proposal for structuring transnational development transactions. This (very) preliminary tripartite suggestion is guided by three different insights gleaned from our past and recent experience of land transfers, from the conventional wisdom of antitrust policy, and from a recent institutional innovation developed for the difficult case of domestic land assembly.

The trigger for my first component is Stuart Banner’s claim that the (or at least a) dominant factor in the British “conquest by contract” of New Zealand derives from the self-serving construction by the British colonial government of the market for Maori land, especially in 1840-1865, when the government was the single purchaser (Banner, 2007). By contrast, as Klaus Deininger and Derek Byerlee claim relying on some empirical evidence, mostly from Peru, “properly designed auctions” generate “very encouraging” results in terms of both “mean payments” and the “positive externalities [generated] by quickly disseminating information on the profitability of agriculture” (Deininger and Byerlee, 2011, at 110–112). The split between these two scenarios suggests that the problem with many deals in the current global land rush could, at least partly, result from the lack of sufficient buyer competition, as was the case regarding the Maoris. This possibility is supported by recent findings on “wide variation in royalties from land deals in developing contexts,” which entails “the lack of corresponding price signals in many cases.”

\textsuperscript{12} DeSchutter seems to learn otherwise from the successful Mexican ejido system given that, even with full alienability, a large majority chose to remain in the communal system (DeSchutter, 2010, at 322). This outcome, however, may only show to what extent the right to exit is instrumetnal for both voice and successful governance (Hirschman, 1970).

\textsuperscript{13} I do not deny the more indirect and defuse effects of such decisions on distant and future groups. In some contexts, their interests can be properly represented by the state apparatus. But this solution may not be satisfactory in some of the contexts considered here; hence my second-best suggestion of setting time limits to whatever property arrangement the proposed procedure yields. See supra note 10 and accompanying text.
affected regions” and thus the possibility open to “some investors [to] exploit this lack of markets and transparency to their advantage” (Anseeuw et. al, 2012, at 42). Intensifying competition by way of mandatory auctions in large-scale land transfers could thus be part of the solution. The auction mechanism is important not only because it is a means of securing that buyers pay the right price but also because it allows the incorporation of development conditions that investors must satisfy. Moreover, auctions can and should involve mechanisms for flexible future adjustments, which can ensure realization of the investment’s expected positive social impact and enable early termination in particularly lengthy leases if circumstances unexpectedly change (Deininger and Byerlee, at 111–112; Narula, forthcoming, at 58). These are significant additional advantages of auctions, despite the difficulties they may generate by ranking not only monetary variables (i.e., the price offered and the amount of the projected investment).

But opening up the possibility of non-monetary variables calls for serious improvement, hence the second component of my proposal, which relies on a conventional wisdom of antitrust.

Antitrust laws foster competition not only by forbidding blunt restraints of trade, such as price fixing, but also by inquiring into the competitive effects of other restrictive practices, including standardizing terms (Areeda and Hovenkamp, 2010, at 380–381; Sullivan and Grimes, 2006, at 283). In sharp contrast with this suspicious attitude towards standardization, transnational land markets implicitly accept that potential buyers need not compete over how, or whether, pre-existing local users would be integrated or involved in the post-transfer use of the land at hand. Insofar as these people are indeed rightful stakeholders, as I claim they are, this blind spot implies that a vital effect of the investment at hand is in fact not subject to competition, and a key normative injunction in the structural pluralism typical of our property law is disregarded. As a way of dealing with this failure, bidders could be required to submit two options—one for outright purchase of the land and the other for becoming equity owners in a local cooperative, formed along the lines suggested by DeSchutter. Alternatively, their proposal could be allowed to include either one or both of these options, but making the entire process

14 A prescription of mandatory auctions need not, and indeed should not, preclude the possibility of investors’ initiatives. Rather, it implies that in such cases, “the potential investor is required to present a business plan” and if the “proposed project is considered valuable,” others will also be given an opportunity to present competing offers, thus initiating “a public bidding process” (Deininger and Byerlee, at 111).

15 Difficult as they might be, multi-attribute-multi-dimensional auctions, notably in the context of U.S. government procurement, involve a robust experience. For the various rating methods applied in such auctions and for the decision process at the Department of Defense, see, respectively, § 15.304 of the Federal Acquisition Regulations (GSA, DoD & NASA, 2005) and Chapter 3 of the Department of Defense Source Selection Procedures (Under Secretary of Defense, 2011). For a sophisticated economic model developed in this context, see Che (1993).
contingent on a minimal number of proposals of both types. This prescription rejects the current structure of the global land market, which erases, or at least marginalizes, the possibility of ending up with such cooperatives. It also rejects, however, DeSchutter’s a priori preference for such an endgame because, as noted, this option may also be vulnerable to unacceptable deficiencies. By fostering competition over this element, my proposal seeks to reveal the premium that a competitive process would assign to the involvement of local users. If the selection of the winning bidder is properly structured, which is the task of my proposal’s last component, this effect would also generate helpful incentives both to local elites wishing to entrench their status in their communities and to foreign investors who, seeking to gain a competitive edge, would look for cost-beneficial ways of structuring the involvement of preexisting local users.

To see how we can design such a happy selection process, consider Michael Heller and Rick Hills’s suggestion for a somewhat similar problem in domestic settings. In order to facilitate economic development, States need power to condemn land that is inefficiently fragmented due to the collective action problem inherent in its assembly. But this power is dangerous and has too often been misused, or even abused, to the detriment of the poor and powerless. Though both attractive and appalling features of eminent domain seem inextricably connected, Heller and Hills show they can be disentangled if we allow the residents of a neighborhood to collectively decide “by a majority vote, to approve or disapprove the sale of the neighborhood to a developer or municipality seeking to consolidate the land into a single parcel.” This procedure gives “neighbors a chance to get a share of the land’s assembly value,” thus “enlist[ing] them to be supporters of land assembly whenever such an assembly really will have a higher value than the neighborhood that it will replace” (Heller and Hills, 2008, at 1469–1470).

For this formula to be transplanted to the context discussed here, we need to assume that pre-auction rights are configured so that pre-existing land users get a percentage matching their proper stake in the land, given the normative accounting discussed earlier. (This crucial assumption is not easy to implement, but is still much simpler than the parallel process of creating a full-blown just titling system, that is, a system that allocates and records the property rights of all the parties involved given this “normative accounting.”) Giving these land users the authority to determine, by majority vote, whether to opt for staying put as part of a DeSchutterian cooperative, or getting higher

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16 This aspect of my proposal can be improved in at least two, admittedly complicating, ways: (1) allowing bidders to raise other options as well, either by way of alternative governance structures or by offering land users substitute land; and (2) allowing the community of land users to do the same, so that the options from which they will end up choosing are at least potentially determined bottom-up, rather than only top-down.
compensation and leaving their land, is an attractive midway between the frequently meaningless consultation process that currently takes place, and the blunt veto power that some authors (e.g., Narula, forthcoming, at 47–50) suggest land users should have. Having this authority also encourages whoever is in charge of this initial allocation process to take the rights of land users seriously; were the financial stakes too low, they would most likely dismiss the alternative of a full-blown sale outright.

If most land users choose the cooperative alternative, it should indeed be adopted. Their willingness to forgo additional compensation to participate instead in a future cooperative endeavor signals their confidence in its success and the endorsement of its expected governance structure. The majority, however, should be allowed to decide otherwise, preferring to receive higher monetary compensation for a full-blown land transfer. Members of local communities should be protected from the unpleasant predicament of having their rights vindicated only through communitarian structures possibly oppressive and unfair. Even when the majority selects the cooperative route, individual members should be able to opt out and receive from the majority the higher monetary compensation that would have been forthcoming had the option of outright sale been adopted (see, analogically, Heller and Hills, 2008, at 1470). Admittedly, just like the alternative of allowing only the cooperative option, this mechanism too could be corrupted if it were to be captured by unresponsive government officials or self-interested local elites. The risk, however, would then be confined to one crucial moment, allowing for a reasonably viable demand for (probably international) supervision in order to ensure its credibility.

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17 As the text implies, I assume that the various monetary offers would be rated by a professional authority. Even so, difficult questions admittedly remain as per the optimal structuring of the land users’ voting procedure in cases of multiple non-monetary offers.

18 Generally, landowners do not enjoy such veto power under domestic (American) law either, as long as invoking the power of eminent domain is necessary (Merrill, 1984). Allowing land users to determine whether to remain put is nonetheless justified within this framework as a way of determining whether a less onerous way of achieving the public purpose might be found.

19 An additional advantage of this way of framing choice is that “current policies [tend to] waive or play down direct payments for compensation” as opposed to “indirect benefits of investment projects (employment, supply chain opportunities and infrastructure),” which are perceived as “more valuable to affected people.” In reality, however, these benefits tend to be “dispersed,” “short-term,” and too often unjustly distributed (Vermeulen and Cotula, 2010, at 914).

20 This last aspect raises many hard questions requiring further reflection and refinement, notably regarding possible conflicts of interest between younger and older members of these local communities.

21 Furthermore, in order to properly engage in market transactions and exercise their market position these vulnerable and often ill-informed populations would require the support of effective lawyers, financial advisors, and community organizers.
CONCLUSION

Sympathetic readers may wonder whether this proposal and its conceptual and normative underpinnings are indeed a re-interpretation of our understanding of markets and property, given their stark differences with the denotations of these concepts adopted in developing transnational markets. I insist that they are. Markets are arenas for alienating rights on competitive terms, which means that laws (or conventions) invariably and necessarily construct the rules of competition and the parties’ baseline entitlements. Like property, then, the market is a concept that offers different conceptions (or interpretations), all of which should reflect its ideal of securing the voluntary reassignment of entitlements to benefit all the parties involved. In order to turn into reality this ideal and the ideals that make property valuable, we must constantly examine our practices. In the emerging global land market, the plight of land users facing the global land rush makes such re-examination vital, urging the possibility of forcing property and markets live up to their implicit ideals.

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