



Takings and Distributive Justice

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TAKINGS AND DISTRIBUTIVE JUSTICE

*Hanoch Dagan**

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INTRODUCTION

ALMOST forty years ago, in *Armstrong v. United States*,¹ Justice Hugo Black set an agenda for takings jurisprudence, when he said that the “Fifth Amendment’s guarantee . . . [is] designed 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.”² This statement places the Aristotelian notion of distributive justice—which requires that recipients of benefits and burdens receive their share according to *some* criterion³—at the heart of takings jurisprudence. It requires that we consider what distributive criteria should guide the distribution of the burden of the public project, activity, or regulation between the landowner

¹ 364 U.S. 40 (1960).

² *Id.* at 49.

³ See Aristotle, *Nicomachean Ethics* 122–25 (Terence Irwin trans., 1985); Ernest J. Weinrib, Aristotle’s Forms of Justice, in *Justice, Law and Method in Plato and Aristotle* 133, 135, 137, 139 (Spiro Panagiotou ed., 1987).

and the community that benefits from this public use⁴ (i.e., the taxpayers of that jurisdiction).⁵

Although Justice Black's statement has been widely embraced as a general proposition,⁶ the question of when a regulation of land is no longer a *mere* regulation, but rather, a regulatory taking that requires compensation, remains one of the most confusing areas of law.⁷ In this Article, it is my hope to make a modest contribution to the ongoing debate over the scope of the regulatory takings doctrine by developing a credible doctrine that distinguishes a regulation from a taking with a view to both civic virtues and egalitarian concerns.

To be sure, I acknowledge the truism that planning considerations are, or, at least, should be, dominant in land use law.⁸ Some authors conclude from this premise that promoting distributive ideals—other than maintenance of the status quo—through the doctrine of takings is impossible, or, at least, undesirable, and therefore need not be given serious discussion and thought. This Article rejects that conclusion and demonstrates that progressive distributive considerations can be grafted onto takings law without unduly hindering or upsetting these major concerns (as well as several others). My main claim is that takings law leaves qualified, but

⁴ The public use doctrine will not be considered here, and it will be assumed throughout that the project, activity, or regulation at issue is indeed for public use. For the best account of the public use doctrine, see Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986).

⁵ See Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 Can. J.L. & Juris. 217, 217–18, 220–21 (1993) (discussing factors considered by the Supreme Court in articulating when regulation amounts to a taking).

⁶ See William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 Wm. & Mary L. Rev. 1151, 1153–54 (1997).

⁷ See Bruce Burton, *Regulatory Takings, Private Property Protection Acts, and the "Moragne Principle": A Proposal for Judicial-Legislative Comity*, 49 S.C. L. Rev. 83, 85 (1997) (describing the current state of takings doctrine as being in chaos); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299, 1301–04 (1989) (same).

⁸ “Planning considerations” need not be defined with any precision for the purposes of this Article. It is enough to insist on the general distinction between planning considerations and distributive ones: On the one hand, the purpose of public projects is typically not aimed at redistributing wealth to the worse-off; on the other hand, that purpose should not be biased in favor of the better-off. Thus, for example, if we conceive of planning considerations as the aggregated preferences of the members of the pertinent community, these preferences should not be weighted differently according to the different preexisting wealth of their holders.

important, leeway for promoting the virtue of social responsibility and the ideal of avoiding any preferential treatment of the better-off.

This leeway can be best utilized by reconceptualizing two familiar tests of takings jurisprudence: reciprocity of advantage and diminution of value. Currently, there is a good deal of confusion with regard to these tests, and rival approaches as to their meanings contribute to the chaotic state of takings law. If, however, we perceive reciprocity of advantage as a doctrinal substitute for concerns of social responsibility, and diminution of value as a proxy for egalitarian commitments, certain interpretations of these tests are ruled out and others seem to be required. Hence, a side-effect of my proposal should be a clarification of certain doctrinal confusions.

These reconceptualizations suggest two new definitions of the reciprocity and diminution of value rules. The reciprocity rule prescribes that a public action imposing a disproportionate burden would still not be considered a taking where two conditions are met: first, if the burden is not overly extreme, and second, if it is likely to be offset by benefits of similar magnitude enjoyed by the claimant from other public actions, even if these benefits are not contemporaneous with the action that triggered the claim. The diminution of value rule prescribes the upper boundary of such permissible disproportionality. According to my interpretation of this rule, diminution must be measured against the value of the claimant's affected land as a whole (or even her total holdings in the same surroundings).⁹ The applicable threshold for diminution

⁹ This formulation does not address the question of the "environmental baseline" from which to measure derogations of the landowner's entitlement. Hence, it is not my aim in this Article to mediate between those who contend that legal protection of general public rights in scarce resources should not be regarded as an occasion for compensation and those who insist that the rule allowing prevention of harmful use without compensation should be strictly confined to damages that do not exceed the threshold of nuisance law. Compare Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 284–87 (1996) (noting similarities between traditional takings law and nuisance law), with Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. Toronto L.J. 47, 76–87 (1996) (discussing benefits of distinguishing rationale for compensation between the two areas of law). In order to avoid the difficulties of setting these background principles that prescribe the inherent limitations of title, I assume throughout this Article that the public action at issue is of undisputed benefit to the public, rather than a prevention of harm to preexisting public rights.

should not require that the public action deprive the landowner of every economically viable use of her land, but it should still not be the case that each disproportionate loss, excepting a *de minimis* one, triggers compensation.¹⁰ Rather, the boundary between permissible and impermissible disproportionality should be set contextually, according to both the question of whether the public action primarily benefits members of the landowner's locality or a larger group of beneficiaries and, in extreme cases, the question of the claimant's relative economic and political power.¹¹

Part II, which is the core of this Article, presents this proposed doctrine in some detail. It also explains the way this doctrine vindicates the concerns of social responsibility and of equality while supplying some normative justifications. Part II advances two main claims. Its first claim is that a takings doctrine that compensates each disproportionate burden not offset by an immediate countervailing benefit is destructive to the virtue of social responsibility. If social responsibility is to be sustained and fostered, a test based on strict accounting cannot be allowed. Instead, a test of

¹⁰ This Article does not discuss the appropriate measure of recovery in cases where compensation is granted. Instead, I regard the current choice between the dichotomous alternatives of no compensation and full compensation as a given. Although my suggestions may, eventually, require consideration of other possible remedial alternatives—such as “partial compensation” and supracompensatory measures of recovery based on the gains society derives from the taking—these speculations will not be developed here. For suggestive discussions, see Benjamin E. Hermalin, *An Economic Analysis of Takings*, 11 J.L. Econ. & Org. 64, 64–67 (1995) (discussing supracompensatory measures); Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 Cath. U. L. Rev. 721, 732–40 (1993) (advocating partial compensation where government “holds a dominant and preceding interest,” and possible supracompensatory measures where market value would be inequitable); see also Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv. L. Rev. 997, 997 (1999) (concluding that, in some cases, payment by the government should be required but compensation to the aggrieved claimants is not warranted, and that in other cases compensation makes sense but charging the government does not).

¹¹ I do not address the important issue of which legal institution—the judiciary or the legislature—should implement my recommendations. Compare, e.g., Frank I. Michelman, *A Skeptical View of “Property Rights” Legislation*, 6 Fordham Envtl. L.J. 409, 420–21 (1995) (suggesting that the regulatory takings problem cannot be “handled at wholesale with a simple statutory formula,” but rather, is best addressed “at retail” by judicial doctrine), with Sarah E. Waldeck, *Why the Judiciary Can’t Referee the Takings Game*, 1996 Wis. L. Rev. 859, 859–60 (suggesting that “the lean structure of the judiciary renders it incapable of assuming [the] tremendous task” of enforcing private property rights).

long-term reciprocity, which requires only rough long-term equivalence of burdens, is called for. This test of long-term reciprocity, however, must not discount the limits of social solidarity and the dangers of opportunism. It must ensure that even temporary imbalances are not unlimited, that the degree of permissible disproportionality is dependent upon the proximity of the benefited community to the injured landowner, and that politically weak or economically disadvantaged landowners are guaranteed proper protection from abuse.

The second main claim of Part II is that the proposed interpretation of the diminution of value test provides a practical proxy for egalitarian concerns, and that there are good reasons to accommodate these concerns within takings law. Once the diminution of value inflicted by the public action is measured against the value of the claimant's affected land as a whole (or her total holdings in the same locality), and the applicable threshold is not set at the extreme positions of total deprivation or *de minimis*, this test yields a built-in disincentive for imposing the public burden on relatively inexpensive parcels. This test thus functions as a proxy for an overt (and problematic) consideration of the socioeconomic status of the affected landowner. Inserting egalitarian considerations into takings law through this mechanism is significant, first and foremost, due to the intrinsic value of equality and to the importance of incorporating demands for just distribution into the concept of property. Furthermore, a progressive takings doctrine of the type proposed in Part II serves other important values, such as social solidarity, efficiency, and personality, and does not excessively interfere with people's liberty or upset the equity among the well-off.

Parts I and III situate the theory proposed in Part II in the contemporary literature and jurisprudence, respectively. Part I revisits three established theories of takings: the economic analysis that investigates the incentive effects of takings law, Richard Epstein's libertarian theory, and Frank Michelman's utilitarian (and Rawlsian) analysis. Although this Article does not address the question of the appropriate scope of the regulatory takings doctrine from the perspectives of these three theories, Part I extracts new lessons from each of these theories that, in turn, inform the theory proposed in Part II. First, Part I maintains that an important, albeit usually overlooked, lesson of the economic analysis of takings law is that ef-

ficiency requires a progressive compensation regime. Second, it claims that even students of takings who reject Epstein's libertarian commitments should appreciate his caution about underestimating the dangers of allowing disproportionate distributions of public burdens, a caution that requires rejection of the very restrictive takings doctrine. Finally, Part I contends that Michelman's discussion of the demoralization costs of takings—which he proposes as part of a larger utilitarian calculus—deserves an independent analysis. This Part concludes that this analysis may yield the foundations of a credible progressive takings doctrine.

Part III seeks to demonstrate the possible implementation of the proposed doctrine. This Part shows that while this doctrine can serve as a basis for criticizing the results of some cases, it is by no means revolutionary in its anticipated consequences. Rather, my proposed interpretations of the reciprocity and diminution of value tests actually account for and rationalize some of our settled intuitions and practices. Hence, my theory supplies the doctrinal vocabulary and highlights the normative underpinnings for an important, albeit currently discredited, line of cases. One purpose of this Article is to celebrate this part of the existing doctrine. The cases that Part III highlights appear in most other accounts to be somewhat ill-founded and unprincipled. My rereading of these cases is meant to revitalize them as illustrations for the possibility of incorporating into takings law the values of social responsibility and of equality.

I. NEW LESSONS FROM THE RECEIVED WISDOM

Part I extracts some unfamiliar lessons from rather familiar takings theories. Section I.A discusses the extensive economic literature. It claims that the most compelling justifications for compensation from efficiency reject a uniform full-compensation rule, a rule that distorts the incentives of landowners and decisionmakers alike. It further maintains that in order to guarantee efficient investment decisions of landowners, as well as to make sure that land use authorities base their decisions solely on planning considerations, our compensation regime must incorporate some measure of progressivity. Section I.B discusses Richard Epstein's celebrated takings theory. While rejecting the libertarian premises of his theory, this Section concludes that progressive authors have dismissed it as

irrelevant too quickly. Disproportional sacrifices, which Epstein emphasizes, must be taken seriously (especially where they point out the claimant's special vulnerability). Furthermore, a uniform no-compensation rule should be unacceptable from any distributive standpoint since it may yield a systematic exploitation of small and relatively less well-off landowners. Finally, Section I.C revisits Frank Michelman's utilitarian theory in order to extricate his account of demoralization costs from its utilitarian source. It contends that reading Michelman's typology of demoralization costs from a distributive point of view presents a powerful starting point for a takings doctrine that takes seriously the virtue of social solidarity and the value of equality. It will be the task of Part II to develop such a theory.

A. Learning Progressivity from the Economic Analysis

Lawyer-economists have offered sophisticated insights regarding the efficiency of takings. Their analyses study the incentive effect of various compensatory regimes on the behavior of the pertinent actors, all of whom are presumed to be—in this framework of analysis—rational maximizers of self-interest. They discuss, more particularly, the incentive effects of different compensation rules on the decisions of private individuals (landowners and potential landowners) and of public officials. This Section claims that a close look at this analysis exposes a surprising lesson: that efficiency dictates a progressive compensation regime.

1. Landowner Investment Decisions

Consider first the incentive effect of a full-compensation rule on a landowner's investments. When the law guarantees private landowners full value on any investment they may make (in other words, when the landowner is always compensated in cases where her land is detrimentally affected by a public use), the individual landowner can make large investments without bearing any risk that a conflicting public use will arise.¹² Under such a legal regime

¹² See Robert Cooter & Thomas Ulen, *Law and Economics* 153–55 (2d ed. 1997); William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 158–61 (1995); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 528–32 (1986).

she will, therefore, invest as though there were no such risk. Insulating landowners from this risk is, however, socially undesirable: Efficiency requires that every investor take into account the prospects of real risks, including the risk that the value of an investment may be destroyed or reduced by a new public need.¹³ Hence, when there is uncertainty about the government's needs, a full-compensation rule provides incentives for excessive private investment, including improvements that will be of no use in the event that the land in question is subjected to public use.¹⁴

At the same time, the conventional economic analysis insists that a no-compensation regime may also generate inefficiencies.¹⁵ Such inefficiencies are the result of landowners' uncertainty when the law does not guarantee full compensation. Assuming that it is difficult for landowners to assess correctly the likelihood of their property being subjected to a conflicting public use and that they are risk-averse with respect to this type of risk,¹⁶ they are expected, under a no-compensation regime, to protect themselves from takings. It is unlikely that they will be able to do so through private insurance schemes, since moral hazard¹⁷ and adverse selection¹⁸ dif-

¹³ See Kaplow, *supra* note 12, at 528–32. As the text suggests, it may be argued that it is appropriate to limit landowners' overreliance but only with respect to reasonably predictable public actions (e.g., announced public projects). See Susan Rose-Ackerman, *Regulatory Takings: Policy Analysis and Democratic Principles*, in *Taking Property and Just Compensation: Law and Economics Perspectives of the Takings Issue* 25, 31 (Nicholas Mercuro ed., 1992).

¹⁴ See Rose-Ackerman, *supra* note 13, at 30. Rose-Ackerman also points out that this problem of excessive private investment would not apply to "improvements to property that the government will use" rather than destroy. *Id.*

¹⁵ The discussion of this consideration generally follows the analyses of Lawrence Blume and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 584–88 (1984), and Rose-Ackerman, *supra* note 13, at 32.

¹⁶ A risk-averse person considers the disutility of a certain loss (or expenditure) to be lower than the disutility of an uncertain prospect of equal expected loss. See Blume & Rubinfeld, *supra* note 15, at 585. On risk aversion generally, see Cooter & Ulen, *supra* note 12, at 44–45, 48–49.

¹⁷ Moral hazard—the willingness to take risks knowing that costs are borne by another—is manifested in this context due to the ability of landowners to affect (e.g., by lobbying) the decisions of public authorities and, therefore, the probability of government action. See Blume & Rubinfeld, *supra* note 15, at 593. On moral hazard generally, see Cooter & Ulen, *supra* note 12, at 49–50.

¹⁸ Adverse selection—the self-selection of higher-risk persons into insurance pools—may be a factor in this context if landowners have better access to information respecting the probability of takings in comparison to (potential) insurers. See Blume

ficulties are said to inhibit the development of such schemes.¹⁹ Hence, as rational maximizers, they can be expected to protect themselves from takings by reducing investment in their land or by channeling their investments to assets (or to forms of holdings) that are unlikely to be affected (or, at least, severely affected) by public projects. This policy of under-investment is prudent on the individual landowner's level since it limits her exposure. It is, however, socially undesirable, since it leads to suboptimal investment in land. In order to avoid such an outcome, the law must supply *ex post* public insurance against the detrimental effects of takings. This is precisely the function of a full-compensation rule.

The problem of inefficient under-investment, along with the need for full compensation, is not equally important with respect to all types of landowners. The danger of under-investment arises only in cases where landowners are risk-averse. In contrast, risk-neutral landowners would respond to the possibility of a conflicting public use efficiently by adjusting their investment decisions commensurate with this risk. Such landowners will, in other words, exercise restraint in investing and will, thereby, efficiently accommodate the risk that their land will be put to such public use.

The conclusion that underinvestment concerns vary among different landowners can be put into even more exact terms that make it especially pertinent for the current purposes: The diminishing marginal utility of income makes risk aversion more probable when a major portion of a person's total wealth is threatened.²⁰ Furthermore, inasmuch as greater wealth implies better information respecting the risks from public regulation, the poorer a landowner is, the more risk-averse—due to her poor information—she is likely

& Rubinfeld, *supra* note 15, at 595. On adverse selection generally, see Cooter & Ulen, *supra* note 12, at 50–51.

¹⁹ Some authors, however, argue that private insurance schemes can also overcome the problems of moral hazard and adverse selection. See, e.g., Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 Nw. U. L. Rev. 1561, 1581–82 (1987) (“[I]t is not clear why adverse selection and moral hazard are more serious problems in this area than in any other area where risks arise primarily from acts by human agents (rather than from natural disasters).”).

²⁰ See Rose-Ackerman, *supra* note 13, at 33. Lawrence Blume and Daniel Rubinfeld note that, although awarding compensation inversely with wealth approximates the degree of a landowner's risk aversion, measuring wealth is difficult, and attitudes about risk may also vary with factors unrelated to wealth. See Blume & Rubinfeld, *supra* note 15, at 606. In Section II.B.2, *infra*, I propose a proxy that avoids such potential measurement difficulties.

to be,²¹ and, hence, the more important compensation becomes if we wish to avoid inefficient under-investment.

Hence, the concern of inefficient under-investment by landowners is heightened—and compensation consequently gains in importance—to the extent that the taking affects a more substantial segment of the injured party's estate (all other things being equal).²² A private homeowner, who is not a professional investor and who has purchased a small parcel of land with her life-savings, may be a typical example where full compensation for many public actions is required.²³ On the other hand, public actions that affect the assets of broadly held corporations (whose major shareholders typically have diversified investment portfolios²⁴) may represent the paradigmatic case in which the concern regarding landowners' under-investment may not mandate full (or even any) compensation.²⁵

²¹ See Blume & Rubinfeld, *supra* note 15, at 606.

²² Another possible way to induce efficient levels of investment in land might be to allow compensation to all landowners, but limit it according to the *ex ante* efficient level of investment. This alternative requires judges to evaluate *ex post* the *ex ante* likelihood of the public need to interfere with the claimant's property rights, and the propriety of her investment given this likelihood. My theory avoids this complicated and error-prone judicial task by using (conventional) rough generalizations about people's levels of risk aversion, and leaving the question of the efficiency of investment in land, given the wide range of future contingencies, to each individual landowner.

²³ This is also a case where the danger of overinvestment from full compensation is not very significant (especially given the subjective value frequently attached in such cases to people's homes, a value not covered by a fair market value measure of recovery). See Lewinsohn-Zamir, *supra* note 9, at 63.

²⁴ See Blume & Rubinfeld, *supra* note 15, at 606 ("[I]t does seem reasonable to expect that as one's wealth increases one has a greater opportunity to diversify risk by investing in a broad array of assets.").

²⁵ To be sure, "any rule based on wealth might induce wealth-masking responses," notably breakdowns of firms to subsidiaries. See *id.* at 609. Overcoming such strategies may necessitate *veil-piercing*, which entails additional administrative costs. Wealth-masking responses are unlikely, however, where the risk of the possible regulation is very low at the time the landowner acquires the property or makes any significant investment decision respecting the land. Cf. Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. Rev. 993, 1057 n.231 (1995) (discussing low possibility that redistributive features of bankruptcy system affect the general price of credit since rules have too little relevance at the time an initial loan is made).

2. *The Public Authority's Planning Decision*

The second important focus of the economic analysis of takings law studies the incentives that influence the public officials who actually make the crucial takings decisions.²⁶ In this context, it has been suggested that compensation provides the appropriate incentive for these decisionmakers. When the public authority does not need to pay compensation for its takings, its officials may disregard the costs that their decisions impose upon private landowners.²⁷ In contrast, compensation creates a budgetary effect that, in turn (assuming that democratic mechanisms make public officials accountable for their budget management), may help internalize these private costs. Hence, compensation is tantamount to a built-in mechanism that verifies the efficiency of public decisions that affect private property.

This consideration does not imply that compensation is required (at least to the same extent) in all cases; in fact, it may be that in some cases a rule of full compensation even distorts the authorities' appropriate incentives. The premise that public officials are underresponsive to private costs unless those costs are internalized through compensation does not apply with equal force in all cases. To be sure, where the injured party is part of the nonorganized public (an "occasional individual") or of a marginal group with minor political clout, under-responsiveness may well be a genuine danger that in many cases can only be mitigated by compensation.²⁸ This, however, is not always the case. Public action may entail the imposition of costs on members of powerful and organized groups as well.²⁹ In such cases, it is reasonable to assume that the land-

²⁶ See Margaret Jane Radin, *Diagnosing the Takings Problem*, in *Reinterpreting Property* 146, 158 (1993) [hereinafter Radin, *Diagnosing*]; Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 306–08 (1990) [hereinafter Levmore, *Just Compensation*]; Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1344–48 (1991); Marc R. Porier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 Rutgers L. Rev. 243, 260–71 (1993).

²⁷ This phenomenon is frequently described as "fiscal illusion." See Merrill, *supra* note 19, at 1583–84 (describing the phenomenon but criticizing it as a justification for compensation).

²⁸ See Levmore, *Just Compensation*, *supra* note 26, at 305–11.

²⁹ For a view that claims that landowners always belong to this category, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 863–65 (1995).

owner's interest will be adequately represented even in the absence of required compensation. Even if she eventually suffers a loss due to the public use, this loss is (in many such cases) offset by a quid pro quo elsewhere, either with regard to planning issues or in other matters.³⁰ What looks like a loss at first glance is just part of an ongoing political exchange.³¹ Therefore, only a progressive compensation scheme balances the pressures that the public authority faces at the stage of choosing the piece of land that would bear the consequences of the public project and induces the public authority to focus solely on planning considerations.

This argument is likely to generate two objections. One ambitious objection is that the consideration of interest group support leads to the exact opposite conclusion from the one suggested above. Strong interest groups, so the argument goes, are likely to block measures that benefit society absent the promise of compensation.³² Hence, in order to make sure that efficient public projects requiring some infringements of property rights of members of such groups are not blocked, compensation must be forthcoming.³³ If we take this line of reasoning to its conclusion, compensation is required more—rather than less—where landowners have political clout. Therefore, if the relative political and economic power of the parties involved is to be given any consideration whatsoever,

³⁰ See Radin, *Diagnosing*, *supra* note 26, at 157–58; Levmore, *Just Compensation*, *supra* note 26, at 308–11.

³¹ A rule of full compensation may also distort the appropriate incentives of public officials in cases where people—and, therefore, also decisionmakers who are responsive to their constituents' preferences—are prone to discount improperly the benefits (typically long-term and dispersed) of property regulation. Applying a rule of full compensation in such cases would lead public officials seeking reelection to under-regulate systematically. A paradigmatic case may be habitat preservation. See Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 363–64 (1997). The issue of “environmental baselines” is beyond the scope of my discussion. See *supra* note 9. In general, this problem may present the task of finding ways to evaluate benefits properly rather than adjusting our compensation practices. Another version of this type of distortion would be a case in which people culturally (and irrationally) tend to object to taxes that impose short-term costs, even if they would avoid greater long-run losses to their own self-interests as they conceive them. This culturally contingent consideration is also beyond the general contours of my argument.

³² See Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1955–59 (1992).

³³ See *id.*

this concern should—at least from the point of view of efficiency—favor the strong rather than the weak.

I think that this argument is misconceived. It assumes, as my own argument does, that strong landowners may block projects that harm them. But then it also assumes that they are unable to extract quid pro quos from the public authority in cases where such projects do go forward, so that only a formal right for compensation can satisfy them.

These two assumptions are contradictory. If we accept the premise of the first assumption (that strong potentially injured parties exert more pressure on the public authority than people who belong to marginal groups or to the nonorganized public), then it becomes difficult to see why this power vanishes if these strong landowners fail to have the project placed elsewhere. Rather, it seems much more reasonable to believe that the excess power such landowners enjoy relative to other landowners is likely to manifest itself in the form of quid pro quos in the event that the proposed project does go forward.

A progressive compensation rule tends to ensure that the placing issue will be resolved according to planning considerations since it balances the relative pressures of strong and weak landowners. It may well lead the stronger landowners to turn to the second-best option of compensation-in-kind. At the same time, a progressive compensation rule gives a relatively weak landowner the *legal* right to compensation given her inability to bargain for other benefits in the future. Thus, a progressive scheme neutralizes external pressures on the public authority, allowing it to base its decisions on pure planning considerations, while roughly equalizing the compensation received by strong and weak landowners alike.

The second objection might be that a uniform rule fully compensating landowners for whatever losses they suffer reaches even better results than a progressive scheme. This regime—an across-the-board rule that compensates for the fair market value of the harm done—makes landowners indifferent to the possibility of their land being harmed.³⁴ Thus, no one has any reason to exert any pressure

³⁴ See Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. L. & Econ. 125, 134 (1992) [hereinafter Farber, *Economic Analysis*]; Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const. Commentary 279, 297 (1992).

on the public authority, efficient planning decisions are likely to be reached, and everyone gets the same level of compensation.³⁵

This objection might be persuasive if receiving the fair market value of the harm done would make each landowner indifferent to the possibility that the public action would infringe upon her own property. This assumption, however, is far too strong. In some cases, fair market value may well measure the utility lost by the landowner due to the public action at hand. But this is not necessarily so, and, in fact, in many cases, it will be otherwise.³⁶ Both 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 the fair market value thereof.³⁷ Therefore, a regime of fair market value compensation for all is still likely to lead landowners to try to shift the impact to other people's land. Unless the compensation regime interferes, the lobbying efforts of strong landowners are likely to be much more effective than those of the weaker ones.³⁸ Hence, the systemic distortion I have emphasized

³⁵ See Farber, *Economic Analysis*, *supra* note 34, at 135–38.

³⁶ See Radin, *Diagnosing*, *supra* note 26, at 153–56. This point also answers a second claimed advantage of a scheme favoring stronger landowners, discussed by Glynn Lunney, that compensation reduces the costs of implementing a measure before the fact by transforming an organized group of strong landowners into a dispersed group. See Lunney, *supra* note 32, at 1955–59. Lunney's argument assumes that compensation satisfies disgruntled landowners sufficiently that they lose interest in lobbying against the regulation. See *id.*

³⁷ See Radin, *Diagnosing*, *supra* note 26, at 154–56. One problem with compensating such subjective values is that the same landowners most likely to be compensated under a progressive regime are those most likely to have strong subjective preferences that are not reflected in the currently available measure of recovery, fair market value. This Article, however, does not seek to address the problem of how to calculate compensation. See *supra* note 10.

³⁸ See, e.g., Robert A. Caro, *The City-Shaper*, *The New Yorker*, Jan. 5, 1998, at 38, 52–55. Robert Caro describes the successful efforts during the late 1920s of New York City's "robber barons" to induce Robert Moses, the enormously powerful city planner, to change the route of the planned Northern State Parkway to avoid any 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. See *id.* at 53. The plan would have taken effect under eminent domain, 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. See *id.* New York City planners rerouted the Parkway through several small farms, depriving many of the farmers of their livelihoods. See *id.* at 54–55.

cannot be neutralized by a compensation regime of fair market value for all.

3. Efficiency and Progressivity

In sum, the two important claims for compensation from efficiency—the concerns of preventing landowners' underinvestment and of inducing public officials to base their decisions solely on planning considerations—include an important built-in proviso that is too often overlooked. The analysis of this Section shows that a compensatory regime that is insensitive to the relative economic and political power of the parties involved is both regressive and inefficient. Hence, efficiency—and not only equality—requires a regime that takes this consideration into account.³⁹

³⁹ It seems fair to ask whether a progressive compensation regime will entail any long-term egalitarian consequences. One reason why this may not be the case is that the compensation regime will be reflected in the market price. See R.H. Coase, *The Firm, the Market, and the Law* 170–74 (1988). Another reason is that inserting progressivity into takings law does not alter the fundamental balance of power within the relevant community. Therefore, so the argument goes, it will only replace the form in which advantageous power is manifested.

In order to appreciate the significance of grafting equality onto takings law, however, neither of these claims needs to be contested. (In fact, my argument implicitly concedes the second claim by assuming that strong landowners who will lose the battle of placing the public project elsewhere will indeed succeed in receiving some other quid pro quo. See *supra* text following note 33.) As emphasized throughout, the immediate purpose of a progressive compensatory regime is not to use takings law as a major instrument for a more egalitarian distribution of wealth. Rather, the purpose is to structure the field of land use in a more egalitarian fashion. This limited and seemingly isolated consequence is not insignificant. First, as this Section maintains, this result induces planning authorities to make more efficient placing decisions. Second, as Section II.A.4 below contends, a more egalitarian land use regime is a prerequisite to any credible attempt to enlist the virtue of social responsibility into takings law. Finally, in Section II.B.4, I claim that shaping land use law has expressive ramifications that may end up producing, in the long run, more tangible consequences. The reason for this claim is that different social meanings are attributed to the distribution of different goods. More precisely, the distribution of claims respecting land has relatively significant implications on the cultural expectations respecting distributive justice, which, in turn, have some consequences on the macro power struggle in our society.

B. Epstein on Proportionality and Vulnerability

Richard Epstein's theory⁴⁰ is considered to be the libertarian blueprint for takings law. As such, it appears irrelevant to analyses of takings law that approach the field with other normative commitments. This Section maintains that, contrary to its appearance, Epstein's theory has valuable lessons even for readers who do not share its ideology. His theory must be taken seriously by progressives since it shows why the seemingly ideal progressive doctrine of a uniform restrictive compensation rule violates the progressives' own distributive ideals. Thus, Epstein can be read as introducing progressives to the challenge of fashioning a more refined takings doctrine that responds to the concerns of social responsibility and of equality without falling back to an unacceptable no-compensation rule.

1. Epstein's Libertarian Blueprint and its Critique

For Epstein, compensation should be required every time a taking's impact on the landowner is disproportionate to the burden (if any) carried by other beneficiaries of that public use.⁴¹ This rule of proportionality dictates that the claimant not sustain a burden that is disproportionately heavy in comparison to that sustained by other beneficiaries of the public action, taking into account the respective benefit to all parties involved.⁴² It disallows any changes in the proportional economic status quo over the course of implementing the pertinent public project, activity, or regulation.⁴³ It does not distinguish between types of landowners or types of public actions, and it does not compromise with respect to any magnitude of acceptable uncompensated disproportionate burden (except, perhaps, a *de minimis* one).⁴⁴ Thus, this rule bars any public actions that make some owners worse off by transferring some of their economic value to the public or to other individuals.⁴⁵ Assuming that the public action is welfare-promoting, or at least not

⁴⁰ See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

⁴¹ See *id.* at 5, 206–08.

⁴² See *id.* at 205–06.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 204–09.

welfare-impoverishing, this rule safeguards against any government action that results in private landowners suffering a net loss of economic value. The proportionality rule thereby preserves the prevailing distribution of assets, legal rules, and wealth (although it may still translate people's assets or other entitlements into different types of wealth without their consent).⁴⁶

Strict proportionality as the criterion for distributing the burdens of land use regulation has an important normative appeal. A strict proportionality rule is attuned to some of the most important social functions of private property: shielding the individual from claims of other persons and from the power of the public authority;⁴⁷ securing the concrete means in every individual's possession for controlling his or her life;⁴⁸ and preserving an untouchable private sphere, which is a prerequisite to personal development and autonomy.⁴⁹ Private property and the constitutionalization of its protection from governmental interference seek to decentralize the ownership of resources in order to decentralize the power relations inherent in any property system. They endow individuals, rather than any collective bureaucracy, with control over resources and thus preserve personal freedom, security, and independence, while preventing collective coercion.⁵⁰ For as long as we seek to protect individual liberty and are troubled by possible abuses of governmental power by public authorities, we need to be suspicious of

⁴⁶ See Richard A. Epstein, Takings, Exclusivity and Speech: The Legacy of *Prune-Yard v. Robins*, 64 U. Chi. L. Rev. 21, 27–28 (1997); Molly S. McUsic, The Ghost of *Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. 605, 645, 647 (1996).

⁴⁷ See Bruce A. Ackerman, Private Property and the Constitution 71–76 (1977); Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy 207–08 (1990).

⁴⁸ See Nedelsky, *supra* note 47, at 207.

⁴⁹ See Isaiah Berlin, Two Concepts of Liberty, in *Four Essays on Liberty* 118, 122–24 (1969); John Rawls, Political Liberalism 298 (1993).

⁵⁰ See Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law, 139–42, 238 (1998); Milton Friedman, Capitalism and Freedom ch. I (1962); Bernard H. Siegan, Property and Freedom: The Constitution, the Courts, and Land-Use Regulation 10 (1997); Charles A. Reich, The New Property, 73 Yale L.J. 733, 771 (1964); Cass R. Sunstein, On Property and Constitutionalism, 14 Cardozo L. Rev. 907, 914–15 (1993). The relationship between private property and freedom is not, of course, as simple as the text may imply, see Gerald F. Gaus, Property, Rights and Freedom, in *Property Rights* 209, 209 (Ellen Frankel Paul et al. eds., 1994), but further complications are not required for current purposes.

any public attempt to redefine our property—and hence our interpersonal—relations.⁵¹ A strict proportionality rule aims at providing the ultimate protection against such excesses and suits a conception of property as a bulwark of individual freedom and independence and as a source of personal economic well-being.⁵²

As we will see in Part II, however, this conception—associated most closely with William Blackstone's description of property as “sole and despotic dominion”⁵³—is not an essential or natural conception of property and, certainly, is not the only possible one. Other conceptions of property emphasize other values, particularly the virtue of social responsibility and the value of avoiding any preferential treatment of the better-off.⁵⁴ Hence, we should beware of embracing too hastily the strict proportionality rule mandated by the important considerations outlined above. Before we perceive proportionality as an ideal and accord it a sense of inevitability (i.e., reify it by perceiving it as the “only one correct solution”⁵⁵), we should examine its distributive consequences.

Broadly applied, strict proportionality would bar any reconfiguration of the distribution of the aggregate of resources, wealth, and legal rules. It would legally immunize the status quo—not of the specific holdings, but, certainly, of the proportional distribution of generic wealth—and, hence, indiscriminately block both exploitative

⁵¹ Jed Rubenfeld suggests that we interpret the Fifth Amendment as being designed to protect individuals from “state instrumentalization” in the form of taking *over* property for a state-exploited *use*, as distinct from “mere” proscription or restriction of the owner's use. Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1143–45 (1993). While my discussion similarly emphasizes the role of the constitutional guarantee of private property as a shield from political abuse, I do not agree with Rubenfeld's claim that instrumentalization is the only, or even a qualitatively unique, risk that requires such protection.

⁵² As discussed *supra* note 4, I assume that a legitimate public use is, indeed, established. Needless to say, proponents of the conception of property as a bulwark of individual freedom will tend to be restrictive in their approach to the requirement of public use.

⁵³ 2 William Blackstone, *Commentaries* *2; see also Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601, 631 (1998) (“The very notion of property as exclusive dominion is at most a cartoon or trope, as Blackstone himself must have known—a trope to make complex systems of rights intelligible by the Cartesian practice of division and separate analysis”).

⁵⁴ See *infra* notes 99 and 137 and accompanying text (discussing property as a source of obligation and as a necessarily egalitarian concept).

⁵⁵ Epstein, *supra* note 40, at 199.

governmental practices and justifiable ones (possibly jeopardizing programs such as social security and progressive taxation).⁵⁶ Moreover, even if we think of strict proportionality only in the context of regulating land use, it may still be problematic. Strict proportionality not only prevents the planning authority from abusing its power by burdening targeted individuals or by arbitrarily discounting the private costs of its projects; it also accords every private landowner veto power over any public attempt to consider—in conjunction with the direct and primary goal of the public project, activity, or regulation—the possibility of distributing the required burden of this public action in accordance with what is mandated by the values of social responsibility and of equality. Insofar as we believe that these ideals can and should be fostered by takings law (as Part II maintains), strict proportionality is an undesirable distributive criterion.

2. The Progressive Intuitive Response and its Pitfalls

These concerns may have led some authors—typically from the progressive school of thought—to argue against expanding land-owner rights to compensation in cases that do not involve physical seizure of property.⁵⁷ They imply that there is a simple connection between takings and distributive justice, i.e., that distributive justice is better served as the doctrine of regulatory takings becomes more limited. For these authors, takings doctrine need not object to deviation from strict proportionality in the regulation of land use as long as the disproportionate impact can be justified by “general, public, and ethically permissible policies.”⁵⁸ Most (if not all) regulatory restrictions of land use should, therefore, be perceived as ordinary examples of the background risks and opportunities assumed by property owners.⁵⁹

⁵⁶ See C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741, 748 (1986); Rubenfeld, *supra* note 51, at 1135.

⁵⁷ See, e.g., Baker, *supra* note 56; Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. Chi. L. Rev. 57 (1997).

⁵⁸ Baker, *supra* note 56, at 764–65.

⁵⁹ See Michelman, *supra* note 57, at 69.

Insofar as land use law is concerned, I respectfully disagree.⁶⁰ The decision as to which land is to be injured by the public action should be determined through planning considerations, with the resultant redistribution being only a by-product thereof.⁶¹ In most land use cases, neither takings nor mere regulations can be characterized as distinctly designed to redistribute from the better-off to the worse-off; the public actions in question should be taken without "any view to the preexisting incomes or accumulations" of those involved.⁶² Hence, "[n]o plausible [takings] regime, even if unfettered by constitutional restraints, could be [or should be] a major engine of redistribution."⁶³ Furthermore, denying compensation harms property holders of all sorts, rich and poor. More precisely, at times (or even typically), a no-compensation regime might lead—as we learn from the economic analysis of takings—to systematic exploitation of small and relatively less well-off land-owners.⁶⁴ Therefore, no distributive ideal should accept a broad no-compensation rule. Not only libertarians should find this rule problematic: Disregard for the extent of disproportionality in the distribution of the public burden is just as offensive to equality and, as I will claim below, to community as well.⁶⁵

Part II tries to accommodate the progressive urge for instilling takings law with concerns of social responsibility and of equality with Epstein's important caution about the dangers of disproportionality. It maintains that both the virtue of social responsibility and the ideal of avoiding any structural privileges that favor the better-off mandate that we modify, to some extent, the *a priori* conclusion of compensation for any taking with a disproportionate impact. Yet, Part II no less insists that we should not entirely abandon or overlook the question of proportionality, or, more pre-

⁶⁰ This paragraph should clarify the important distinction that needs to be drawn between the regulation of land use and other types of regulation where nondistributive considerations do not enjoy a similarly prominent status. In the latter case, proportionality should be much less attractive to egalitarians. This Article focuses solely on the regulation of land use.

⁶¹ See Lewinsohn-Zamir, *supra* note 9, at 56.

⁶² Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1182–83 (1967).

⁶³ McUsic, *supra* note 46, at 665.

⁶⁴ See Thompson, *supra* note 31, at 361, 366–67.

⁶⁵ See *infra* note 117 and accompanying text.

cisely, the question of the magnitude of disproportionality. The individual loss involved should therefore always be in the picture (albeit not in an exclusive position). We must always inquire whether the individual disproportionate contribution in question can, indeed, be regarded as "a proper price of communal citizenship" or whether it is, in fact, "an unfair sacrifice of the few to the many."⁶⁶

C. Michelman on Reciprocity and Equality

The theory proposed in Part II, like so much else in takings scholarship, owes an important intellectual debt to Frank Michelman's seminal contribution.⁶⁷ The use it makes of his analysis, however, is unconventional. This Article does not aim at improving the utilitarian theory of takings law, but rather, at developing a theory of takings law that accommodates the values of social responsibility and of equality. This Section demonstrates that the fundamental framework of such an account can be grounded—albeit implicitly and indirectly—in Michelman's piece.⁶⁸ More specifically, it can be extracted from the new interpretation of his discussion of demoralization costs suggested below. I certainly do not claim that the resulting account is the "genuine" interpretation of Michelman's piece. Nonetheless, it is my belief that, although Michelman's contribution has been extensively studied and discussed over the last thirty years,⁶⁹ there is intellectual potential that has yet to be explored.

1. Michelman's Utilitarian Calculus and its Difficulties

Michelman's analysis begins by explicitly conceptualizing the issue of compensation in distributive terms. Takings doctrine needs to decide "when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons."⁷⁰ As Michelman explains, a taking is a reallocation of resources and, as such, raises the question of whether its re-

⁶⁶ Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393, 1406 (1991).

⁶⁷ See Michelman, *supra* note 62.

⁶⁸ See *infra* Section I.C.2.

⁶⁹ See Fred F. Shapiro, *The Most-Cited Law Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 767 (1996) (Michelman's piece is the most frequently cited article on takings and the twelfth most-cited law review article of all time).

⁷⁰ Michelman, *supra* note 62, at 1165.

distributive effects should be canceled by compensation that spreads the loss (or “socializes” it) among the beneficiaries of this reallocation, or whether losses should “be left with the individuals on whom they happen first to fall.”⁷¹

Michelman answers this question by resorting to a utilitarian calculus.⁷² According to this calculus, a landowner who has been injured by a legitimate public action should be compensated if (and only if) rendering compensation is cost beneficial. The benefit from rendering compensation is the avoidance of “demoralization costs,” i.e.,

the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.⁷³

The cost of rendering compensation is the “settlement costs,” i.e., “the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs.”⁷⁴

In his attempt to ameliorate the practical difficulties of appraising demoralization costs, Michelman suggests that we resort to certain “supposed facts about human psychology and behavior.”⁷⁵ The key to demoralization, in his opinion, lies in the “risk of majoritarian ex-

⁷¹ Id. at 1168–69. Michelman also addresses the question of whether the taking is legitimate. See id. at 1172–82. This Article assumes that the answer to this question is in the affirmative. See *supra* note 4.

⁷² Michelman also turns to John Rawls’s account of “justice as fairness,” John Rawls, *Justice as Fairness*, in *Justice and Social Policy* 80, 93–98 (F. Olafson ed., 1961), which yields, in Michelman’s opinion, similar results in many though not all situations. See Michelman, *supra* note 62, at 1218–24. A discussion of this conclusion or of the possibility of some (relatively marginal) divergence between the dictates of these two approaches is not required by our discussion and, therefore, is sidestepped. For an opposing view maintaining that a wide divergence exists between the implications of these two ethical approaches on takings law, see Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 *Ecology L.Q.* 577, 600–07 (1996).

⁷³ Michelman, *supra* note 62, at 1214 (citation omitted).

⁷⁴ Id. at 1214.

⁷⁵ Id. at 1215–16.

ploitation," which is distinctively graver "than the ever-present risk that accidents may happen."⁷⁶ We perceive that "the force of the majority is self-determining and purposive" and, therefore, systematic.⁷⁷ Systematic exploitation is much more devastating (and much less adjustable) than the "random uncertainty" generated by "other loss-producing forces."⁷⁸

Taken at face value, Michelman's formula seems to point to only some of the considerations that a utility-oriented scheme needs to take into account. Hence, although Michelman's formula still can supplement the economic inquiry detailed above, the broad parameters of an effective utilitarian calculus are determined by the more updated accounts supplied by the economic analysis of law.

Moreover, Michelman's conceptualization of demoralization costs is rather problematic in its original, utilitarian context. If the majoritarian exploitation is systemized enough and, furthermore, is accompanied by a corresponding legitimizing hegemonic ideology, it may be reified and internalized as just. Hence, in such a case, the disutility that its victim(s) would experience is *less* than the disutility suffered by victims of random—and, accordingly, much more conspicuous—loss-producing forces.⁷⁹

But this significant quandary is irrelevant to my objectives. In what follows I extricate the concept of demoralization costs from its utilitarian source and use it as the starting point for a theory of takings that addresses the distributive question from the perspectives of promoting social responsibility and equality, without reverting to an unacceptable no-compensation rule. Therefore, we can safely return to Michelman in order to get a richer account of the concept of demoralization costs.

2. From Demoralization Costs to Reciprocity and Equality

Recall that a landowner is supposedly expected to be demoralized when she feels exploited by the majority. More specifically,

⁷⁶ Id. at 1216–17.

⁷⁷ Id. at 1217–18.

⁷⁸ Id. at 1216–18. By "other losses," Michaelman refers to accidents beyond social control, such as earthquakes.

⁷⁹ Moreover, if the exploitation is indeed systemic, it also becomes predictable and is capitalized into future investments. Hence, redistribution and demoralization wash out and only underinvestment remains.

Michelman seems to point to five types of takings in which land-owners are expected to experience such a feeling, where they are exploited by virtue of being singled out to bear the burden of a justified public action: (a) The claimant has sustained an injury disproportionate to injuries sustained by others; (b) "the efficiency gains of the project itself are so doubtful" that it may be a disguised attempt at deliberate redistribution; (c) "the loss is not likely to be recouped by reciprocal benefits tied in some way to the project"; (d) "those who lose now have little confidence that they will gain from similar projects in the future"; and (e) the "losers lack [the] political influence . . . to extract concessions to mitigate their burdens in the future."⁸⁰

This typology, which, for Michelman, is merely illustrative, may well be the most important contribution of his article. The reason for its importance is that this list of causes of demoralization can be read as pointing to three fundamental considerations that are at play when takings law is discussed from a distributive point of view, namely:

(1) Does the injured party sustain a disproportionate part of the burden entailed by the public project, or are like burdens widely disbursed throughout the community? (This consideration, referred to in this Article as the question of proportionality, relates to case *a* of the five-part typology.);

(2) Is the burden offset, or is it likely to be offset, by benefits that the claimant gains or is likely to gain from the actions (present or future) of the public authority? (This consideration of "reciprocity of advantage" follows cases *c* and *d*.);

(3) Is the landowner's political or economic power disproportionately low in relation to that of the public project's direct beneficiaries or of potential injured parties who have succeeded, or can be expected to succeed, in diverting the loss or a future burden from a similar project from their own land? (This consideration builds on cases *b* and *e*.).

⁸⁰ Fischel, *supra* note 12, at 149 (citing Michelman, *supra* note 62, at 1217–18). This typology also includes a sixth cause of demoralization: settlement costs sufficiently low that compensation would be easy. See *id.* I believe settlement costs pose less of a significant problem than do William Fischel and Frank Michelman, both as an empirical matter and from a normative point of view. See *infra* note 83 and accompanying text.

Michelman would view the first consideration as the most important. Ultimate legitimacy, he explains, can be attained only if there is no discrimination in the distribution of “the benefits and costs associated with each collective measure so that each person would share equally in the net benefit.”⁸¹ Only practical difficulties (the settlement costs) make this ideal unattainable. Hence, the need for a second-best solution arises—to arrive at “an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed ‘evenly’ enough so that everyone will be a net gainer.”⁸²

I suggest that we employ a different conception of these considerations and of the interrelation between them, treating each of the three considerations as a competing distributive criterion (which also stands for a corresponding conception of property). To my mind, it is not only the practical difficulty of excessive settlement costs—which, according to preliminary empirical research, may well be found to be considerably exaggerated⁸³—that raises doubts about the validity of the predominance of the important and valuable, but by no means exclusive, consideration of proportionality. In other words, questions (2) and (3) do not merely help us find the cases in which the unattainability of the ideal rule of full compensation can be mitigated or in which the denial of compensation can be tolerated. The considerations of long-term reciprocity of advantage and of the relative political and economic power of the injured landowner should not only apply where the settlement costs are substantial. Instead, these considerations are normative grounds of independent value that challenge Michelman’s “first-best” ideal of equal net benefits from each public project.

Part II seeks to develop a takings doctrine that not only allows deviation from strict proportionality for pragmatic reasons, but also accommodates, in its normative infrastructure, these substantive concerns alongside the consideration of individual liberty. It highlights the normative underpinnings of these competing distributive criteria and demonstrates the complicated, limited, yet

⁸¹ Michelman, *supra* note 62, at 1225.

⁸² *Id.*

⁸³ See Lunney, *supra* note 32, at 1957.

still-existing and important manner in which they can be translated into the language of legal doctrine.

II. TOWARD A PROGRESSIVE TAKINGS LAW

Part II presents (albeit in broad strokes) a takings doctrine that is premised on a commitment to social responsibility and to equality. It develops two main tests. The first test is of long-term reciprocity of advantage. Reciprocity of advantage, according to this interpretation, insists both on long-term rough equivalence of burdens and on disallowing overly extreme transient imbalances, while still refusing to enforce strict short-term proportionality. By rejecting strict short-term accounting, long-term reciprocity refuses to reduce citizenship and membership to monetizable exchanges, and seeks to preserve and inculcate people's sense of responsibility toward their fellow community members. At the same time, by insisting on long-term rough equivalence and on limits on the extent of permissible temporary sacrifices, long-term reciprocity distances itself from utopian communitarianism, a theory that ignores the dangers of opportunism and the limits of other-regarding motives in our nonideal world. Furthermore, the test of long-term reciprocity that this Part develops acknowledges that significant membership and social responsibility are much more likely to flourish in local communities. Hence, this test is more tolerant of deviations from strict proportionality where the public action benefits the injured landowner's local community than where it benefits larger social units.

The second test is a variation on the familiar test of diminution of value. In addition to the question just mentioned of the relevant benefited group, which addresses the upper boundary of permissible disproportionality, the contours of this test are determined so that it serves as a proxy for egalitarian considerations. Diminution is accordingly measured against the value of the claimant's land as a whole (or even her accumulated holdings in the same surroundings), so that it incorporates a built-in disincentive to infringements upon property rights of the relatively less well-off landowners.

Part II includes an elaborate defense of inserting egalitarian considerations into takings law. It explains that a takings doctrine with an equalizing tendency reflects and inculcates a progressive conception of property that insists that questions of distribution are

internal to the concept of property. It also maintains that, without safeguarding against regressive abuses, the test of long-term reciprocity cannot credibly stand for social solidarity and responsibility. Finally, Part II insists that an egalitarian interpretation of the diminution of value test is also supported by considerations of efficiency and personality and does not unduly hinder the concerns of liberty and of equity among the well-off.

A. Social Responsibility and Reciprocity of Advantage

This Section maintains that the virtue of social responsibility can be accommodated within the distributive criterion that distinguishes regulations from takings. It suggests that such an approach constitutes a valuable instrument for imbuing our local communities with the spirit of social responsibility. This Section further demonstrates that the appropriate legal method for this task is to allow certain types of advantages that a claimant receives from other public actions to act as a substitute for the requirement of proportionality, as long as the disproportionality involved is not overly extreme. Finally, it contends that this conception of reciprocity of advantage should be refined so that such substitution may not be available where the claimant is politically weak or economically disadvantaged.

1. Reciprocity of Advantage: A Contested Concept

Reciprocity of advantage is a familiar concept in takings jurisprudence.⁸⁴ Nonetheless, in law—as well as in life—reciprocity is a contested concept that admits of different conceptions.⁸⁵ Prevailing takings jurisprudence tends to view reciprocity of advantage either very narrowly or very broadly.

⁸⁴ The term “average reciprocity of advantage” was coined by Justice Oliver Wendell Holmes in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). For a discussion of the historical development of this concept, see Lynda J. Oswald, The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis, 50 Vand. L. Rev. 1449, 1490–1510 (1997).

⁸⁵ See generally W.B. Gallie, Essentially Contested Concepts, 56 Proc. Aristotelian Soc'y (n.s.) 167, 169 (1956) (discussing “concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users”).

On one hand, reciprocity of advantage has been interpreted narrowly, requiring that the restricted parcel receive a reciprocal benefit that is embedded within the specific public project, activity, or regulation.⁸⁶ Such a conception of reciprocity prescribes that a distinct and tangible compensation-in-kind, not enjoyed by the community as a whole, must flow directly from the public action to the burdened landowner. It is tantamount, therefore, to a rule of strict proportionality.

On the other hand, reciprocity of advantage also has been read in a much broader sense, requiring only that the injured landowner be a member of the benefited community and, as such (rather than in her role as the regulated party), that she enjoy a share of the general welfare-enhancement generated by the public action at issue or by other beneficial public actions, even if this benefit is outweighed by the burden she sustains. This is an attenuated conception of reciprocity that can view even “the advantage of living . . . in a civilized community”⁸⁷ or the benefit of improved quality of life as sufficient to dismiss compensation claims.⁸⁸ This conception is not so remote from the no-compensation regime, which, as claimed earlier,⁸⁹ is overly permissive and not sufficiently sensitive to the individual burden involved.

In this Section, I will refrain from applying either of these extreme interpretations of reciprocity of advantage. Instead, I will work with an intermediate conception of long-term reciprocity. This conception of reciprocity absolves the public authority from paying compensation if, and only if, the disproportionate burden of the public action in question is not overly extreme and is offset, or is likely in all probability to be offset, by benefits of similar magni-

⁸⁶ See, e.g., *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (requiring trial court to consider whether “direct compensating benefits accrue] to the property, and others similarly situated, flowing from the regulatory environment”), cert. denied, 513 U.S. 1109 (1995); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 11–12, 18, 21–22 (advocating a rule of reciprocity contained in the particular statute rather than a weighing of the long-term benefits of citizenship).

⁸⁷ *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).

⁸⁸ See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 (1987); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U. L. Rev. 297, 303, 364–66 (1990).

⁸⁹ See *supra* Section I.B.2.

tude to the landowner's current injury that she gains from other—past, present, or future—public actions (which harm neighboring properties).⁹⁰

This intermediate conception of long-term reciprocity is stricter than the attenuated conception of reciprocity: It does not find the mere fact of the landowner's membership in the community of enough advantage to offset the disproportionate loss she has suffered. Instead, it requires probable, and not only theoretical, long-term reciprocity. Furthermore, unlike the attenuated conception of reciprocity, this middle road addresses the question of short-term proportionality: Reciprocity of advantage is fulfilled only if the disproportionality involved is not too extreme.⁹¹

Yet from a temporal point of view, this intermediate conception of long-term reciprocity is not as demanding as requiring strict short-term proportionality: The loss involved need not necessarily be offset by present benefits from the same transaction. Other public actions (past, present, or future) that supply roughly equivalent advantages also may be taken into consideration.

⁹⁰ It must be acknowledged that, in its current formulation, this test of long-term reciprocity is vague and indeterminate. It may be claimed that long-term reciprocity should be further refined so that, instead of “too extreme disproportionality,” it should include a more precise definition of impermissible disproportionality (that can be adjusted according to the size of the benefited social group, as Section II.A.3, *infra*, maintains). Furthermore, a rule-form norm of reciprocity would need to take into account the appropriate discount factor of future (and past) beneficial public actions. But the question of whether takings doctrine should be governed by precise rules or vague standards has been debated, and there is no need to address this debate for the present purposes. Even if we opt for the form of precise rules, the admittedly rough doctrine proposed herein can be implemented with proper adjustments. For examples of the formal principles versus balancing approach debate in the takings context, see Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697 (1988) (advocating judicial articulation of formal principles), and Frank Michelman, *A Reply to Susan Rose-Ackerman*, 88 Colum. L. Rev. 1712 (1988) (advocating balancing, the practice of “situated judgment” or “practical reason”). For a general discussion of the rules versus standards discourse, see Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992).

⁹¹ Notice that since the point of long-term reciprocity is to set reasonable limits on social responsibility, a series of small burdens must be aggregated in order to consider the reasonableness of its cumulative weight.

2. Long-Term Reciprocity and Social Responsibility

I believe that this conception of long-term (and rough) reciprocity of advantage should be regarded as an important component of takings jurisprudence since it allows the incorporation of the value of social responsibility into the legal doctrine. The concept of reciprocity reminds us that the injured landowner is a member of a community and, as such, enjoys various social benefits for which she is not required to pay directly. Hence, she also should bear certain obligations toward her community. As long as the disproportionality in the distribution of the burden of the public action is not too extreme, and as long as the political and economic power of the injured party is not disproportionately low (a consideration that will be added to this discussion below⁹²), there should be no difficulty if the particular landowner (who has not been arbitrarily singled out) incurs a disproportionate share of the public burden.⁹³

To my mind, reciprocity (as per this intermediate interpretation) represents an attractive qualification of the ideal of proportionality and not merely a second-best solution. The adoption of reciprocity avoids not only the settlement costs entailed by a strict proportionality rule, but, more importantly, the more extensive *social* costs of strict proportionality.

Requiring compensation for every private burden imposed for the public good (unless that burden is immediately offset by compensation-in-kind of the very same magnitude)—even where all the conditions of reciprocity, as conceptualized herein, have been fulfilled—reflects and inculcates in our local communities an atomistic social vision. This social vision underplays the significance of belonging to a community, perceives our membership therein in purely instrumental terms, and insists that our mutual obligations

⁹² See *infra* Section II.A.4.

⁹³ For a similar position, see Singer & Beermann, *supra* note 5, at 246–47; cf. Levmore, *Just Compensation*, *supra* note 26, at 291–93 (suggesting that there should be symmetry between the government's treatment of takings compensation and the forms of taxation, so that a broad compensation scheme would correspond with targeted taxation, such as user fees, and a narrow compensation scheme with more broadly based taxation). Notice that the argument of this Section also applies—albeit indirectly—to landowners who are not active participants in the community (such as lessors) as long as future owners, as well as current lessees, indeed extract enough long-term countervailing benefits, since the current value of the land is the discounted sum of benefits that can be extracted from it.

as members of such a community should be derived either from our consent or from their being to our advantage.⁹⁴ Put differently, a regime of strict proportionality defines our obligations *qua* citizens and *qua* community members as “exchanges for monetizable gains.”⁹⁵ This regime thus commodifies both our citizenship and our membership in local communities.

In contrast, reciprocity presupposes—or, maybe, attempts to inspire—a different social vision. This vision perceives people as fundamentally social beings, situated in relation to others, embedded in communities as well as in ongoing relationships of give-and-take.⁹⁶ These networks of constructive relationships are understood to be the source of some obligations to others, even where these are not fully and voluntarily articulated and are not accompanied by an immediate and equivalent quid pro quo,⁹⁷ as long as some future, and roughly equivalent, quid pro quo is probable. The mere fact of belonging or membership entails special responsibilities. Hence, land ownership—like ownership at large—is perceived not merely as a bundle 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.⁹⁸

Put differently, land ownership is a source of special responsibility toward the landowner’s community. In fact, social responsibility is a constitutive component of the conception of ownership that corresponds to any distributive criterion that considers reciprocity. (It should be recalled that various legal cultures perceive owner-

⁹⁴ See Charles Taylor, *Atomism*, in *Philosophy and the Human Sciences: Philosophical Papers* 2, at 187, 187–88 (1985); see also Robert Nozick, *Anarchy, State, and Utopia* 171–72 (1974) (discussing each citizen’s claim to a portion of the total social product).

⁹⁵ See Margaret Jane Radin, *Contested Commodities* 5 (1996). For a detailed discussion of the indicia of commodification, see *id.* at 118–20.

⁹⁶ See Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 *Representations* 162, 168–69, 182–83 (1990). It may be helpful to add that this social vision is not suggested as an empirical point regarding people’s psychological reactions, but rather, as an analytical point respecting a specific kind of social interaction and organization.

⁹⁷ See Michael J. Sandel, *Liberalism and the Limits of Justice* 143 (1982); Joseph W. Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 611, 653–55 (1988).

⁹⁸ See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 *S. Cal. L. Rev.* 561, 588–97 (1984) (comparing historic traditions of the meaning of property as a protection of individual self-interest with conceptions that require a belief in public spiritedness and personal forbearance).

ship as a source of obligations and responsibilities.⁹⁹) In some cases, such responsibility imposes upon landowners certain constraints with respect to what they can do with their property, especially regarding uses that threaten or hinder the quality of life of other members of their community.¹⁰⁰ In other cases, the social responsibility of landowners requires some uncompensated disproportionate impact in the distribution of burdens entailed by public actions that enhance the community's well-being.¹⁰¹

Admittedly, reciprocity of advantage does not establish a regime of complete noncommodification—i.e., no monetary compensation—that might accord some ideal of citizenship (or membership). Reciprocity of advantage as conceptualized herein is sufficiently cautious not to be too utopian about citizenship, acknowledging the detrimental consequences of a no-compensation regime in our nonideal world and, thus, requiring long-term rough equivalence of burdens and advantages. By insisting that there should be no strict short-term accounting, however, it tries to recognize, preserve, and foster the noncommodified significance of citizenship alongside this calculated, thus commodified, aspect of it. Reciprocity insists that citizenship should not be reducible to a market relationship by urging us to adhere to our plural and ambivalent understandings of citizenship—as both a source of mutual advantage and a locus of membership and belonging. The intermediate conception of reciprocity is meant to stabilize the coexistence of these conflicting understandings both in society as a whole and in each of its constituents.¹⁰²

⁹⁹ Indeed, the republican conception of property emphasizes duties, participation, and equality, and the Judaic conception perceives property as entrusted by God to its possessor partly for the purpose of charitable use. See Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 Buff. L. Rev. 635, 646–52 (1982) (describing the republican conception); Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* 57–58 (1997) (describing the Judaic conception); cf. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 32–40 (1991) (describing the Continental conception of an “inherently limited” property). Even the classic Liberal version of private ownership incorporates some—albeit limited—obligations, such as the special responsibility to ensure that the property is not used in a harmful way by others. See Tony Honoré, *Ownership, in Making Law Bind: Essays Legal and Philosophical* 161, 174 (1987).

¹⁰⁰ See Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 *Const. Commentary* 259, 263, 267–69 (1992).

¹⁰¹ See *id.* at 272–73, 275.

¹⁰² Cf. Radin, *supra* note 95, at 102–14 (discussing strategies of incomplete commodification).

3. Long-Term Reciprocity and Localism

A further refinement of the social vision underlying this intermediate conception of long-term reciprocity is still necessary. Although we may aspire to achieve such coexistence of mutual advantage and membership at the macro level of citizenship, we must concede that it is far more likely to be sustained at the micro level of our local communities where our status as landowners also defines our membership.

To be sure, one should not deny that even local communities, which are bound only by a geographic common denominator, may not be as strong as communities held together by bonds of ancestry or a common ideology. I believe, however, that even (or is it especially?) in our global, mobile, and interdependent world—where people are “continually in motion” and association is always conceived as voluntary and subject to “the right of rupture or withdrawal”¹⁰³—geographic communities are significant enough. Many localities genuinely differ and offer residents competing options in their lifestyle choices.¹⁰⁴ Many people choose, at least to some degree, a specific locality according to the compatibility of its specific peculiarities with their own ambitions, goals, and needs.¹⁰⁵ People also may find in their local political organization a medium for “constituent contact and civic participation”: an important “locus for ‘republican’ associational voice” through which they can protect and develop “a web of community understandings.”¹⁰⁶

Inasmuch as we believe that structuring our geographic localities into such local communities fulfills 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).¹⁰⁷ Land use law,

¹⁰³ See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *Pol. Theory* 6, 11–16, 21 (1990).

¹⁰⁴ See Carol M. Rose, *Ancient Constitution Versus Federalist Empire: Antifederalism from the Attack on “Monarchism” to Modern Localism*, in *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* 71, 88 (1994).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 85–89 (describing the Antifederalist notions of republicanism and localism).

¹⁰⁷ Although this account of the “ideal local community” derives from social practices of actual communities (and micro-communities), it is explicitly normative. Hence, it must not be interpreted as subject to modifications according to the local level of solidarity in a particular community.

including takings doctrine, regulates our relationships as members in such localities.¹⁰⁸ It shapes our conceptions of the *meaning* of owning land within a geographic locality¹⁰⁹ and thus reinforces, modifies, and shapes our vision of our relationships as landowners in our particular locality.¹¹⁰ It can help to structure our localities—which would otherwise be merely the geographic locations where we happen to reside—as *communities*.¹¹¹

Robert Ellickson's influential study teaches us that members of communities expect others to keep only a rough account of the outstanding credits and debits attributed to the numerous aspects of their multiplex relationship.¹¹² For as long as the aggregate account does not become radically unbalanced, community members should not be concerned if particular subaccounts are not balanced.¹¹³ They are expected to put up with minor imbalances as long as their future interactions are expected to provide adequate opportunities for evening up accounts.¹¹⁴ In other words, a norm of

¹⁰⁸ For purposes of this Article, I take the geographical divisions set by land use law as a given. Characterizing the desirable size (and other features) of a geographical community is a significant normative question of land use law as a whole and thus beyond the scope of this Article.

¹⁰⁹ See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1473–77 (1996) (arguing that property law helps shape social relationships); Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 Mich. L. Rev. 1520, 1549–53 (1992) (discussing the cultural consequences of how burdens are distributed).

¹¹⁰ See William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 Colum. L. Rev. 1774, 1786–87 (1988) (arguing that the judiciary shapes “public opinion concerning the importance and sanctity of private property”); Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. Pa. L. Rev. 2055, 2057–58 (1996) (discussing effect of formal rules on individuals generally); cf. Radin, *supra* note 95, at 202–03, 222 (discussing culture-shaping effects of tort compensation rules). See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 956–61 (1995) (discussing the force of social meanings and their availability for the government’s rhetorical purposes).

¹¹¹ Cf. Pildes, *supra* note 109, at 1553 (“Life in community, offering numerous types of advantages, depends upon rules of property that express commitment to sustaining social coexistence on terms of fair, mutually respectful cooperation. These rules reflect social conventions that have emerged as to what kinds of relationships people can expect from each other—and when government acts, what kinds of collective obligations and responsibilities define the relationship between individuals and government.”).

¹¹² See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 55–56 (1991).

¹¹³ See *id.* at 56.

¹¹⁴ See *id.*

strict accounting or strict proportionality—which seems most fitting for an arm's length, impersonal dealing between strangers¹¹⁵—is perceived as inappropriate for an ongoing relationship of cooperative interaction, mutual trust, and group solidarity.¹¹⁶ In order for such conceptions of local communities and of land ownership to sustain and flourish, however, the private burdens, albeit temporary, must not be perceived as unacceptable sacrifices that may create resentment and thus impede, rather than enhance, any sense of social solidarity or communal concern. Furthermore, the aggregate of each member's long-term burdens as a landowner in a particular local community should be equalized with the total long-term benefits she receives.¹¹⁷

My conception of long-term reciprocity seeks to capture these prescriptions. It allows reciprocity to act as a substitute for proportionality and, therefore, rejects strict accounting. Yet, it also insists that probable, and not merely theoretical, long-term reciprocity would be required, and it safeguards against too extreme a transient imbalance by disallowing overly excessive private burdens. Finally, as we have seen,¹¹⁸ this conception of long-term reciprocity requires some distinction between public actions that benefit localities and public actions of larger government bodies. In the former category—where the beneficiary of the burden is one's local community—tolerance toward deviations from proportionality is especially warranted. Public actions of larger government bodies, in which the beneficiary—society as a whole—is much more abstract and less immediate, compose a very different category. (An especially problematic instance of this category is when the state or national project at issue benefits a specific sector or interest group.) Hence, insofar as the public use under consideration has less local focus, the

¹¹⁵ See Elizabeth Anderson, *Value in Ethics and Economics* 145 (1993) ("[Parties to a market transaction] deal with each other on an explicit, quid pro quo basis that serves to guarantee mobility. . . . The impersonality of market relations thus defines a sphere of freedom from personal ties and obligations.").

¹¹⁶ See Ellickson, *supra* note 112, at 234–36.

¹¹⁷ Cf. *id.* at 274–75 (comparing the substantive norms of co-owners with the norms in a local community).

¹¹⁸ See *supra* notes 108–11 and accompanying text.

upper bounds of permissible disproportionality—the maximal extent of disproportionate impact—should be reduced.¹¹⁹

4. An Egalitarian Refinement

Yet even this intermediate conception of reciprocity of advantage may require further refinement. We know that local government—like (or even more so than) central government—may be corrupted even if we attempt to structure it in the spirit of civic virtue. More importantly, we must acknowledge that in our nonideal world, corruption of public-spiritedness can take various forms, and some of the more troubling manifestations of this phenomenon are not necessarily crude infirmities of the administrative process, but rather, more systemic and subtle problems such as the capture of the local authority by strong interest groups.¹²⁰ If we wish, therefore, to make a credible claim for social solidarity and responsibility (in whose name long-term reciprocity is viewed as a substitute for proportionality)—if we indeed wish to uphold “the bonds of civic mutuality” against the systemic threat of “corrosion by the privatization . . . of politics”,¹²¹—we must protect members of our local communities from various forms of abuse.¹²² In our context,

¹¹⁹ Cf. Lewinsohn-Zamir, *supra* note 9, at 108–09 (arguing that restrictions that primarily benefit a local group provide more nonmonetary compensation, and thus less need for damage payments, than restrictions that provide regional or national benefits). This distinction runs counter to William Fischel’s claim that the quintessential area (or perhaps the only area) of justified (or even required) judicial antimajoritarian intervention in regulatory takings is the regulation of undeveloped land by local governments. See Fischel, *supra* note 12, at 139 & chs. 7–8. Fischel’s basic argument, however—that local government is much less amenable to both the “exit” and the “voice” modes of civic influence than are state and federal legislatures—has been convincingly refuted. See Carol M. Rose, *Takings, Federalism, Norms*, 105 Yale L.J. 1121, 1133–39 (1996) (book review).

¹²⁰ See Epstein, *supra* note 40, at 264–65; Rose, *supra* note 104, at 87, 90–91.

¹²¹ Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, in *Liberty, Property, and the Future of Constitutional Development* 127, 138 (Ellen Frankel Paul & Howard Dickman eds., 1990). See generally Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 Ind. L.J. 145, 148–57 (1977–1978) (discussing public choice and “public interest” models of local government legitimacy).

¹²² Cf. Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. Rev. 531, 537–41 (1995) (discussing various mechanisms, including collateral, retaliation, and punishment, through which second- and third-parties can enforce behavior if relationships break down); Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, in *Liberal Rights: Collected Papers*, 1981–1991, at 370, 373–74, 376, 387 (1993)

this consideration requires that we also take into account the specific circumstances “of political power, of inclusion and exclusion from the actual governing of the community.”¹²³ It asks us to be skeptical about disproportionate contributions to the community’s well-being where these contributions are required from landowners who are either politically weak or economically disadvantaged, even where the requirements of reciprocity apply.¹²⁴

Hence, claims of reciprocity as a substitute for proportionality are especially problematic where the landowner is a member of an alienated minority that is effectively excluded from actual participation in law-making, as well as in less dramatic situations, i.e., whenever the claimant is either poor or belongs to a politically weak sector of society. Moreover, even where the injured landowner is part of the nonorganized public, a similar cautious attitude may be warranted if either the public project’s direct beneficiaries, or the parties who successfully diverted the loss from their own land, enjoy significant political or economic power. Although we should not reject claims of reciprocity as a substitute for proportionality in all of these cases, we should treat them with some caution (albeit a diminishing caution as we move from cases of placing burdens on the disadvantaged to cases where the claimant is a homeowner with no special political or economic power). This caution is required not only by virtue of egalitarian concerns, to which I refer shortly; it is entailed also by the very claim of social responsibility.

B. Equality and Diminution of Value

1. A Takings Doctrine with an Equalizing Tendency

In addition to, and—as we have just seen—compatible with, the virtue of social responsibility and solidarity, I believe that the criterion that distinguishes regulatory takings from mere regulations can and should be shaped with a view to the egalitarian ideal of giving preferential treatment to improvement in the lives of the

(suggesting that a structure of rights protects individuals when social relationships break down and offers security in relations where social bonds have not yet been established).

¹²³ See Radin, *Diagnosing*, supra note 26, at 159.

¹²⁴ See *id.*

worse-off, or, at least, of avoiding any structural privileges that favor the better-off.¹²⁵

I am mindful of the demanding limitations that planning places on the possibility of promoting social justice through land use law.¹²⁶ Indeed, it must be acknowledged that the purpose of takings can seldom be egalitarian and that egalitarianism cannot be pursued solely, or even primarily, via takings doctrine. Still, I argue that takings law *can* be designed with more or less of an “equalizing tendency.”¹²⁷ It can more vehemently protect the property interests of the poor and the weak.¹²⁸ In what follows, I propose that the doctrine should opt for this alternative. This Section outlines the doctrinal implications of such a choice and defends it against various claims that takings law is an inappropriate forum for any egalitarian considerations.

Designing takings doctrine with an equalizing tendency corresponds to an egalitarian conception of private property. According to this conception (propounded by various authors, including Michelman in his later writings), private property is not merely a “possessive proprietary principle” or an “antiredistributive principle.”¹²⁹ Rather, it is an expression of a cluster of values—primarily privacy, security, and independence¹³⁰—that “always involve the distribution as well as the retention of wealth.”¹³¹ Property must entail

¹²⁵ For this conception of equality, see Thomas Nagel, *Equality and Partiality* 12, 67–69 (1991); Joseph Raz, *The Morality of Freedom* 225–27 (1986).

¹²⁶ See *supra* Section I.B.2.

¹²⁷ This term is Michelman’s. See Michelman, *supra* note 62, at 1182.

¹²⁸ Cf. Ackerman, *supra* note 47, at 59–60 (suggesting a doctrinal response that gives “some, though not necessarily decisive, weight to distributional factors” through the proxy of the type of property held). For the impact of similar considerations on the development of the applicable measure of recovery for the expropriation of alien-owned property according to international law, see Dagan, *supra* note 99, at ch. 6.

¹²⁹ Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *Iowa L. Rev.* 1319, 1319 (1987).

¹³⁰ See Michelman, *supra* note 121, at 149–50, 154. There are also other justifications of private property that support a progressive conception of property. For two successful attempts—based on the personhood and the labor theories of property—see, respectively, Jeremy Waldron, *The Right to Private Property* 377–78, 385–86, 429, 444 (1988), and R.H. Tawney, *Property and Creative Work*, in *Property: Mainstream and Critical Positions* 135, 140–41 (C.B. Macpherson ed., 1978). For the claim that the Blackstonian conception of property is not entailed from considerations of economic efficiency, see Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *Hofstra L. Rev.* 771 (1980).

¹³¹ Michelman, *supra* note 121, at 150.

distribution since, as the Legal Realists have emphasized, ownership is a source of economic and, therefore, social, political, and cultural rights and powers, the correlative of which is other people's duties and liabilities.¹³² Therefore, if we base our justification for private property on values like privacy, security, and independence—if we support private property in the name of power-spreading (decentralization of decisionmaking power) as a prerequisite for individual liberty¹³³—we also must remember that concentrations of private property (i.e., private power) may, in themselves, become “sources of dependency, manipulation, and insecurity.”¹³⁴

Once we realize that the same property rights that guarantee individual liberty are also “collective, enforced, even violent decisions about who shall enjoy the privileges and resources of this society,”¹³⁵ we cannot consider the legal protection of land ownership—the mobilization of the coercive power of the state in the interests of land-owners¹³⁶—an “easy case” of protecting individual rights. The conflict between owners and other members of society, between the haves and have-nots, is built into our understanding of the very concept of property.

¹³² See Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8, 11–14 (1927) (“dominion over things is also *imperium* over our fellow human beings”); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 470–79 (1923) (maintaining that inequalities in the distribution of income and power are the direct result of legal allocation of background rules); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 28–33 (1913–1914) (purporting that legal rights, privileges, powers, and immunities are jural relations, advantageous to their holders to the extent they are disadvantageous to those subject to their correlatives); see also Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* ch. 3 (1998) (tracking Hale’s assault on traditional notions of the “rightness of property rights”); Michael Robertson, *Property and Ideology*, 8 Can. J.L. & Juris. 275, 278–83 (1995) (arguing for fundamental differentiation between types of private property based on the degree of the owner’s powers over others).

¹³³ See *supra* Section I.B.1.

¹³⁴ Michelman, *supra* note 121, at 139; see also Charles E. Lindblom, *Politics and Markets: The World’s Political-Economic Systems* 170–88 (1977) (exploring the political role of businessmen in private enterprise societies and arguing that polyarchies may be controlled by business and property); Michelman, *supra* note 129, *passim* (discussing necessity of some distribution to achieve democratic ideals).

¹³⁵ Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 Notre Dame L. Rev. 1033, 1046 (1996).

¹³⁶ See Robert W. Gordon, *Paradoxical Property, in Early Modern Conceptions of Property* 95, 102 (John Brewer & Susan Staves eds., 1995).

Hence, an egalitarian conception of property emerges that acknowledges and endorses the dialectic of retention and distribution. This conception finds proportionality an overly simplistic and one-sided rule that should not be our only guiding principle in shaping property law. Instead, it requires “an *ongoing* commitment to dispersal of access” and insists that we design our property system so that it dynamically ensures that “lots of people have some” property and that “pockets of illegitimately concentrated power” (i.e., property) do not re-emerge.¹³⁷

2. A Doctrinal Challenge: Diminution of Value and Beyond

Attractive as it may seem as an inference from our ideals of political morality or from a persuasive account of the concept of property, incorporating egalitarian concerns into takings doctrine still has some lingering suspicions to confront. There are two types of doubts we must address, one practical, and the other normative. I will begin with the practical concern and demonstrate both that there are ways of incorporating egalitarianism into the distributive criterion that distinguishes takings from regulations, and that these legal techniques are limited and must be fashioned with great care. It is only with reliance on such carefully tailored techniques that I will later claim that the normative reservations are misplaced.

The first question, then, is whether my suggestion can actually be implemented. Proponents of egalitarianism will readily admit that public measures, whose burden is deliberately distributed in a progressive fashion, do not require full compensation even though they can be classified as takings.¹³⁸ Nonetheless, they may still insist—and rightly so—that such a public action, with the desired goal (or, at least, a primary objective) of redistribution, would be

¹³⁷ Singer & Beermann, *supra* note 5, at 241–43 (emphases omitted and added); see also Carol M. Rose, *Property as the Keystone Right?*, 71 *Notre Dame L. Rev.* 329, 342–44, 347 (1996) (recounting the practical difficulties of diffusing economic and political power in a property rights regime); Singer, *supra* note 109, at 1464–73 (outlining the historical and contemporary distributive component of property).

¹³⁸ See Stephen R. Munzer, *A Theory of Property* 422 (1990); Note, *The Principle of Equality in Takings Clause Jurisprudence*, 109 *Harv. L. Rev.* 1030, 1045 (1996); cf. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding the constitutionality, assuming just compensation, of land-reform measures that target oligopolistic owners and redistribute some of their land titles as falling within the Public Use Clause rather than purely private takings).

an atypical case of land use regulation.¹³⁹ Such a redistributive measure therefore is not useful for demonstrating that egalitarian considerations can be taken into account in the more frequent instances of land use control where redistribution is simply a by-product of the public project, activity, or regulation.

Hence, if we wish to take into consideration the demands of egalitarianism in the typical case of land use regulation, where the disproportionately distributed burden results from planning considerations, we must consider the relative political and economic power of the injured landowner. But how can we do so if our entrenched understanding of judicial legal discourse regards any consideration of these issues in deciding specific cases as crude and inappropriate?¹⁴⁰

This difficulty is a serious one and should not be taken lightly. In the framework of this Article, however, I can only point to two strategies: use of proxies and/or requiring a heightened scrutiny of proportionality in certain cases. I must concede their generality and hope that future academic development or judicial implementation will render them more subtle and nuanced.

The first and most important strategy is a familiar one to our law. Frequently, when we feel uneasy about the types of factors that decisionmakers take into account in their decisions, we use proxies. These proxies are based on rough generalizations of the characteristics of the typical parties involved in the kind of question being addressed. The proxies are, by definition, crude facsimiles and are bound to be both under- and overinclusive, but they are also less likely to be misapplied or abused.¹⁴¹

Proxies can be helpful in our context as well. One example can be drawn from a particular version of a familiar test currently employed for distinguishing regulations from takings. Consider a rule that conditions compensation on the extent (the percentage) of the diminution of value of the property in question, i.e., the size of the

¹³⁹ Cf. Jules L. Coleman, *Corrective Justice and Property Rights*, in *Property Rights*, supra note 50, at 124, 137 ("The typical 'taking' is not part of systematic redistribution aimed at implementing the correct distribution of resources.").

¹⁴⁰ See Lon L. Fuller, *The Morality of Law* 46–49 (1964); Richard A. Posner, *Economic Analysis of Law* 566–67, 569–70 (5th ed. 1998); Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 *Vand. L. Rev.* 395, 398 (1950).

¹⁴¹ See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 149–55 (1991).

loss caused by the public action relative to the preexisting value of the affected property.¹⁴² Assume (and here I am choosing one version of this test from a very perplexing range of case law¹⁴³) that the reference point for measuring the percentage of the claimant's loss is the value of her parcel as a whole and, in the event that she owns other parcels within the relevant local community, the total value of these holdings.¹⁴⁴ Finally, assume further (contrary to how we have come to read the diminution of value test, but in accordance with the requirements of the conception of reciprocity of advantage as outlined above) that the threshold of this test is set neither too high (so that only public actions that deprive landowners of every economically viable use of their properties require compensation) nor too low (so that each loss, excepting a *de minimis* one, is compensated).

It should be noted that a given loss of absolute dollar value, resulting from a specific public need, may be very substantial (as a percentage diminution of value) if it is imposed upon an inexpensive parcel and much less significant if it is imposed upon a more costly one.¹⁴⁵ Hence, employing this particular interpretation of the diminution of value test can, in many cases,¹⁴⁶ discourage the public authority from choosing inexpensive (and usually small) parcels and, instead, encourage it—all things being equal from the planning perspective—to impose the required burden on landowners of more costly (and usually bigger) parcels. Insofar as owners of in-

¹⁴² The diminution of value test has its origins in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹⁴³ For recent surveys of the diminution of value test in takings jurisprudence, see Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 677–719 (1996); John E. Fee, *Comment, Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1538–49 (1994).

¹⁴⁴ In other words, we can assume that a strategy of “conceptual severance”—either “horizontal,” “vertical,” or “functional”—is disallowed. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496–97 (1987); Margaret Jane Radin, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, in *Reinterpreting Property*, *supra* note 26, at 120, 126–30; cf. William W. Fisher III, *The Trouble with Lucas*, 45 Stan. L. Rev. 1393, 1402–05 (1993) (presenting the enormous problems of using the “conceptual severance” procedure in takings cases).

¹⁴⁵ This would be true in any case in which the required injury tends to be fixed irrespective of the value of the injured parcel.

¹⁴⁶ The incentive effect described in the text will not always apply, since the physical configuration of the parcels may also affect the diminution of their values in the event that they are affected by the public action.

expensive parcels are generally less well-off than owners of more costly ones,¹⁴⁷ this version of the diminution of value test emerges as a rule that “thinks” progressively¹⁴⁸ but “speaks” in formal legal terminology.¹⁴⁹ Looking at the total value of the injured landowner’s holdings within the relevant local community is aimed at refining the accuracy of this proxy without collapsing into an open and problematic examination of the landowner’s socioeconomic status.¹⁵⁰

The second strategy—which should be utilized in extreme cases only— involves such a particularistic method of legal reasoning that may allow the injured landowner to insist on a heightened scrutiny of proportionality where she is either poor or belongs to a politically weak segment of society. In extreme cases—where it is clear that the claimant’s political or economic power is disproportionately low in relation to that of the public project’s direct beneficiaries or to that of potentially injured parties who succeeded, or can be expected to succeed, in diverting the loss, or a future burden from a similar project, from their land—long-term reciprocity of advan-

¹⁴⁷ Admittedly, this is not necessarily so. Cf. Paul, *supra* note 66, at 1495 (owner of inexpensive parcel may own other parcels, with high value, unaffected by the regulation). This, however, only indicates that the diminution of value test is, indeed, a proxy. Applying the diminution of value test against the total value of holdings in the community, see *supra* note 144 and accompanying text, addresses the specific example provided by Jeremy Paul.

¹⁴⁸ Such a rule seems also an efficient one. First, it balances the regressive and inefficient characteristics of a seemingly neutral rule (a point that has been discussed above, see *supra* Section I.A.3, and will be reconsidered below, see *infra* Section II.B.3). Second, by inducing the public authority to impose the burden on larger parcels, it may also reduce the litigation costs involved by minimizing the number of potential plaintiffs.

¹⁴⁹ This conceptualization and rationalization of the diminution of value test requires that we disregard certain factors that have been considered recently by courts as relevant for solving the “denominator puzzle,” such as the question whether the State’s law applicable to the property at issue recognizes the separate and distinct existence of the estate the claimant seeks to sever. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

¹⁵⁰ Admittedly, avoiding a consideration of the claimant’s actual socioeconomic status favors landowners with diversified portfolios over owners whose land represents their sole (or major) asset, a preference that is unjustifiable from the point of view of distributive justice. This skewing is the price of avoiding a direct examination of claimants’ socioeconomic status. It is less troubling insofar as the investment patterns of the members of the community at issue are more homogenous, e.g., in a rural community where land is the chief asset among most residents.

tage should not be a substitute for proportionality, and strict short-term proportionality should be required.¹⁵¹

This strategy involves explicit judicial consideration of the relative economic and political power of the injured landowner and is thus especially controversial. I believe, however, that our uneasiness regarding judicial handling of such factors—which is understandable as a general characterization of the judicial process—should be minimal in this particular context. The direct application of these considerations by the courts is, after all, not available across-the-board. Rather, the doctrine is confined to limited cases where the landowner herself attempts to invoke this exception to the reciprocity of advantage test and where the relevant power discrepancies are conspicuous.¹⁵² Moreover, the egalitarian aspect of the doctrine (in both strategies) may well operate as an *ex ante* disincentive to infringe upon property rights of the disadvantaged. Thus, it should usually apply merely as a background rule that would prevent such cases *ab initio* with no need for explicit judicial intervention.

3. The Reconciliation of a Progressive Takings Doctrine with Equity, Efficiency, Liberty, and Personality

Thus far, I have responded to the pragmatic critique. I also hope that the two strategies I have outlined demonstrate the limited fashion in which egalitarianism can be incorporated into takings doctrine. It is time now to turn to the normative critique.

Normative considerations, argue some critics, dictate that promoting ideals of distributive justice should be exclusively confined to those fields of law that are specifically designed for fostering these ideals, such as tax law, welfare law, or some segments of land use law.¹⁵³ In this view, it is undesirable to instill our egalitarian commitments into takings doctrine, in which the redistribution is

¹⁵¹ For a recent proposal of a compensation statute that also accommodates the particular hardships for the individual property owner, see Treanor, *supra* note 6, at 1174–75. Note that while the landowner's economic power is a function of her overall wealth, her political power in relation to a specific public authority is also dependent on the geographic distribution of that wealth.

¹⁵² It should be noted that this would not be the only case in which a party's financial condition would be a relevant factor in setting the damages award. A defendant's financial condition is pertinent for determining whether an award of punitive damages is excessive or inadequate. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

¹⁵³ See *infra* notes 155–62 and accompanying text.

paradigmatically only a side effect, even if their proposed function in this context is, indeed, rather moderate.

I think that we can trace four arguments that support this claim, deriving from equity, efficiency, liberty, and personality.¹⁵⁴ All four are important considerations that should be taken into account any time we attempt to accommodate egalitarian concerns in a legal institution that is not specifically designed for redistribution; the cumulative force of these arguments dictates a cautious attitude toward any such endeavor and may require a rather minimalistic and carefully tailored incorporation of egalitarian concerns. None of these considerations, however, can justify a bright-line segregation of our law into fields that can promote equality and fields from which egalitarian concerns should be excluded.

Let us consider first the equity argument, which focuses on the inherent discriminatory nature of takings that "often single[] out certain members of the landowner group for different treatment."¹⁵⁵ Hence, the claim arises that compensation is needed in order to check against "abuses such as favoritism and exploitation"¹⁵⁶ (the latter especially in regard to minorities) and to "assure more equality between landowners" as well as "between landowners and people whose wealth comprises other assets."¹⁵⁷

The second argument is based on efficiency considerations. For legal economists, taxes and transfer payments are generally regarded as the most efficient way of accomplishing redistribution,

¹⁵⁴ There may be two further arguments to consider. First, it may be argued that our egalitarian commitments should focus our attention on the poorest of the poor, who are not landowners, and should thus require that we acknowledge the possible progressive effect even of regulations that disadvantage small and relatively poor landowners. This argument might be persuasive if such regulations were typically in favor of the poorest nonlandowners, but I think it is not really disputable that this is very rarely the case and that typically the beneficiaries are the relatively rich and powerful. See *supra* note 38 and accompanying text. Another possible argument is that tax law and welfare law are more transparent instruments for redistribution and are thus preferable from the viewpoint of democratic theory. My response to this argument is twofold. First, one may doubt the extent to which the distributive implications of these seemingly transparent fields are indeed obvious. See *infra* note 168 and accompanying text. Second, the preference-shaping effects of takings law, discussed *infra* notes 176–80 and accompanying text, make any such argument circuitous.

¹⁵⁵ Lewinsohn-Zamir, *supra* note 9, at 54.

¹⁵⁶ William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 11 n.37 (1995).

¹⁵⁷ Lewinsohn-Zamir, *supra* note 9, at 59–60.

whereas attempting to promote egalitarian ideals through other legal rules typically creates unnecessary inefficiencies in the regulated activities (in addition to the inevitable inefficiencies that are caused by the redistribution itself).¹⁵⁸

The next argument derives from the attempt—which is one of the cornerstones of modern liberal thought—to accommodate egalitarianism with a genuine commitment to personal liberty. According to this claim, the concern for the well-being of other people is the responsibility of the government, to be achieved via its tax and transfer payment mechanisms. In contrast, individuals, when utilizing their private property, are not required to treat others with care or concern.¹⁵⁹ They are entitled to take an attitude of self-interest regarding their property and to decide by themselves when to deviate from this attitude in what must then be considered supererogatory conduct. Only such a “division of labor” can promote distributive justice without unduly undermining individual liberty.¹⁶⁰

Finally, according to the personality argument, “people are more severely hurt when a *certain* asset of theirs is taken, than when a similar value is taken from their total wealth.”¹⁶¹ An important explanation for why an injury to a specific asset transcends the financial setback involved lies in the unique role that (some of) our resources play in our lives, namely, as a means of expressing and developing our personalities. A legal regime responsive to this phenomenon should prefer the method of taxes and transfer payments to other ways of redistribution.¹⁶²

In what follows, I claim that—all these weighty arguments notwithstanding—takings doctrine is not *necessarily* an inappropriate locus for egalitarian concerns.¹⁶³ On the contrary, as long as they are implemented through one of the two strategies outlined above (either through a proxy that attempts to divert a required disproportionate impact of a public action from the worse-off to the bet-

¹⁵⁸ See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667, 667–69 (1994).

¹⁵⁹ See Ronald Dworkin, *Law's Empire* ch. 8 (1986).

¹⁶⁰ See id. at 299–301.

¹⁶¹ Lewinsohn-Zamir, *supra* note 9, at 55.

¹⁶² See id.

¹⁶³ Cf. Munzer, *supra* note 138, at 421–22 (“[I]f redistribution is sometimes legitimate, and if takings can redistribute, then one cannot rule out certain takings simply on the footing that they aim to redistribute income or wealth.”).

ter-off or—in extreme cases only—by shielding the weak from claims of reciprocity as a substitute for proportionality), there is no obstacle to or fault in allowing our distributive ideals to step in. In fact, their presence is even commendable.¹⁶⁴

I will start with the efficiency argument; my response to it also will be helpful in addressing the equity argument, which is the most serious criticism from the standpoint of distributive justice. My response is straightforward. Not only does the economic analysis not raise any opposition to these strategies for incorporating egalitarianism into takings doctrine, it even supports them. As we have seen,¹⁶⁵ a compensation regime that is not sensitive to the relative political and economic power of the parties involved is both regressive and inefficient. Its inefficiency (as well as its regressivity) derives from its allocational consequences, which, in turn, spring from the incentives this regime generates for both public authorities and private landowners. An indiscriminate regime distorts the incentives of public officials. It structurally and systematically encourages them to impose the burden on members of the nonorganized public or of marginal groups even where the best choice, from a planning perspective, would place the burden on members of powerful or organized groups.¹⁶⁶ By the same token, insensitivity to the economic power of the parties involved may distort the incentives of landowners: Undercompensation to some landowners may lead to inefficient underinvestment, and overcompensation of others may lead to inefficient overinvestment. The two strategies suggested herein supply countervailing incentives to officials and landowners alike and, thus, ameliorate—if not solve—these disturbing consequences.

Unlike the efficiency argument, the claim derived from equity is not entirely inapplicable in our context, but I believe that it is both exaggerated and unbalanced. It is exaggerated—at least regarding

¹⁶⁴ I assume that the legislative process is not more vulnerable than the judicial process to pressures from strong interest groups who try to block redistribution. If this assumption is relieved, my call for “desegregation” actually gains momentum.

¹⁶⁵ See *supra* Section I.A.

¹⁶⁶ Characterizing these incentives as structural and systematic is meant to emphasize that we are not dealing with administrative arbitrariness, *mala fides*, or brute corruption. The economic analysis reveals far more subtle difficulties in the administrative process surrounding land use regulation that cannot be remedied by the judicial supervision of the propriety of the administrative procedure.

the doctrine that emerges from my discussion—since, as I see it, takings law always must consider the extent of disproportionate impact and should allow uncompensated injuries (in the name of social responsibility) only where the extra burden involved is not too excessive.¹⁶⁷ It also should be kept in mind that takings law does not apply only to land, so that employing the same considerations regarding legal norms that affect other resources would tend to spread these excesses among the wider group of the well-off. Further, if we insist on focusing on the troublesome concentration of the burden on landowners, as distinguished, for example, from people whose wealth is fungible, we must remember that in other respects—notably taxation—landowners are often treated in a comparatively favorable fashion.¹⁶⁸

Furthermore, even if we concede that there may be some remaining extra burdens that are not evenly spread among the well-off,¹⁶⁹ the conclusion that equity requires a takings doctrine that disregards the claimant's political and economic power still does not follow. The reason for this contention should be clear at this point: Such a takings doctrine would produce regressive incentives that could exacerbate the wealth and power disparities in our society.¹⁷⁰ It would seem odd, at best, if in the name of avoiding certain discrepancies from the ideal distribution of burdens among the group of well-off, we were to allow such consequences.¹⁷¹

¹⁶⁷ Given the diminishing marginal utility of income, such discrimination between the well-off is especially less significant, particularly in comparison to the regressive consequences of a takings doctrine that disregards the claimant's political and economic power, as discussed below. See *infra* notes 169–71 and accompanying text.

¹⁶⁸ This is because: (1) imputed income is not taxed; (2) mortgage interest is deductible; and (3) profits on home sales are excluded on a limited basis. See I.R.C. §§ 121, 163 (1986); William D. Andrews, *Basic Federal Income Taxation* 22, 73–74 (4th ed. 1991); William A. Klein & Joseph Bankman, *Federal Income Taxation* 55–56, 117–20 (11th ed. 1997).

¹⁶⁹ Recall that in my proposed doctrine no such burden can fall on weaker parties.

¹⁷⁰ Some authors argue that there is no point in resorting to distributive considerations in takings doctrine since the injured landowners are already typically ordinary citizens who own a relatively small piece of land. See, e.g., Lewinsohn-Zamir, *supra* note 9, at 59. If the empirical claim is accurate, it vindicates, rather than undermines, the necessity for distributive considerations in takings law: The only explanation for the phenomenon would be that the current, indiscriminatory regime creates regressive incentives on the part of the planning authorities.

¹⁷¹ It should be recalled that we also allow some distributional differences within the group of the well-off in order to achieve other social goals. This is the case in the

Finally, neither the argument derived from liberty nor the one based on personality compromises the normative desirability of my proposal. Allowing egalitarianism to affect takings doctrine in the ways suggested is no more intrusive and hence no more restrictive, of individual liberty than tax law is. Both taxation and regulatory takings impose certain burdens on private individuals for the public good, and both restrict, to that extent, individuals' freedom to control their resources. Neither the frequency of such interferences in the lives of individuals nor their intensity can substantiate any significant differentiation.¹⁷²

My theory does not require a rejection of personality theory's claim that people have a unique bond with resources that are constitutive of their selves, and it does not undermine the moral significance of that phenomenon.¹⁷³ The personality theory recognizes that the same piece of property may have personal value in the hands of one owner and fungible value in the hands of another.¹⁷⁴ My theory responds to this distinction. A consideration of the claimant's relative power would favor the case of private homeowners, the paradigmatic situation where property has personal, rather than fungible, value. Correspondingly, the personality argument has less, if any, relevance regarding broadly held corporations, and such corporations are a typical case in which long-term reciprocity can more easily substitute for proportionality.¹⁷⁵ Hence, my proposal responds to, rather than undermines, the prescriptions of the personality argument.

many instances of discrimination between similar taxpayers in order to provide incentives for certain types of socially beneficial activities. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 Yale L.J. 472, 498–99 (1980).

¹⁷² See *id.* at 503–07 (finding no empirical distinction between taxation and regulation in terms of frequency or intensity).

¹⁷³ For an extended account of this phenomenon, see Dagan, *supra* note 99, at 40–49.

¹⁷⁴ Cf. Margaret Jane Radin, *Residential Rent Control*, in *Reinterpreting Property*, *supra* note 26, at 72, 79–86 (advocating rent control measures based on theory that for landlords, the property is fungible or commercial, while for renters, the property has personal value).

¹⁷⁵ Conversely, it may be argued that where groups are perceived as units—where, for example, the local communities we inhabit are, to some extent, constitutive of our selves—the personality theory of property requires that we give some property rights to these groups as such. Cf. Margaret Jane Radin, *Property and Personhood*, in *Reinterpreting Property*, *supra* note 26, at 35, 46 (describing Hegel's view of property relationships that arise from the nature of groups).

4. *Takings, Property, and Distributive Justice*

Far and beyond all the above, it is not merely that none of the arguments of the normative critique holds against a careful and moderate version of allowing our egalitarian ideals to break free from the traditional straight-jacket of taxation and transfer payments. The strict restriction of these ideals to these fields—more particularly, the total exclusion of egalitarian principles from takings law—may even contribute to the frustration of those ideals. Therefore, a genuine egalitarian commitment requires the kind of move this Section suggests.

Takings law is a conspicuous branch of the law of property. Its basic norms are enshrined in revered texts such as constitutions, and the occasions on which it is judicially enforced tend to be dramatic and highly visible.¹⁷⁶ Consequently, takings doctrine is one of the most distinctive areas of law shaping our conception of ownership. Our conception of ownership—the meaning we attribute to private property, especially of land—defines, in turn, various aspects of our daily, routine interactions as property owners and as citizens; hence, it takes a prominent role in structuring the way in which we perceive our relationships with others.¹⁷⁷ Therefore, any attempt to accommodate within one legal regime a takings doctrine that is premised on Blackstone's conception of property¹⁷⁸ (and, therefore, utilizes a rule of strict proportionality) and an egalitarian system of taxation and transfer payments is bound to be problematic.

To be sure, I do not advocate that both fields should or even can employ identical distributive criteria. But we cannot hope to realize an egalitarian scheme of taxation that is radically inconsistent

¹⁷⁶ See Michelman, *supra* note 121, at 135.

¹⁷⁷ See *supra* notes 108–11 and accompanying text. Notice that the text insists that the possible expressive function of takings law is indirect. Indeed, it seems to me that what may affect people's preferences and values are not specific doctrinal rules (of which they are usually unaware), but rather, the more fundamental legal concepts and institutions. Thus, in our case, I do not claim that the specific contours of the compensation regime of takings law have any expressive function. Such a claim would have been especially difficult respecting the egalitarian component of the doctrine I propose, given that one of the doctrine's virtues is the fact that its egalitarian component is covert, implicit in the seemingly technical conception of diminution of value developed in Section II.B.2. My claim is therefore that takings doctrine may have significant ramifications on our conception of ownership, and that ownership—a concept of popular use that is legally constructed—may affect people's preferences and values.

¹⁷⁸ See *supra* note 53 and accompanying text.

with the prevailing doctrine of takings law. If takings law influences our conception of ownership and thus how we perceive our rights and responsibilities toward one another, then those perceptions will carry over to our attitudes about taxation. "It seems artificial . . . to expect that the same person who is not required to pay (almost) any attention to the fate of others" with respect to her private property "will recognize the legitimacy of the claims of others (equally strangers) [with regard] to fragments of her resources when the tax-collector asks his due."¹⁷⁹ We thus cannot reasonably expect the self-regarding attitude generated by a libertarian takings doctrine to produce progressive policies when we come to shape the field of taxation and transfer payments.¹⁸⁰

Hence, if we are committed to progressive public policies, we need to do our best to graft—with care and moderation, but with persistence as well—our egalitarianism into takings law and thereby inculcate the progressive conception of property.

III. APPLICATIONS

The purpose of this Part is to make the previously abstract argument somewhat more concrete and demonstrate its potential applicability. Furthermore, the analysis of the results of three familiar cases in terms of the doctrine proposed herein is aimed to demonstrate its deep roots in the prevailing case law. The first case—*Agins v. City of Tiburon*¹⁸¹—is, for me, a straightforward application of long-term reciprocity of advantage. The second—*Penn Central Transportation Co. v. New York City*¹⁸²—is presented as a more complicated example of the interaction between reciprocity of advantage as a substitute for social responsibility and diminution of value as a proxy for equality. Finally, the third example—*Hodel v. Irving*¹⁸³—demonstrates the need for direct resort, in infrequent and extreme cases, to a consideration of the plaintiff's political and economic power.

¹⁷⁹ Dagan, *supra* note 99, at 39.

¹⁸⁰ For an extended discussion of this point, see *id.* at 38–40.

¹⁸¹ 447 U.S. 255 (1980).

¹⁸² 438 U.S. 104 (1978).

¹⁸³ 481 U.S. 704 (1987).

This Part is not intended as a comprehensive, or even representative, summary of takings doctrine. Rather, the discussion that follows utilizes these Supreme Court cases merely to show that there is nothing revolutionary in the anticipated consequences of my proposed doctrine. On the contrary, the theory and doctrine proposed herein can fairly be described as representing a significant—although by no means the only—trend in takings jurisprudence.

Pointing out these judicial manifestations of my proposed theory does not make it redundant or of merely theoretical value. As we will see, all three opinions seem rather unpersuasive given the doctrinal language that was available to their authors. This Part should thus be read as an attempt to vindicate the results of these cases by supplying them with the appropriate doctrinal vocabulary and normative underpinnings. It thus presents the theory proposed in this Article as an exercise in articulating and rationalizing certain implicit judicial intuitions in the hope that such rationalization will reinforce their juridical status.

A. *Agins v. City of Tiburon*

Agins and other appellants acquired five acres of unimproved land in the City of Tiburon, California, for residential development.¹⁸⁴ The city then adopted new zoning ordinances that restricted use of the land to one-family dwellings, accessory buildings, and open space uses, with density restrictions permitting appellants to build between one and five family residences on their tract.¹⁸⁵ The appellants alleged that their property had been taken without just compensation.¹⁸⁶

The Supreme Court disagreed. It noted that these zoning ordinances “substantially advance legitimate governmental goals,” namely: “discourag[ing] the ‘premature and unnecessary conversion of open-space land to urban uses,’” thus preserving its suburban nature.¹⁸⁷ The Court further noted that “[t]here is no indication that the appellants’ 5-acre tract is the only property affected by the ordinances,” and emphasized that the ordinances limit develop-

¹⁸⁴ See *Agins*, 447 U.S. at 257.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at 258.

¹⁸⁷ *Id.* at 261 (quoting Cal. Gov’t Code § 65561(b) (West Supp. 1979)).

ment but “neither prevent the best use of the appellants’ land nor extinguish a fundamental attribute of ownership,” and that appellants “will share with other owners the benefits” of these zoning ordinances, that is the “careful and orderly development of residential property with provision for open-space areas.”¹⁸⁸ The Court held that the restrictions on the commercial development of the appellants’ property were constitutional and that no compensation was necessary despite the alleged diminution in value of the appellants’ land: “[I]t cannot be said,” concluded the Court, “that the impact of general land-use regulations has denied appellants the ‘justice and fairness’ guaranteed by the Fifth and Fourteenth Amendments.”¹⁸⁹

While some of the Court’s reasoning can be criticized, its conclusion both reflects a long line of authorities and, more importantly, is easily justified from the distributive perspective suggested herein.

Consider first the reasoning. The Court seems to suggest that the advantages appellants receive from the ordinances serve as an immediate quid pro quo that offsets the diminution of the property’s value. If true, this would make *Agins* an easy case in which the requirement of proportionality is satisfied and therefore no compensation is called for even under Epstein’s libertarian regime. Yet the premise for this happy conclusion is almost certainly wrong. Not only did appellants not consider the purpose of the ordinances—the careful development of residential property with provision for open-space areas—as an advantage, but it was this very purpose that frustrated their plans for the tract they bought. To be sure, the City of Tiburon’s zoning ordinances, like most other such regulations, apply to all (or many) landowners and thus do not raise the unique difficulties of exaction cases: the constitutionality of setting conditions to the issuance of individual land use permits. Nonetheless, the ordinances impose different burdens and grant different benefits to different landowners according to the different uses of their land.

The mere lack of short-term proportionality, however, is not the end of the story in my proposed scheme; rather, it merely marks its beginning. The regulation involved in *Agins*—like the prohibitions

¹⁸⁸ Id. at 262 (citation omitted).

¹⁸⁹ Id. at 262–63.

of industrial use discussed in the seminal case of *Village of Euclid v. Ambler Realty Co.*¹⁹⁰ as well as other garden-variety land use controls, such as height restrictions that preserve the neighborhood's skyline¹⁹¹ or set-back rules that restrict how close to the property line each landowner can build¹⁹²—is a rather straightforward example of the application of my proposed interpretation of the reciprocity test.

All these restrictions, and many others, may well impose disproportionate burdens on some landowners. Still, in most of these cases the virtue of social responsibility underlying the reciprocity test would be frustrated if compensation were available. The disproportionality in the distribution of burdens that these restrictions impose is, typically, not excessive, and there is no suggestion that one particular landowner, or one group of vulnerable landowners, is specifically targeted. Moreover, a more charitable reading of the *Agins* Court's proportionality argument, criticized above, would take it to imply that such disproportionality should be tolerated since the injured landowner is a member of the benefited local community, and that in these circumstances it is justified—maybe even laudable—to require such a sacrifice as part of one's long-term reciprocal relationship with other members of one's community.¹⁹³

B. Penn Central Transportation Co. v. New York City

May a city, as part of its comprehensive program to preserve landmarks and historic districts, place restrictions on the development of individual historic landmarks without effecting a taking requiring the payment of just compensation? New York City's

¹⁹⁰ 272 U.S. 365, 388–95 (1926).

¹⁹¹ See *Welch v. Swasey*, 214 U.S. 91, 103 (1909).

¹⁹² See *Gorieb v. Fox*, 274 U.S. 603, 608 (1927).

¹⁹³ Recent cases may indicate some change in this traditional attitude. In assessing the constitutionality of exaction, this new jurisprudence asks whether the sacrifice required as a condition to the issuance of a permit is "sufficiently related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (same test). Requiring such "essential nexus," *Nollan*, 483 U.S. at 837, and insisting on "rough proportionality," *Dolan*, 512 U.S. at 391, between a landowner's sacrifice and benefit *may* suggest that even with respect to the very different question of the extent of permissible disproportionality of burdens of *general* land use regulations, a similar approach of strict proportionality may be underway. Needless to say, such an approach can only be criticized from the standpoint of the progressive takings theory advocated in this Article.

Landmarks Preservation Law was applied to the parcel of land occupied by Grand Central Terminal, one of the city's most famous buildings.¹⁹⁴ Penn Central, the owner of the Terminal and of a number of other buildings in this area of midtown Manhattan (mostly hotels and office buildings), claimed that, by impeding the construction of a structure that would otherwise have been lawful, such application amounted to the taking of its property.¹⁹⁵

Writing for the majority, Justice William Brennan disagreed. The Court openly acknowledged that "the Landmarks Law has a more severe impact on some landowners than on others," but insisted that in itself, this fact "does not mean that the law effects a 'taking.'"¹⁹⁶ The Court held that no taking was involved for two main reasons. First, responding to the appellants' claims of being "solely burdened and unbefited," Justice Brennan accepted the City Council's judgment "that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."¹⁹⁷ Second, in considering whether the severity of the impact of the law on the appellants' property was of such magnitude that it amounted to a taking, the Court treated "the parcel as a whole—here, the city tax block designated as the 'landmark site'" as the pertinent unit, and explained that the city's transferable development rights program "undoubtedly mitigate[s] whatever financial burdens the law has imposed on appellants."¹⁹⁸

The dissenters, led by Justice William Rehnquist, strongly disagreed. They pointed out that there are over one million buildings and structures in the City of New York, only four hundred of which are designated as official landmarks.¹⁹⁹ The designation imposes upon the owners of these buildings substantial costs—here a multimillion-dollar loss—with no comparable offsetting benefits except for the honor of designation.²⁰⁰ The benefits from the Terminal's preservation "will accrue to all the citizens of New York City," and

¹⁹⁴ See *Penn Central*, 438 U.S. at 115.

¹⁹⁵ See id. at 115–19.

¹⁹⁶ Id. at 133.

¹⁹⁷ Id. at 134.

¹⁹⁸ Id. at 130–31, 136–37.

¹⁹⁹ See id. at 138 (Rehnquist, J., dissenting).

²⁰⁰ See id. at 139–40 (Rehnquist, J., dissenting).

the appellants would not enjoy “a substantially greater share” thereof.²⁰¹ Such an extreme disproportionality should not go uncompensated: “It is exactly this imposition of general costs on a few individuals at which the ‘taking’ protection is directed.”²⁰² Thus, according to the dissent, the appellants’ property had been taken and the question whether the transferable development rights they received constitutes “just compensation” should have been remanded to the court of appeals.²⁰³

If we read the majority as trying to show that no disproportional impact is involved in the Terminal’s designation, the opinion is remarkably unconvincing. But while this is indeed a possible reading—maybe even the more probable reading—it can also be read much more charitably. Thus, instead of thinking of the advantages from preservation as the purported quid pro quo of the multimillion-dollar loss the appellants have encountered—a tenuous proposition, to be sure—we can think of the preservation status as merely part of a continuous flow of advantages they receive as citizens of New York City. Their current burden is indeed both significant and disproportionate, but this immediate disproportionate impact may still be counterbalanced by long-term reciprocity. The particular situation of the *Penn Central* appellants illustrates the type of case where even significant disproportional distribution should be tolerated due to long-term reciprocity.

In *Penn Central*, the intended (and probably also the actual) beneficiary of the preservation project is not a state or the nation as a whole, but rather the citizens of New York City. As the Court reported, the Landmarks Preservation Law was designed “to safeguard desirable features of the existing urban fabric” that “benefit [the] citizens [of New York City] in a variety of ways,” such as protecting and enhancing its tourist attractions, business, and industry, and promoting the use of such “landmarks for the education, pleasure and welfare of the people of the city.”²⁰⁴ These benefits will accrue most generously for landowners in the concentrated geographic neighborhood around the Terminal—the neighborhood where the appellants’ real estate holdings are clustered.

²⁰¹ Id. at 148 (Rehnquist, J., dissenting).

²⁰² Id. at 147 (Rehnquist, J., dissenting).

²⁰³ See id. at 150–52 (Rehnquist, J., dissenting).

²⁰⁴ Id. at 109 (quoting New York, N.Y., Admin. Code § 205–1.0(b) (1976)).

Hence, this case is very different from one in which, for example, a regulation places an interstate highway near the claimant's home, builds a federal nuclear facility in her neighborhood, or prohibits many uses of her land in order to preserve endangered species. Unlike the landowners in such cases, the *Penn Central* appellants will benefit directly and proportionately in the long-term from the aggregated benefits of the city's public actions, despite the transient disproportionate burden. A credible doctrine that would substitute reciprocity for social responsibility²⁰⁵ awards compensation only when citizens cannot look forward to such offsetting benefits.²⁰⁶

Even given such expected benefits, we might be concerned that the large absolute cost of the Terminal's restoration to the appellants might justify compensation. The diminution of value, however, should be compared not to the value of the single parcel, as the Court suggested, but instead to the "plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings."²⁰⁷ This version of the test, used by the Court of Appeals of New York²⁰⁸ and appropriate if we conceptualize diminution of value as a proxy for egalitarian commitments,²⁰⁹ transforms the question of diminution of value. The appellants' total holdings assure us that an exception based on egalitarian concerns is unnecessary for these landowners: The losses may not look very significant weighed against the advantages appellants have received throughout the years, and against the sizeable long-term benefits they are likely to reap.²¹⁰

²⁰⁵ See *supra* notes 118–19 and accompanying text.

²⁰⁶ See, e.g., *Richards v. Washington Terminal Co.*, 233 U.S. 546, 556–57 (1914) (awarding compensation where federally required exhaust system for railway tunnel significantly decreased value of petitioner's neighboring home).

²⁰⁷ *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276–77 (N.Y. 1977) (describing that the terminal acts as a "magnet" or "flagship" for appellants' other enterprises), aff'd, 438 U.S. 104 (1978).

²⁰⁸ See *id.* at 1276, 1278.

²⁰⁹ See *supra* Section II.B.2.

²¹⁰ A very different question would be presented if historic districting significantly burdened a relatively weak landowner. Some lower-income homeowners, for example, have found that the required renovation costs of living in a historic district, along with increased property taxes resulting from rising housing values, are so prohibitive that they can no longer afford to own the homes. See Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. Rev. 64, 85–86 (1985). Although the homeowner would benefit in the long-run from the regulation if she could afford to bear the initial costs, my egalitarian exception may recognize that her

As in *Agins*, the Court's reasoning deserves to be criticized. This critique, however—and, again, similar to my attitude respecting *Agins*—should not lead to the wrong conclusion. The difficulties the majority encounters in justifying its rule derive from the lack of a satisfactory doctrinal apparatus that could translate the Court's progressive intuitions into legal language. But once such an apparatus is available, the outcome seems more than reasonable. There is no reason for us to discard *Penn Central*; all we need is to cast it in the light of a more satisfying progressive takings doctrine.²¹¹

C. *Hodel v. Irving*

In 1982, Congress attempted to respond to the increasing fractionalization of Indian trust lands, whose tiny undivided interests often yielded pennies in annual rents, by forbidding the passing on at death of certain small, undivided interests.²¹² In *Hodel*, the plaintiff landowners' claim that the regulation effected a taking justifying compensation might have seemed tenuous at first blush: There was no doubt that encouraging the consolidation of Indian lands—so that their use could become more productive—was a “public purpose of high order.”²¹³

Furthermore, while the Court labored to show that the resulting diminution of value “can be substantial,” and said that the actual

weak economic position leaves her unable to reap such reciprocal benefits and thus would require compensation accordingly.

²¹¹ For an interesting example of a judicial opinion making such considerations, see *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), aff'd, 765 F.2d 159 (Fed. Cir. 1985). In *Shanghai Power*, an American corporation sought compensation for its lost claim against China regarding China's confiscation of the company's power plant in Shanghai. See id. at 239. President Jimmy Carter had settled all American claims outstanding against China in the process of establishing diplomatic relations, and the plaintiff claimed that its portion of the settlement, about \$20 million, was worth far less than the claimed value of \$144 million. See id. Judge Alex Kozinski concluded that while the plaintiff did have a property interest in the claim, there was no compensable taking. First, plaintiff did recover some amount of its losses. Second, the court noted that the President's ability to establish good relations with foreign nations was what made foreign trade and travel for Americans such as the plaintiff possible. See id. at 244–45. Thus, although the plaintiff suffered a disproportionate short-term loss, no compensation was required because the burden was not radically disproportionate and because the plaintiff stood to benefit as a long-term trader. See id. at 245–46.

²¹² The statute affected interests that represented less than 2% of a tract's acreage, and that had earned less than \$100 in the preceding year. See *Hodel*, 481 U.S. at 709.

²¹³ Id. at 712.

loss to the three estates involved—of approximately \$100, \$2,700, and \$1,800, respectively—was “not trivial,”²¹⁴ it is very hard to see how these losses, even viewed relative to the total values of the estates, could be deemed more disproportionate than the losses involved in cases like *Agins* or *Penn Central*. Finally, the Court acknowledged that to the extent that owners of escheatable interests maintained a nexus to the tribe, their probable gain from the consolidation was likely to exceed their loss.²¹⁵ Nonetheless, the Court in *Hodel* unanimously held—based on a reasoning that is irrelevant for our purposes (and not very convincing)—that the taking of these claimants’ rights without compensation violated the Fifth Amendment.²¹⁶ An amended version of the statute was recently held still unconstitutional.²¹⁷

How can such an extreme insistence on proportionality be explained? William Fischel’s discussion of this case proposes a compelling explanation. At issue in *Hodel*, he reminds us, were Indian lands on reservations: “Reservation Indians cannot vote in federal elections; they have no congressional representatives.”²¹⁸ To be sure, Native Americans do lobby, but they are still disenfranchised, usually excluded from the pluralistic give-and-take that requires representation in the political process.²¹⁹ Therefore, Fischel concludes, the Court’s special solicitude for reservation Indians seems proper.²²⁰

²¹⁴ *Id.* at 714.

²¹⁵ See *id.* at 715–16.

²¹⁶ The Court reasoned that the measure involved effectively abolished—and not merely regulated—the right to pass on property, a right that is analyzed as an essential stick in the bundle of rights that is commonly characterized as property. See *id.* at 716–18. In order to see how problematic this exercise of conceptual severance is, one must appreciate how difficult it is to distinguish the present decision from the decision in *Andrus v. Allard*, 444 U.S. 51 (1979), in which the abrogation of the right to sell endangered eagles’ parts was upheld. Compare *Hodel*, 481 U.S. at 718 (Brennan, J., concurring, joined by Marshall and Blackmun, JJ.) (distinguishing *Andrus*), with *id.* at 719 (Scalia, J., concurring, joined by Rehnquist, C.J., and Powell, J.) (finding this statute indistinguishable from the statute involved in *Andrus*).

²¹⁷ See *Babbit v. Youpee*, 519 U.S. 234, 242–43 (1997). The amended statute considerably extended the time window for assessing the income-generating capacity of the fractional interest, permitted the devise of fractional interests to persons who already owned an interest in the same parcel and permitted tribes to establish their own codes to govern the disposition of such interests. See *id.* at 240–41.

²¹⁸ Fischel, *supra* note 12, at 164–65.

²¹⁹ See *id.*

²²⁰ See *id.*

Indeed, an explicitly distributive analysis of takings law can accommodate *Hodel*'s strict proportionality with cases like *Agins* or *Penn Central*. *Hodel* represents an extreme example of cases where the plaintiff's political and economic power is so low that our egalitarian commitments may well require the use of a side-constraint, so that reciprocity should not be available as a substitute for proportionality.²²¹

Hodel thus exemplifies the fact that at times we may find the indirect egalitarianism embedded in my proposed interpretation of the diminution of value test insufficient, and therefore resort to an explicit consideration of the relative economic and political power of the injured landowner. In these cases, which are probably rather infrequent, the same regulation can have different constitutional significance as applied to different claimants.²²²

²²¹ See *supra* Section II.A.4. It may still be argued, however, that compensation should have been due to the tribe as a whole, rather than to any of the particular claimants. The reason for this is that requiring more particularistic compensation—as the Supreme Court required—may entail high transaction costs, which may in turn frustrate the statutory scheme. This result would be unfortunate from the viewpoint of the Indian tribe, whose lands are not as productive as they could otherwise be. Furthermore, if this would indeed be the case, it would also undermine the social solidarity within the tribe, since from the internal perspective, the scheme attacked in *Hodel* is a typical case of long-term reciprocity. Compensation to the tribe can be optimal in these circumstances since it provides adequate protection to the tribe vis-à-vis Congress, while at the same time preserving the feasibility of the statutory scheme which promotes both efficiency and social solidarity. For a recent suggestion that allows this form of general compensation, see Heller & Krier, *supra* note 10, at 1006–07.

²²² One criticism of my view of *Hodel* might be that the legislation at issue resulted from lobbying by Indian tribes, and thus did not present an occasion where the low political and economic power of Native Americans merited heightened attention by the Court. See H.R. Rep. No. 97–908, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 4415, 4423. The relevant judicial deference, however, went not to the interests of tribal sovereigns as units, but to individual Native Americans who might be adversely affected by the rule. The lower court ruling discussed at length the intent of Congress in originally enacting the nineteenth-century land allotment legislation to ensure that each Native American would have a right to leave her property to her family. See *Irving v. Clark*, 758 F.2d 1260, 1265–66 & n.10 (8th Cir. 1985). Justice Brennan referenced this reasoning in his concurrence to the Supreme Court's opinion. See *Hodel*, 481 U.S. at 718 (Brennan, J., concurring). This situation is thus consistent with my thesis: that although the tribal community as a whole might have benefited from the escheat rule, the low power and economic status of tribal members meant that their sacrifice should not be required to further those group interests. The status of individual Native Americans in this case appears particularly vulnerable when we compare it not only to the landowner's tribe but also to the relevant regulatory body, the Bureau of Indian Affairs. Reducing the administrative burden on the Bureau was

CONCLUSION

The current literature on takings takes one of three approaches toward the relationship between takings law and distributive justice. Libertarians advocate strict proportionality; progressives tend to restrict as much as possible the range of the regulatory takings doctrine; and many others think that land use regulation that is motivated by planning concerns is a poor forum for expressing commitment to equality or community.

But there is also a fourth approach. Takings doctrine can openly address the distributive question with commitments to social responsibility and to equality. There is room to allow for the virtue of social responsibility and solidarity and for the ideal of avoiding any structural privileges that favor the better-off. Those who endorse these values should seek to incorporate them—alongside and in perpetual tension with the value of individual liberty—into our conception of private property²²³ and into the legal norms governing public actions that necessitate some injuries to individual landowners.

The doctrine this Article proposes is not revolutionary, either in its anticipated consequences or in the type of doctrinal tests it applies. It concedes that, due to its focus on planning considerations, takings law can hardly be expected to be a major catalyst of redistribution. Hence, a credible takings doctrine cannot be radical; inasmuch as it offends libertarians, a rule of no compensation should be (almost) equally unacceptable to egalitarians. The leeway left for the concerns of social responsibility and of equality must be exploited more subtly. Under my proposal, these concerns are reflected in new interpretations of the familiar tests of reciprocity of advantage and diminution of value.

one of the explicit motivations for enacting the statute at issue in *Hodel*. See H.R. Rep. No. 97–908, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 4415, 4423.

²²³ The resulting conception of property underlying takings doctrine as perceived herein corresponds to the “fluid” conception of property recommended by Joseph Sax in this context more than three decades ago: “[P]roperty really is a multitude of existing interests which are constantly interrelating with each other” and competing with one another in a dynamic way. Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 61 (1964) (footnote omitted); see also Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970*, at 1–17 (1997) (describing the dialectical character of the meaning of property in American legal thought).

If we wish to structure our localities as communities with some measure of social responsibility, we need to allow some uncompensated losses that are disproportionately dispersed. Allowing such disproportionality, however, can foster social responsibility only where there is an actual (and not merely theoretical) expectation that these losses will be offset by some reciprocal benefits (even if these benefits derive from other public actions) and where the diminution of value involved is not excessive. Furthermore, in order to remain faithful to our egalitarian commitments, we need to introduce them into takings law. This can be accomplished both through the proxy of the diminution of value test and (in extreme cases) through an exception to the reciprocity test that shields the weak from claims of reciprocity as a substitute for proportionality. The egalitarian component of the doctrine supports, rather than undermines, the social responsibility premise of the reciprocity rule.

Once the concerns of social responsibility and equality are added to the consideration of individual liberty as the normative premises of takings law, some doctrinal perplexities of this troubled field may be laid to rest. A credible claim for social responsibility requires a specific interpretation of the reciprocity of advantage concept. Reciprocity should be deemed to occur only if the (not too excessive) disproportionate burden of the public action is offset, or is likely to be offset, by benefits of similar magnitude that the claimant enjoys from other—past, present, or future—public actions. Moreover, even this intermediate conception of reciprocity is subject to an examination of the extent of disproportionate diminution of value, where the upper boundary of permissible disproportionality is set according to both the question of whether the public action primarily benefits members of the landowner's locality or a larger group of beneficiaries as well as (in extreme cases) the question of the claimant's relative economic and political power. Similarly, perceiving the concerns of social responsibility and equality as the normative justification of the diminution of value test entails rather specific doctrinal implications. In order for this test to allow some (but not too extreme) disproportionate burdens to go uncompensated, as well as to divert public burdens away from the worse-off, the threshold of uncompensated percentage should not be set too high or too low, and diminution should be

measured against the value of the claimant's affected land as a whole (or even her total holdings in the same surroundings).

This progressive takings doctrine is not only required by a commitment to social responsibility and to equality but is also supported by considerations of efficiency and personality; furthermore, even the concerns about liberty and equity among the better-off do not compromise the attractiveness of such a doctrine. I am not suggesting, to be sure, that my proposal supplies some sort of cure-all formula in terms of the distributive criterion for distinguishing takings from regulations; nor do I imagine that it is the "correct" way of balancing the competing claims of liberty, community, and equality in this legal realm. Indeed, I do not actually believe that any such "objective solution" exists for resolving, once and for all, these eternal questions.²²⁴ I, at least, can conceive of none. Yet choices between these irresolvable opposing values and ideals must be made. These choices require that we be aware of our distributive preferences and that we be capable of successfully translating them into legal language. My modest attempt here has been to explore the possibility of a credible takings doctrine and a corresponding conception of property that accommodate the values of social responsibility and equality, values that are too often perceived as alien to this field.²²⁵

²²⁴ See Berlin, *Four Essays on Liberty*, *supra* note 49, at 1–li (arguing that the very concept of an ideal is incoherent).

²²⁵ See Rubenfeld, *supra* note 51, at 1136 ("The justice or injustice of a particular redistribution of wealth is an issue simply orthogonal to Compensation Clause analysis.").