Private Property and Public Welfare

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'... The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property… Nor will the state, though unable to repair the losses for the present, be finally released from the debt, but whenever it possesses the means of repairing the damages, the dormant claim and obligation will be revived.' Grotius, *De Jure Belli ac Pacis*, Bk. 3, ch. 20.

1. The Fifth Amendment Paradox

The law governing public takings of private property is as simple to state as it is difficult to fathom. The common-law rule is that government takings of private holdings without the owner's consent are permissible provided the taking serves a public purpose and the owner is compensated at market value.[1] The public purpose need not be extraordinary, nor need the taking be uniquely capable of achieving it. It is enough that the taking reasonably furthers a public end. Where no constitutional protection for property exists, a court presumes a duty to compensate, but the legislature may displace the presumption by stating clearly its will to do so. Where the right to property is constitutionally entrenched, the common-law rule is binding on legislatures.

Grotius's facile '[b]ut it is to be added' attests to the facial incoherence of this

[1] *Manitoba Fisheries Ltd. v. The Queen* 1979.

rule. The duty to compensate suggests a property prior to the public interest, one established by direct acquisition—whether original or through contract—independently of the general welfare, common good, or democratic process. But if such a property exists, why should the owner's consent be unnecessary for the state's acquiring his holding for an ordinary public end?[2] Is it that the private right 'give[s] way' to the public interest when respecting its full force would permit the owner unilaterally to veto a public measure or to extract a disproportionate share of its public benefit—that is, when exercising the right would be inconsistent with membership in a civic body? But then why should it be irrelevant that the public benefit might be obtainable without the expropriation or that the subjective cost to the owner is disproportionate to the state's marginal gain in choosing against the next best beneficial option? If property preceded the state, respecting it to the point of inconsistency with civic membership would require that the expropriation be

[2] By an "ordinary public end" I mean an end of political association that is distinct from collective self-preservation at one extreme and the upkeep of government at the other. In a case of public necessity, expropriation with compensation is compatible with private property given that secure property presupposes a state. At the other extreme, government may not expropriate for its buildings, desks, stationery, and whatnot because the obligation to defray the cost of government falls on the citizenry as a collective body, not on anyone singly. Even if compensation at market value were paid, that would not remove the special burden from the owner, whose interest in secure possession has been uniquely harmed. Here distributive fairness (the requirement that burdens be reciprocal) bars a taking even absent a private right of property. However, for the ends for the sake of which government is instituted, a choice may arise whether to purchase in the market at the expense of the citizen body or to expropriate and place a special burden on a private individual. Here distributive fairness does not determine the former course because the specially burdened individual might be reciprocally advantaged by the government project in a way that makes the taking ultimately fair. So any bar or fixed constraint on takings for public ends of this sort must come from a private right of property somehow conceived. The question is whether the constraint embodied in the Fifth Amendment (expropriation is permissible with no questions asked about necessity or proportionality but subject to an absolute duty to compensate the owner) reflects a coherent conception of property.

shown to be necessary for a significant public gain; yet no such requirement exists.

Let us then try out the opposite possibility. The state's permission forcibly to take a directly acquired holding for an ordinary public end whether or not the taking is necessary to achieve the end suggests that property in specific things is mediated by the public interest—that there is no property outside it. But then why should it be necessary for the state to compensate the erstwhile holder for an 'expropriation'? Is it that the owner would otherwise be forced to bear the entire cost of a benefit redounding to all? But distributive justice cannot explain the common-law duty to compensate, because that duty exists even if the owner would be commercially favoured by a public easement to an extent that offset his special burden and even if the owner's *ex ante* holdings exceeded his fair allotment by the amount taken from him. How can distributive justice explain a compensation requirement that might very well create or perpetuate a distributive *in*justice? It would seem that a distribution-blind duty to compensate must reflect a property preceding any collective distribution. But then why is consent not required for a discretionary public use of someone's resources?

In sum, the common-law takings rule is facially paradoxical in that it seems to view property as a hybrid concept—neither purely private nor purely public but somehow both in combination. The rule reflects the state's eminent domain—its sovereign lordship over all things within its territory—but then qualifies its eminence. Neither consent nor necessity is required for a public taking, but compensation is. Eminent domain with something 'added'.

I concede that a welfarist understanding of political justice can make sense of

a *prima facie* duty to compensate someone for a public taking of his holdings. For one who believes that the just is whatever maximizes social utility or promotes human well-being, the legal right to hold something as one's own must be justified by the general happiness or common good. So, private property might be understood as promoting the efficient employment of resources or as protecting a human interest in a sphere of individual sovereignty—one wherein the individual's choices regarding the use and disposition of things need consider no wish, preference, or need of others. No doubt, the interest in *dominium* may occasionally have to yield to the more inclusive (or greater) good of which it is an ingredient (unit); but on those occasions, public takings must be carried out with the least harm to the interest secured by the property right and with the least impact on economic incentives—hence the presumed duty to compensate the owner. Moreover, the welfarist would say, the presumptive duty ought not to be lightly set aside. In particular, it ought not to be displaceable by everyday calculations of cost and benefit, because the political ruler's judgment that the benefit of an uncompensated taking would outweigh its cost is fallible and presumptively self-serving; it is always inclined to overestimate the benefits to those to whom its rule is beholden and to underestimate the costs to the owner. Still, circumstances might arise in which the net gain from an uncompensated taking exceeds the threshold required to allay concerns about mistake and bias. In those circumstances, the welfarist will say, the state may take without compensating. Thus, the welfarist can explain not only the *prima facie* duty to compensate but also its displaceability by legislation a court interprets as clearly overriding the presumption.

Imagine, however, that the common-law rule is constitutionally entrenched such that, while the right to hold something as one's own is defeasible, the duty to compensate for a public taking is not. Not even a national emergency can permanently override it. It is doubtful that any welfarist conception of political justice could accept that configuration of property norms; for it is simply dogmatic to claim that no exception to the duty to compensate could ever be justified by the common good. The welfarist cannot have it both ways. He cannot assert at once that there is a threshold of net gain, the surpassing of which justifies an uncompensated taking, and that there is no such threshold.[3]

More surprising than the welfarist's inability to explain the state's permission to expropriate for ordinary public ends combined with an unqualified duty to compensate the owner is that the natural right theories of Locke and Kant cannot accept that combination either, though they have different reasons for rejecting it. No doubt Locke can explain a state power to tax individuals as members of a collective body in order to sustain the civil society that perfects their natural rights to liberty and property.[4] The same social contract by which they collectively institute a civil condition authorizes the sovereign to tax them collectively to support it; while consent by a majority of their representatives suffices to validate a specific tax as levied for a public purpose. Perhaps Locke could also accept a state power to

[3] The welfarist might label as "takings" only those limitations on ownership not reciprocally beneficial to the owner and say that there is an absolute duty to compensate for takings so defined. But that is to finesse the absolute duty, not to explain it. A limitation on ownership serving a special interest is prohibited by the common-law rule, not allowed if compensation is paid. The compensation requirement for an exercise of eminent domain presupposes a taking in the public interest.

[4] Locke 1689/1988, Second Treatise, para. 140.

expropriate with compensation when the preservation of the civil order requires it, for then the property right would be yielding (to the extent necessary) to the logical conditions of its own existence. However, Locke cannot accept a state power to single out an individual from the collective body and, for an ordinary public end, deprive him of something he has laboured to acquire and that meets the conditions for rightful acquisition: that nothing unconsumed be spoiled and that enough and as good be left for others. Since acquisition meeting those conditions confers (for Locke) a valid right prior to public authority, and since public authority is justified only as protecting natural rights, unconsented-to takings for ordinary ends are impermissible even if compensation is paid.[5] Spreading the monetary loss does not transform a singling out into a collective tax, because no one else has suffered a transgression of his private property. Accordingly, it is difficult to see how Locke could understand the state's eminent domain.

By contrast, Kant can explain the state's permission to take directly acquired holdings without consent (eminent domain), but he cannot account for an indefeasible duty to compensate. For Kant, the right to own *simpliciter* is indefeasible, for it is required by the right to the maximum scope for liberty consistent with equal liberty. Without ownership, no one could use land from which he was physically absent, and yet such use is compatible with the equal user rights of all under a general law.[6] However, the right to own the *specific* things one has peaceably acquired in a state of nature is (for Kant) only provisional, for that right is established by unilateral actions pursuant to an arbitrary choice to claim something

[5] Locke 1689/1988, Second Treatise, para. 138-9.
[6] Kant 1991, The Metaphysics of Morals, 168-9.

specific as one's own; and no one may, consistently with his innate right to be his own master, acknowledge a coercive obligation unilaterally imposed on him by another.[7] For Kant, conclusive rights over specific things can be established only omnilaterally through the general will; and so the state's nonconsensual taking of unilaterally acquired holdings for a public purpose infringes no prior right. Such a taking is permissible, not because valid property rights in specific things are defeasible, but because there are no valid property rights in specific things outside public law.[8] For that reason, however, there can be no unqualified duty to compensate the provisional owner either; there is only a duty optimally to balance the interest in secure possession with other public interests.

To be sure, there is for Kant a *presumptive* duty to compensate someone whose holding was peaceably acquired, for the provisional right has force unless explicitly disconfirmed by the general will's representative. But this is so only because holdings peaceably acquired *can* be confirmed by the general will, whereas those acquired by dispossession cannot be, for the general will cannot recognize an acquisition inconsistent with the right to own.[9] The state's presumptive duty to compensate merely reflects this comparative advantage enjoyed by those whose possession was original, prescriptive, or derived through a voluntary exchange. Without that advantage, rightful possessors would be on a par with dispossessors, contrary to the right to own that the civil condition is supposed to perfect. Because,

[7] Kant 1991, Metaphysics of Morals, 77, 82, 85, 87.
[8] Kant 1991, Metaphysics of Morals, 124.
[9] Kant 1991, Metaphysics of Morals, 78. But long possession can convert a wrongful possessor into a rightful one, for the alternative would be a perpetual inconclusiveness of title inconsistent with the right to own; see Kant 1991, 108-9.

however, the provisional right's force reflects a possible validity rather than an existing one, the provisional owner cannot complain if the general will erases his right.[10]

The question, then, is whether *any* theory of the relation between property and the state can generate the combination of rules we imagined: that forcible expropriations for an ordinary public end are permissible subject to an *indefeasible* duty to compensate the owner. Of course, our question would lack importance if that configuration were merely imagined—why dream up a conceptual monstrosity and then seek a logical explanation for it? But we need not have imagined the rule, for it is in the American Constitution.

In the United States, an owner's right to compensation for a public expropriation is guaranteed by the Fifth Amendment in absolute terms. The Amendment's taking clause states: '…nor shall private property be taken for public use without just compensation.'[11] In *Pennsylvania Coal v. Mahon*, Justice Holmes doubted that the guarantee admitted any exceptions. True, the state may prohibit without compensation uses of holdings that exceed the bounds of rightful use—that are legal nuisances. That is the police power to regulate private property in a manner not amounting to an expropriation. It is not this essay's concern. The state may also

[10] John Rawls's position is Lockean with respect to personal property and Kantian with respect to means of production and natural resources. For Rawls, the right to the exclusive use of personal property is one of the basic liberties, the priority of which would seem to rule out expropriations short of public necessity. Because, however, his theory of justice is indifferent as between public or private ownership of the means of production and natural resources, there can be no right in his political liberalism to compensation for a nationalization of holdings of that kind; see Rawls 1993, 298.

[11] The same guarantee has been read into the Fourteenth Amendment applying to the several states (*Hairston v. Danville and Western Ry. Co.* 1908).

act for the public welfare in a way that injuriously affects an owner's economic interests but without interfering with his ownership.[12] In such cases, the state may or may not incur a duty of distributive justice to compensate the injured party depending on whether that party is reciprocally advantaged by the public measure to an extent that offsets his loss. That too falls within the police power and outside this essay's concern. My focus here is on state *expropriation*, which I take to mean something distinct from unfair disadvantaging.[13] When the state wishes to dispossess an individual (singled out from the collective body) of his rightful holding ('private property') or to prohibit a use that lies within the owner's right to use, it must rely on its power of eminent domain. And the exception-less limit of that power, said Holmes, is the duty to compensate the erstwhile owner.[14]

Holmes provided no theoretical argument for an absolute duty to compensate for a public taking. To the extent that an argument can be gleaned from his judgment, it is that it would be distributively unfair for the state to lay the whole cost of a public benefit on the shoulders of one. Compensating from the public purse transforms an expropriation of one to the taxation of all. We saw, however, that the argument from distributive justice cannot explain an unconditional duty, for it holds only if the

[12]For example, it might construct a major highway diverting traffic from a gas station on a county road.

[13]Yet, one branch of the takings jurisprudence of the United States Supreme Court assimilates expropriations to economic harms that are compensable only if the owner has been burdened for the benefit of others; *Penn Central Transp. Co. v New York* 1978. Perhaps the most influential article on takings law in the last fifty years also dissolves the distinction between expropriating and unfair disadvantaging; see Frank I. Michelman (1967). For an approach to the takings clause that respects this distinction, see *Loretto v. Teleprompter Manhattan CATV Corp.* (1982).

[14] Justice Brandeis, dissenting in *Pennsylvania Coal Co. v. Mahon* (1922) did not dispute this. He simply characterized the Kohler Act (prohibiting the mining of coal adjacent to buildings) as an exercise of the police power.

distribution of holdings was *ex ante* fair and compensation is required to preserve the fair distribution. So, if A's peaceably acquired holdings cannot be justified under any scheme of distributive fairness, then distributive justice could not object to an uncompensated conversion of A's excess holdings to a public use. And yet the takings clause would (I say without fear of contradiction) still prohibit such an uncompensated taking. So an absolute duty to compensate for a public taking cannot be explained by the state's duty to distribute public burdens fairly. It must be explained by the idea of a private property independent of the public interest that the public authority must respect. But then the puzzle with which we began resurfaces: why are nonconsensual takings for ordinary public ends (that might be achievable by other means) permissible?

The issue is whether there is a coherent theoretical account of the Fifth Amendment's takings clause. In what follows I argue that Hegel's theory of the relation between property and the state understands the takings clause. Indeed, I argue that, relative to a company of philosophers including a welfarist (of whatever hue), Locke, and Kant, Hegel is *uniquely* able to understand the takings clause. That thesis might seem to leave open the question whether an absolute duty to compensate is truer to political liberalism than the presumptive duty explained by Kant and so whether an entrenched guarantee of compensation is, in Rawls's phrase, a constitutional essential for liberalism. Not so. One cannot demonstrate Hegel's capacity to explain an absolute duty to compensate for a public expropriation without also showing that such a duty is entailed by the liberal idea (shared by Kant) that the separate human individual is an end-in-itself. So I shall also make that argument.

The essay proceeds as follows. In sections 2 and 3, I expound Hegel's derivation of an inherently valid (though still inchoate) property in specific things prior to the idea of a civil authority. In section 4, I set forth Hegel's account of the necessity for the transition to a rule of law within which the pre-civil right to private property is apparently solidified but in which are also generated positive rights to welfare that upset the assumptions underlying the derivation of private property. The result is a 'civil society' (*burgerliche Gesellschaft*) marked by a tension between the public welfare and private property, where each claims a self-contradictory absolutism requiring illogical accommodations and concessions. While it is possible to view the takings clause as reflecting this tension, it is also possible (I argue) to view it as belonging to the constitution of a well-ordered political community. In section 5, I set forth Hegel's account of the state as a holistic entity of which a public sphere aimed at the common welfare and a private sphere ordered to the singular (atomistic, monadic) person are distinct and mutually complementary parts. The idea of a property that is established inside the state but outside the public sphere yields the configuration of norms contained in the takings clause. It also removes the appearance of paradox in that combination.

2. Why Acquisition?

In the justice paradigm Hegel calls Abstract Right, the human individual claims to be an unconditioned end solely by virtue of its inborn capacity for free choice. An unconditioned end is one that is neither relative to a subject (it is objective) nor

valuable for the sake of some further end (it is final). The capacity for free choice is plausibly such an end, because it is the original purposiveness that is universally and necessarily expressed in positing the particular, contingent ends toward which action is directed. A bearer of the capacity for positing ends is called a person, and the capacity itself is called personhood.

The person's capacity for free choice makes possible its rejecting as motives for action all ends given by life. For the person, all such ends are optional and their value relative to the chooser. Accordingly, for the justice paradigm built on the supposed unconditioned end-status of free will, everything but the free will is consigned to the sphere of contingency and relativity. The human individual is pictured as a bifurcated being: on one side, a generic person stripped of individuating features; on the other, a particular individual rich in such features.[15] Yet only the generic person counts for the public reason of right and wrong; and so any property right must be derived solely from it, without regard to physical needs or the satisfaction of wants. Because, moreover, the individual *qua* person is here regarded as morally self-sufficient—as owing its end-status to nothing beyond its free will—Hegel begins with a solitary person, from whose project to validate end-status he derives a private property.

It would be a mistake, however, to view Abstract Right as a state of nature of the kind deployed by contractarian theories of civil authority. This is so because, unlike Hobbes, Locke, and Kant, Hegel does not think that persons really are morally self-sufficient—that they have natural rights outside all association; and so he does not think that they are *by nature* dissociated from each other. Hegel's own standpoint is

[15] Hegel 2008, Philosophy of Right, para. 35.

distanced from that of Abstract Right, which will in the end be integrated into an ethical system ordered to his own conception of an unconditioned end. Hegel begins with a stateless condition, not in order to show why already dignified human beings must institute a state, but rather to show how their *quest* for dignity conceptually impels them to a state of a certain kind. Like Aristotle, Hegel begins with a stateless condition in order to demonstrate that a political community sufficient for dignity is the human being's *telos* or natural end. So, while his account of the state begins from the atomistic person, it is not (as Locke's and Kant's accounts are) *based* on this person. Considered on its own, Abstract Right will turn out to be an untenable abstraction from the political community to which it in truth belongs. A framework of justice ordered to a person who claims to be morally self-sufficient will turn out to be embedded in a political community that requires such an adversary for the confirmation of its own natural authority.

In detaching itself from everything empirically given, the person juxtaposes itself to a world of particular things. A 'thing' is whatever is not a person or part of a living person—whatever lacks a capacity for free choice and is not bound up with that capacity in a free nature.[16] Lacking free will, a thing has no side that is unconditioned, and so it can place no other being under an obligation not to use or destroy it. Not being an end, it may be used solely as a means. Correlatively, the person is permitted to subdue all things to its ends.[17] This permission is unlimited by the survival needs of others, for, as we have just seen, such needs are for persons subjective wants with no standing to put an absolute end under an obligation to accommodate them. Thus, there

[16] Hegel 2008, Philosophy of Right, para. 42.
[17] Hegel 2008, Philosophy of Right, para. 44.

is no proviso on permissible acquisition that no one be disadvantaged by it with respect to life needs. The Lockean proviso is unknown to Abstract Right just as it is unknown to the common law.

The question, however, is why one end must respect another's acquisition. A thing offers no moral resistance to its use by an absolute end, but why should one absolute end respect the dominion over a thing of one who is not his superior? The fact that the empirical individual needs things for biological survival cannot provide a reason for respect, for if another's chosen attachment to life cannot limit an end's permission to acquire unoccupied things, neither can it place an end under an obligation not to acquire things already taken into possession. Acquisition by one end could command the respect of equal ends only if it were required by ends *qua* ends, for only then would respect be necessarily reciprocal and therefore not servile. But why should an absolute end have need of anything?

Hegel's justification of a private property in things is perhaps best illuminated by a contrast with Kant's, since both begin from the end-status involved in free will. Kant derives property from the person's innate right to the maximum liberty consistent with equal liberty. To own something distinct from one's person, he argues, is to have a right to stop someone else from using it even though one's physical possession of the thing has been discontinued. If it were impermissible to do this, then one's liberty to use usable things would be arbitrarily curtailed, for ownership is consistent with everyone's equal liberty under law. But an arbitrary limitation of liberty is wrong, and so property must be possible for free wills.[18]

[18] Kant 1991, Metaphysics of Morals, 69.

Though elegant, this argument is incomplete. While it justifies the practice of owning in general, it does not justify a person's ownership of the particular things it directly (without the mediation of a public authority) acquires, and in fact Kant provides no such justification. On the contrary, he regards a property in things directly acquired (whether by first occupation or through voluntary transfer) as provisional, pending omnilateral review by a citizen legislature in a civil condition. For Kant, only holdings mediated by the general will are conclusively one's property, if one can call a revocable license to use state-owned things 'property'. By contrast, Hegel provides a justification for a person's property in the specific things it acquires directly—independently of any approval by a public authority. That justification is the subject of this and the following sections. It begins as follows.

The person claims to be an unconditioned end, and yet it is in fact conditioned as a void by the luxuriant world of contingent beings from which it abstracts. As that which is *not*-contingent, personality depends for its identity on the world of contingent things. This dependence confers on contingent things the appearance of an independence that challenges the person's claim to unconditioned end-status. That status is something merely claimed and asserted. But this means that the person is an unconditioned end only in its own estimation, which is to say that it is not an unconditioned end after all. A disparity thus opens between the person's subjective conviction of end-status and the reality of its dependent existence. Insofar, therefore, as the person remains aloof from things, it is self-contradictory as an unconditioned end. This internal contradiction implies that the person *lacks* the world as that whose subordination to its ends validates the person's claim of final worth. Because it lacks the world, the person also

desires it. This is not an appetite given by nature from which personality can detach itself but an intellectual desire of personality for validation as an end. To satisfy this desire, the person must step out of its self-relation and perform actions of a type that realize or make good its claim of authority over things.[19] Specifically, it must perform actions that put objects into a relation of subservience to it. These actions will constitute a property because they will (partially or perfectly) *validate* a claim of end-status vis-a-vis a thing. The question for discussion is: can there be an objective validation of this claim outside the framework of public law?

3. The Validation Scale and Grades of Ownership

If property in an object is a person's validated claim to end-status vis-à-vis that object, then we understand property when we understand what types of action validate the claim and with what grade of perfection. If a kind of action (say, taking physical possession) validates the claim to some degree, then performing that action generates a right, having a corresponding grade of force, to be master of the object to the exclusion of all but those whose actions have produced better validations. So, an action partially validating end-status produces a right *in personam*; it implies a correlative obligation to respect the claim on those who have taken no self-validating action with respect to the object. Grades of ownership based on superior and inferior validations of end-status must be distinguished from better and worse claims to possession based on temporal priority of possession. A first possessor and

[19] Hegel 2008, Philosophy of Right, para. 41.

a squatter have the same grade of ownership based on the degree of self-validation produced by physical possession. What resolves their rival claims is the first possessor's temporal priority. But what resolves the rival claims of a mere possessor and a long user (as we'll see) is the better validation of end-status produced by use.

Action-types that validate a claim of end-status to different grades of perfection generate ownerships that stand to each other as gradations of a vertical scale. Those whose actions on a thing have validated a claim of end-status better than the actions of others have stronger claims to be master of the thing than those whose validation was inferior, and those whose actions have validated the claim perfectly have claims inferior to none. Theirs is an unqualified ownership—a right *in rem* or against the world.[20] Accordingly, by virtue of the validation scale, it will be possible to distinguish (as the common law does) between inferior and superior titles to things and between relative titles held against some and absolute titles held against all. Each grade of ownership on the scale contains the exclusive power to perform all mastery-displaying actions of which the object admits, limited only by the remainder, reversion, or right to recovery of those with superior claims. The question on which we must focus is this: is an unqualified ownership or right *in rem* available outside public law and if so, how can private property still be subordinate to the public welfare such that nonconsensual takings for ordinary public ends are permissible?

[20] In this essay, a right *in rem* means a right to be master of something that is valid against all. A right *in personam* is a right to be master of something that is valid against some but not all.

Physical possession[21]

To begin with, the person proves its end-status by physically bringing unoccupied things under its control—that is, by possessing them.[22] First possession confers a (relative) right to possess, use, and alienate a thing to the exclusion of all non-possessors even if possession is interrupted because it (partially) validates a normative claim—that this person is the thing's end until the person chooses to relinquish it. Possession is, however, the weakest form of self-validation because it leaves the thing with an independent existence over against the person. The thing is brought under a person's control but is not yet subsumed to its free choice of ends. Thus, the right conferred by first possession is only a better claim than can be made by those who have established no control at all; it is not yet unqualified ownership. In possession, moreover, the person's self-proving activity is hemmed in by physical constraints, for there are narrow limits to what one can manually grasp or surround with a fence. The possessive personality desires the world (universe), but there is only so much a body can do.[23]

Because physical possession is right-generating only as giving reality to the person's claimed end-status, not every act of possession counts as creating a possessory right. There must have been an intention to control the object to the exclusion of others, for otherwise possession is not the validation of a claim to end-status. Second, there must have been a physical occupation normally adequate for

[21] This and the following subsection take material from Brudner 1995, The Unity of the Common Law, 45-57.

[22] Hegel 2008, Philosophy of Right, paras. 54-58.

[23] Hegel does not airbrush Abstract Right. It is the normative framework based on the possessive personality for whom dignity consists solely in dominion over things. Hegel looks this paradigm in the face, observes its downfall, and then integrates it into the total public life sufficient for dignity, wherein its excesses are tamed.

control and observable by others, for if possession is clearly indefensible or merely intended, then end-status is not objectively validated.[24] Accordingly, the common-law prerequisites for the enforcement of possession are just the conditions for the person's validation as an end prior to enforcement. The common law does not bestow property rights pursuant to some socially desired goal. It *certifies* a property already implicitly accomplished by actions on the ground of a kind that validate end-status.

William Blackstone thought that first possession confers a right against the world—that it is the first ownership legitimating all subsequent transfers.[25] Were that true, the doctrine of eminent domain would be false, for there cannot be separate sovereigns over the same undivided parcel of land. Against Blackstone stands Kant, for whom all directly acquired title is relative (better than the dispossessor's) and provisional (pending public review) and for whom rights *in rem* (having force even against the state) are therefore impossible—a view that renders the compensation requirement of the takings clause incomprehensible. Liberals seem faced with a choice between extreme proprietary individualism and collective ownership. We'll see, however, that a *via media* exists.

The equation of first possession with unqualified ownership engenders well known problems. First, why should one person's choice unilaterally to possess a specific object place all other persons under an obligation to respect his exclusive possession of that object? Here one must distinguish two reasons why unilateral acquisition might fail to create obligations in others. One is that the equality of persons might rule out unilaterally imposed obligations even if there were no competition for objects and so

[24] *Pierson v. Post* 1805

[25] Blackstone 1771, 2 Commentaries on the Laws of England, 258.

even if acquisition by one disadvantaged no one else. That is Kant's reason for denying that first possession creates a right *in rem*, but it is not Hegel's. Kant denies that direct acquisition can produce a right *in rem* because he sees acquisition as permitted but not necessary. If there is no rational necessity for acquisition, then it is indeed inconceivable that one person's arbitrary choice to possess something could bind non-consenting equals. But Hegel, we saw, explains acquisition as essential to an end-status self-contradictory without it, and so the obligation to respect acquisition by unilateral actions can be *a priori* reciprocal. If there is an *a priori* reciprocal obligation to respect persons as ends, then there is an *a priori* reciprocal obligation to respect the possession in which end-status becomes real.

Another reason why first possession might fail to create a right *in rem* is one that Hegel recognizes. It has to do with interpersonal competition for scarce means of self-validation. The problem is that, in gaining proof of his end-status through the object, the first occupier also makes the object unavailable for the self-validation of others. Why should they accept this? Unilateral possession could confer a valid right to exclusive possession only if that right were somehow reconciled with the freedom of acquisition of competitors for the object; and so far it has not been. I'll return to this.

A further problem with equating first possession with first ownership was noticed by Holmes.[26] If first possession suffices to confer unqualified ownership—a right against the world—then whatever other powers come with ownership, the right to possess must be what ownership is. Someone who divested himself of the right to possess could not be an owner, while someone who acknowledged ownership in

[26] O. W. Holmes 1963, The Common Law, 163-7.

another would also acknowledge legal possession in that person and so could assert no possessory right against him. Yet tenants have possessory rights against persons they acknowledge as owners, and owners temporarily divest themselves of possessory rights without ceasing to be owners. If first possession is first ownership, how can possessory right and ownership come apart?

These problems become soluble if we regard the claim that first possession is first ownership as mistakenly seeking a right *in rem* at the beginning of property's development rather than at its end. The kernel of truth in this claim is that, because it leaves the object with an appearance of independence, possession is the least satisfactory validation of end-status; and so (assuming the competition problem solved) it confers on the first possessor a title relative only to those who have yet to establish even this minimal connection with the object. True, the 'only' here is 'all', but the possessory right is not yet a right *in rem* because it is contingent on no other person's gaining a better validation in the object by annulling its independence; to the one who does, the possessory right will yield. Possession, in other words, confers a relative or imperfect property, better only than no connection to the thing at all. That is why the first occupier has a right to exclude all other would-be possessors, and it is why no trespasser can defeat a possessory title (even that of a thief) by appealing to the right of the true owner.[27] Yet because possession is an imperfect property, it will end up being subordinate to a non-possessory ground of title that represents a fully adequate realization of personality as an unconditioned end. Thus, someone with the best possessory title (e.g. a tenant) may be distinct from the absolute owner; while,

[27] *Costello v Chief Constable of Derbyshire* 2001

conversely, ownership based on actions that confirm end-status perfectly can serenely cede finite rights of possession to another, even as possession continues to confer relative (including temporally finite) rights.

Use

That first possession confers no right *in rem* is attested to by the common law itself. Suppose P takes possession of a pristine tract of land by enclosing it with a fence on which he posts signs warning off trespassers. While P takes an extended holiday, S squats on the land and puts it to intensive use for twelve years. If P takes no action to oust S, his title will be extinguished in favour of S's.[28] What is the ground of S's title? Against everyone but P, S can point to his possessory actions, because no one else but P has established a possessory connection with the land. Against P, however, S cannot appeal to his physical possession, because there is no reason why S's possessory acts should displace P's. On the contrary, since P's acts occurred first, they should withstand any subsequent acts of possession as those of a mere trespasser. To be sure, we say that P has been dispossessed or that his possession has been discontinued, leaving S alone in possession of the land. However, the discontinuance of P's possession is not a precondition of S's possessory right but a legal conclusion thereof. What we mean is that S's occupation was of such a kind as to oust P's, to deprive it of juridical force. If S had merely replaced P's signs with his own, P would not have been dispossessed. Similarly, if P had made the slightest use of a portion of the fenced-in area, no acts of S would have

[28] *Buckinghamshire County Council v. Moran* 1989

succeeded in dispossessing him.[29] Accordingly, P is dispossessed not because S performed actions amounting to mere possession, but because he performed actions that were superior to possessory ones as validations of end-status. What are these actions?

We saw that possession fell short as a validation of end-status because it left the thing with an appearance of independence. Use is a better validation because using something as one pleases subdues it to the person's free choice of ends. Also, use transforms the thing's physical character, consumes its use-value, and in that way reduces it to the finality of the person.[30] Accordingly, use is a better property—a better validation of end-status vis-à-vis the thing—than possession without use. Possession is 'adverse' to that of the previous occupier and sufficient to dispossess him only if it consists in public acts of use (with an intention to control) where the previous occupier is making no use of the land. Thus, time will not run in favour of a trespasser, because the intentional possession of the first occupier confers a title good against non-possessors and hence invincible against subsequent acts that are merely possessory. Yet it will run in favour of someone whose use has the potential (needing only a certain longevity to ripen into a mastery of the object) to override the bare possession of the previous occupier and whose property in the thing is thus potentially superior. The user's property is superior, however, not because the law decrees it to be so for public ends, but because use is superior to possession as a validation of end-status. Once again, the common law merely recognizes a pre-existing relation of dominion.

Nevertheless, use is not a complete property. As so far constituted, property is

[29] *Re St. Clair Beach Estates Ltd. and MacDonald* 1975
[30] Hegel 2008, Philosophy of Right, paras. 59-64.

inadequate as a validation of end-status in several respects. In possession and use, first of all, the person proves its end-status in a self-contradictory way, for it finds itself dependent on external things for the confirmation of its mastery of them. Therefore, the same possessive and usufructuary actions that cancel the object's independence also perpetually reinstate it. The person's satisfaction is necessarily ephemeral because each satisfaction produces a new lack *ad infinitum*.[31]

Second, taking possession and using are physical actions that purport to ground an *intellectual* right to own something to the exclusion of others—a right whose validity is independent of the contingency of continuous physical possession. Yet the intellectual right is thus far limited by the requirement that the thing have at one time been physically possessed. While struggling to free itself from its contingent origins, the right continues to be anchored to them, and this dependency contradicts the *unconditioned* end-status that personality seeks.

Third, we have not yet bridged the gulf between fact and right. Possessing and using are contingent happenings that purport unilaterally to exclude other persons from control of the object. If excluding were not disadvantaging in a normatively relevant sense, the claim of right to exclusive possession could be validated *a priori*; for, acquisition being necessary for end-status, the obligation to respect *de facto* acquisition could be notionally reciprocal, hence acceptable by equal ends. The property unilaterally established by possession and use would then suffice for a right *in rem*, for the laws of first and adverse possession would reconcile the free acquisition of each with that of all, and no person would be deprived in a way that is normatively significant for Abstract Right.

[31] Hegel 1977, Phenomenology of Spirit, paras. 173-5.

However, if someone is so deprived, then unilateral acquisition could not confer a property, for it could not then be freely recognised by those it purports to bind.

On Hegel's account of acquisition, unilateral acquisition must deprive others in a normatively significant way. That is, it must deprive others, not only of the things they might biologically need or subjectively fancy, but also of the things they require for the confirmation of their end-status. We have seen that acquisition confers rights insofar as it stems from a contradiction between the person's claim to end-status and the apparent independence of objects. This contradiction generates an urge of the will to cancel that independence and to validate its own finality. Understood as a desire of the will rather than an appetite of the body, the acquisitive project is inherently one of infinite accumulation. If (as for the ancients) acquisition is understood as required for the body, its limits can be set by the body's subordination to the final end of living well. When, however, acquisition is viewed as essential to the validation of a final end, all previous restraints are off. No doubt, new (freedom-generated) restraints will emerge once Abstract Right is integrated into the political life sufficient for end-status; but at this stage, there are none. Personality claims a right to subdue the totality of things and cannot in principle rest satisfied until it has done so. Furthermore, because personality is at this stage the singular personality of the atomistic individual, the presumed right of personality to infinite accumulation is the equal right of *each separate* personality to such acquisition. We have, therefore, competitive claims of right to an infinite accumulation. Under these conditions, any unilateral acquisition by one necessarily frustrates the project of another, for it makes him worse off in terms of his self-validation as an end. Because a right based on

unilateral acquisition would preclude the self-validation of all other persons, it cannot be valid in an unqualified sense.

Accordingly, if private property is to exist prior to a public scheme of distributive justice, it must somehow reconcile one person's right to exclusive possession with the freedom of acquisition of all others. A unilateral acquisition can generate property if and only if it is made consistent with the right of others to an unlimited accumulation.

Exchange

Exchange remedies the three defects in unilateral acquisition.[32] First, in alienating my possession, I resolve the contradiction between my claimed mastery of the object and my actual dependence on it for validation. That is so because, on the one hand, I demonstrate my independence of the object by letting it go; but, on the other, I remain the recognized owner of the object's exchange value. Because that value is the same metaphysical identity of qualitatively different particulars that personhood is, the person can depend on it without contradicting its end-status vis-à-vis material things. What it depends on is an intellectual object that is just the reflection of itself. No doubt this object has a physical token that may be possessed and used (say, for melting into a substance convertible to a tooth). But the fact that money is a token shows that what is owned in owning money is something intellectual—that a coin's use value as a physical object is something ancillary and insignificant. In any case, once property in exchange value is established by a bare exchange of promises to deliver in the future (enabling a market in

[32] In this subsection I read Hegel's extremely condensed text (Philosophy of Right, paras. 71-4) in a way that should be regarded as Hegelian in inspiration rather than textually determined.

choses in action), its emancipation from physical possession and use is complete. While a banknote may still have some incidental use value as a piece of paper, the number debited from the purchaser's bank balance to the credit of the seller's has no material or useful properties whatsoever.

Second, when exchange takes the form of an executory contract, ownership has freed itself entirely from the contingency of empirical possession. It is no longer the case that I must possess something empirically in order to have the right to possess it even when I am away from it. By virtue of contract, I have the right to possess something even though I have never possessed it and whether or not I actually possess it. In this way, contract turns acquisition by original possession on its head. Whereas before, empirical possession preceded intellectual possession (a right to possess) and was needed for it, now intellectual possession precedes empirical possession, which is not needed for it. Accordingly, the person's unconditioned end-status is best validated in the recognized ownership of exchange value that crystallizes in reciprocal promises. We can say that end-status is best embodied, not in the intellectual possession of a material object, but in the intellectual possession of an intelligible object—exchange value.

Third, exchange solves the competition problem. To isolate the property-validating role of exchange, assume that the object offered for sale has never been sold before, that the holder has it through first or adverse possession. Now, in purchasing the object, I recognize the other's ownership by awaiting his decision to alienate it and by giving him an equal value in return. Yet I do not thereby foreclose my opportunities for unlimited acquisition, because I recognize his ownership of the thing only insofar as it

becomes available to me, and he recognizes my ownership under the same condition.[33] But not only does my contractual partner recognize my ownership. Because (assuming perfect information) all other persons have passed on the opportunity to acquire something offered for sale in a public market, indeed have registered the cost of their disappointment in the value I must relinquish to own it, recognition for holdings acquired through open exchange is omnilateral rather than simply bilateral. That is to say, my contractual partner is a conduit for a mutual recognition between the all and the individual even prior to the existence of a public authority. The market recognizes something as mine only insofar as I reciprocally acknowledge others' interest in the object by paying the social cost of their going without it. As a consequence, contracts manufacture rights *in rem*; relative rights go in and absolute rights come out.[34]

The upshot is that our final properties are not in the physical things we possess in isolation but in their metaphysical values realized in exchange. What I own without qualification is not the thing I unilaterally possessed, but only the equivalent value allotted to me by the market when I relinquish my possession—a value reflecting everyone else's frustration in letting me have it. Inversely, the one who owns something as a pure commodity abstracted from its material and useful properties is its absolute owner, for his ownership is recognized by all in

[33] Hegel 2008, Philosophy of Right, paras. 72-74.

[34] David Hume's "social convention" theory of property explains property as originating in a common interest in the secure possession of what people already hold or might acquire through fortune and industry. But according to Hume's account of human nature, our avidity is "insatiable, perpetual [and] universal", while external goods are scarce relative to our limitless wants; Hume 1888, Treatise of Human Nature, p. 492. Why then would we, especially the stronger among us, tacitly agree to an arrangement that perpetually excludes us from what we desire? The market exchange theory of property unites the convention theory with what is missing from it—namely, an account of how a convention of respect for exclusive possession can be made compatible with freedom of acquisition.

return for his acknowledging (by paying) its social cost. To him alone belongs a right *in rem*. Thus, the best validation of end-status with respect to an object is a paper title indicating receipt through a market transaction from someone qualified to relinquish an ownership that is best so far—that no one else can trump. The ownership conferred by that paper requires no physical possession, trumps ownership by prior possession (for example, a squatter's), and, once certified against prior claims, cannot be extinguished by adverse possession.[35] Indeed, it can even stand serenely aloof from a tenant's temporally finite right to exclusive possession. It is timeless, metaphysical ownership—the kind of ownership that alone fulfills a claim of end-status raised above all finitude, relativity, and contingency.

That contract is the perfection of property is reflected in the law of property. At common law, ownership by possession and use yields to ownership by deed or contract. Thus, before its first sale, no one but a prior possessor may eject a squatter from Blackacre. But if a prior possessor with best relative title conveys Blackacre to a buyer, the buyer may eject the squatter though the squatter's possession preceded his. Is this because the buyer received and now asserts the seller's best relative title? That cannot be, because the seller's title was relative to those who had established no connection with Blackacre, whereas the buyer's title is good also against the seller by virtue of the latter's having consented to it by a voluntary transfer. So

[35] On the surface, the ousting of adverse possession by certification of title has an instrumental explanation. The quieting purpose of certification would be defeated if a squatter could oust the registered title holder by long use. But there is a deeper reason. Without certification, ownership acquired through exchange is provisional on no one's showing up with a prior claim, and in that sense it is still relative or *in personam*. That is why adverse possession can still defeat it. Once certified, however, ownership via exchange is truly absolute or *in rem*; and the relative property conferred by the unilateral action of using cannot trump *in rem* ownership recognized by all.

the buyer has more than the seller had thanks to the seller's recognition. But recognition, we saw, is not simply bilateral. The buyer's title is also good against those who either passed on Blackacre or bid unsuccessfully for it and for whose disappointment the buyer paid. Let us say this group comprises all. So the buyer's right against all is now based on an action in which all were involved and reciprocally considered rather than (like the first possessor's) on a unilateral doing exclusive of all. This means that the buyer may eject the squatter, not because he asserts the seller's prior possessory right, but because he wields a new right against the world that is derived from a market exchange and that trumps the squatter's relative title based on possession.

Now suppose that buyer (B) sells Blackacre to C, who is dispossessed by D, who purports to sell the fee simple to E, who, unaware of D's defective title, sells the 'fee simple' to F, and so on for a hundred years. Notwithstanding that he took in an open market, the last buyer lacks a right *in rem*, for his right is provisional on no one's (in this case none of C's heirs) showing up with a better claim from the distant past. Even if there were no better claim, no one could know this, and so all property would be provisional—infected with contingency—leaving the person's claim of unconditioned end-status unrealized. Knowledge of title, it thus turns out, is not an end of policy that public law adds to the pre-civil derivation of property—something external to the person's self-validation in ownership of things; it is rather intrinsic to the fulfillment of that project.

Accordingly, whereas unilateral possession confers a relative property, acquisition in an open market confers a right *in rem*—or would if not for the fog obscuring the chain of title. At this point, natural property requires an artifice to resolve that uncertainty in a way that reconciles the last buyer's property with a dispossessed owner's. So, market actors might set

up a public record of transactions and accept a registered deed of sale with patently unbroken pedigree as valid against the world; and, obversely, they might tacitly deem an open market exchange to pass absolute title to a good faith purchaser who buys without public notice of a dispossessed owner's title.[36] By means of such a convention, market society completes the saga of the person insofar as a pre-civil condition can do so. It establishes a valid right *in rem* and so (but for the egocentricity of Abstract Right, about which more presently) fulfills personality's project of self-validation in things.[37]

The foregoing account of property reveals the conceptual link between property and contract.[38] It shows that contract is not the arbitrary transfer of a property juridically complete prior to exchange but rather itself the perfection and legitimation of private property. Perhaps it is not a complete legitimation. After all, if the rightfulness of exclusive possession depends on there being an equal opportunity to bid for commodities, then it would

[36] Indeed, market actors could also cooperate in setting up a title registry, and they could mutually guarantee title by voluntarily paying into an insurance fund from which compensation is paid to anyone aggrieved. Thus a public authority is not needed for publicly recognised and certified title; it is needed only to compel compliance with the public system already in place. Rather than creating property, the public authority puts the finishing touches on it.

[37] What if, as with chattels, there is no public record of transactions? In that case, another custom is required to bolster the market's fulfillment of the right *in rem.* It must be generally accepted that, if the thief (T) cannot be found, the *bona fide* purchaser (BFP) may elect either to restore the object to the owner (O) in return for the price he (BFP) paid or keep the object and compensate O. If T is known, reconciling O's and BFP's rights *in rem* would seem to require that BFP retain the object, leaving O to seek compensation from T. The law of market overt (one-sidedly favouring the BFP) was abolished in the UK by the Sale of Goods (Amendment) Act, 1994, ch. 32. This effectively means that there are no *in rem* rights to chattels in Britain, that all property in chattels is provisional there.

[38] James Penner denies this link, arguing that property is sufficiently explained as an exclusive right to determine the uses of a thing; see Penner 1997, 91-2. However, Penner's argument seems to be a *petitio principi*. He first stipulates that the concept of property is individuated by the interest in determining the uses of things and then, finding nothing in the concept so defined that entails a right to make binding agreements, he concludes that property and contract are separate concepts. They are indeed distinct concepts, but it doesn't follow that they are unconnected. If property is understood as a valid claim to be master of an object, then the social validation that comes through contract may be seen as the fulfillment of property.

seem to depend on everyone having the wherewithal to bid, for otherwise equal opportunity is formal. Yet Abstract Right is indifferent to how buying power is distributed. Because it sees end-status as reposing solely on free will, Abstract Right is content if every person is formally at liberty to bid for objects and to enter into exchanges to acquire them, and if every object is available at a price. Having or not having the means to bid is a peculiarity of the individual having no interpersonal salience; only persons count for Abstract Right, and they are neither rich nor poor.

Still, complaints about formalism are out of place here, for they come from outside a framework that is unabashedly formalistic. Abstract Right has not yet revealed itself as inadequate on its own terms; hence its principled formalism cannot be effectively criticized simply by calling it formalistic. Unless Abstract Right collapses irretrievably from within, we must grant that it has, all on its own, a legitimation story for exclusive possession that is at least plausible in that it can point to a form of omnilateral approval for omnilaterally binding proprietary obligations. Crucially, moreover, this framework can point to an omnilateral approval for directly acquired holdings that is given prior to public law and distributive justice. For such an approval one need not await the deliberate ratification of private holdings by a public authority representative of all. Even if inadequate on its own, the omnilateral recognition of private property through market exchange might be worthy of some respect, and whatever measure of respect is owed might be owed unconditionally.

4. Property in Civil Society

Thus far, Hegel (with some interpolations of our own) has derived a private

property prior to the rule of law—one that is independent of distributive fairness or the public interest. This explains a stringent duty to compensate an owner for a public taking but leaves unexplained the public authority's permission to take for ordinary ends without consent. To understand this permission, we must understand the necessity for a public authority as well as the revisions this necessity forces to the previous account of property.

The objective reality of the person's mastery of things was not fully attained until the person relinquished its *de facto* possession to another in return for the other's (and society's) recognition of its ownership. Thus the person's realized end-status is embedded in a common will wherein each recognizes and confirms the other as an owner. However, the person who at this stage claims to be an absolute end also claims that its end-status is innate in its singular free will and so independent of any relation to another. We who are observing the person's development can see that end-status is realized only in a relation of mutual recognition, but the person we are observing claims to be morally self-sufficient; and so it treats the common will materialized in exchange as a conventional pact subordinate to the self-related person for whose sake it came into being. At this point, therefore, the common will has no explicit normative authority. That valid rights issue only from mutual respect is a proposition whose truth has not yet been demonstrated to the person whose education to right we are following. For this person, right consists in a permission to reduce all things to its singular self. Each person claims a permission to realize its *separate* end-status and so to flout the common will—the framework for joint end-status—

whenever it suits.[39] No one can wrong another.

Accordingly, the social realization of personality's unconditioned worth turns out to be its vulnerability to the unbridled liberty of its egocentric associates. The completion of property demands that the person transfer its possession to someone who claims a permission to disregard his contract if he chooses. In this way, the self-related person's worth-claim is refuted by the very anarchic character of the social interactions to which this view of the person's worth gives rise. If each person is exclusively a final end, then no one is an end, for each may use the other as it pleases. Faced with this self-contradictory result, the person must abandon the claim that its end-status depends on itself alone—that it rests sufficiently on its singular free will. The self-destructiveness of this claim reveals the common will as a better ground for the person's unconditioned worth and as a more coherent foundation of ownership rights.[40] Hitherto something derivative from the self-related person to which it remained inferior, the common will is now recognised as authoritative law.

Accordingly, we have passed to a condition in which mutual recognition is the sole ground of valid right-claims, not only for us the observers (inherently), but also for the person whose self-realization *qua* end we are observing (actually). In this way, the property rights in acquired things that were formerly implicit but contradicted by the claimed supremacy of the singular will become explicit. Property rights are thus perfected by the rule of law, but they are not created thereby, because there was already a social validation of property in things directly acquired prior to public authority. The latter has simply given explicit normative force to that prior validation.

[39] Hegel (2008), Philosophy of Right, paras. 81-82.
[40] Hegel (2008), Philosophy of Right, para. 104.

The origin of welfare entitlements

It looks like the derivation of private property can end there, in which case there could be no state power of eminent domain. As with Locke, the justifying reason for civil authority would be to perfect the 'natural' rights to freedom of movement and to the grade of property attained by one's action on an object. Were the civil authority to interfere with rightful possession or use for an ordinary public end, it would violate the right it was instituted to perfect even if it compensated the owner. Expropriations would be *ultra vires*.

However, the derivation of private property cannot end there. This is so because the very transition to a rule of law brings to sight a common good that contradicts the atomistic premise of the derivation. The argument for private property began from the individual person's claim to moral self-sufficiency based on the end-status involved in its singular free will. Property in a thing was justified as the validation of an isolated person's claim of final worth. Yet the perfection of that property has contradicted its starting-point, for it has revealed the person's moral dependence both on a market and on the public authority that enforces the market's *imprimatur* on holdings. Because, moreover, the justification of private property assumed naturally dissociated free wills, it also assumed that the free will is the only public thing, that all needs and goods were the subjective addictions and preferences of discrete individuals. That is why the inchoate duties of Abstract Right were only negative obligations not to interfere with freedom of movement or with the grade of property a person had acquired. There could be no positive duty of concern for another's welfare, for the end-status realized in the common will inhered in a capacity for free choice that turned every animal need into an

optional attachment and that, being innate, had no needs of its own. There was thus no public conception of welfare that free and equal ends could be coercively required to promote.

All these assumptions are overturned with the transition to a rule of law. This is so because the common will's normative authority implies a changed conception of what is unconditionally true about agents and a correspondingly enlarged understanding of their potential for freedom. If the common will is authoritative for persons, then authoritative law is law that is immanent in the agent's reasonable will rather than law that is given by a natural teleology external to the will. Therefore, agents are inherently autonomous—capable of acting from principles (universalizable maxims) rather than immediate inclination and subject only to laws they can give themselves. This means that law is normative only insofar as it can be self-imposed by ends, while persons are respected as ends only insofar as they are subject to laws to which ends can assent. Accordingly, the transition to a rule of law brings in its train a new conception of what is essential to agents and therefore a new conception of what is necessarily public: not only the agent's capacity for free choice but also its potential for self-determination. Moreover, this transition also brings to sight the link between normativity and autonomy. Law is authoritative only as an expression of a common will each agent can regard as its own. Therefore, agents have a positive right to autonomy correlative to the duty on authority-claimants to rule solely as ministers of the common will.

The problem these developments pose for the previous account of property is plain. That account presupposed morally self-sufficient, hence atomistic ends whose end-status reposed solely on their capacity for freely choosing among subjective

inclinations. The account's climax, however, reveals persons as potentially self-determining moral subjects and citizens who necessarily share a common good—namely, the realization of that potential. Whereas, moreover, the persons of Abstract Right had (inchoately) only negative rights against interference with liberty and property, moral subjects have a positive right to autonomy correlative to the duty on authority-claimants to rule in the name of what all citizens can rationally will for themselves.

Now, it might seem that this positive right to autonomy is satisfied if authority-claimants rule *solely* as ministers of the common will, specifying and enforcing the duty to respect the negative rights hitherto unfolded and nothing more. Not so. The very elevation of the common will from a derivative embodiment of the singular will to an authoritative law involves an expansion in the content of rights. This is so because the exclusively negative form of the right to freedom was tied to a conception of freedom identified with the capacity for choosing among subjective ends. The transition to the rule of law, however, has revealed that conception of freedom as too thin. By virtue of their capacity for undetermined choice, agents can act from respect for the law guaranteeing equal rights, and the realization of that potential for autonomy is a public good. So, if the rights of agents are connected to a public conception of freedom (to what equal ends can reciprocally demand from each other), then there is no non-arbitrary basis for limiting rights of freedom to the negative ones dictated by the thin conception that has been revealed as partial. Those rights must be generalized without regard to any restriction imposed by the superseded conception. But a generalized right to freedom includes positive rights to the conditions of autonomy in addition to negative

rights against interference. Let us see what revisions to property theory these new developments require.

A positive right to the conditions of autonomy is specified in the following ways. It implies, first, what Hegel calls a right of insight.[41] This is a right to the procedures and practices by which law's impartiality may be validated through the participating reason and assent of those subject to it. This right generates the requirements of publicity and systematicity in the law, of reasoned decisions, as well as the rules of due process in court (the other clauses of the Fifth Amendment). Second, the right of autonomy implies what Hegel calls a right of intention. This is a right to see in the adverse legal consequences of one's actions only the traces of one's own choices—hence a right (for example) against strict liability for penal consequences. Third, the right of autonomy implies a right of welfare.[42] This is a right, not to the satisfaction of one's personal aims, but to the minimum level of resources needed to liberate the mind for the pursuit of self-authored projects and to guarantee independence from those who would otherwise control the means of subsistence. Accordingly, the common will has undergone a metamorphosis just in becoming recognised as authoritative. It has become the common welfare.

A positive right to welfare is a right to the material and cultural preconditions of an autonomous life. Although some speak of this right to resources as property, I eschew this terminology for two reasons: one, because it blurs a distinction between private ownership and citizen entitlements that I wish to vindicate; two, because, in doing so, it smuggles into language a contestable position—namely, that property is nothing more

[41] Hegel (2008), Philosophy of Right, paras.132, 215, 224.
[42] Hegel (2008) Philosophy of Right, 128-130, 230.

than a right to a certain allocation of social wealth.[43] Instead, I will reserve the name 'property' for a person's (relatively or fully) valid claim based on its own actions to be master of an object (the property of Abstract Right), and I will refer to positive rights to resources as 'entitlements' to social wealth.

Nevertheless, the distinction between private property and entitlements to social wealth leaves room for the idea of a positive right to the exclusive control, use, and trading of the resources to which one is entitled from the common store. Although this looks like a positive right to property, it is not. It is rather a positive right to property-like powers and remedies as a condition of autonomy. A property-like power or remedy is one extracted from the direct relation between a person and a thing of which it is an integral part in order to enjoy and protect holdings allocated by the common welfare. The power is property-*like* because, while the exclusive rights to control, use, and alienate are integral to property understood as a person's valid claim to mastery of a thing, they are only accidentally joined to an entitlement to a resource. My entitlement to a plot of land could be satisfied even if I were given it on condition that I leave it for the use of others every seven years. I could enjoy the X loaves of bread I receive from the common store even were I prohibited from trading any for a quantity of eggs. Likewise, an injunctive remedy against trespass is conceptually connected to a person's exclusive mastery of a thing; it is not so joined to an entitlement to a resource from the common store, for that entitlement could be protected by a liability rule requiring takers to pay court-determined damages. So a property-like rule is one borrowed from its conceptual home in the direct relation between person and thing for

[43] See Charles Reich, (1964).

employment in a public allocation to which it is only contingently connected.

Property-like rules are conditions of living autonomously. This is so partly because the secure (i.e. intellectual) possession of necessities liberates the moral subject for the pursuit of ends other than subsistence and partly because property-like rules protect a sphere wherein the person's autonomy may find expression through its exclusive use, management, and alienation of things according to its own will and its own goals. At this stage, therefore, it is appropriate to speak of a quasi-property (held from the common welfare) in resources as a condition of autonomy and so as a legally cognizable need of the human individual. In Abstract Right, the individual's needs were juridically insignificant, since all need signified a natural 'necessity' from which the free will could detach itself, hence really an optional value having no normative force for other persons. At this stage, however, needs are freedom's needs—agency goods, as we might call them. Understood as objective requirements for acting from self-authored ends, they now come within the purview of right.

Civil society as a bifurcated entity

Once the material conditions of self-determination are acknowledged as something to which subjects are entitled from rulers as a condition of their valid authority, the negative right against intrusions to property generated by Abstract Right cannot remain unaltered; for that right is now shaped by what citizens owe each other as members of a civic body ordered to the common welfare. I say 'shaped' because the rights paradigm ordered to the self-related person has been superseded by one ordered to the autonomous citizen, and no logic has yet come forward to redeem it as

part of a whole. Recall that the market recognition relied upon by Abstract Right as validating exclusive possession took no account of disparities of buying power, for those disparities reflected peculiar features of the individual having no bearing on what persons owed each other as abstract ends. Yet disparities in buying power are obviously relevant to what citizens owe each other as members of a collective body ordered to the common welfare. Since Abstract Right (we can now say) erred in treating these inequalities as irrelevant to the justice of private spheres of sovereignty over resources, it is superseded by a new, welfarist paradigm in whose entitlements the negative rights of Abstract Right are *merged*. As a consequence, there is now no property independent of the common welfare. Rather, a right against interferences with historically acquired holdings is now inwardly limited by the equal right of all moral subjects to the material conditions of self-determined action. Thus historically acquired holdings may be forcibly redistributed by the public authority without violating rights, provided that the redistribution is for the common welfare. No compensation is owed in any stringent sense, for there was no right to holdings that could not be justified by the collective welfare. Accordingly, whether compensation is paid depends solely on what conduces to the common welfare—on whether the benefits of compensation (e.g. alleviating anxiety, avoiding the frustration of expectations on which investments were based) outweigh its administrative costs, or as to how far compensation is fiscally consistent with achieving the positive ends of government. Previously inexplicable, the state power of eminent domain is now eminently intelligible; what is now mysterious is an absolute duty to compensate the 'owner'.

Still, the human agent's quest for validation cannot end there, for, far from being

confirmed, its claimed end-status has come to naught. The elevation of autonomy to the fundamental end of civil union has generated a theoretical momentum whose end-point is the negation of autonomy. The systematic realization of the right to self-determination turns out to be the thoroughgoing submersion of a sphere of private sovereignty in the absolutism of the common welfare. Persons do not own what they possess and use; rather, they hold licences from the state that are revocable at will, perhaps with compensation, perhaps without. Property thus reflects the end-status, not of the individual agent, but of a collectivity in which the individual's separate end-status is submerged.

Given the self-contradictoriness of this result, the common welfare cannot coherently be pursued to its logical end-point. Its logical momentum is curtailed by an equally logical recoil, leaving space for the self-related person of Abstract Right to reassert its priority and lordship over things. Civil society is just this restless oscillation between opposite poles—between the priority of welfare and the priority of the person—neither of which offers repose. On the one hand, the person's claim of unconditioned worth finds no reality outside a common welfare inwardly constitutive of ownership; on the other, this realization of the person is its obliteration, requiring a return to the beginning—and so on endlessly. This is why Hegel calls the public sector of civil society an 'external state'. In civil society, the state is one side of a split entity of which the other is the market. As such, it is one particularism juxtaposed to many others—a powerful sovereign pitted against a multitude of petty ones interacting through exchange. Neither sovereignty can abide the other, yet neither can conquer the other without subverting itself.

Now, the Fifth Amendment paradox might be understood as reflecting this basic tension in liberal civil society—as a kind of neurotic accommodation of mutually ambivalent opposites in a divided soul writ large. So, forcible takings for ordinary public goals (whether or not the taking is necessary for the goal) are permitted because the person is an end only within a civic body ordered to the common welfare; but compensation is unconditionally owed because that terminus annihilates the person, whose end-status depends on separateness and self-relation.[44] On this critical view, the paradox of the takings clause is not simply apparent or facial; it is a real incoherence symptomatic of a deeper one in the bifurcated structure of a civil order at once derived from, and hostile to, the stateless person.

Though plausible, a critical view of the takings clause is not uniquely explanatory. Another explanation is available—one that reveals the takings clause as coherent. The general idea is that the contradiction inherent in civil society is logically surmounted in the political community (what Hegel calls the 'State') and that a takings law of the kind found in the Fifth Amendment reflects that solution. If this is correct, then the takings clause belongs to the law of a well ordered political community. Even if, historically speaking, that clause reflects the conflict in civil society between state and person, its intelligibility is not relative to civil society; it is part of the constitutional law of a whole entity reconciling the public and private sides of the human individual. This would imply that the takings clause is a durable element of liberal constitutionalism even if civil society is an ephemeral form of political association.

[44] For a discussion of how this tension is reflected in the public takings jurisprudence of the U. S. Supreme Court, see Margaret Radin, (1988).

Property in the Political Community

The conflict in civil society between state and person stems from the atomistic premise from which civil authority was derived. Like the rights paradigm, the welfarist one presupposes a person that regards itself as morally self-sufficient—as depending for its dignity on its free will alone—and so as naturally solitary. No doubt, the welfarist framework rejects that conception of the human being in favour of one that regards the individual as a moral subject who comes to dignity only through equal membership in a civic body. Nevertheless, that framework is thoroughly shaped by the view of the person it rejects.

Recall that the welfarist paradigm was attained by elevating to normative authority a common will of dissociated and (putatively) self-sufficient ends—a common will that morphed into a common welfare just in acquiring normative force. The anti-individualism of the welfarist paradigm is determined by this atomistic starting-point. Because the person's claim to *separate* end-status is equated with its claim of permission to a *welfare-blind* dominion over the world of objects, the common welfare had to come forward as an end hostile to the person's separate end-status as such. Yet the common welfare's rational authority depended, we saw, on its fulfilling an individual end-status that was self-contradictory in isolation. Thus, the welfarist paradigm's atomistic foundations assured its hostility to the very individual end-status its authority depended on perfecting. Inevitably, this latent flaw surfaced when the collective welfare asserted its authority. That authority entailed the disappearance of spheres of individual sovereignty, hence the inversion of the collective welfare into something partisan and

tyrannical. The individual's recoiling from that outcome produced the tension between individualism and collectivism that civil society involves.

We can see, however, that this tension is not primordial but consequent, not an ineluctable feature of civil life but the result of a certain conception of the human individual's final worth. Specifically, civil society's fragmentation is the disillusionment of atomism—of the human individual's claim to moral self-sufficiency based on its innate capacity for free choice. The human individual's end-status, it has turned out, depends on its acknowledgment of a public authority that reciprocally takes the individual's realized end-status for its aim. But if that is so, we must now turn against our atomistic starting-point as denying the human being's political nature and as twisting the natural bond between state and person into mutual hostility. We must instead regard the human being as standing *ab initio* within a relationship of mutual recognition between itself and a public authority—one wherein each respects the end-status of the other as a condition of its own confirmation as an end.

I call this relationship dialogic community. Its political manifestations are two—one undeveloped and inadequate to its dialogical structure, the other fully adequate thereto. We begin with the inferior manifestation. It will take us far from anything recognizable as liberalism or private property; still, it is a logical step we must take in order to win our way back.

Property in the totalitarian state

Dialogic community unites explicitly the poles whose interdependence was revealed in the mutual ambivalence of state and person in civil society. Because the

public authority and the person are valid ends only in being freely recognised by the other, each supports the other's independence for the sake of its own realized worth. Instead of subduing the other to its own primacy, each defers to the end-status of the other. Each renounces its claim to exclusive end-status and becomes a means for the other's validation. Thus, the political community defers to the individual's free agency and moral self-determination as to that which spontaneously confirms political membership as the human good; and it thereby shows that individual agency first comes to its rational importance—hence dignity—within a political community. From its side, the individual agent renounces its claim to moral self-sufficiency and, through devoted public service, recognizes its political unit as the ground of its dignity. Because each defers to the other, each is preserved (and indeed validated) as an end though allowing itself to be a means. Each depends for confirmation on the other; yet this dependence is consonant with the end-status of both, for the other is no indifferent object but one that has the other's end-status for its aim.[45]

At its first appearance, however, dialogic community is a polity one may call 'totalitarian,' for it allows no independent existence to a sphere of private acquisition aimed at validating the individual person. Rather, private acquisition is respected only as a material support for service to the collective body, in free devotion to which the individual's honour is alone thought to rest. There is no public recognition for acquisition directed to the end-status of persons conceived as standing outside the collective unit, for the separate person is equated with the apolitical person grounding '*bourgeois*' civil society. Hence there is no place for private law in the strict sense—that is, for a transactional law developed for the

[45] Hegel (2008) Philosophy of Right, para. 152.

occasional interactions of otherwise dissociated persons by judges who take no account of common ends and who are independent of political masters. We have come to this because the common welfare's collapse as public reason—its inversion into a particularism opposed to many others—has discredited the atomistic starting-point that caused it; and nothing has occurred yet to redeem atomism as a position required by the common good itself—as one established *within* dialogic community. Because the self-related person's worth is now denied, there is no respect for a property valid outside public life or for a private law for hypothetically dissociated persons. True, private (direct) acquisition is permitted, but only because the subordination of privately acquired wealth to politics and war is the ever-repeated nullification of the atomistic self that proves the latter's destiny in the united people. The true import of private acquisition is that it reflects the end-status of the political community in what is distinct from community—a truth made explicit in the commandeering of the compatriots' private holdings to support the people's wars and in the confiscation of the holdings of outsiders.

Yet the totalitarian polity's realization as an end is simultaneously its negation as such. In order to gain confirmation as the human individual's good, the polity must defer to individual free choice and moral self-determination, reciprocally recognizing the independent worth of individual agency and conscience. Yet the polity here defers only to an agent who surrenders its independence; it does not respect the one who does not. The agent who seeks its rational importance solely in public service cannot truly possess an independent worth; for it then attains its dignity as a patriot and soldier, as a member of a collective unit, but not as an end in its own individual right—not as a *separate* end. Hence this agent lacks the qualification objectively to confirm the political unit as the

human individual's end. By contrast, the agent who possesses this qualification stands outside the polity as an isolated atom—as one whose worth-claim challenges the polity's end-status and so cannot be recognised by it. Nevertheless, this agent is entitled to stand outside, for it is the independent end that dialogic community requires for its validation, yet (in its totalitarian phase) has no room for. Because the agent who claims end-status on its own contradicts the polity's natural authority, the polity must reduce to a means—to slavery—the outsider whose independence its authority simultaneously requires. In this way, the activity meant to validate the polity's natural authority reveals it as an arbitrary and violent power.

Property in the dialogical state

The totalitarian polity's downfall as the common good points the way forward. That downfall reveals the necessity to the political community's confirmed end-status of recognition by an adversarial agent—one who initially claims worth on its own, apart from community. This means that the agent's refusal of the one-sidedly collective unit as its natural end must be respected by the dialogical polity in order that this polity may in turn be independently acknowledged by the singular person as its end—as the solid ground of its separate worth. Put succinctly, the totalitarian state's self-contradictory realization shows that the atomistic person is itself inherently embedded in a dialogical relation with the political community. Each requires the other's recognition for perfected rights and valid authority, respectively. Civil society exhibited this latent connection, but in the deformed (bifurcated) shape that it takes for persons who are unaware of it—who regard

themselves as morally self-sufficient and therefore apolitical. When (through the logical process Hegel has traced) they become aware of it, they can submit to the polity's authority without loss to their separate worth; for the polity now reciprocally defers to the atomistic agent, whose path of self-discovery is the means by which the polity is objectively confirmed as the good. With this mutual recognition, the dialogical polity implicit in civil society comes into explicit existence.

The dialogical polity is structurally different from both civil society and the totalitarian state. It is not an entity bifurcated into mutually external and particularistic sectors—state and market—each unilaterally (but half-heartedly) seeking to subordinate the other. But neither is it a holistic body of patriots opposed to a subordinated market of atomistic owners. Rather, the dialogical polity is a holistic entity that encompasses both a public administration (of formal justice and welfare) and a free market of atomistic owners as particular instances of its own archetypal form of mutual recognition—as reflecting media by which that form is independently validated (in the conative action of supposedly self-sufficient agents) as the form of all valid worth-claims. It is thus a One inwardly articulated into public and private sectors, which are now equal and mutually limiting parts of a whole. Each part acknowledges the other as an end without self-sacrifice because each recognizes the other through the mediating whole that preserves both as equally necessary types of its dialogical structure. Thus, private property instantiates dialogic community, for objective ownership was established only through a mutual recognition between *de facto* possessors

who are also conduits for a mutual recognition between the 'all' and the individual, the former conceding exclusive ownership, the latter paying the market price of that concession. The public welfare paradigm also manifests mutual recognition, for the moral subject submitted to authority on condition that authority submit its laws to the test of self-imposability by self-respecting ends. Both paradigms are necessary, for both are logical stepping-stones toward the dialogical polity's confirmation as an end in the spontaneous worth-seeking of the singular agent.

The dialogical polity is the entity that Hegel designates by the term 'State'. Whereas civil society was an 'external' state, the dialogical polity is the state *sans phrase*—the state that conforms to the idea of the state as an impartial whole. The dialogical polity is also the entity on which Hegel lavishes the praise that liberal champions of civil society have found servile and idolatrous. 'The State,' he writes in language that Aristotle reserved for the divine mind, 'is an absolute unmoved end-in-itself… [It] has supreme right against the individual, whose supreme duty is to be a member of the state.'[46] Yet, once read against Hegel's analysis of the totalitarian *polis*, these statements lose their illiberal tenor. Hegel's state is a final end for the individual only because, unlike the *polis*, it contains all that is required for the satisfied end-status of the separate individual; and it is the separate, not (necessarily) the apolitical, individual who is the darling of liberalism. *Qua* final end, the state has supreme right against the individual considered in his or her natural immediacy or apart from belonging; but all the institutions reflecting the end-status the individual

[46] Hegel 2008, Philosophy of Right, para. 258.

claimed apart from belonging (for example, private property, the market, due process) are received back from the whole (so purified of immediacy) as examples of the form of mutual recognition reflecting that form's natural authority in the juristic achievements of its other. So nothing is lost to the individual but the husk of immediacy. We can say that the individual surrenders to the state its isolated singularity (the claimed self-sufficiency of which is the root of civil society's internal conflict and the cause of totalitarianism's destruction of the singular as such) but receives back official respect and concern for its embedded singularity.

Now, the idea that the singular person's property in specific things is first stabilized inside the dialogical state but outside the latter's public sector lends coherence to the takings clause of the Fifth Amendment. Recall that a right *in rem* was inchoate in a stateless condition, incoherent in civil society, and non-existent in the totalitarian state. Because a right *in rem* first stabilizes as one determination among others of the dialogical state, the latter has eminent domain in the sense that property is intelligible only within it. As there is no coherent property outside the state, no one can assert a property *against* the state. To do so is to adopt the position of moral self-sufficiency that the foregoing logical development has refuted. Inasmuch as no one may assert a property as an external constraint on state authority, the latter may take for ordinary public ends without consent and without having to show necessity or cost-benefit proportionality. Because, however, property exists in the state as the private property approved in a free market and not as a product of the public welfare, the public authority has an unqualified duty to respect it both as legitimated by a mutual recognition and as

part of the life sufficient for dignity. For the public authority to respect private property as an internal determination of the state rather than as an external limit, it is enough to compensate the owner at a value judicially determined as fair rather than at a price he negotiates.

5. Conclusion

For Hegel, natural right consists in the ensemble of instances of mutual recognition organized within the body of the mutual recognition state. Private property exists because it is one of these instances; it exists subject to limitation because it is *only* one. And the same may be said for the rulers' duty to promote the welfare of those duty-bound to obey them. That idea of reciprocal limitation within a whole explains the otherwise incomprehensible paradox of the Fifth Amendment: a state authority to expropriate for ordinary public ends subject to an unqualified duty to provide just compensation to the owner. It also shows why a liberal should prefer the constitutional guarantee of compensation understood by Hegel to the presumptive right explained by Kant. The separate end-status of the individual person is fulfilled, not in the general-will state in whose sovereignty the individual can stand only as a citizen, but in the dialogical state, within which the individual can stand both as a citizen and an owner.

The argument for a constitutional duty to compensate for a public expropriation goes with a certain understanding of what an expropriation is. It is not any sort of discriminatory harm to economic interests nor does it depend on a taking's imposing a financial burden without promising a compensatory benefit. Someone may be

expropriated even if he would end up no worse off in welfare terms. Setting aside citizen obligations (to pay taxes, not to harm common goods), an expropriation is an interference with a thing's subjection to the control, non-nuisance use, and alienating power of someone the validation scale identifies as its relative or absolute owner. So, any legal limitation on exclusive possession, socially ordinary use, or the freedom to alienate non-harmful things is an expropriation unless attached to something allotted from the common store.

It is doubtful, finally, whether any non-Hegelian conception of natural right can resolve the Fifth Amendment paradox. If natural right is equated with an unbounded liberty, then there is, as Hobbes taught, no natural right to own capable of limiting the sovereign. As the origin of the distinction between mine and thine, sovereignty is unlimited by the concept 'mine'; hence it does no wrong in taking without compensating, not even presumptively.[47] If, as Kant thought, there is a natural right to own but no natural, conclusive right to own anything in particular, then there is a presumptive but not absolute right to compensation for a public taking of one's (peaceably acquired) particular holding. If, as Locke claimed, there is a conditional natural right to own the particular thing into which one has infused one's labour, then, absent necessity, the state's forcible taking of an acquisition meeting the condition is robbery with or without compensation. And if the basis of right is the common welfare, then one's property is defined by the sum of the laws embodying distributive justice; and whether compensation is due for the suffering caused by a public taking depends on whether the benefits accruing to the "owner" from the public project will offset his loss.

[47] Hobbes 1957, Leviathan, 83, 117.

Only if private property and the public welfare are particular instances of an encompassing idea requiring both can they coherently acknowledge each other as an unconditional limit. Thus, only dialogic community explains an authority to expropriate for the public welfare limited by a right of compensation indefeasible by the public welfare.

Though no other theory of natural right can reveal the Fifth Amendment's takings clause as coherent, another line of thought can shed light on the puzzle it contains. A permission in the state forcibly to take someone's holdings for the public welfare combined with an indefeasible duty to compensate the owner might be understood as reflecting the tension in a civil society built on morally self-sufficient atoms. I mean the tension between a public authority justified as actualizing the stateless person's welfare-blind property rights, on the one hand, and the authority of a public welfare hostile to those rights, on the other. Thus a critical theory of atomism yields a critical theory of the takings clause. However, if explanations of legal doctrine that reveal it as coherent are superior to those that criticize it as incoherent, then the Hegelian explanation is better than the critical one. Moreover, viewing it so might change even the way we regard the takings clause from the standpoint of our historical situated-ness within civil society. If that clause belongs to the law of a well-ordered political community, then there is no reason to view it merely as a symptom of the present disorder. We might just as well see the takings clause as the glinting of the well-ordered community *in* the present disorder.

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