Takings

Private Property and the Power of Eminent Domain

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To my mother and
the memory of my father

Preface

From the time I first entered teaching in 1968, my main interest has been in the common law, its historical growth, and its logical structure. I am an outsider to constitutional law. Nevertheless, this book challenges the central assumptions of modern constitutional law governing property rights and economic liberties. This enterprise is a risky one. It is worth explaining why I have undertaken it.

In thinking about the common law—about property, contracts, and torts—the obvious question is, do they exhibit any abiding intellectual unity? I believe they do. Property law governs acquisition of the rights persons have in external things and even in themselves. Torts governs protection of the things reduced to private ownership. Contracts governs transfer of the rights so acquired and protected. This trinity—acquisition, protection, and transfer—exhausts the range of legal relationships between persons. It is just this universality that lends coherence and power to the legal achievements of the classical common law.

Originally I considered these relationships strictly a matter of private law. Public law, and certainly political theory, had no place in my thinking about the organization of the common law system. But working in these areas has convinced me that the separation between public and private law breaks down, in both theory and practice.

Start with property. The general rule of acquisition is a rule of first possession. At first glance it seems that only one person and one thing are at issue, surely a private transaction. But a moment's reflection shows that this perception is false. The rule of first possession is said to give the first possessor rights against the rest of the world. Although the

transaction looks private, a statement of its legal consequences reveals the social conception of ownership at its roots.

Similarly in torts, a theory of causation might start with a simple case of A hitting B. No transaction could look more private. But we see this as a two-party relationship only after deciding that B has the right of action for damage to his person. Why B instead of someone else? What is the source of duty that requires all persons to refrain from hitting B or taking his things? Beneath the law of tort, therefore, lies a theory of property rights, again good against the world. Tort law also presupposes a social conception of ownership.

Finally, with contracts, C's promise to D seems like a private transaction between two persons. Yet if one asks why C and D are entitled to enter into a contract with each other, the answer presupposes that the rest of the world has a duty not to interfere with the formation of their agreement. Thus are born the torts of defamation and interference with prospective advantage. C's right to enter into a contract with D cannot be acquired by a contract between themselves. It must be part of the original bundle of property rights good against the rest of the world. Again, collective recognition of the entitlement lies at the root of the common law.

These common law rules of property, tort, and contract represent more than social abstractions. While they are the basis of our legal culture, they are not self-executing. There is the further question of the costs of enforcing them. In examining doctrines of property, contract, and tort it is convenient to begin by assuming that the costs of bargaining and the costs of legal enforcement are zero or close to it. Given this strong premise, we tend to organize legal doctrine around a principle of individual autonomy and to extol the virtues of individualized justice on a case-by-case basis. Both these elements were prominent in the legal thinking of the nineteenth century, which was dominated by two-person lawsuits, with their relatively low transaction costs. Everywhere the emphasis was on individual self-determination and consent, upon social recognition of the perimeter of rights surrounding each individual.

Yet some cracks in the system were evident even in the early common law cases. Transaction costs are not always so low as to give the pursuit of individual justice free rein. Autonomy is indispensable to the social order, but in emergencies physicians must be given some leeway to treat unconscious patients. Similarly, where a person takes or uses the property of another in order to preserve his own life, a forced exchange is allowed against the will of a property owner: the drowning man may tie

his boat to a stranger's dock, but he can be made to compensate for the damage he inflicts. And the law of nuisance abounds in many forced exchanges that are allowed because of the difficulties of working out mutually advantageous bargains among large numbers of interested parties. More generally, where the costs of transacting exceed the gains yielded, voluntary transactions will not take place, even if everyone would be better off if they did. What is true of relations among neighboring landowners seems to be true of relations in a larger social order.

The study of the private law then depends upon a detailed analysis of the uses and limits of the autonomy principle. Nonetheless, the very questions one asks about the common law can also be asked about state action that infringes on individual autonomy. The law of eminent domain illustrates par excellence the social limitations upon the private rights of ownership. The matter is evident from the text of the takings clause of the Constitution, which says, "Nor shall private property be taken for public use, without just compensation." No matter where one looks in the catalogue of common law wrongs, one finds the theme of taking another's private property, a theme now captured in the eminent domain clause. The scope of the clause is as broad as the manifold types of takings that human ingenuity can devise. Yet in every case the takings clause recognizes that the claims of individual autonomy must be tempered by the frictions that pervade everyday life. It authorizes at the constitutional level the forced exchanges found in the laws of necessity and nuisance. Autonomy must be protected by supplying an equivalent for what is lost, but it is not protected absolutely.

There is no internal limitation on the scope of the takings clause. As we move from simple to complex cases, we move down the continuum from private to public law. There is no clean break on that continuum between disputes with two parties and those with two hundred million. Private law and public law no longer fall into separate domains. The modern view is that private law gets submerged in the rush to public law. My position is exactly the reverse: to make sense of the system, we must "go public" with private law. The rules of public law make sense only if they can be "reduced" to propositions that are understandable in private-law terms. Statements about groups of individuals must be translated into statements about individuals. Two-party transactions are the atoms from which the complex structure of the state is constructed.

Or so I thought. The case law, however, tells a very different story. The law of the Constitution is the law of the Supreme Court. Even a cursory examination of its decisions shows a radical disjunction between

the private and the public faces of the law. In instance after instance the Court has held state controls to be compatible with the rights of private property. The state can now rise above the rights of the persons whom it represents; it is allowed to assert novel rights that it cannot derive from the persons whom it benefits. Private property once may have been conceived as a barrier to government power, but today that barrier is easily overcome, almost for the asking. The Court's decisions rightly speak of partial takings, of causation, of the police power, of assumption of risk, of disproportionate impact. Each of these great themes has its common law parallel, and each is an indispensable element of a comprehensive theory of eminent domain. Yet while the notes are the same, the melody is not, because the Supreme Court has combined these legal conceptions in ways unrecognizable to students of the private law. Under the present law the institution of private property places scant limitation upon the size and direction of the government activities that are characteristic of the modern welfare state.

This book is about the conflict between the original constitutional design and the expansion of state power. At a general level it argues that the system of limited government and private property is not elastic enough to accommodate the massive reforms of the New Deal or those reforms that preceded or followed it. I argue that the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, progressive taxation. Where these governmental innovations do survive in principle, it is often in a truncated and limited form.

My original intention was to write a short article showing the obvious tension between private and public law, between the original constitutional structure and its current design. I thought I could confine my attention to the decided cases. But the demands of theory were so severe that the inquiry expanded. Settling one problem only posed another: if all taxes, regulations, and changes in the common law rules of property, tort, and contract are takings, then how can the government function at all? Under the prodding of countless criticisms and counterexamples, the original article grew by degrees into this book. I do not pretend to have exhausted the subject, but I do hope I have outlined the central features of my own system of analysis.

This book has been in the works for close to eight years, and I have departed from my original design more than once on points both large

and small. I began work on the text as a fellow at the Center for Advanced Studies in the Behavioral Sciences during the winter of 1978. In following years I presented portions of the book in lectures or seminars at Brigham Young University, the Claremont Colleges, Northwestern Law School, the University of San Diego Law School, Wabash College, and the Yale Law School. My work has been supported by the Law and Economics Program of the University of Chicago and, in the fall of 1983, by a generous grant from the Institute of Educational Affairs.

I have benefited enormously from the comments of many friends and colleagues. Larry Alexander, Douglas Baird, David Currie, Frank Easterbrook, Lance Liebman, Frank Michelman, Geoffrey Miller, Daniel Rubinfeld, Carol Rose, Geoffrey Stone, and Cass Sunstein all gave extended and spirited criticisms of early drafts, to which I have tried to respond. I have also benefited from conversations with Bruce Ackerman, Randy Barnett, Gary Becker, Mary Becker, Walter Blum, James Capua, Gerhard Casper, Robert Cooter, Robert Ellickson, Donald Elliott, Dennis Hutchinson, John Langbein, Richard Posner, Joseph Sax, and Alan Schwartz. Several generations of students at the University of Chicago have provided diligent research assistance: Alan van Dyke, whose work was supported by a grant from the Illinois Bar Association, spent endless hours on earlier drafts of the book, and Russell Cox did the same for the final rounds of rewriting. I am also grateful for the able assistance of Sharon Epstein, Ross Green, Matthew Hamel, Janet Hedrick, Mark Holmes, Melissa Nachman, and Judy Rose. Susan Carol Weiss retyped the endless revisions of the earlier draft. Peg Anderson of Harvard University Press rounded the final manuscript into shape with an astute eye and a clear touch. Finally, a special note of thanks to Michael Aronson of Harvard University Press, who shepherded the book through to publication.

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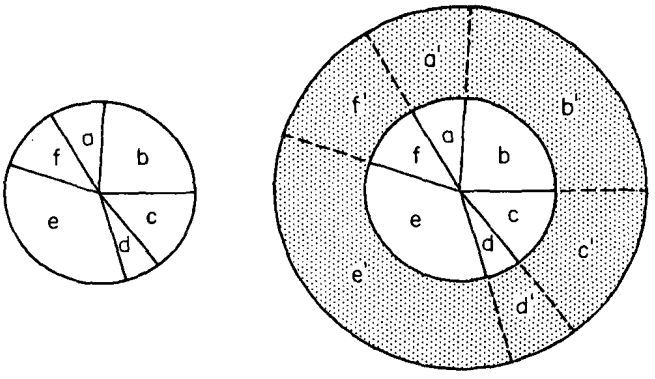
PART I

Philosophical Preliminaries

1 A Tale of Two Pies

This book is an extended essay about the proper relationship between the individual and the state. The specific vehicle for examining this question is the eminent domain (or takings) clause of the Constitution, which provides: "nor shall private property be taken for public use, without just compensation." In the course of this study, I subject other constitutional provisions to examination as well. The problem to which the eminent domain clause is directed is that of political obligation and organization. What are the reasons for the formation of the state? What can the state demand of the individual citizens whom it both governs and represents? The simplest way to present the problem is to draw two pies: see the figure on the next page.

The first of these pies represents the situation in a world without effective government control. Each individual is endowed (according to the natural rights tradition) with certain individual rights. Yet the value of these rights in a state of nature is low because some individuals continually try to take that which by right belongs to others. Uncertainty and insecurity make it difficult to plan, which prevents individuals from effectively utilizing their talents and external goods. The question of governance is how the natural rights over labor and property can be preserved in form and enhanced in value by the exercise of political power, defined by Locke "to be a right of making laws with penalties of death, and consequently all less penalties, for regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in defence of the



common wealth from foreign injury, and all this only for the public good."[1]

The larger pie indicates the gains that are possible from political organization. The outer ring represents the total social gains, while the dotted lines indicate the proportion of the gain received by each individual member. The implicit normative limit upon the use of political power is that it should preserve the relative entitlements among the members of the group, both in the formation of the social order and in its ongoing operation. All government action must be justified as moving a society from the smaller to the larger pie.

These two pies allow us to isolate all the elements that surround both the origins of the state and the operation of the takings clause. The boundaries of the slices in the first pie are the limits of the private rights to be protected by the state: they identify the private property that cannot be taken without just compensation. To achieve this end a police power must be vested in the sovereign to prevent the private violation of the boundaries so defined. We now have the inherent power of all government, but it must be limited in the ends that will be served and in the means chosen to serve them. The formation and operation of the state, moreover, requires transfering resources from private to public hands. Private property must be converted to public use. Yet the power in the state to take for public use arises because the state will not obtain the resources needed to operate by voluntary donation or exchanges. If these sources of revenue and power were sufficient, then the state would raise no problem that a system of ordinary markets could not solve. But these exchanges do not occur voluntarily and must therefore be coerced. It

1. John Locke, *Of Civil Government*, ch. 1, ¶3 (1690).

becomes critical to regulate the terms on which the exchanges take place. The requirement of just compensation assures that the state will give to each person a fair equivalent to what has been taken; that is, area *a* in the second pie equals area *a* in the first, and so forth. Finally, the public use requirement conditions the use of the coercive power by demanding that any surplus generated by the action, here the outer ring, is divided among individuals in accordance with the size of their original contributions. Each gain from public action therefore is uniquely assigned to some individual, so that none is left to the state, transcending its citizens.

In essence the entire system of governance presupposes that in a state of nature there are two, and only two, failures of the system of private rights. The first is the inability to control private aggression, to which the police power is the proper response. The second is that voluntary transactions cannot generate the centralized power needed to combat private aggression. There are transaction costs, holdout, and free-rider problems that are almost insuperable when the conduct of a large number of individuals must be organized. To this problem, the proper response is the power to force exchanges upon payment for public use. The eminent domain solution shows how a government can be organized to overcome the twin problems of aggression and provision of public goods. As these two problems are the only ones that call forth the state, so they define the limits to which the state may direct its monopoly of force. The theory that justifies the formation of the state also demarcates the proper ends it serves.

The simple structure of the two pies presupposes that we have a very clear sense of what counts as individual rights and of why government is called upon to protect them. Thus the political tradition in which I operate, and to which the takings clause itself is bound, rests upon a theory of "natural rights." That theory does not presuppose the divine origin of personal rights and is consistent, I believe, with both libertarian and utilitarian justifications of individual rights, which, properly understood, tend to converge in most important cases. Whatever their differences, at the core all theories of natural rights reject the idea that private property and personal liberty are solely creations of the state, which itself is only other people given extraordinary powers. Quite the opposite, a natural rights theory asserts that the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state. No rights are justified in a normative way simply because the state chooses to protect them, as a matter of grace. To use a common example of personal liberty: the state should

prohibit murder because it is wrong; murder is not wrong because the state prohibits it. The same applies to property: trespass is not wrong because the state prohibits it; it is wrong because individuals own private property. At each critical juncture, therefore, independent rules, typically the rules of acquisition, protection, and disposition, specify how property is acquired and what rights its acquisition entails. None of these rules rests entitlements on the state, which only enforces the rights and obligations generated by theories of private entitlement.