

University of Miami Law Review

Volume 41
Number 1 *Symposium on Richard Epstein's
Takings: Private Property and the Power of
Eminent Domain*

Article 4

11-1-1986

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Richard A. Epstein, *An Outline of Takings*, 41 U. Miami L. Rev. 3 (1986)
Available at: <https://repository.law.miami.edu/umlr/vol41/iss1/4>

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An Outline of *Takings*

RICHARD A. EPSTEIN*

I. INTRODUCTION

This issue of the *University of Miami Law Review* is devoted principally to the proceedings of a Conference, which Professor Larry Alexander organized on my book, *Takings: Private Property and the Power of Eminent Domain*.¹ The Conference was held in late January 1986 at the University of San Diego Law School. The arguments that surged to and fro in those sessions were among academics who had a close familiarity with the book, the structure of its argument, and the direction of its conclusions. In order to make that discussion more intelligible to the reader not familiar with *Takings* itself, the editors of the *University of Miami Law Review* have asked me to provide a brief introduction to the major themes of the book. The purpose of this introduction is to set the framework for the debate and discussion that follows. I shall save my own response to my critics until the end of this issue.

At the outset it is useful to note that *Takings* proceeds at two levels. On the first, it is a textual analysis of one provision of the Constitution, the eminent domain clause, which provides “nor shall private property be taken for public use, without just compensation.” At a second level, the book is an effort to justify that principle of social organization by showing how the systematic application of the clause has very powerful functional roots: while conceptions of social utility are hard to state and to identify, the society which adheres to the demands of the eminent domain clause will find itself better able to obtain prosperity for all of its members than one which deviates from this principle. The book therefore contains both traditional textual arguments and social justifications designed to show why the eminent domain clause, as interpreted, makes sense. Such seems unavoidable for any book which wants to serve a dual function, especially because it turns out that the connection between constitutional language and social function is more intimate than one might expect at first blush.

In order to make the main lines of the argument clear, I first

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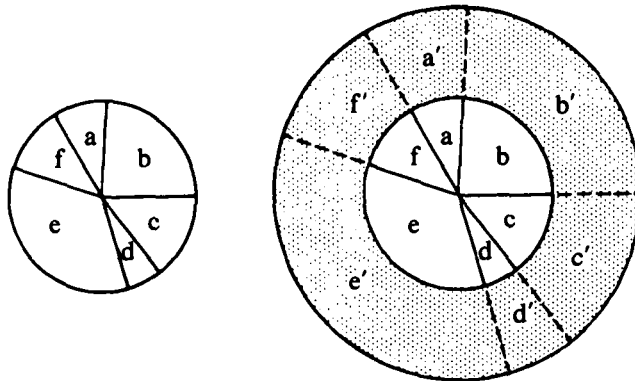
1. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter (p. —)].

want to address some of the basic assumptions of my approach. The first section thus discusses in connection with the image of "two pies," the basic questions of political organization that any society must answer. Thereafter I shall turn to matters more closely related to the eminent domain clause itself, and to the four specific textual issues that the eminent domain clause raises, and how I propose to resolve them.

II. TWO PIES

Throughout the book I rely upon what is called in the Introduction the Tale of Two Pies (ch. 1).² Stated briefly, the inner pie represents the distribution of holdings under a system of private property. The outer ring indicates the gains which can be achieved by a reassignment of property rights undertaken through collective action where voluntary transactions themselves cannot be undertaken. In principle, one can conceive of a set of arrangements of private property—the inner pie—which allocates all things of value to various persons. Those persons will attach subjective value to what they own, and will in general be prepared to part with it (when allowed to do so) only if they receive something in exchange which they value more highly. Nonetheless, there are many situations in which the voluntary transactions are precluded because the total transaction costs exceed the total gains from the exchange. This result is apt to happen under circumstances where there are a large number of individuals who find it difficult to bargain with each other—indeed everyone else—simultaneously. If there were some way in which exchanges between these parties could be coerced, then these bargaining problems could be overcome, and the gains thereby generated, at least in theory, could be distributed amongst the individuals who have been forced to participate in these transactions—the outer pie. This problem can arise

2.



before there is any well formed government: Hobbes's war of all against all is easily understood as a bargaining breakdown that renders the holdings of the inner pie unstable and prevents the creation of any social surplus through collective action. *Takings* rests on the view that the power of the state is needed to insure that violence and disorder are controlled—a function accepted by limited and extended governance theorists alike. Political organization is thus best understood as arising out of a network of forced exchanges in which individuals are taxed by the state and receive in exchange the protection of the remainder of their holdings not taken by taxation.³

These problems with collective action do not, however, end with the formation of the state, but continue to manifest themselves in many ways after it is formed. The eminent domain clause allows the state to take for public use, but only upon the payment of just compensation. It is accordingly well designed to overcome holdout, coordination, and collective action problems within the functioning state. It operates to allow those forced exchanges that enhance the welfare of individuals who have been subject to the exchange, and to prohibit the use of state power in ways that works to the net detriment of some group of individuals. In the book, I also argue—and the point is a difficult one—that the pro rata distribution of the surplus (i.e., the outer ring) has beneficial effects in improving the chances that the government only initiates the proper forced exchanges.⁴

Underlying the two pies metaphor is a consistent view of the way in which collective behavior should be analyzed. Whether one deals with the text itself, or with its functional justification, the two pies image presupposes a strict form of reductionism, or methodological individualism: any statement about groups of individuals—whether in political blocs, racial or ethnic groups, informal associations, partnerships, or states—must be reduced to statements about the individuals who compose them. The point is true whether one speaks about the rights and duties of the entities involved, or about the gains and losses that these groups or entities enjoy or suffer from various configurations of rights and duties. To introduce groups or entities as separate bearers of rights is to allow a wild card into the system, which makes it impossible to exclude one set of results and to embrace another: there is simply no common metric which allows one to balance the interests of groups or entities against individuals. If groups count separately from, or more than, their members, then in the end, any outcome is permissible depending on the weights

3. See generally Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y __ (1986).

4. See *infra* pp. 12-14.

attached to various groups. Political power begins with "we the people," and there are no aggregations of individuals who are entitled, so to speak, to special treatment on the ground floor. "Representative government begins with the premise that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction. The state qua state has no independent set of entitlements, any more than a corporation has rights qua corporation against its shareholders" (p. 331).

Armed with that assumption my view of government becomes this: all questions of conflict between the state and the individual must be decomposed into a complex array of conflicts between various individuals. We cannot simply look at the overall pie; we have to examine it slice by slice. To understand what the state may do to one individual necessarily requires that we understand what individuals can do to another, alone and jointly. More concretely, to know what it means for the state to take private property from one individual entails that we know what it means for persons to take private property from each other. To answer the great questions of public law requires us to get in on the ground floor by understanding how individuals do interact with each other and how they should interact. The question of political authority is therefore approached by an accretion of the knowledge acquired in individual cases, applied to collective situations.

III. FOUR QUESTIONS

This approach can then be carried over to the four questions that are addressed in sequence in *Takings*. First, what does it mean to take private property? The answer to this question presupposes that we have a conception of how private property is acquired, and the rights that it confers upon its owner. It also sets the stage for a consideration of the relationship of taxation, regulation, and modification of liability rules to the analysis of partial takings. With the scope of takings thus defined, the second question concerns the scope of what is generally termed the police power: When is that taking justified without compensation? Where there is no police power justification for an admitted taking, the inquiry shifts to the last two questions, which have more in common than is generally supposed. Third, when is that uncompensated taking for public use? If it is not for a public use, then it cannot go forward without the consent of the parties from whom the property is taken. Fourth, assuming that the taking may go forward, when is there just compensation? The issue of "rent seeking" behavior is closely related to both the public use and just com-

pensation questions. As the connection is sometimes misunderstood, I discuss it briefly as well. Finally, as the issue of transfer payments and welfare rights is highly controversial, I single it out for brief special discussion.

A. *What is a Taking of Private Property?*

1. THE ACQUISITION OF PROPERTY

The question, "what is a taking of private property?" presupposes that we can have some intelligible account of how any private property is acquired, for such is essential in defining the boundaries of the inner pie of original entitlements. If there is no central state already in place, the mode of acquisition will have to be, as the older common lawyers had it, by "natural" acquisition. This observation then leads to the basic common law proposition that "possession is the root of title" (ch. 5). The system is not perfect, but it does have enormous strengths. It assigns things uniquely to one person against another. It places limitations upon how much one person can acquire, because others will be able to demarcate land of their own from which they can exclude him. It can be combined with imputation rules about the ownership of airspace and subsurface lands and minerals, which reduces the amount of resources that have to be spent in acquiring ownership, so that more can be released for developing and protecting them: the *ad coelum* rule is the most durable example of this economical rule of acquisition, because it makes the ownership of other resources to follow ownership of the surface.

The first possession rule can of course lead to unfortunate results, as with well documented instances of over-exploitation of the common pool, with questions of airplane overflight at high altitudes (chs. 14, 15), or with cases of private necessity. Yet here, because there are substantial social gains that can derive from regulation, we have the very kind of state involvement that passes muster on my view of the just compensation and public use components of the takings clause. I will not belabor the point here, but the conclusion that I reach is that the common law tradition of natural acquisition does very well when measured by the best utilitarian standards that we can devise. I note that for all the "moral" criticism of the rule, no one has actually proposed any alternative baseline—let alone one that would work as well in presumptive fashion—even if we assumed that we could start with the postulate that there was a well functioning state (through its imperfect agents?) with complete power to assign property rights in whatever shape it sees fit.

2. THE SCOPE OF PROPERTY RIGHTS

A related inquiry asks, "what is the scope of private property once acquired?" Stated otherwise, what does anyone get in acquiring ownership by taking first possession? My answer is the traditional one, that is, one gets the full bundle of rights, both in the physical domain (earth to sky) and all the standard incidents of ownership—possession, use, and disposition. These are certainly the standard incidents of property as generally recognized both in ordinary usage and in legal analysis. They have the virtue of providing exclusive and exhaustive domains of rights for all individuals, without the prior intervention of the state. This definition affords a working basis for the analysis of those polar cases where government action is focused against a single person or small group of persons. It also explains why challenges to government action for the taking of property have been so ubiquitous over our constitutional history, whether under the takings clause, the due process clause, or the contract clause. As the institution of private property is fundamental and all pervasive, it is not surprising that lawyers look to takings arguments whenever there is any readjustment of property rights.

3. LARGE NUMBERED TAKINGS

This conventional conception of property has strong implications for all sorts of individual cases, but for these purposes it is critical to note the tight, logical connection between taking private property and general economic regulation, taxation, and modification of liability rules, for it is at this juncture that the book is most controversial. Here my argument assumes a formal aspect: partial takings are subject to the same basic rules and analysis as total takings, whether done by private parties or by the state. Partial takings may be done by metes and bounds, by time (take the life estate, leave the remainder) or by incident: prevent alienation, but leave the right of use untouched; allow use, but hamper the rights of alienation. All of these activities are part of the same central phenomenon so much so that it would be quite pointless to distinguish between the taking of the whole, coupled with a return of the thing subject to some legal restriction, and the simple taking of the part, leaving the residue, however defined, behind. Only an unthinking formalist could insist upon any rigid and principled line between total and partial takings, or try to identify some configuration of sticks within the bundle that fall within the core while others do not.

The next step in the argument asks: How many people can you take from at one time? The answer is the range can be from one to

everyone: it depends upon what the taker does. There is no necessary limitation which says that theft must be done on a unique personal basis. There can be, and sadly enough have been, systematic programs whereby large portions of the population have been stripped not only of their property, but also of their lives. There is no magic here. The greater the number of people whose lives and fortunes are affected by the acts of their neighbors, the greater the presumptive social concern. If A imposes a restrictive covenant that restricts his neighbor, X , from building a house, and does so by personal fiat backed by public force, there is a taking of private property. Why then is it different if he does it with the aid of B , and manages to impose a similar restriction upon Y as well? The number of takers and the number of victims does not change the quality of the act: the network of covenants still restricts use. It is a nice convention of language, but one of no moral consequence, to call the single act by A against X a taking, while we call the acts of A , B , and C , collectively, against X , Y , and Z , collectively, zoning.

The same point can be made formally. Takings are a function of two variables, the number of persons from whom something is taken, n , and the fraction or percentage of what is taken from each person, p . The analytical point is that $T(n,p)$ remains a taking for all values of n from one to infinity, and for all values of p between 0 and 1. The effort to find a narrower definition of taking that excludes economic regulation generally requires one to partition this interval in each of its two dimensions. Thus, for example, there is a taking where the number of persons is less than some arbitrary number k , greater than 0 and less than n , and a fraction of property, p , is greater than some arbitrary fraction j , which is greater than 0 but less than 1. As n and p are both continuous variables, any such division is completely artificial, no matter where the line is drawn.

The standard judicial and academic effort to get around the point by talking about takings as applied to either isolated individuals or as applied to substantial things hardly solves the problem. All it does is place the putative dividing line closer to n equal to 1, and to p equal to 1. Yet it gives no account of what the legal response should be to cases where the number of persons affected is greater than k , and the fraction suffered is less than p —the new class of nontaking takings. And it does nothing to indicate what happens when the two variables are allowed to move freely and independently of each other. Saying, as Justice Holmes said in *Pennsylvania Coal Co. v. Mahon*⁵ that we cannot go “too far” with regulation before it becomes a taking, only

5. 260 U.S. 393 (1922).

says that such a line might exist without saying where it goes, or why it matters. The modern scholarship that seeks to make sense of takings law out of Justice Holmes's distinction is a doomed effort to build a lofty edifice upon a broken structure.⁶ More bluntly, the line between regulation and takings is not principled, but incoherent. Nothing in the vast literature on the subject has rehabilitated the distinction that it now occupies in modern Supreme Court jurisprudence. Why should we owe any intellectual allegiance to a doctrine so fundamentally misconceived?

The same analysis applies to other forms of social control, from taxes to modifications of liability rules. Is there any one who seriously argues today that these systems are not ways to effectuate wealth transfers between interest groups and hence between individuals? Why then the reluctance to apply the prohibition against uncompensated takings to this entire class of social transfers? If *A* takes \$10 from *X*, and *B* takes \$10 from *Y*, and so on down the line, what difference does it make if we call it a set of takings, a special assessment, or a tax? Again the distinction is deplored, but no categorical demarcation between takings and taxes is offered. "All regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state" (p. 95).

This broad account of taking does not imply that the government can do nothing. If every government action that deviates from common law rights is some kind of taking, then we would have a total prohibition against the state even existing. Both as a textual and a common sense matter the position seems absurd. The Constitution grants affirmative powers to the federal government; it recognizes many in the state. It would be odd to say that the eminent domain clause was a total repeal of all jurisdictional grants of powers. The Constitution is not a suicide pact, but an effort to find a limited government solution to the Hobbesian fear of unbridled self-interest, but which does not fall prey to the structural weakness of pure representative democracy. It is hard to think that any constitution, including our own, disables government from protecting individual rights at all.

But neither my interpretation of the eminent domain clause nor my political system calls in any way for this extreme result. I have

6. I include here the standard works: B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977), which I criticized in Epstein, *The Next Generation of Legal Scholarship?* (Book Review), 30 *STAN. L. REV.* 635 (1978); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165 (1967), which I criticized in *Takings* (pp. 84-86, 116-21, 154-58, 197-99); Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964); and Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149 (1971), both of which I discussed briefly in *Takings* (p. 197).

never claimed that just because a taking exists, that cash compensation must necessarily follow (to be paid for, no less, by taxes that could never be collected). There are still the other three stages in the analysis that have to be undertaken. Some takings can be justified by the police power; and for others implicit in-kind compensation (e.g., the benefit of regulation or taxes) may be provided to the persons whose property is taken, whether in whole or in part, so that the constitutional standard of just compensation is in fact met. With this in mind, the extensive coverage of the eminent domain clause makes good sense. It states that in a system of limited government the burden of justification is *always* placed upon those who would take private property, no matter what or how they would contrive to do it.

B. *The Police Power*

The police power is the first limitation upon the scope of the eminent domain clause. To understand its proper scope, it is strictly necessary to recall the methodological individualism on which the entire analysis rests. Where all the members of the group have a justification to restrict an individual's conduct then that group has a justification as well. Thus there are occasions in which *A* may justify taking *B*'s property, as in disarming an attacker in self-defense. Similarly, the police power applies when a large group of neighbors disarm a thief in the neighborhood or limit pollution by an industrial plant. Likewise, the state can use force to prevent or control the private use of force and fraud. There is no magic transformation of what constitutes a tort as we move from the individual to the collective case. So too there is no magical expansion of the *types* of justifications that can be offered at the group level. Building an ordinary home does not become a nuisance against many neighbors when it is not a nuisance against any of them individually. The invocation of the police power to justify most varieties of modern zoning laws therefore fails because the end of government action is impermissible.

Still there are ends which are legitimate by this account of the police power: zoning, for example, can be a method to prevent pollution by certain types of firms. Nonetheless, even if the end is legitimate, there cannot be *carte blanche* in the state with regard to the choice of means (ch. 9), as it is all too easy to have an overbroad technique which effectively is turned toward an impermissible end. The zoning ordinance that masquerades as an antipollution device could easily be an effort to prevent (legitimate) competitive injury. The hard question is the selection of means to achieve this limited class of permitted ends, which is no trivial matter when uncertainty is

introduced: anticipated perils may or may not happen; injunctions can be overbroad or underbroad. Yet here the proper solution is to try to reduce the sum of errors of both over- and under-enforcement, where each is weighted equally. The concept of the police power is not an "open sesame" to public control based upon public will, even though it often has been twisted to that end. And the police power is surely not as expansive as the public use requirement, from which it is almost never distinguished in the modern law.⁷

C. *Public Use and Just Compensation*

Answers to the third and fourth questions, regarding the scope of public use and just compensation, take the analysis still further. There are many cases in which the distinction between many person partial takings and single person takings will make a difference, even though both are covered by the eminent domain clause. In the case of partial takings from many, there often are, but need not be, parallel benefits to those from whom the taking has occurred. This situation makes it more likely that no cash compensation is needed to bring the books into balance.

Take a simple example. Suppose there are two identical plots of land worth \$1000 each. The two plots have a common border. A strip of land along that border—each plot contributing half the strip—is taken to build a road which benefits both parties equally. When finished, the retained land of each (coupled with access to the highway) is now worth \$1600. What is the point of cash compensation for the land taken, where collection and distribution of such compensation only increases costs and reduces the total size of the surplus, here, \$600 for each? The benefit of use of the road is compensation for the loss of the land. It is implicit in-kind compensation.

But should we be satisfied simply because the compensation test is met? There is still some question about the proper distribution of the \$1200 surplus generated by the road construction. To see the point, vary the original example and suppose instead that land of only one of these persons is taken to construct the highway. Now a cash transfer from the other is necessary to insure that he participates in the social gain, for otherwise when the dust settles the total value to one is, say, \$1400 and the other \$1800. Both are better off with the

7. For an example of the confusion, see *Loretto v. TelePrompster*, 458 U.S. 419 (1982). The two issues cannot be resolved by the identical loose public interest standard, for the state must pay for takings that meet the public use requirement, but not for those that fall within the scope of the police power. See Epstein, *Doctrine Not Deference: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351.

road, but in different proportions, i.e., 2 to 1. The just compensation requirement is clearly satisfied—both have increased net worth. Nonetheless there is something uneasy about the situation. Ideally one wants to have the same distribution of benefits whether all the land is taken from one, half from each, or indeed, any other division.

To adopt a rule that makes no adjustments for the benefit of the landowner, the greater fraction of whose land is taken, is not simply to tolerate a particular distributional result. It will have negative allocative effects as well. Without equalization of the gain *ex post*, each landowner *ex ante* will seek to have the road located someplace off his land to which he has complete access. Allowing strategic games of this sort increases the possibility that the state may end up placing the road in the wrong place, with the added disadvantage that real resources will be dissipated in factional strife. This concern with the division of the surplus from needed government action, and nothing more complex, is what drives my analysis of both the just compensation requirement (the first \$2000) and the public use requirement (the \$1200 in joint gains).

Clearly the examples here can be made more complex in any number of ways. Valuation could be unclear; the number of parties might increase; their positions might not be identical; the administrative costs of making transfers is positive. In principle, therefore, the right division of the surplus may come at too high a price. Nonetheless, the concern with the proper division of the surplus allows one to give the sensible account to the public use requirement that much of the traditional literature has ignored. The taking of land under the Mill Act, or the creation of an easement by necessity, has always been the source of doctrinal anxiety because the benefit seems to be private. One could argue that some member of the public gets some marginal benefit from the activity, but then there is the question why an ounce of public concern justifies a pound of private taking. Yet in my view the two situations are the same. The division of the surplus in the two party situation simply replicates the division of the surplus in the case of taking of property with just compensation for public use. Taking into account both public and private gain the social surplus is divided equally in both situations. The intuitive pull in favor of the Mill Act is far stronger than the traditional legal arguments used to justify it.⁸ Here again the effort is not to endorse either zero or unlimited government. It is not an effort to be liberal or conservative, but to identify the size of an optimal government, constrained to behave in a responsible fashion. To give the state the absolute power of parcelling out

8. See Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. — (1986).

the surplus at will in the formation of collective goods introduces the very bargaining problems that the eminent domain clause is designed to avoid. This interpretation of the public use requirement differs from the received wisdom of the subject, which treats public use as a pointless appendage to the overall clause. But it is an account of public use which integrates the language of the text into the structure of the clause far better than any other.

All this is not to say that the implementation of the public use and just compensation clause requirements are straightforward in all cases. I think that I have given a clear account of what a taking is, one which emphasized the loss of rights from the original common law bundle. But there is no reason to expect that one can give the same crystalline account (or as is sometimes said, "formally realizable" account) of when compensation has been provided. But why should that be a surprise? In the ordinary case of the condemnation of land for a highway, there is no doubt that the land has been taken, yet there will often be disputes over its proper valuation. Should one consider current use, or highest and best use? Should one take into account the changes in value, positive or negative, of the land which was retained? Should one weigh the implicit benefits and costs that are conferred upon the landowner by virtue of the full condemnation? No one says that we should abandon the just compensation problem in its entirety because these questions of valuation raise hard matters of principle as well as delicate questions of assessment.

The same is true with large numbered takings. In some cases it is easy to figure out the cost of the statute or a regulation. It is necessary simply to look at the changes in the value of the underlying assets. The City of Berkeley⁹ imposes a rent control law; does anyone think that the sharp reduction in prices in newly regulated rental structures bears no relationship to the diminished flow of future receipts and profits from the asset? Or that zoning does not work to shift wealth as a consequence of the shift in entitlements? There are even more ambitious forms of social control, such as comprehensive wage and price controls, or collective bargaining, that cannot be priced by seeing how the costs of regulation are incorporated into the value of a particular asset, like land. But there are other ways to get evidence on these points, and the book explains at length why the common pool test, the disproportionate impact test, and the motive test do give information (ch. 14). These tests will be far from perfect, but what is the alternative? The right question is only this: Are these tests better than simply saying that once we entertain the prospect of

9. See *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986).

general social legislation, there are no restraints on legislative power? Stated otherwise, do the tests succeed in sufficiently delineating what they permit and prohibit to make it worthwhile to tolerate uncertainties at the margin? I think they do.

It is worth speaking about these tests briefly. The relevance of common pools is as follows. Where resources are subject to well-defined property rights, voluntary transactions can move them to higher valued uses. Yet once natural resources are placed in common pools, there is a tendency for private parties to overconsume to the detriment of overall welfare, as they get all of the gain from private consumption and bear only a small fraction of the total loss to the original stock. In principle, a set of voluntary agreements among all users of the common pool could create gains in which all could share, but the division of the proceeds creates a large stumbling block that only rarely can be overcome. Absent the universal agreement, the premature destruction of the pool continues. This unhappy outcome is exemplified by the exhaustion of the fishery, where the common resources cannot be conserved because the bargaining among fishermen tends to break down. Where resources are moved from common pools into well-defined private ownership, therefore, the total social yield is likely to be positive, so that there is enough for winners to compensate losers, i.e., enough to insure that just compensation can be provided all, be it in cash (e.g., for those who are denied total access to fishing) or in kind (e.g., specified rights to fish in the controlled regime).

The converse proposition is every bit as important. When resources, which are subject to well-defined private rights, are placed into common pools, then the presumption is that their value diminishes. There is no longer enough wealth for winners to compensate losers, and hence no reason to believe that the necessary compensation has been provided, be it in cash or kind, as the just compensation language requires. It is here that the taking must be struck down. The zoning statute is the opposite of the fishery or the oil pooling arrangement, precisely because it makes the decision whether or not to build collective and uncertain, where once it was vested in private individuals whose only constraints were the law of nuisance, which itself worked off well-defined boundary conditions, chiefly, but not exclusively, associated with physical invasion tests. The zoning statutes typically create the very bargaining problems that the common control over the fishery avoids. Collective bargaining agreements in the labor context are another illustration of the same problem. Hold-outs and bargaining games now predominate. In contrast, before the

statute there were (relatively) competitive markets in employment, where the wages were set without the risk of system-wide bargaining breakdown.

The motive test is relevant for a different reason. Quite simply, if one group announces that it wants to transfer wealth from a rival to itself, why not believe it? Clearly this test will diminish in power if any court should decide to attribute to interest groups the very consequences that they desire. But today the test works to identify transfers that are designed to take property without just compensation precisely because there are no effective constitutional constraints against this behavior, so that no one exercises caution in identifying the redistribution that is sought. The political candor in our present constitutionally unrestrained environment is quite revealing.

The disproportionate impact test works off the general theory of incentives. If a person has the same stake as a potential winner that he has as a potential loser, his private incentive is to maximize his net winnings over his net losses. Where both gains and losses are pro rata, then the only way the person will be able to achieve this situation is to opt for that general rule which will maximize the welfare of the whole, for then he will maximize his share as well. The theory of disproportionate impact thus seeks to create incentive compatible structures so that persons who work for their own private interest advance the social interest as well. Many general statutes, e.g., the statute of frauds and the statute of limitations, have this character, and such is true with many of the general features of contract and tort law, whether captured in the doctrine of consideration or proximate cause. The variations in doctrine do not work to shift wealth across classes because persons do not know whether they will in some future concrete case be helped or hurt by the rule.

An analogy might help. A perfectly pro rata stock dividend of common stock on common stock does nothing to shift wealth between shareholders. More generally, a perfectly pro rata rule which changes legal rights should also leave the relative wealth positions unchanged. That rule should (unlike the stock dividend) have the capacity to improve overall welfare as well. The advantage therefore of the disproportionate impact test is that it allows a court to assess the comparative desirability of different social states even if it is quite impossible to make any direct measurement of the gains or losses all persons receive from some general enactment. The test itself receives obedient lip service in the decided cases,¹⁰ but by judges who, once

10. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

they have noted its intrinsic fairness, have been unable to articulate the functional reasons for its importance.

In an ideal world one would hope that all three tests would point in the same direction. The looseness in real cases is that they often point in opposite directions. Such should hardly be surprising given that the task at hand is valuation, which is always slippery and elusive. (The standard tests of value, replacement cost less depreciation, capitalization of earnings, and comparable values, also yield different values in ordinary condemnation cases as well. But we still condemn property.) Nonetheless, it would be a mistake to dwell too much on the cases where the tests conflict. There are lots of clear cases in which my tests all point in the same direction, which is why I take so implacable a stand against most zoning, rent control, collective bargaining, progressive taxation, and the like. There are also cases which are clear the other way, as with oil and gas pooling, certain antinuisance regulations, recordation statutes, and modifications of general tort rules of broad application. The distinctions that are made are worth drawing and they yield results that stand in sharp contrast with modern law which pretends that virtually all general social regulation is outside the eminent domain clause.

D. *Rent Seeking*

These three tests of just compensation (like the parallel public use requirement) are also tied together by the general concern with "rent seeking behavior."¹¹ In economic terms a rent is the difference between the highest and the second best use to which any particular property can be put. If the highest value is \$100, and the second highest is \$60, the owner of the resource will continue to deploy the thing at its highest use so long as it is subject to a tax of less than \$40—or so it first appears. Within the political arena taxes and regulations of all sorts have been proposed on the ground that the change in the wealth will have no effect on the use of the resource, and by implication on overall levels of production. Nonetheless this optimistic scenario works only if the taxes and regulations could be costlessly generated outside of the political process. Once it is clear that these taxes and regulations do not just simply appear, then it is no longer possible to maintain the position that the legislated shift in wealth has no effect upon production levels overall. The owner of the resource will spend money to defeat or deflect the tax. Those who benefit from it will spend resources in order to acquire the resource in question.

11. See generally (ch. 14); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

Both those expenditures are deadweight losses, so that the outcome of the process is necessarily a negative sum game—regardless of who wins the struggle. The point here is not only of concern for political theory. It ties into the structure of the eminent domain clause as well. If these regulations and taxes are takings, then to the extent they are the outgrowth of rent seeking behavior, the very existence of a negative sum game, shows some persons have not been compensated with in-kind government benefits for the loss of their property rights. The program therefore must be struck down. Rent seeking behavior dominates when legislation creates common pools, is motivated by the desire to secure special gains, or creates disproportionate impacts.

E. *Welfare Rights*

One important implication of this general theory is that it proscribes both as a matter of constitutional and political theory all coerced transfer systems, including those designed to aid the poor and the needy. Here of course the argument proceeds *only* as a matter of first principle, as it seems clear that the heavy reliance interests upon existing transfer systems makes it quite impossible to root them out as a constitutional matter, or even to want to do so (pp. 324-29).

Nonetheless, questions of first principle are important if only for the way in which they shape the general political debate over transfer systems. And *Takings* is highly critical of these transfers. As a textual matter these transfer payments are raised from taxes, under circumstances where it is most unlikely that there is any equivalent return benefit to the parties who are taxed. The argument therefore is that these taxes are outside the power of the state to impose, except insofar as is strictly necessary to forestall the use of private force or political revolution.¹² This conclusion surely runs against much of our political tradition, and is I think the most controversial point in the book, and more will be said about it in the general discussion that follows. Nonetheless, from the vantage point of general political theory, it is important to understand the functional justifications for this straightforward doctrinal implication. Transfer payments between rich and poor have the same negative welfare consequences that are associated with other forms of transfers. They bring forward the cycle of thrust and resistance that tends to reduce the overall level of

12. There is a question of whether the "state" here refers to federal or state government. I did not attend sufficiently to the questions of incorporation in the book (p. 307 n.2). In fact, there are good reasons, discussed at the Conference, for thinking there is a stronger case for implementing transfer systems at the state level, owing to the exit rights available to the parties taxed. *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 97 (1986).

social welfare. Nor is it very clear that they do much to eliminate poverty, because they reduce the incentive of all persons to produce. The successful find that much of their gains are taxed away from them, while the poor find that their energies are better devoted to the acquisition of transfer payments than to the creation of real wealth.

There is of course far more to welfare and transfer payments than this simple observation suggests. It seems quite clear, for example, that to the extent that persons can make interpersonal comparisons of utility, they would assign a greater utility to a given sum of money to a poor person than a rich one. This fact alone distinguishes transfer payments from rich to poor from all other types of transfers. It is also just that observation that accounts for the enormous amount of charitable giving, much of it conducted through religious organizations. The argument against welfare rights therefore does not assume that there is no case for charitable assistance. To the contrary, the insistence of the imperfect social obligation of benevolence to those in need is an effort to respond to that problem. The strength of a constitutional prohibition against coerced transfers is that there is no reason to believe that forced systems of wealth transfer will ever be an effective means to alleviate poverty within the social system at large, no matter how noble the end. There are cases where a moral obligation should not be transferred into a legal imperative.

IV. THE AGENDA

In closing I should note that *Takings* is an effort to find in a single clause of the Constitution the distillation of a comprehensive political theory. If the book is correct, then it is possible to find guidance in a single provision to the fundamental problems of political obligation. The same analysis that applies to the acquisition of original property rights carries over to the largest questions of social organization. It is clear that these are not modest claims, and clearer still that these are highly controversial, as the transcript of the proceedings of the San Diego Conference, and the accompanying papers so clearly reveal.