SELF-OWNERSHIP, LABOR, AND LICENSING*

By Daniel C. Russell

Abstract: *In this essay I examine restrictions on labor as takings of property: a liberty to work is property, and restrictions of that liberty are takings. I set property in one's labor within a unified framework for all forms of property, understood as a social institution for balancing two freedoms: freedom to act even if it interferes with someone else, and freedom from interference. As such, property includes not only possession but also use and disposition. To restrict use or disposition is to alter those freedoms, which is a taking of property, including property in one's labor. I understand such takings to be justified insofar as they benefit the persons whose freedoms are altered, taking up the question of when restrictions on use and disposition of labor are to the benefit or the harm of excluded workers. Appreciating that labor is property, and that restrictions on labor are takings, reframes the justificatory burden that restrictions on labor must bear. And where that justification is lacking, this approach reframes the nature of the wrongs that unjustified restrictions perpetrate, especially against the most vulnerable workers.*

KEY WORDS: self-ownership, property, takings, occupational licensing, freedom, labor, reciprocity

> The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property.
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> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*,
>
> book I, chapter 10, part 2, paragraph 12

Adam Smith saw guilds for what they usually were: a veneer of protecting the public from shoddy work stretched thin over a solid core for protecting incumbents against new competition. Smith saw the inefficiency and unfairness of barriers to work. But he saw something more, and he put together two things that we usually don't: restrictions on labor, and

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takings of property. A liberty to work is property, and restrictions of that liberty are takings.

Smith was right, and property in one's labor should be understood within a unified framework for all forms of property. The first task in understanding property, in labor or in anything else, is to resist the seductive but false supposition that property is a thing, or even a relation to a thing. *Property is a relation between persons*, delineating what things persons are at liberty to do without the interference of others. Labor is not *like* property; it *is* property—the liberty to work without let or hindrance, a liberty that Smith called our most sacred. Nor do we call labor one's property by any courtesy, but only as a perfectly straightforward use of that concept, correctly understood. But it is also true that we need a better framework for understanding property generally, even property in things, and especially in the public law of takings, which in the United States anyway is in a shambles.

I begin with a minimalist understanding of property, as rules for balancing two freedoms: freedom to act even if it interferes with someone else, and freedom from interference (Section I).[1] As such, property includes not only possession but also use and disposition. To restrict use or disposition is to alter those freedoms, which is a taking of property, including property in one's labor (Section II). I understand such takings to be justified insofar as they benefit the persons whose freedoms are altered, taking up the question of when restrictions on use and disposition of labor are to the benefit or the harm of excluded workers (Section III).

Appreciating that labor is property, and that restrictions on labor are takings, reframes the justificatory burden that restrictions on labor must bear. And where that justification is lacking, this approach reframes the nature of the harms and the wrongs that unjustified restrictions perpetrate, especially against those who have only their labor for their patrimony.

I. Property[2]

Takings are forced rearrangements of property rights by use of public authority. Without such authority, collective action would often collapse under the weight of strategic bargaining: as even one party may hike up his price for contributing to a joint venture (the "hold-out problem"), or else wait for others to contribute instead (the "free-rider problem"), a venture that would have benefited everyone may never get off the ground.

[1] "Interference" here is a descriptive rather than a normative term, and one of our central questions will be when interference is wrongful.

[2] Section I develops the approach to property I take in "Self-Ownership as a Form of Ownership," in David Schmidtz and Carmen Pavel, eds., *The Oxford Handbook of Freedom* (New York: Oxford University Press, 2018).

The aim of takings is to avoid such otherwise prohibitive costs of transacting for joint ventures, effectively moving persons to the bargains they would have made amongst themselves if they had been able to bargain smoothly.[3]

Insofar as public action requires public takings, the public authority to take is an element of any society's institutions of property. But if everyone benefits from limits on freedom to withhold one's property, everyone also needs limits on those limits—one shudders at the thought of an authority with license to rearrange rights at any time for any reason. So, what is the proper role and scope of public takings, as an element of institutions of property?

Right away, the question of takings forces us to take a position on the nature of property. But few things are as ideologically divisive as the nature of property, so the more comprehensive our premises the less consensus any conclusions about takings can gather. A better way to proceed is to develop instead a minimal theory of property, a theory about *what any comprehensive theory has to be*, no matter what else it may be. Of course, we can't pretend to avoid controversies altogether, but such a minimalist approach might make the controversies more tractable. At the very least, they should become easier to spot.

A. The challenge of mutual association

No matter what else they do, institutions of property have to help make mutual association beneficial for everybody. Those benefits cannot be taken for granted, because the very possibility of mutual association requires explanation. Everybody needs both freedom to go about life and freedom from interference, but going about life almost always interferes with somebody else. In this respect, a scheme of property rights is like a system of traffic rules,[4] which determines (say) when pedestrians are to be free to keep walking even if it interferes with drivers, and when drivers are to be free to keep driving even if it interferes with pedestrians. Clearly, it is impossible to eliminate interference altogether; more than that, the freedom to interfere is an invaluable resource in social life, so that the only question is how that resource may best be allocated.[5] No matter what else it does, the institution of property has to help make mutual association possible by balancing freedom to interfere with freedom from interference.[6]

[3] On this general rationale for forced rearrangements of rights, see Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960).

[4] David Schmidtz, "The Institution of Property," in Schmidtz, *Person, Polis, Planet* (New York: Oxford University Press, 2011).

[5] Coase, "The Problem of Social Cost."

[6] See also Carol Rose, "Property as Wealth, Property as Propriety," *Nomos* 33 (1991): 232.

George Bramwell made that balance explicit in *Bamford v. Turnley* (1862),[7] in which one neighbor sued to stop another from manufacturing bricks on his land. Each neighbor wanted the very same things: *freedom to interfere*, and *freedom from interference*. The plaintiff wanted freedom to forbid a smoking kiln, even if forbidding it annoyed his neighbor; the defendant wanted freedom to bake bricks, even if his neighbor found the smoke annoying. We share society only by agreeing on tradeoffs between two such freedoms, *and these just are the freedoms that constitute property*: a Hohfeldian *liberty* to act even if it interferes with someone else (equivalently, no obligation not to interfere), and a *claim* against the interference of others (equivalently, an obligation on the part of others not to interfere).[8] The purpose of institutions of property is to balance these claims and liberties—these *rights of way*—so that mutual association enriches the freedom to go about one's life, at the least cost of lost freedom from interference.

Bramwell's opinion in the case identified exactly that purpose:

> [T]he very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.[9]

Bramwell perceived that institutions of property *just are* for striking a balance between claims against interference and liberties to interfere, by the simple device of giving neighbors *equal standing before the law*. Any claim of A's against B will be a like claim of B's against A; so the less A allows B to enjoy some liberty, the less can A enjoy a like liberty. The upshot of equal standing is that each neighbor wins only by that balance that benefits every neighbor, "a rule of give and take." So when A is to be afforded no freedom to make bricks, the justification is not that the benefits redound to B but that *the benefits redound even to A*, by protecting mutual association, where neighbors need be no more than "trifling nuisances" to each other.

Whatever else a society's institutions of property may do, protecting mutual association is what any such institutions *must* do. It's not uncommon for theories of property to start with what a community, once there, might aspire to do. Our approach starts with the recognition that first there has to be a community.

[7] *Bamford v. Turnley* 122 ER 25, vol. 122 (1862).

[8] See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," *Yale Law Journal* 23 (1913).

[9] George Bramwell, opinion in *Bamford v. Turnley* (1862).

B. Meeting the challenge

Bramwell's central insight is what I shall call the principle of reciprocal benefits:[10]

> *Property is an institution for protecting every bearer of a claim against interference, in ways that benefit that person in the greater scheme of things, as one who is also the bearer of a liberty to interfere.*

The phrase "in the greater scheme of things" adds several things. One concerns *time*: benefits and harms in the greater scheme of things must be contrasted with any benefits or harms *in vacuo*. Bramwell recognized that while A would always prefer to do without B's nuisance today—whether B is the one baking bricks or the one trying to prohibit A's baking—there are nonetheless some nuisances that eventually even A cannot afford to be protected from. That is why some nuisances must be "ordinary" rather than actionable: *in vacuo* A may wish he could enjoy complete silence from B, for instance, but given equal treatment, A would have to forgo in the greater scheme of things all the valuable things that he and others might do only by making noise. The reason to limit A's freedom from B's interference is that such a limit creates a balance of freedoms for all that is a vastly greater benefit even for A, who faces a future in the sort of community that such a balance of freedoms makes possible.

A further point concerns *generality*. Not everyone needs to make the same amount of noise; but the question of optimal balance is not how much a particularly quiet neighbor would lose by giving up the freedom to create trifling nuisances.[11] The question is how much one would lose by living in the sort of community where freedom to be a nuisance was limited by the need for that freedom on the part of its least tolerant member. (Likewise, *mutatis mutandis*, for a community that limited freedom to prohibit nuisances by the need of its most tolerant member.)

Lastly, "in the greater scheme of things" also refers to our *interdependence*. Ultimately what A wants is the most valuable liberty to go about his life that he can hope for, and so the reason to put up with B's interference is not just that this increases A's own freedom as well, but also that it increases freedom for *everybody else*, all of whom are then at liberty to do and to create the sorts of things that can give A hope of a vastly more attractive future. We put up with the tradeoff of liberties and claims both because of the prosperity that humans create only in multitudes, and because sharing society is enriching for its own sake. Mutual association is what can make

[10] I owe the phrase to Richard Epstein, "Nuisance Law: Corrective Justice and its Utilitarian Constraints," *Journal of Legal Studies* 8 (1979): 82.

[11] See Eric Mack, "Elbow Room for Rights," in David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy* (New York: Oxford University Press, 2015): 204–7.

it valuable to be at liberty to go about one's life, and so it is our interconnectedness that gives each of us reasons to allow the rest of us as much liberty as we can afford.

The principle of reciprocal benefits identifies *a justificatory burden that institutions of property must meet*, whatever else they may also be justified in doing. More precisely, the principle of reciprocal benefits reveals when an institution is a bad one. The question is not whether an institution makes a community so bad that it is not worth belonging to at all, though. A community can withstand many a bad institution and still be worth belonging to, taking all things together. Rather, the principle of reciprocal benefits helps us identify those institutions about which the best that we can say is that we might withstand them, even as they reintroduce some measure of the very problems of shared existence that property is meant to help solve.

C. *Incidents of property*

Property is not things but freedoms: freedoms to act without interference, even if one's actions interfere with another. But what freedoms are these? Or, more precisely, what freedoms are the *incidents* of property? The answer, as should now be clear, is that the incidents of property are whatever they have to be in order for institutions of property to create reciprocal benefits within mutual association. And so the incident of property that is easiest to see is the freedom *to restrict access to* what is owned (*ius possendi*). It is, after all, in virtue of this freedom that there can be property at all.[12] However, in order for persons to do and to create things of value with their property, for themselves and their neighbors, property must also include the freedom *to use* what one owns (*ius utendi*), as well as the freedom *to dispose of* it (*ius abutendi*), as for instance by transferring it. A property right is always some configuration of freedoms of these three types.[13]

Persons have property rights in their labor in exactly this sense. By labor I don't mean "sweating toil," except by coincidence; I mean the human capacity ("the strength and dexterity of one's hands") to reconfigure factors that *might* advance one's aims into resources that actually *do*.[14] A right against expropriation of that capacity is freedom to restrict access; a right to engage in work is freedom to use that capacity; and a right to exchange services with others is freedom to dispose of that capacity.

Distinguishing possession from use and disposition will be important for understanding the nature and variety of takings. For instance, the taking of an easement across an owner's land, as for the construction of a

[12] David Schmidtz, "Property and Justice," *Social Philosophy and Policy* 27, no. 1 (2010).

[13] On these three incidents of property rights, see Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), 59.

[14] Daniel C. Russell, "Locke on Land and Labor," *Philosophical Studies* 117 (2004). *Contra* G. A. Cohen, *Self-Ownership, Freedom, and Equality* (New York: Oxford University Press, 1995), 173.

common road, is more precisely a taking of the owner's freedom to restrict access to that strip of land, in exchange for the market value of that freedom. But where the joint venture is to preserve a scenic view, owners may be forced to contribute the freedom to build on their land (a right of use); where the joint venture is to preserve the peace of a residential neighborhood, owners may be forced to contribute the freedom to transfer their land to commercial users (a right of disposition).

And so the distinction between possession, use, and disposition will also be important for framing restrictions on labor, such as occupational licensing. In particular, observe that rights of use and disposition can be taken even without any seizure or dispossession. Of course, the sort of taking that is easiest to grasp is the condemnation of the right of possession; land can be seized, labor can be forced. But even when property is in a thing, that property can be taken whether that thing is seized or not: rights of use and of disposition can be taken without any taking of possession, and such rights are property. Crucially, the rationale for limiting takings of possessory rights is the same for limiting takings of rights of use and disposition. And crucially, it is use and disposition—specifically, the liberty to do work and to make one's work available to others—rather than possession that are at issue in cases of occupational licensing.

D. Scope of property

Institutions of property balance claims against interference with liberties to interfere. The principle of reciprocal benefits states what justifies the rules that constitute institutions of property, including the public power to take property. So the justification for taking is that even those from whom property is taken are better off in the greater scheme of things for living in the sort of community that such a power to take property makes possible.

This justification can be applied to the question of where the claims and liberties that constitute property must *not* extend, and therefore what arrangements of rights are not to count as takings, in the first place. The dangers of being underprotected from interference with one's actions are easy to see, but Bramwell's insight was that since protection is reciprocal, in the greater scheme of things *overprotection* is dangerous too. In fact, it is this observation that made Bramwell's opinion memorable for introducing the legal concept of "ordinary nuisance." Neighbor A may wish today that he could forbid B's annoying outdoor cookouts, but A could not afford such protection in the greater scheme of things. Neighbor B's cookout, though no doubt a nuisance, must be regarded as only an *ordinary* nuisance against which A is to have no claim in that time and place. More broadly, every institution of property must admit such a thing as interference that is not actionable wrong, or what is known in the common law as *damnum absque injuria*.

The other side of this coin, of course, is that property cannot extend so far as liberty to create "extraordinary nuisance"—those sorts of interference from which neighbors must be able to expect protection. If A would be overprotected by freedom from B's ordinary nuisance, so too would A be overprotected by freedom to create extraordinary nuisance.

Generalizing, in order to create reciprocal benefits, institutions of property must assign each person *no greater a claim against interference* than will benefit him or her in the greater scheme of things. Put another way, each of us is owed protection against overprotection. Arranging rights so as to provide such protection is therefore *no taking of property*. It is no taking when A is barred from using his property in ways that put filth onto B's property; it is no taking when A is barred from contracting with B to sell his services as a hit-man.

E. Protection of property

The principle of reciprocal benefits also applies to *how* claims against interference are to be protected where they *do* extend.[15] Different protections alter the balance of claims against interference with liberties to interfere. A *property-rule* entitles A to refuse to transfer the protected freedom to B and, equivalently, forbids its transfer to B without A's permission. By contrast, a *liability-rule* transfers the protected freedom from A to B for compensation as determined by public authority. The *takings power* just is the power—the freedom to alter other freedoms—that the public authority exercises when it transfers property by way of liability.

It's tempting to say that property is only as real as it is absolute—and in particular, as it is immune to takings—but a moment's thought shows why that cannot be so. Along with everybody else, A is put at some risk if B is allowed to drive a car; by licensing B anyway, the public authority transfers A's freedom from that risk to B *without* having to get A's permission, provided that B compensate A, as the public authority deems appropriate, in the event that B harms A. A liability-rule offers less protection than a property-rule, but more protection is not always better: here, A would be *overprotected* by a property-rule, because the costly negotiations between every A and every B would preclude vehicular travel, the benefits of which swamp the associated risk in the greater scheme of things, even for A. To create reciprocal benefits, institutions of property must assign each person *no greater protection of property* than will benefit him or her in the greater scheme of things.

Of course, less protection is not always better either. The reason to protect A with a liability-rule is to reduce transaction costs that would otherwise preclude transfers that A would lose from forgoing. But if it could

[15] The classic discussion is Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972).

be determined ex ante that it is *A in particular* that B risks injuring, then B should have to negotiate with A for the transfer; neither A nor B can afford to live where a neighbor can be forced to sell his or her claim against injury to whichever neighbor desires to purchase it. A liability-rule would therefore underprotect A, and for the same reason it would extend B's property further than even B could afford. So in order to create reciprocal benefits, institutions of property must also assign each person *no less protection of property* than will benefit him or her in the greater scheme of things.

The standard rationale for occupational licensing is the same as that for licensing drivers. Occupational licensing is an arrangement of property rights, such that one may not use or transfer one's labor in certain ways without first obtaining formal public permission in the form of a license, in the name of improving quality of service.[16] Permission may depend on academic credentials, hours of training, licensing exams, bonding, and so on, often with a licensing fee.[17] In theory, licensing provides the public good of protecting the public from poor services from which they cannot feasibly protect themselves.[18] For instance, patients cannot check the credentials of EMTs in the midst of an emergency; patients can check the credentials of a family physician, but third parties they might infect cannot.[19] Of course, beyond some ceiling on risk A becomes worse off, and so licensing provides the public good of a reasonable ceiling on that risk. Even A is better off if B *may* be licensed; even B is better off if he *has* to be licensed.

Licensing therefore bears the same justificatory burden as all other property institutions do, a burden described by the principle of reciprocal benefits. In particular, there are two things that together justify such takings. First, it matters that *the stakes are high*. *In vacuo*, A would always rather avoid B's nuisance; but in the greater scheme of things there are some nuisances of B's that A should have no protection from at all, for A's own sake. Stakes are "high" when, as Bramwell observed, even B would be worse off for an institution that permitted neighbors to create such nuisances—that is, when the nuisance is in this sense "extraordinary." Incompetence that poses some severe threat is no ordinary or "trifling" nuisance, though, and it is for this reason that A is to be protected from B in the first place. And second, it matters that *transaction costs are high*, as

[16] Morris Kleiner, "Occupational Licensing," *Journal of Economic Perspectives* 14 (2000): 191. The *locus classicus* is Kenneth Arrow, "Uncertainty and the Welfare Economics of Medical Care," *American Economic Review* 53 (1963). See also George Akerlof, "The Market for Lemons," *Quarterly Journal of Economics* 84 (1970): 500; Carl Shapiro, "Investment, Moral Hazard, and Occupational Licensing," *Review of Economic Studies* 53 (1986).

[17] See Morris Kleiner and Alan Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market," *Journal of Labor Economics* 31 (2013): 184–85.

[18] Arrow, "Uncertainty and the Welfare Economics of Medical Care."

[19] For discussion see Kleiner, "Occupational Licensing," 192; Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation* (Washington, DC: U.S. Federal Trade Commission, Bureau of Economics, 1999), 9–11.

when patients don't know in advance which EMTs will attend them, and third parties don't know which patients may be carrying poorly treated contagion. This explains why A's protection from B is by liability-rule rather than property-rule, which would leave A and B to negotiate the transfer for themselves, to the detriment of both.

F. From property to takings

As promised, I have not offered a theory of property. The approach to takings that I've sketched here starts from two ideas: one, that *property is not things but freedoms*, so that to alter those freedoms just is to take property; and two, that the justification for taking property is to benefit those *from whom property is taken*, in the greater scheme of things (the principle of reciprocal benefits). This is not a theory of property, but a theory about what a theory of property has to be. Even so, appreciating what institutions of property have to do is enough to help us understand what the takings power has to be. Restrictions on labor are takings of property in labor, and the burden of justifying such takings is the same as it always is.

II. Takings

A. The challenge of the takings power

The takings power just is the power that the public authority exercises when it transfers property by way of liability. By a *power* is meant the freedom to alter other freedoms; for A to lack such a power as against B is for B to have an *immunity*.[20] So we must say, more precisely, that property is a liberty to interfere plus a claim against interference, *together with* some configuration of powers and immunities with respect to altering such liberties and claims. By definition, all transfers of property, including takings—transfers by legislative fiat—just are transfers of such claims and liberties.[21] So, since the public takings power just is a power to alter property, the configuration of relations that constitute institutions of property in a given society depends at the fundamental level on the scope of that power.[22]

The reason to vest such power in the public authority at all is that a property right may be more valuable to its owner if it is protected with a liability-rule, owing to the sometimes prohibitive costs of making mutually beneficial transfers of freedoms protected with a property-rule (Section 1.E).

[20] See again Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning."

[21] Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57 (1967): 347.

[22] It is even possible to characterize the state in terms of this power, as a network of forced exchanges; Epstein, *Takings*, 15.

But by the same reasoning the takings power cannot be a *license* to take; the power that lowers the risk of overprotection also increases the risk of underprotection. The power to alter property invites abuse, whether as a means of doing favors for cronies or of lowering the price of implementing a well-meaning ideal. Put another way, the purpose of the takings power is to provide public goods, yet such use of that power is *also* a public good: we would all benefit from it, but incentives to provide it are rare.[23] If our problem in the absence of a takings power is overprotection, underprotection is our problem in the face of it.

For this reason there is an important asymmetry between property- and liability-rule protections of property generally: the prohibitive cost of creating a mutually beneficial rearrangement of rights is the special reason to protect with a liability-rule, whereas property-rule protections need no special reason at all. There is a *presumption* of property-rule protection;[24] a liability-rule is appropriate only where a claim against interference would be overprotected by a property-rule, given the costs of transacting for a transfer of that claim.

As there is a presumption of property-rule protection, so there is a presumption against takings, which is to say that a taking is appropriate only for special reasons—namely, when transaction costs are such that a property-rule would overprotect the holder of property in the greater scheme of things. And so the Fifth Amendment to the Constitution of the United States says, "nor shall private property be taken for public use, without just compensation." The Fifth Amendment acknowledges the necessity of a special clause for liability rules rather than property rules—the necessity, that is, of a takings clause and not a "property clause."

The takings power solves a problem, but it is also itself a problem for strong limitations to solve.[25] What institutions of property a community turns out to have will depend on a public takings power as constrained by such limits,[26] and so takings face the justificatory burden of creating reciprocal benefits by ensuring that those from whom property is taken are better off in the greater scheme of things, owing to the institution that licenses the taking. This justification can be applied to the five chief questions about the scope of any takings power:

[23] Gordon Tullock, "Public Decisions as Public Goods," *Journal of Political Economy* 79 (1971): 917. I am using the phrase "public good" as economists do: a good that is both nonrivalrous and non-excludable.

[24] See Richard Epstein, "The Clear View of the Cathedral," *Yale Law Journal* 45 (1993): 2092-93, 2096-2111, 2120; Epstein, "The Seven Deadly Sins of Takings Law," *Loyola of Los Angeles Law Review* 26 (1993): 963–64.

[25] See Epstein, "The Clear View of the Cathedral," 2111–20. It isn't obvious what institutional form those limits should take: Epstein (*Takings*) argues that it is a strong judiciary; William Fischel (*Regulatory Takings: Law, Economics, and Politics* [Cambridge, MA: Harvard, 1995]) that it is a strong judiciary at some levels of government, but various sorts of political activism at other levels. See also Daryl J. Levinson, "Making Government Pay," *University of Chicago Law Review* 67 (2000).

[26] See Epstein, *Takings*, 96–97.

What is to count as property?
What are the purposes for which property is to be taken?
When is compensation for takings to be in cash or in kind?
When is compensation to be due?
What is the amount of compensation to be?

Let's consider the first two questions first, which concern appropriate occasions for exercising the takings power (Sections II.B and II.C) and in licensing in particular (II.D–II.E). We can then consider the remaining three questions, concerning compensation, in Section III.

B. What liberties are to count as property in the first place?

The answer to this first question depends on what liberties *cannot* be property, because of the threat they would pose to shared interests in general health and safety. Mutual association benefits everybody insofar as no one is to be at liberty to act with "injury to his neighbour." Such prohibitions are not takings, since ex hypothesi there is no such liberty to be taken.

Some public acts that might look like takings—such as the seizure of a power plant when this is necessary to prevent contaminating a water supply[27]—are therefore not takings at all. In U.S. constitutional law such acts are known as exercises of the "police power," that is, the authority to prevent serious threats to public health and safety. The appearance of a taking by the police power is illusory, however, because that power prohibits only what one was not at liberty to do in the first place.[28] Of course, if there is great risk of underprotection from nuisance in the absence of the police power, there is also great risk of overprotection when the police power is interpreted too broadly, forbidding nuisances that would have created even greater benefits in the greater scheme of things.

C. For what reasons may property be taken?

The takings clause of the Fifth Amendment to the U.S. Constitution limits the takings power to takings "for public use." The rationale for the public-use test is that there must be special reasons to take,[29] which rule out transfers of property from A to B for the private benefit of B. For that

[27] See Epstein, *Takings*, chap. 9. See also Fischel, *Regulatory Takings*, 153.

[28] For the same reason, it is not a taking when a lease on public land is canceled, where the lease agreement permits (*United States v. Fuller* 409 U.S. 488 [1973]). See Epstein, *Takings*, 146–51.

[29] See also Epstein, "The Clear View of the Cathedral," 2113; cf. Frank Michelman, "Property, Utility, and Fairness," *Harvard Law Review* 80 (1967): 1182.

reason, takings are justified only as necessary[30] to provide public goods, like roads and common-carrier utilities.[31] Takings for public goods are consistent with the rationale of taking from A, not just to benefit B, but *to benefit even A*. Takings for other purposes, though, cannot be so justified: insofar as goods that come from them are not *public*, such takings are transfers from some for the benefit of others.[32]

Of course, a lot depends on when a reason is "special" or a use is "public." What should be clear is that a taking—protection by a liability-rule—is justifiable when property would be overprotected by a property-rule. A half-century of lugubrious Supreme Court decisions notwithstanding, public use cannot be so "broad and inclusive" as to be the same as "a conceivable public purpose."[33] The justification for taking is never that the public authority thinks the world would be a better place if B had what is A's.[34]

D. Licensing as taking

Restrictions on labor, injury to neighbors aside, are takings of property in labor. But several points require clarification before we proceed. First of all, it is no taking not to guarantee employment, even though employment can increase the value of property in labor. Recall that the principle of reciprocal benefits is *defensive*: it defends A from transfers to B except insofar as such transfers benefit A. The principle never entitles B to a transfer from A so as to benefit B, which would make property the very problem it is meant to help solve. So, however much B's not finding work with A may be harmful (*damnum*) to B, it can be no wronging (*injuria*). It is a taking, not when the public authority refuses to make zero-sum transfers, but when it does not allow positive-sum transfers.

Second, in treating licensure as a taking there is no assumption that workers have any claim to work within the particular field to which licensing restricts entry. The freedom that is taken in cases of occupational licensure is again not a *claim* to work, but a *liberty* to employ one's labor, "harm to one's neighbour" aside, without let or hindrance.

Finally, and crucially, we must also appreciate that when there is an argument against restricting A's labor, the argument has nothing to do

[30] Given the presumption of property-rule protection, the proper standard is necessity rather than mere expediency. See Epstein, *Takings*, 110.

[31] See Epstein, *Takings*, 166-68, 179, 181. Of course, it is as important to be as strict about "public goods" as it is about "public use." Unfortunately, human imagination overproduces purported examples of public goods; see Coase, "The Lighthouse in Economics," *The Journal of Law and Economics* 17 (1974).

[32] See Epstein, *Takings*, 167 and chap. 18.

[33] *Berman v. Parker* 348 U.S. 26 (1954), 36; *Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984), 2329-30. To date the most prominent offspring of these decisions is *Kelo v. City of New London* 545 U.S. 469 (2005).

[34] See Michelman, "Property, Utility, and Fairness," 1182–83.

with what options A would have had in some hypothetical baseline to which he is entitled. Rather, the argument is that everyone would enjoy the reciprocal benefits of living in a society made possible by an arrangement of property rights within which A would have greater liberty to employ his labor.[35]

E. Licensing and the public-use test

Now, the standard rationale for occupational licensing is that even though restrictions on the use and disposition of labor can raise prices by restricting entry into an occupation, nonetheless certain restrictions make everyone better off in the greater scheme of things as those higher prices are offset by superior services.[36] And that is to say, in the language of the Fifth Amendment, that licensing is justified insofar as it is a taking of property for public use.

Unfortunately, takings-by-licensing in the United States increasingly fail to pass the public-use test. In the United States, licensed workers have gone from 5 percent of the workforce in the 1950s to about 25 percent today,[37] and only about one-third of the expansion is attributable to changes in the nature of work.[38] And while prices have risen alongside licensing in the United States,[39] in general improvements in the services provided haven't followed.[40] Worse, high prices and low provider

[35] It is this understanding of how property claims are justified that sets apart the approach I take here from the otherwise similar approach of Liam Murphy and Thomas Nagel, in *The Myth of Ownership* (New York: Oxford University Press, 2002), who notice that property holdings exist only within institutions, but seem not to notice that a justification for holdings might attach to the institutions that license them rather than to the particular holdings per se.

[36] Shapiro, "Investment, Moral Hazard, and Occupational Licensing." For discussion see Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor, *Occupational Licensing: A Framework for Policy Makers*, https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf, 58–60.

[37] Morris Kleiner and Alan Krueger, "The Prevalence and Effects of Occupational Licensing," *British Journal of Industrial Relations* 48 (2010): 678–79; Kleiner and Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market," 175–77; Morris Kleiner and Evgeny Vorotnikov, "Analyzing Occupational Licensing Among the States," *Journal of Regulatory Economics* 52 (2017): 135–39; Treasury et al., *Occupational Licensing*, 17–18. Recent data at the time of this writing are available from the United States Bureau of Labor Statistics (https://www.bls.gov/cps/certifications-and-licenses.htm).

[38] Treasury et al., *Occupational Licensing*, 19–23.

[39] Lawrence Shepard, "Licensing Restrictions and the Cost of Dental Care," *Journal of Law and Economics* 21 (1978); Cox and Foster, *The Costs and Benefits of Occupational Regulation*, 29–35; Morris Kleiner and Robert Kudrle, "Does Regulation Affect Economic Outcomes? The Case of Dentistry," *Journal of Law and Economics* 43 (2000); Treasury et al., *Occupational Licensing*, 60–61.

[40] Shepard, "Licensing Restrictions and the Cost of Dental Care"; Sidney Carroll and Robert Gaston, "Occupational Restrictions and the Quality of Service Received," *Southern Economic Journal* 47 (1981); Cox and Foster, *The Costs and Benefits of Occupational Regulation*, 21–24; Kleiner and Kudrle, "Does Regulation Affect Economic Outcomes?"; Kleiner, "Occupational Licensing," 197; Kleiner and Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market."

density lead some consumers to lower-quality substitutions (including do-it-yourself) and some to doing without, resulting in worse services actually received.[41]

The reason licensing has done so little to benefit the public is that takings in this area of public law have seldom been for public use. The common practice of "grandfathering" incumbents against new standards doesn't help if stakes are high;[42] the common practice of state-specific licensing actually raises transaction costs.[43] And neither stakes nor transaction costs can explain where licensing has actually expanded: licensing to thread eyebrows (Louisiana), to braid hair (Arkansas, Iowa, Missouri, Washington), to sell caskets (Alabama), to coach dieters (Florida), or to broker room-shares (Pennsylvania).[44]

These takings of property in labor all share a combination of *low stakes* and *low transaction costs*. Where the stakes are low, protecting consumers by licensing risks raising prices by more than the protection is worth to consumers. Where transaction costs are low, it is better left to consumers and providers to negotiate tradeoffs of credential and price. Not only is there no strict public-use basis for licensing in these circumstances—which creates no public goods but is, if anything, a public nuisance. There is not even a *loose* public-use basis: licensing serves no "conceivable public purpose" that providers couldn't achieve by obtaining voluntary certification, say, and that consumers couldn't achieve by scrutinizing provider reputation.[45] Left to their own devices, consumer A and provider B can each factor the value of the credential to themselves into their negotiations for the price of the service. Outside the public-use situation, both providers and consumers would be better off without any liability-rule transfer of liberty from provider to consumer, which underprotects providers and overprotects consumers.

III. Compensation

Like all liability-rule protections, takings force an owner to surrender certain property rights in exchange for compensation for those forgone rights. By understanding the nature of compensation for takings generally (Sections III.A–III.C), we can sharpen our question of whether, and when, occupational licensing does in fact create reciprocal benefits even for those whose liberties to work without hindrance are taken (Sections III.D–III.E).

[41] Carroll and Gaston, "Occupational Restrictions and the Quality of Service Received"; Cox and Foster, *The Costs and Benefits of Occupational Regulation*, 28–29, 35–36.

[42] Cox and Foster, *The Costs and Benefits of Occupational Regulation*, 37.

[43] Shepard, "Licensing Restrictions and the Cost of Dental Care," 188–94.

[44] Institute for Justice website, http://ij.org/pillar/economic-liberty/?post_type=case.

[45] Especially given the explosion of online ratings services; see Treasury et al., *Occupational Licensing*, 34–35.

A. What form is compensation to take?

It is important to see, first of all, that compensation for takings can be either *in cash* or *in kind*.[46] The road that connects A's farm to the marketplace may be worth at least as much to A as the easement taken, so that the resulting road is in-kind compensation for the taking.[47] Further cash compensation may overprotect A, by making the road harder for the public to provide.

Compensation in cash and in kind are not mutually exclusive, since in-kind benefits may be less than the full value of the taking.[48] That said, too strict an accounting of A's gains and losses can overprotect A too. For a like taking, B may benefit more than A does; C may benefit for no taking at all. Even so, when the marginal benefits of takings remain very large, A will do better not to get in the way. Rectifying differential gains and losses is costly, and is worth doing only as marginal benefits diminish.[49]

B. When is compensation for takings to be made?

Since taking from A is supposed to benefit A, all takings should be compensated. But it is important to see that A's neighbor B *also* benefits from a restriction that makes it less perilous for A to do, to create, and to possess things that other people value, which is how humans create prosperity. Even when a taking benefits the whole public, some member of the public must pay disproportionately more. Turning it into a grave misfortune for anyone to have what enough others want is a practice that makes losers of all of them in the greater scheme of things.

Universal compensation also protects the community from takings that move resources to lower-valued uses; even good intentions can destroy wealth when they don't have to pay their own way. Consider the 1992 Supreme Court case *Lucas v. South Carolina Coastal Council*.[50] When the Council rezoned beachfront property to prevent new construction, the combined value of Mr. Lucas's two undeveloped lots fell from $1,200,000 to almost nothing; the Supreme Court found that Lucas was owed compensation under the takings clause. Question: if the rezoning—which just is an alteration of protected liberties—was for public use, should the public have to compensate Lucas for what the public had (let's suppose) good reason to do?

Yes, as the sequel of the case illustrates. After purchasing Lucas's two lots, the Council sold them—to a housing developer—for $392,500 each, even though a neighbor had offered $315,000 for one of the lots in order to keep it undeveloped. The Council's purpose may have been public

[46] See Epstein, *Takings*, chaps. 13–14.
[47] See Epstein, *Takings*, chap. 14.
[48] See Epstein, *Takings*, 204. See also Michelman, "Property, Utility, and Fairness," 1168–69, 1171–72.
[49] Fischel, *Regulatory Takings*, chap. 2.
[50] *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992).

use, but when public money was on the line, the Council decided $77,500 per lot was too much to pay for that use, even after arguing before the Supreme Court that $600,000 per lot was not too much when Mr. Lucas's money was on the line.[51] Even for public-use takings, a universal compensation rule therefore serves as a safeguard against moving property rights from higher- to lower-valued uses.[52]

The reason for a takings power is, again, to make everybody better off for the licensed transfers, and the reason to compensate for takings is that *that* way of licensing transfers is what it takes to make everybody better off in the greater scheme of things. Put another way, even A can benefit from an institution that transfers freedom from A to B, but even B loses from an institution in which A is not compensated for the transfer.

C. What is the appropriate level of compensation?

The reasons to compensate are also reasons to compensate *completely*. Providing public goods may benefit everybody (an in-kind compensation), but any residual cost of provision is still a taking. For the same reason, the cost of a taking must be reckoned at the market value of what is taken, as it was prior to the taking; otherwise, the power to compensate below market value becomes a power to take at a discount at someone else's expense.[53]

D. Licensing and compensation for takings

Recall that the standard rationale for licensing is that it can pay its own way, compensating everybody—even workers excluded by the license—with enormous in-kind benefits of improved general health and safety. To be sure, licensing has high administrative costs, it raises prices, and it makes providers scarcer; but the transfer of certain freedoms to use and dispose of labor from workers to consumers moves them to where they are ultimately more valuable for everyone. The case for this rationale is strong for workers like Emergency Medical Technicians (EMTs), where nothing short of licensing would create those benefits. But when states can require cosmetologists to complete an average of 372 hours of training, as compared with 33 hours for

[51] Fischel, *Regulatory Takings*, 59–61. See also Epstein, "*Lucas v. South Carolina Coastal Council*," *Stanford Law Review* 45 (1992–93).

[52] Cf. Epstein, "Physical and Regulatory Takings," *Stanford Law Review* 64 (2012): 101; Richard Epstein, "The Harms and Benefits of *Nollan* and *Dolan*," *Northern Illinois University Law Review* 15 (1995): 486; "The Seven Deadly Sins of Takings Law," 973; Fischel, *Regulatory Takings*, 144.

[53] Fischel, *Regulatory Takings*, chap. 2. By contrast, Michelman ("Property, Utility, and Fairness") argues that a public project should proceed without compensation when the administrative and other costs of compensating would dissipate the net benefits of the project. This approach, it seems to me, takes the locus of justification to be the particular *taking*, and not the *institution* that licenses taking according to Michelman's rule.

the average EMT,[54] it is no surprise that licensing yields few benefits in quality. It is difficult to deny that in the end, such licensing for no public use is a net transfer from both consumers and excluded workers to protected incumbent workers and salons. To the extent that any in-kind benefits of the taking are insufficient compensation for the taking, the licensing requirement transfers freedoms to use and dispose of labor from higher- to lower-valued uses.

This too has been the pattern in the United States.[55] Licensed workers often earn a substantial premium over their unlicensed counterparts, even after controlling for other variables.[56] Worse, such premiums are regressive: premiums rise disproportionately in higher-paying occupations, and meeting licensing requirements is hardest for the least advantaged, such as poor workers and workers with a criminal record.[57] Unlicensed workers also face lower rates of employment and employment growth, compared with licensed workers performing similar work.[58] Some licensing requirements protect only those incumbents in a given state, by requiring minimum residency periods, or by rejecting licenses from out of state. These requirements make it harder to move for work,[59] which is especially burdensome for military spouses and immigrants.[60]

[54] Dick Carpenter II, Lisa Knepper, Angela Erickson, and John Ross, *License to Work* (Institute for Justice, 2012, http://ij.org/report/license-to-work/). Ironically, it is in all likelihood not in spite of the higher stakes for EMTs that training hours are shorter, but precisely because of the higher stakes: legislatures have much more to lose by making EMTs scarce than by making cosmetologists scarce.

[55] For an overview of the effects of licensing on the labor market, see Treasury et al., *Occupational Licensing*; see also Mary Gittleman, Mark Klee, and Morris Kleiner, "Analyzing the Labor Market Outcomes of Occupational Licensing," National Bureau of Economic Research 2015 (http://www.nber.org/papers/w20961).

[56] Kleiner, "Occupational Licensing," 194–96; Kleiner and Kudrle, "Does Regulation Affect Economic Outcomes?"; Kleiner and Krueger, "The Prevalence and Effects of Occupational Licensing," 681–84; Kleiner and Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market," 173–74, 185–94; Gittleman et al., "Analyzing the Labor Market Outcomes of Occupational Licensing"; Kleiner and Vorotnikov, "Analyzing Occupational Licensing Among the States," 143–46.

[57] Kleiner, "Occupational Licensing," 196; Treasury et al., *Occupational Licensing*, 12, 35–36; Patrick McLaughlin and Laura Stanley, "Regulation and Income Inequality," Mercatus Center, 2016, https://www.mercatus.org/system/files/McLaughlin-Regulation-Income-Inequality.pdf; Kleiner and Vorotnikov, "Analyzing Occupational Licensing Among the States," 146–50; Nila Bala, "Occupational Licensing Locks Too Many Americans out of the Job Market," *The Hill*, 4 January 2018, http://thehill.com/opinion/criminal-justice/367444-occupational-licensing-locks-too-many-americans-out-of-the-job.

[58] Shepard, "Licensing Restrictions and the Cost of Dental Care"; Kleiner, *Licensing Occupations* (Kalamazoo, MI: Upjohn Institute for Employment Research, 2006); Morris Kleiner and Kyoung Won Park, "Battles Among Licensed Occupations," National Bureau of Economic Research, 2010, http://www.nber.org/papers/w16560; Kleiner and Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market," 178; Gittleman et al., "Analyzing the Labor Market Outcomes of Occupational Licensing."

[59] Shepard, "Licensing Restrictions and the Cost of Dental Care," 188-89; Kleiner, "Occupational Licensing," 193; Janna Johnson and Morris Kleiner, "Is Occupational Licensing a Barrier to Interstate Migration?" Federal Reserve Bank of Minneapolis, 2017, https://www.minneapolisfed.org/research/sr/sr561.pdf; Treasury et al., *Occupational Licensing*, 39–40, 64–66.

[60] Treasury et al., *Occupational Licensing*, 38–39.

Where the stakes are low, where transaction costs are low, or both, transferring liberty from workers to consumers via licensing is a taking of property from excluded workers for at best insufficient in-kind compensatory benefits. Where stakes are low, the taking is a net loss for the excluded worker, even if transaction costs are high. Where transaction costs are low, consumers and providers can negotiate tradeoffs of credential and price, even if stakes are high.

Unfortunately, the legal treatment of licensing in the United States has been no more satisfying than its handling of the takings clause. Licensing routinely transfers wealth from consumers and excluded workers to incumbents, but lawmakers are seldom held accountable for such transfers, which usually go unseen and are always off-budget. The fact that it was in the 1950s that licensing began to expand throughout the United States is probably no accident, considering the Supreme Court's 1955 decision in *Williamson v. Lee Optical of Oklahoma, Inc.*, which upheld an Oklahoma law restricting the making, repair, and fitting of eyeglasses to licensed ophthalmologists and optometrists.[61] The Court's decision established a general deference to state legislatures to regulate work, requiring states to show only some rational basis for the regulation.[62] And states can almost always discharge this burden: for instance, in *Niang v. Carroll* (2018) the Court of Appeals for the 8th Circuit upheld a Missouri law requiring cosmetology licensing for hair-braiders, accepting with a straight face that the law "furthers legitimate government interests in health and safety."[63] Such lawsuits have had little success, whether tried under the due process and equal protection clauses of the Fourteenth Amendment[64] or under antitrust law (the Sherman Act);[65] and in general, licensing requirements once passed have been very difficult to repeal.[66]

[61] *Williamson v. Lee Optical of Oklahoma, Inc*. 348 U.S. 483 (1955).

[62] For discussion see Neily Clark, "Beating Rubber-Stamps into Gavels," *Yale Law Journal* 126 (2016), https://www.yalelawjournal.org/forum/beating-rubber-stamps-into-gavels-a-fresh-look-at-occupational-freedom.

[63] *Niang v. Carroll* 879 F.3d 870, 873 (8th Cir. 2018).

[64] See David Bernstein, "The Due Process Right to Pursue a Lawful Occupation," *Yale Law Journal* 126 (2016), https://www.yalelawjournal.org/forum/the-due-process-right-to-pursue-a-lawful-occupation-a-brighter-future-ahead; Amanda Shanor, "Business Licensing and Constitutional Liberty," *Yale Law Journal* 126 (2016), https://www.yalelawjournal.org/forum/business-licensing-and-constitutional-liberty.

[65] For example, *North Carolina State Board of Dental Examiners v. Federal Trade Commission* 135 S. Ct. 1101 (2015); see Neily, "Beating Rubber-Stamps into Gavels." Some suits have even been brought under the First Amendment, when the occupation has been one of communicating; see Neily, "Beating Rubber-Stamps into Gavels" and Shanor, "Business Licensing and Constitutional Liberty."

[66] Robert Thornton and Edward Timmons, "The De-licensing of Occupations in the United States," *Bureau of Labor Statistics Monthly Labor Review*, May 2015, https://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm.

E. Use, disposition, and compensation

If charges of arbitrariness and favoritism won't stick in cases like these—cases of meritless takings of rights of use and disposition of labor—it is hard to see what would, short of a substantial shift in judicial reasoning.[67] But for that very reason, it is important to work toward, if not a comprehensive, then certainly a unified understanding of the justificatory burden for all legislative transfers of property, whether that is property in land or whether it is "the property which every man has in his own labour."

Unfortunately, it is with respect to use and disposition of property that U.S. takings doctrine is especially in a shambles. The problem, in a word, is that the Supreme Court has no coherent framework for recognizing takings of use and disposition, as opposed to dispossession, and so treats restrictions on use and disposition only when they are so egregious as to be equivalent to dispossession. The failure began with the Court's very first effort on such takings, in *Pennsylvania Coal v. Mahon* (1922).[68] Pennsylvania Coal owned the right to mine underground, and H. J. Mahon owned the right to build on the surface. However, Pennsylvania Coal *also* owned the so-called support rights—that is, by contract the surface rights included no right against subsidence—whereas a new Pennsylvania law required mineral owners to guarantee support to surface owners, that is, to transfer their support rights, and thereby to bear enormous restrictions of their right to mine.[69] In his opinion for the majority, Justice Holmes wrote that the Pennsylvania law violated the takings clause because that law had gone "too far." But while Holmes's opinion sounds like a victory for protecting use, in fact it was a defeat: going "too far" meant restricting use so far as to wipe out so much value *as to be tantamount to dispossession*. Ever since, the Court has interpreted taking as dispossession *only*, and interprets restrictions on use and disposition as takings only when they are equivalent to dispossession. So, the Court's position has been that as long as restrictions of use and disposition leave an owner with some scintilla of value, there is no dispossession, and therefore no taking, and therefore no compensation.[70] Short of a total wipeout, rights of use and disposition are in the public domain.[71]

[67] See Bernstein, "The Due Process Right to Pursue a Lawful Occupation."

[68] *Pennsylvania Coal v. Mahon* 260 U.S. 393 (1922).

[69] It's tempting to call this law (the Kohler Act) an exercise of the police power, but it wasn't. Mines like Pennsylvania Coal were already supporting surface owners; the actual effect of the Kohler Act was to pressure mining companies into paying a tax (under the also-newly-created Fowler Act), as the price of retaining their support rights. See Fischel, *Regulatory Takings*, chap. 1; see also Epstein, "Why Is This Man a Moderate?" *Michigan Law Review* 94 (1996): 1761–62; Rose, "*Mahon* Reconstructed: Why the Takings Issue is Still a Muddle," *Southern California Law Review* 57 (1984).

[70] See Epstein, *Takings*, 50. This was the rationale stated in *Penn Central Transportation Co. v. New York City* 438 U.S. 108 (1978) and even in *Lucas*.

[71] See Epstein, *Takings*, 104. For criticism see Michelman, "Property, Utility, and Fairness," 1184–90, 1226–28, 1250–51; Epstein, *Takings*, chap. 17; Richard Epstein, "Takings Law Made Hard," *Regulation* (Winter 2009–2010); Fischel, *Regulatory Takings*, 1–2. For a more congenial

I have not tried to develop a theory of takings, but only to give some idea of how takings are framed when our focus is on what has to obtain for an institution of property, including takings, to create reciprocal benefits. It is an advantage of the approach to property and takings I have sketched here that, despite its humble bases, it is determinate enough to explain what is muddled about the Court's approach over the last century.

IV. Conclusion

Property is not a thing but a liberty to act plus a claim against interference, along with powers to alter those rights and immunities from such alterations by others. Property is taken when one is dispossessed of what one owns, and also when one is less at liberty to use and dispose of it. And the justification for takings of property is the benefit for those whose property is taken, in the greater scheme of things. This approach to property and takings, though minimal, is determinate enough to unify a wide range of public acts as takings of property, whether it is property in things or the property everyone has in his or her labor. My hope is that by understanding these public acts together, we might better frame our thinking about them individually.

I have focused on one such public act, the licensing of labor, as a taking of property in labor. Freedom to use and dispose of one's capacity to labor are property rights in one's labor (Section I). That property, I have argued, should never be taken by way of licensing except for public use (Section II), and such licensing as serves public use should be so beneficial as to provide complete in-kind compensation for those excluded (Section III).

Other public acts can be considered within the same framework as well, insofar as they alter rights of use and disposition of one's labor. For instance, an income tax restricts one to disposing of one's labor only with the permission of a public authority, obtained by paying a tax, which reduces the rate at which workers can convert their labor into consumption. *Contra* Robert Nozick, taxation of income from labor is not on a par with forced labor,[72] but on a par with restricted disposition—or rather, it *is* restricted disposition. Likewise, tariffs, import quotas, subsidies, barriers to competition, and price controls all reduce the conversion of labor to consumption by needlessly making consumption costlier. Minimum wage laws make it harder for the least productive workers to employ their labor (even when *total* unemployment remains unaffected); restrictions on educational options limit opportunities for making one's labor more productive in the first place. "Welfare cliffs" destroy the value of property

view of the Court's approach, see J. Peter Byrne, "Ten Arguments for the Abolition of Regulatory Takings Doctrine," *Ecology Law Quarterly* 22 (1995); William Michael Treanor, "Takeings," *San Diego Law Review* 45 (2008).

[72] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 169.

in labor through benefits that disappear as soon as one takes a job. Public deficit financing is a taking of property in the labor of future persons, since a deficit today is a tax tomorrow. The burden of justifying such policies just is the burden of justifying takings of property in labor, and so Bramwell's common-law insights about reciprocal benefits can provide a useful framework for the justification of a wide array of social policies.

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