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ARTICLES

Never Jam To-day: On the Impossibility of Takings Jurisprudence

JEANNE L. SCHROEDER*

"I'm sure I'll take you with pleasure!" the Queen said. "Twopence a week, and jam every other day."
Alice couldn't help laughing, as she said, "I don't want you to hire me—and I don't care for jam."
"It's very good jam," said the Queen.
"Well, I don't want any to-day, at any rate."
"You couldn't have it if you did want it," the Queen said. "The rule is, jam to-morrow and jam yesterday—but never jam to-day."
"It must come sometimes to 'jam to-day,'" Alice objected.
"No, it can't," said the Queen. "It's jam every other day: to-day isn't any other day, you know."
"I don't understand you," said Alice. "It's dreadfully confusing!"
"That's the effect of living backwards," the Queen said kindly: "it always makes one a little giddy at first—"1

The jurisprudence that has developed under the takings provisions of the Fifth2 and Fourteenth3 Amendments to the U.S. Constitution is a top contender for the dubious title of "most incoherent area of American law." A LEXIS search will produce hundreds of recent articles attempting to reconcile, critique, or condemn Supreme Court takings jurisprudence or to justify, reinterpret, or re-imagine the underlying theory of property.4

This article will, therefore, spare the reader yet another exegesis of the case law of takings. Nor will I survey the literature on takings, if for no other reason than that it is so copious that it is impracticable to do so. Nor will I take either of the two dominant analytical approaches to takings: (1) the "conservative"

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. A somewhat different version of this article will be part of a chapter in JEANNE L. SCHROEDER, THE VESTAL AND THE FASCES: PHILOSOPHIC AND PSYCHOANALYTIC PERSPECTIVES OF THE FEMININE AND PROPERTY (forthcoming 1996) [hereinafter SCHROEDER, THE VESTAL AND THE FASCES]. I would particularly like to thank David Gray Carlson, Jack Williams, and the students of the "Hegel's Logic" Seminar, Cardozo School of Law, Spring 1996.


2. The Takings Clause reads "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

3. The Takings Clause of the Fifth Amendment applies to the states by incorporation under the Fourteenth Amendment. See Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

4. Presumably, there are many hundreds of earlier articles and notes not available on LEXIS.
approach, which accepts some form of traditional property jurisprudence and then proposes how to rationalize or reconcile the case law; or (2) the "progressive" approach, which argues for a substantial reconceptualization of property concepts on the grounds that the traditional approach is incoherent and/or an intolerable barrier to beneficial government regulation.

What I will do is, first, defend the coherence of the notion of property, the necessary role of private property rights in the actualization of human freedom and, therefore, the importance of protecting property rights from the government. Second, I will show the impossibility of an "objective" test or algorithm for when government regulation does or does not constitute a taking. Property is not a natural right but one which can exist only in an organized society. The determination of property's boundaries can be made only through pragmatic reasoning and will always be a matter of politics. As a result, the Takings Clause cannot alone accomplish the task traditionally assigned to it of serving as the bulwark that protects private rights from oppression by the public sphere of the state.

These two viewpoints are consistent because I do not approach property analysis from any of the classical liberal schools of political philosophy and jurisprudence or from a Marxian-influenced critique associated with many critical schools of thought. I adopt a property analysis based on the political philosophy of G.W.F. Hegel. This analysis explains what classical liberalism can identify only as an embarrassing paradox: private property is not itself a natural right of man but, nevertheless, is logically necessary for man's essential freedom.5

In the retroactive logic of the Hegelian dialectic in which—as the White Queen put it—we live backwards, it is logically impossible to identify the moment at which the quantitative change of a diminution of property rights becomes the qualitative change of a destruction of property rights. Therefore, at any given moment we can only see that a taking either has not yet occurred, or has already occurred. It is always jam tomorrow or jam yesterday, but never jam today. Consequently, because we cannot rely on logic to identify the exact moment when a regulation becomes a taking, we must turn to pragmatism to adopt general standards and prophylactic rules.

I shall show, however, that this difficulty is not only consistent with, but necessary to, Hegel's conception of freedom. The failed encounter of property law seen in the dialectics of takings reflects a general failure and negativity,

which lies at the heart of subjectivity and law. And yet, it is precisely this negativity which opens up room for human freedom to actualize itself by going beyond the limit. Freedom cannot be bound by a pre-existing "objective" rule; we must always leave space for subjectivity.

I. HEGELIAN PROPERTY

Hegelian jurisprudence is not antiliberal, but extraliberal. By this I mean that Hegel did not reject the principles of classical liberalism. Rather, he started his analysis with classical liberalism, but showed that it was incomplete. He agreed with liberals that individualism, autonomy, and negative liberty are true, authentic, and fundamental aspects of human nature necessary for the actualization of human freedom. He argued, however, that they are not the only true and authentic aspects of human nature and, therefore, cannot be the sufficient conditions of freedom.

For Hegel, subjectivity—the capacity to bear legal rights—can only be achieved in what psychoanalytic philosopher Jacques Lacan called the "Symbolic"—the order of law and language. By this I mean that the Hegelian


7. This is an article on neo-Hegelian philosophy, not liberalism. I am using "classical liberalism" as a catch-all term for a variety of political, economic, and jurisprudential philosophies that have developed since the eighteenth century and which consider the free-standing, individualistic, atomistic, and self-interested aspects of human nature to be either natural, pregiven, essential, or otherwise authentic in some significant way. Liberalisms tend to hold that human beings are in some way fundamentally deserving of equal dignity and are endowed with some forms of natural rights. Social organization of these essentially atomistic beings is justified typically through some concept of a hypothetical social contract entered into in some form of a state of nature. Political freedom is usually conceptualized as a negative liberty from interference by others, rather than as a positive entitlement to something. This is not to suggest that many modern theorists who would identify themselves as working within the liberal tradition do not also recognize other values, such as a communitarian or social side of human nature, or some concepts of positive freedom. Nevertheless, this crude caricature is sufficient for the very limited purposes of this article.

Because I am using the term "liberalism" in the sense of classical liberal philosophy, I will use the term "progressives" to designate those left-leaning scholars who are often called "liberals" in colloquial English.


9. Lacan, whose psychoanalytic theory is deeply influenced by Hegel's philosophy, divided the consciousness into three orders: the Symbolic, the Imaginary, and the Real. See STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 33 (1983); Jacqueline Rose, Introduction II, in JACQUES LACAN, FEMININE SEXUALITY 27, 31 (Juliet Mitchell & Jacqueline Rose eds. & Jacqueline Rose trans., 1983). I have written about these orders extensively elsewhere. See Schroeder, The Vestal and the Fasces, supra note 5; Schroeder, Bundle-O-Stix, supra note 5; Schroeder, Virgin Territory, supra note 5. A complete exegesis is beyond the scope of this article. For present purposes it is sufficient to know that the "Symbolic" is the order of law, language, and subjectivity. For an excellent, albeit
subject (the legal actor) and law are mutually constituting. It is precisely the moment of the institution of law as abstract right (which includes property and contract) that is the moment of the creation of legal subjectivity as intersubjectivity. That is, to Hegel, the abstract person in the "state of nature" is not yet a "subject" in the jurisprudential sense of a being capable of bearing legal rights and being bound by legal duties. The abstract person can only achieve this capacity (subjectivity) through relationships with other legal actors (subjects) who recognize him as one of their own (hence the term "intersubjectivity"). This means that although property does not pre-exist society pursuant to natural law, neither is it the mere creature of positive law. Freedom requires property, but property and law require each other. Consequently, unlike liberalism, freedom also requires society even as it requires autonomy.

A. THE ABSTRACT PERSON

As a German scholar working in the early nineteenth century, Hegel started his political analysis from the version of liberalism developed by Immanuel Kant, rather than from those versions more familiar to American lawyers developed by John Locke, Thomas Hobbes, Jean-Jacques Rousseau, and Jeremy Bentham. Nevertheless, Hegel is relevant to American jurisprudence because these theories all share a belief in the concept that is the starting moment of Hegel's critique—the notion of authentic human nature as containing elements of autonomy, self-standing individualism, and a natural right to negative liberty. Kant serves as an excellent starting point for the critique of liberalism precisely because he takes this shared notion of the autonomous individual in the state of nature to its logical extreme.

To oversimplify, Hegel agreed with Kant that the most basic, simplest, and most abstract (and, of course, least adequate) notion of what it could mean to be a person is the notion of self-consciousness as free will. To be free is to be the


10. Schroeder, Virgin Territory, supra note 5, at 139-40. By "law" I am referring to law as Recht, abstract right. Positive law (Gesetz) is not written until the higher stage of development that Hegel calls civil society is reached. See infra note 74.

11. Seyla Benhabib gives an excellent account of the difference between Hegel and liberal social contract theory. Essentially, liberal theory presumes a pre-existing individual with the capacity to enter into contract. Hegel insists that contract, and hence the ability to be a legal subject capable of contract, can only exist in a market society. Seyla Benhabib, Obligation, Contract and Exchange: On the Significance of Hegel's Abstract Right, in STATE AND CIVIL SOCIETY, supra note 8, at 159, 162-70.

12. Hegel's imperative of abstract personality—"[b]e a person and respect others as persons"—is "consciously modelled on Kant's categorical imperative." SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 137 (1972). One should not assume from this, as Margaret Jane Radin does, that Hegel was simply agreeing with Kant as to human nature. See Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 971 (1988) [hereinafter Radin, Property and Personhood]. Rather, as I discuss in this article, Hegel started with the Kantian construct as a temporary presupposition as part of an argument that the construct is only one true moment in human nature. Consequently, The Philosophy of Right should be read as an extended critique of Kant.

13. See HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 67-68.
means to one's own ends, rather than the means to the ends of another. The Kantian construct is a totally negative notion of personhood. To be free means not to act under compulsion. This means that in order truly to have free will, the person can have no needs, desires, relations, or other pathological characteristics. It also means that pure freedom is totally arbitrary—if the person acted for a reason, it would be bound by that reason, and not be free. The person at the start is, therefore, a pure negativity. This might initially seem depressing because in our society we tend to identify the negative as the opposite of the affirmative, and, therefore, as that which is bad. But, as I shall emphasize, the Hegelian concept of negativity can be seen as hopeful and, indeed, as the very basis of human freedom. The negative and the affirmative require each other. Pure negativity becomes not nothing, but, rather, pure potentiality. It is the very possibility and, therefore, the ability to grow, create, and love.

To Hegel, the abstract negative person as free will contains an internal contradiction that sets the engine of the dialectic in motion. That is, the self-consciousness as free will on the one hand has positive existence, but on the other hand has no positive attributes and is pure negativity. As such, even though the free will is on one hand an individual, on the other hand, it is indistinguishable from all other individuals and, therefore, is not individual. Moreover, to be truly free the person must be beyond desire, yet, as Hegel explained in the *Phenomenology of Spirit*, self-consciousness as negativity is nothing but desire.

**B. THE CONCRETE PERSON**

Hegel argued that the abstract person can only overcome this contradiction and achieve the initial stage of subjectivity by being recognized as a legal subject by a person it recognizes as a legal subject. As I have put it elsewhere, to Hegel, subjectivity is intersubjectivity mediated by objectivity. For Hegel,
property serves as this initial mediator. Although this struggle for recognition is described as a matter of necessity, this should not suggest that we experience this process as one of cold logic.\(^{21}\) According to the reasoning of the dialectic, abstract concepts must be manifested or actualized in concrete “actual” form. This is one of the meanings of Hegel’s (wrongly) notorious assertion that “[w]hat is rational is actual; and what is actual is rational.”\(^{22}\) If the Kantian construct is defined as abstract free will, then, in order for the concept of freedom to have “meaning”—i.e., determinate being—it is logically necessary that the abstract person become a specific, concrete individual with positive existence. Because this can only be achieved through recognition by another, the person is driven by an insatiable desire for the other. To Hegel, the search for love rules man’s universe.

The struggle for recognition is part of the dialectic of self-consciousness. Self-consciousness for Hegel is desire . . . .

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the other. Either of these results destroys what Hegel believes to be the logic of personality—to be recognized as a person and to actualize one’s freedom. Consequently, as we shall see, in order simultaneously to assure mutuality and relationship, while yet preserving the individuality and freedom of each person in a relationship, the relationship needs a buffer or “mediator.” An analogy is the Christian concept that the relationship between God and Man in the state of sin must be mediated by Christ.

To Hegel, property is one such mediated relationship. In property, the mediator is the owned thing or res of property. In philosophic terms, this owned thing is called an object. Consequently, subjectivity is intersubjectivity mediated by objectivity. For an extended discussion of the necessity of separation, see generally Schroeder, Virgin Territory, supra note 5; and for a discussion of the necessity of mediation, see generally Schroeder, Bundle-O-Stix, supra note 5.

21. Of course, to say that it is logically necessary for the free abstract person to actualize its freedom in concrete existence sounds like the abstract person is not free at all but bound by necessity. This misunderstands the retroactive nature of Hegel’s logic. He is considering the concept of the abstract free person retroactively from the position of a concrete individual situated in society. He is asking, “How did we get here from there?” And he is concluding not that it had to happen this way, but that it must have happened this way.

To use a lurid but vivid example I have used elsewhere, from my standpoint sitting here at my computer in the Spring of 1996, it is logically necessary for my parents to have had sexual intercourse sometime around September 1953. But what could have been more free and contingent from my parents’ point of view back then?

This is why Radin was wrong in accusing Hegel of “assuming away” concrete characteristics in positing the abstract person. See Radin, Property and Personhood, supra note 12, at 971-72, 974, 977. As I explain elsewhere, see Schroeder, Virgin Territory, supra note 5, at 131-33, Hegel does not “assume away” any human characteristics. Rather, he “abstracts from” them. By this I mean that he presupposes the existence of complex individuals, and then retroactively attempts to derive the logical process by which they come into being.

This is not to suggest that there is no necessity in Hegelian logic. As I shall explain at length, according to Hegel’s dialectic logic, abstractness or pure potentiality is at another moment identical to concreteness or actuality. That is, abstract free will is at one moment the same thing as its actualization in social life, and concrete social life is at one moment the same thing as its potentiality as abstract free will. At another moment, however, potentiality and actuality are totally separate. Moreover, the argument that a result is logically required does not necessitate any prediction as to the actual empirical result.

22. Hegel, Philosophy of Right, supra note 6, at 20. Avineri provides an excellent explanation of the meaning of this phrase based on Hegel’s concepts of “rationality” and “actuality.” See Avineri, supra note 12, at 126-27.
Indeed, once it is understood that the aim of desire is the preservation of self-consciousness, then it seems logical to conclude, as Hegel does, that self-consciousness can only achieve satisfaction in another self-consciousness. If desire seeks to maintain identity, then self-consciousness must seek an object which provides it with recognition. And the only object which can provide recognition to a self-consciousness is another self-consciousness. 23

To state it another way, Hegel’s analysis of property and subjectivity is desperately erotic. Although abstract freedom requires that a person have no desires, actualization of freedom requires that a person give way to the desire that is the essence of self-consciousness. The problem is that even while the abstract person now desperately desires to be recognized by others, the abstract person is unrecognizable: being purely negative, it has no identifying characteristics. 24 This is why I have been referring to the abstract person as “it.” To be recognized, the abstract person must take on external differentiating characteristics. This takes place through a process that develops into property and law.

C. PROPERTY

External characteristics are “objects.” An “object” in philosophical discourse is anything external to, or differentiated from, the “subject” (in this case, abstract personhood). 25 As in the classical liberal jurisprudence reflected in the writings of Madison and the other Federalists, 26 these potential “objects” of

23. See Rosenfeld, Dialectics of Contract, supra note 8, at 1220-21. See generally Schroeder, The Vestal and the Fasces, supra note 5; Schroeder, Virgin Territory, supra note 5.
24. See Hegel, Philosophy of Right, supra note 6, at 70; Brudner, supra note 17, at 19, 38.
25. See Hegel, Philosophy of Right, supra note 6, at 73-74; Peter Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 CARDOZO L. REV. 1077, 1164 (1989); Jeanne L. Schroeder, Subject: Object, 47 U. MIAMI L. REV. 1, 50-55 (1972) [hereinafter Schroeder, Subject: Object]. Some critics chide Hegel for adopting a strict subject-object distinction. See, e.g., Radin, Property and Personhood, supra note 12, at 1892-94. One should note, however, that at this stage, given the definition of abstract personhood, the subject-object distinction is merely a logical truism. Precisely because the abstract person lacks identification with an object, it is alien to the object. This would be trite, except for its corollary. The very movement of the dialectic will reveal the internal contradiction of the subject-object distinction. Consequently, as the person is objectified (by taking on individuating characteristics) and develops first into a legal subject and eventually into a complex, concrete individual, the subject-object distinction must, by definition, become sublated into a complex, concrete interrelationship.

Madison did not . . . have a simple conception of property as land or even material goods. The “faculties for acquiring property” emphasized a subtle, nonmaterial dimension of property. . . . Madison’s concept of property thus had a modern, sophisticated quality that went far beyond the focus on land that we associate with the traditional image of the yeoman farmer.

JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 30 (1990). Nedelsky’s interpretation of Madison’s notion of property is not quite as broad as McGinnis’s, however. “While Madison did not use the term property to stand
property are not limited to actual physical things such as land and cattle, or even intangibles such as debts and intellectual property. They also include whatever is necessary for concrete personality: one's body, beliefs, opinions, talents, etc. 27

Hegel's analysis makes clear, however, that the Lockean liberal notion of property as a natural right of the individual that is prior to society and the law is incoherent. 28 Each of the rights of property necessarily presupposes the existence of others in society and can come to full actualization only in legal relationships. Property cannot be a right of a truly abstract autonomous presocial individual, because property requires interrelation and mutual dependence. We desire the objects of property not for their own sake, but derivatively as means to our true desire—the desire of and for other persons.

The development of the immediate subject-object relationship (of the owner and property), which eventually allows for the mediated subject-subject relationship of mutual recognition, requires three moments which correspond to the three traditional property rights of possession, enjoyment, and alienation. 29

1. Possession

The logical first element of property is possession 30—the identification of an identifying characteristic (object) with a specific person (subject). To have possession of something is to have "external power over" it so that the will is embodied in it. 31 It is "man's physical and anthropological capacity to appropriate externality for human purposes." 32 This may at first blush seem individualistic, but it actually requires the existence of others. The person takes possession of property so that he can become recognizable by other persons. Possession of an object by one person can only be understood in terms of the exclusion of others from the same object. 33 That is, the only way to identify an object to this person is in terms of not identifying it to that person. This is the familiar concept (often associated with Wesley Newcomb Hohfeld) that property—like all legal rights—can only be understood as a relationship among legal subjects. 34

for all individual rights (as in the Lockean sense of life, liberty, and estate), the reverse often appears to be the case: when Madison spoke of individual rights, it was property he had in mind." Id. at 23.

27. See Hegel, Philosophy of Right, supra note 6, at 74-75; Benson, supra note 25, at 1164.
29. See infra text accompanying notes 30-53.
30. Hegel, Philosophy of Right, supra note 6, at 76-88; Brudner, supra note 17, at 23.
31. Hegel, Philosophy of Right, supra note 6, at 76.
32. Benhabib, supra note 11, at 171.
33. "[T]aking possession confers the title of property only if the individual is situated in a context of social relations that legitimize this act." Id. at 172.
34. See Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 65-115 (Walter W. Cook ed., 1919). Thomas Grey labels the view of property as a bundle of rights the "specialist" definition of property used by lawyers as opposed to the lay definition of the thing owned. Thomas C. Grey, The Disintegration of Property, in NOMOS XXII, Property 69, 69 (J. Roland Pennock
Although the English word "possession" (and its German cognate used by Hegel) carries the unfortunate connotation of immediate physical custody of tangible things, Hegelian possession is not so limited. Physical custody is merely one possible way to actualize possession. Indeed, because it is the most determinate form of possession, it is the most inadequate—a brute fact easily defeated by a brute. For possession to serve its function, it must be intelligible by others. One can possess an object more adequately through "marking" or changing it. Elsewhere I have suggested that a more accurate term for Hegelian possession might be "objectification." It is the requirement that a claim to property be made "objective" in the sense of intersubjectively recognizable.

2. Enjoyment

Mere possession as identification and exclusion is problematic. The person takes possession of objects to establish personality, but mere identification of person with object does not in and of itself enable the person and the observer to distinguish between the person (the subject) and the object. The person thereby asserts mastery as subject over the object by enjoying it. In other words, within the dialectic of property, the person does not seek to possess an object in order to enjoy it. Rather, the abstract person is driven to possess the object because it desires others. It is only upon possession of the object that he (who is now in the process of becoming a concrete person) is driven to enjoy it. The exact manifestation of enjoyment obviously depends on the specific object—food can be eaten, debts collected, the sensuous pleasures of the body experienced, etc.

Enjoyment is the most solipsistic element of property in that the subject turns

& John W. Chapman eds., 1980) [hereinafter NOMOS XXII]. I have criticized this view on two grounds. First, the notion of property as rights was not only not invented by Hohfeld, it is not particularly modern. Second, and more importantly, Hohfeld and Grey's definition of property is deficient in that it fails to recognize that, although property rights are of course always rights among legal subjects, what distinguishes them from other rights is that they relate to the control over objects. Schroeder, Bundle-O-Stix, supra note 5, at 271-302.

35. See HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 84-85.
36. See Benson, supra note 25, at 46.
37. See HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 85-86.
39. I have called this definition of objectivity as intersubjectivity "Community Objectivity." It is found in many disciplines in addition to law, including the philosophy of science. See Schroeder, Subject: Object, supra note 25, at 17-24.
40. See HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 88-89.
41. This does not mean that Hegel ignores the empirical fact that people often seek to enjoy objects in order to satisfy physical or emotional needs. We all need to eat. Hegel's point is that property relations to objects can not be reduced to these sensuous relations. See Schroeder, Bundle-O-Stix, supra note 5, at 266-70.
inward to the object. Enjoyment is, therefore, inadequate. It is masturbatory: the eros of personhood is for social intercourse. Solitary enjoyment also implicitly presupposes the existence of others who must be excluded so that the object can be enjoyed, and who must observe if property is to fulfill its purpose. But without mutual recognition, the enjoyer remains virgin and sterile, while the observer is reduced to perverse voyeurism.

The danger of enjoyment is dependence upon the object. Rather than being the means to his own ends (the definition of freedom), the person risks becoming subjected to the ends of the object. Because the enjoyer only has positive existence through enjoyment of his object, he is an addict who is a slave to, and lives only for, the object. This is inconsistent with the free nature of the person and with the function of property, namely the actualization of that freedom. So long as the person remains fascinated by the enjoyment of the object, he cannot turn to others.

These contradictions cannot remain. The person possessed the object in order to actualize his freedom by becoming recognizable. In order to establish his mastery over the object, he subjected it to his will through enjoyment. But by doing so, he became the slave of the object. He must rid himself of the enslaving object. But if he were to try to free himself by abandoning the object, he would lose the identifiability that is necessary for recognition and concrete freedom.

3. Alienation

The initial contradiction of property is sublated in contract. This is the logical first moment when abstract persons are able to recognize each other and become legal subjects. The person cannot remain in lonely enjoyment but must extricate himself from the trap of objectivity. Simple abandonment of the object is a self-defeating retreat back into abstraction and away from recognizability. The person must, therefore, find a way of untangling himself from the object, while simultaneously maintaining sufficient connection to it to remain recognizable. This enables him to enter into a relationship of mutual recognition by another person.

Although superior to abandonment, gift is, surprisingly, inadequate to this function. True, in gift the donee can recognize the donor as a person with identifying characteristics who is indifferent to the object given and is therefore free in the sense of being a means to his own ends. The problem is that the donee’s recognition does not “count.” This is because in gift, the donor treats the donee as the means to the donor’s ends of achieving freedom. The donee does not herself exercise subjectivity in receiving the gift—she is literally the

42. See Brudner, supra note 17, at 31-33.
43. See id. at 31.
44. See id. at 34.
45. See id.
46. See id.
object of the donor's affection. The donor can not requite the donee's love precisely because he has selfishly demanded love from her rather than helping her become loveable. How often have we seen this failed dialectic played out in actual "love" affairs?

Because the donor does not achieve his goal of being recognized by another subject, he also fails in achieving the subjectivity he desires. Instead of achieving the self-other relationship of mutual recognition, the donor remains in a subject-object relationship. Moreover after the gift is made (as in abandonment), the giver is once again left without an identifying object in his possession. He squandered his object in a failed attempt at recognition and is once again left unrecognizable.

D. EXCHANGE

The only way of making a person loveable is to love her—to recognize her as a subject worthy of recognition. In exchange—i.e., contract—one person does not give an object to the other; two persons exchange objects. Not only is the first party thereby recognized as a free subject by the counterparty, the counterparty is simultaneously recognized as a free subject by the first party because the counterparty is also alienating an object. Because in contract the two parties are briefly united in a common will—the agreement to engage in the

47. Although we tend to think of gifts as benevolent, from a Hegelian property analysis they are parallel to the malevolent relationship described in Hegel's famous lord-bondsman dialectic. The lord, seeking recognition, enslaves a bondsman who is forced to bow down in obeisance. This does not have the desired result, however, because the lord has reduced the bondsman to a degraded state. By enslaving the bondsman, the lord has refused to recognize the bondsman as an equal human being whose judgment counts. Or, to put it the other way, the lord can only maintain his status as a lord by refusing to recognize the bondsman as a human being. The recognition by the bondsman is unsatisfying precisely because the lord craves admiration from someone better than himself, yet the lord can not allow himself to admit that the bondsman is even his equal. HEGEL, PHENOMENOLOGY OF SPIRIT, supra note 19, at 114-21.

Similarly, admiration which is bought—as in the case of gift—is suspect. We despise those who take bribes. Consequently, there is something unsatisfying in the recognition of thanks precisely because we do not really admire another person when he is thanking. It is a servile act. By demanding love, rather than giving it, the donor, like the lord, reduces the donee, like the bondsman, to an inferior position. The donee whose love is demanded is perceived as pathetic and clinging, and not loveable. This is why the seducer's desire turns to loathing the moment his paramour asks "When will I see you again?"

This is not to imply, of course, that gifts never have benevolent social functions. Rather, the relationship of gift does not further the specific function assigned to property, namely the creation of legal subjectivity.

48. For simplicity, in this article I use the term "contract" to describe its more complete manifestation in exchange. Hegel, however, was careful to recognize that even gift has a contract aspect. "A contract is formal in so far as the two acts of consent whereby the common will comes into being—the negative moment of the alienation of a thing ... and the positive moment of its acceptance—are performed separately by two contracting parties: this is a contract of gift." HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 106. The gift contract is, however, inadequate to the function of mutual recognition precisely because the two parties do not both share the two moments of contract.

49. This is as much the case in services contracts as in sales contracts. The services performed are as much an object (in the sense of being separable from the concept of personhood) as the money paid.

50. See HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 70.
Neither is reduced to the subhuman level of a mere means to the ends of the other. This is the moment of mutual recognition between subjects, a moment that can only be achieved through the mediating object in the relationships known as property, contract, and abstract law.  

Law is essential to this dialectic because it is through the recognition of rights that a person obtains the dignity of a subject. Law (i.e., property and contract) and the legal subject who is capable of contract are mutually self-constituting. The abstract person creates rights not so he can immediately claim them for himself, but so that he can accord them to the other in order to bestow on her the dignity of subjectivity so that she may in turn recognize him and return the gift of subjectivity.

E. SUBLATION

Unlike liberal philosophers, Hegel does not stop with the recognition of individualistic subjectivity and the negative liberty of property rights. I have been describing the Hegelian dialectic in terms of desire and love, but the relationship achieved at the level of abstract right is only the cold impersonality of the marketplace. As its name suggests, abstract right is the most abstract, and therefore the least adequate, form of human relationships. Consequently, it is only the first necessary step in, and not the culmination of, the development of the personality and the actualization of freedom. This is why the last two-thirds of Hegel's *The Philosophy of Right* concern how abstract right is sublated into the more adequate relationships of morality, which in turn is sublated into ethical life, thereby enabling the development of a complex individuality within a complex society. This means that, in contrast to utilitarian liberalism, Hegelianism refuses to analyze all human relations in terms of economic man interacting in the marketplace. This also means that, in contrast to the dictates of libertarian liberalism, property rights cannot be absolute. Property rights will be necessarily limited not only by property's own internal limitations, but by the higher requirements of morality and ethics.

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51. *See id.* at 102-03.
52. *See id.* at 104-05.
53. As Hegel said:

> If someone is interested only in his formal right, this may be pure stubbornness, such as is often encountered in emotionally limited people . . . ; for uncultured people insist most strongly on their rights, whereas those of nobler mind seek to discover what other aspects there are to the matter . . . in question.

*Id.* at 69.

54. Brudner describes the relationship of contract as "the distorted image peculiar to persons who define their worth independently of all connection to others." *Brudner,* *supra* note 17, at 37.
55. *See AVINERI,* *supra* note 12, at 139. Indeed, to describe more complex relationships, such as marriage, in terms of contract is not just impossible; it is "disgraceful." *HEGEL, PHILOSOPHY OF RIGHT,* *supra* note 6, at 105.
56. As I discuss elsewhere, property is limited internally by its own logic, as well as externally by positive law. Because the logic of property is mutual recognition, those minimal "objects" which are
Nevertheless, it is a common, but serious, misreading of Hegel to assume that the fully developed Hegelian state can abrogate private property rights or private markets to serve other purposes (as in contractarian and egalitarian liberalism). Nor can the person lose his individuality and autonomy when he becomes a citizen of a Hegelian state. One cannot understand Hegelian theory without first grasping the dialectical process of "Aufhebung," which is usually inadequately translated into English as "sublation."\(^{57}\) I will discuss sublation in detail later in this article when I argue that sublation describes the process that takes place when a regulation becomes a "taking."\(^{58}\) At this stage, let me emphasize that sublation is not an evolutionary concept like survival of the fittest. The logically more primitive moments in the development of a notion are not replaced by the logically more advanced. Sublation is the process by which an earlier moment is preserved even as it is negated. Each moment of a concept is a true, authentic, and necessary moment which must always remain in existence. Each earlier stage contains the possibility of the next stage, and each later stage is the actualization of the earlier one.

F. THE PERMISSIBLE LIMITATION ON PROPERTY

We are now ready to pose the principal question of this article: If moral and ethical considerations require the limitation of property, but the dialectic logic of sublation demands that property be preserved, what degree of limitation of property is consistent with and necessary for the actualization of human freedom? This Hegelian question is identical to the liberal question of how to interpret the Takings Clause.

Hegel's answer is unfortunately, but inevitably, disappointing to the traditional consumer of law review articles. Logic can prove why it is necessary to make this distinction between permissible limitations of property rights and impermissible takings, but it cannot develop an algorithmic test that can locate the line dividing the two. This determination can be made only through pragmatic, rather than logical, reasoning and can only be established through positive law.\(^{59}\) Such pragmatic reasoning and positive legislation falls precisely necessary for recognizability—such as our personality and beliefs—must remain inalienable. This is why slavery is an abstract wrong. See Schroeder, Virg in Territory, supra note 5, at 140-49; see also Brudner, supra note 17, at 35-47; Jeanne L. Schroeder, Hegel's Subjects, Blackstone's Objects and Hohfeld's Ghosts: A Comment on Russell's Imagery of Slave Auctions, 18 CARDOZO L. REV. (forthcoming 1996). I discuss the necessity that the restrictions of positive law on property be limited in infra text. See also WESTPHAL, supra note 28, at 29, 32; Brudner, supra note 17, at 42-47.

57. I say inadequate because this obscure English term is not used in colloquial English and does not have the rich implications of the German. Although borrowed from chemistry, I have never seen it used in any context except in discussions of Hegelian influenced philosophy.

58. See infra text accompanying notes 117-31.

in the realm that liberalism calls "mere" politics. Consequently, Hegel agrees with liberals that a limitation on governmental " takings" of property is necessary for freedom and a just society. In contradistinction to classical liberalism, however, Hegelian political theory does not expect takings law to serve as the boundary between law and politics, the public and the private. To understand why this is so, one must turn to Hegel's concepts of quality and quantity as developed in his Science of Logic.

In the next section, I discuss in greater detail the liberal dilemma of takings law. I then show how Hegel's logic explains, but cannot solve, this quandary. Finally, I end with a consideration of how the takings dilemma reflects the Hegelian-Lacanian paradox of freedom.

II. THE LIBERAL DILEMMA OF TAKINGS LAW

A. PROPERTY AND THE CONSTITUTION

Clearly, the Framers of the U.S. Constitution thought that private property was essential to human liberty, or they would not have given it such extraordinary protection. As Jennifer Nedelsky explains, the Takings Clause was to stand as a barrier between politics and law, between the public and the private. This is why Charles Reich in the 1960s thought he could protect welfare recipients from the capriciousness of the government by redefining their entitlements as "new property."

The traditional role of property as the bastion of private rights against the
onslaught of the public is most consistent with the Lockean liberalism of the Federalists. If property is a, or even the, natural or fundamental right of man, and if man entered into the social contract in order to protect his natural rights, then, by definition, a government must protect private property rights to be legitimate. The jurisprudential and political problem this raises is obvious: virtually all government regulation directly or indirectly affects property.

This becomes even more problematic when one reads into the Takings Clause the Madisonian definition of property, which included not only rights with respect to material things (such as land and cattle) and intangibles (such as debts and intellectual property) but also things that fall within the philosophical concept of "objects" such as our bodies and minds (i.e., our talents, opinions, religion, speech, etc.). Richard Epstein and Robert Nozick are no doubt correct that, if one were to adopt this extreme version of the Libertarian view of property, only the most minimalist state could be justified.

Classical liberalism, broadly understood, is by far the dominant political philosophy in this country, but radical libertarians, who believe that virtually all government regulations constitute takings, are certainly in the minority. But to every other school of liberalism, takings jurisprudence raises a paradox. It is possible to take a more moderate Lockean approach which recognizes property as one, but not necessarily the only, right (natural or otherwise) that government should protect. But then, how can one balance between competing natural rights and fundamental interests? Contractarians, such as Hobbes, argued that in order to stop the war of all against all, man submitted himself to the unlimited power of the absolute sovereign who grants entitlements—known as property—to citizens. How, then, can we reconcile a constitutional provision that seeks to rein in the sovereign's power over property when, by definition, the social contract has ceded absolute power over property to the sovereign? Utilitarianism protects property instrumentally as a means of achieving the greatest happiness for society as a whole. Should not the government then have some constitutional power to rearrange property entitlements if this would further the greater good? But how do we reconcile this notion with the utilitarian instinct that the best way to ensure utility (or wealth) maximization for society generally is to permit each individual member to maximize his own utility (or wealth) in

64. See supra text accompanying note 26.
66. Nozick recognizes a natural right of property established by appropriation (either by the owner, or by transfer from a legitimate owner). See Robert Nozick, Anarchy, State, and Utopia 150-53, 174-82 (1974). He then asks what vision of the state is consistent with these rights. "So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?" Id. at ix.
67. Once again, these descriptions of various schools of liberalism might be so simple as to border on caricature, but they are sufficient for the limited use to which I am putting them. For an excellent concise description of Hobbesian contractarianism, see Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 790 (1985).
68. See, e.g., id. at 798-802.
On the other hand, an egalitarian liberal might simultaneously recognize that the government’s right to take property must be limited because it can easily devolve into an unequal and, therefore, unjust, tax levied against a targeted individual, rather than against similarly situated people generally. 70

In any event, our Constitution expressly protects property from uncompensated takings by the government. Moreover, all of the major schools of liberalism recognize some fundamental liberty interest in property—either as a natural right or as a right necessarily created by positive law to protect other natural rights such as autonomy, the pursuit of happiness, or equality. Yet all but the most extreme libertarians also recognize other fundamental interests that justify at least some governmental limitation of property interests. This raises obvious line drawing problems: when does government regulation so interfere with property rights that the property has been taken?

Inevitably, takings jurisprudence requires that we draw some line between takings and legitimate exercises of the state’s police power. The need to draw lines does not, however, in and of itself make takings jurisprudence uniquely difficult. Law requires us to draw lines all the time. We typically do this through positive law—whether formally adopted by the legislature, promulgated through case law, or developed informally through custom and practice. The uniqueness arises because the Takings Clause is supposed to be the vital barrier between the

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69. My colleague Michel Rosenfeld describes egalitarian liberalism, as conceived by Thomas Nagel, as assuming that there is “moral equality between persons,” and that each person has “an equal claim to actual or possible advantages.” Moreover, besides being on the main forward-looking, egalitarianism “establishes an order of priority among needs, and gives preference to the most urgent.” Further, Nagel emphasizes that “the essential feature of an egalitarian priority system is that it counts improvements to the welfare of the worst off as more urgent than improvements to the welfare of the better off.”


70. This is Frank Michelman’s explanation of the justifiable purpose of a Takings Clause. If the government wishes to create a public park, it is justifiable to tax all citizens, or even all wealthy citizens and no poor citizens. But it is unjust to make one individual pay the lion’s share of the cost of the park through forfeiture of his land, while other individuals of similar wealth are not required to contribute in similar ways through taxation. See, e.g., Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165 (1967). The Supreme Court has adopted this as a justification for the Takings Clause. See Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that Fifth Amendment’s guarantee is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

Interestingly enough, as is often the case, this theory, which was developed to further a progressive political agenda, has been co-opted to serve other purposes. Egalitarian-type arguments are currently being used by supporters of legislation that would define certain pollution control requirements as takings.
public and the private. Under liberal jurisprudence, however, the usual devices of positive law would seem inept for this task precisely because the Constitution is supposed to be above politics and positive law.

The chaotic state of the case law on takings jurisprudence suggests that the Supreme Court has so far been unable to do so. Commentators love to feast upon the irrationalities and inconsistencies of the precedents, and decry either the over-solicitousness toward vested interests or inattention to fundamental rights in one or another specific decision. Few critics, however, have ventured to offer a resolution.

B. THE SUPPOSED DISINTEGRATION OF PROPERTY

As a result, some critics have concluded that the very concept of property and the prohibition on uncompensated takings are so internally incoherent that they are disintegrating before our very eyes.\(^71\) This conclusion is based on two observations.

First, the liberal justification for the protection of property in the Constitution is, as we have seen, that private property is a right that is either natural in and of itself or fundamental in the sense of being necessary for the protection of other natural rights, such as autonomy, the pursuit of happiness, or, to a more limited degree, equality. As such, the Constitution assigns a barrier function to property. Yet, property is also a legal right that only exists insofar as it is enforceable in a court. Specific property rights are often not merely delimited, but created, by positive law. For example, copyright is a relatively modern creature of legislation. Critics like Nedelsky ask: how can property both be a natural right and a right created by positive law?\(^72\) If it is a right created by positive law, how can it serve as a limitation on the government's power to adopt positive laws reducing property rights?\(^73\)

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71. See, e.g., Grey, supra note 34, at 74.
72. Nedelsky states that "[p]roperty has also carried with it the paradox of self-limiting government: it is the limit to the state; it is also the creature of the state. In property, the state sets its own limits." Nedelsky, supra note 26, at 8. "It is now widely accepted that property is not a limit to legitimate governmental action, but a primary subject of it." id. at 231.
73. In more general terms, how can government simultaneously be responsible for establishing the property rights of the citizenry and also be entrusted not to render its constituents helpless when conditions dictate defining property rights so as to benefit public officialdom? In property theory, this might be called the problem of positivism.

Paul, supra note 62, at 1411.
As we have seen, to a Hegelian, the first question is not a philosophical problem although, as we shall discuss, the second remains intractable as a logical matter. Freedom does not consist of the recognition of natural rights of the autonomous individual which theoretically exist prior to society in a hypothesized state of nature. Freedom can only be actualized within society. Property is a stage in this process of actualization. On the one hand, property is by definition necessarily both artificial, in the sense of a human creation, and fundamental, in the sense of necessary for freedom. On the other hand, although property is not a natural right, it is not merely a creation of positive law. Hegel thought that property and law, in the sense of abstract right, are mutually constituting. Abstract right consists of the recognition of human subjectivity through the regime of property, and the regime of property requires that it be recognized as an abstract right.

But, at this level, property as a right is only abstract. As possibility, it must be actualized in specific, concrete manifestations. It is these concrete manifestations that are recognized and delineated by positive law (Gesetz) established by the civil society and state based on morality and ethical life. This leads us to the second internal liberal critique of property and takings.

C. THE SEEMINGLY ENDLESS DIVERSITY OF PROPERTY

As a matter of empirical fact, property can consist of a seemingly bewildering variety of rights. For example, even though we colloquially say that an owner of a fee simple absolute estate in realty has unlimited rights of possession, enjoyment, and alienation of the object of her property, every lawyer knows that these rights are in fact limited: at a minimum, her right of continued possession may be subject to the state’s taxation power, her right of enjoyment is subject to nuisance restrictions, and her right of alienation is limited by antidiscrimination laws. In practice, most owners’ rights are even more restricted by, for example, easements (which restrict the right of possession) and zoning regulations (which can restrict the rights of enjoyment and alienation).

How, critics ask, can we speak of “property” as an identifiable set of rights when we recognize such variant combinations of rights as property? The Hegelian replies that we can—so long as we stay at the appropriate level of generality. It does not follow from the proposition that in order for property to serve its philosophical function it must reflect the abstract elements of posses-

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74. Hegel discusses the process whereby abstract right is first determined as positive law (Gesetz, in German) in his discussion of civil society (roughly, the market economy) which is, in turn, part of his discussion of ethical life. Hegel, Philosophy of Right, supra note 6, at 240-61.
75. For an excellent discussion of the restrictions placed on “fee simple absolute,” see Stewart E. Sterk, Neighbors in American Land Law, 87 Colum. L. Rev. 55 (1987).
76. In a typical example, Lawrence Becker comes up with a list of 13 different property rights. He would recognize as property an interest which has one of the first eight rights he lists plus “security.” Lawrence C. Becker, The Moral Basis of Property Rights, in Nomos XXII, supra note 34, at 186, 190-92. Similarly, Grey bases his critique, in part, on the multiplicity he sees in the possible definitions of the word “property.” Grey, supra note 34, at 70-71.
sion, enjoyment, and alienation of an external object that all *empirical* actualization of property must be full, complete, or perfect. If one grasps that the Hegelian notion of the elements of property is to be understood at the highest level of abstraction, then one can see that these elements can be actualized in a dizzying array of concrete manifestations. Nevertheless, all of those legal relations that we traditionally recognize as falling within the rubric of “property” should contain some form of each of the three elements. The more adequate the manifestations of the three elements of property, the more likely we will label the right “ownership.” 77 If the manifestations are not as adequate, we are likely to give a different label to the right.

A simple illustration can be seen in the mirror image rights of a debtor and a secured party under a simple hypothecation of a good. Both the debtor and secured party are considered to have property rights in the collateral. Although we tend to say that the debtor “owns” the collateral subject to the secured party’s security interest, our society could just as easily say that the secured party “owns” the collateral subject to the debtor’s equity interest. Indeed, this is how we traditionally describe the relative property rights of the debtor and the secured creditor in those states which recognize deeds of trust (rather than mortgages) in realty. 78

In a hypothecation, the debtor has the immediate rights of possession (in the sense of physical custody) and enjoyment, but both rights are conditioned on her continued performance of her obligations under the security agreement. 79 Frequently, under the terms of the security agreement the debtor does not have the present “right” (in the Hohfeldian sense) 80 to alienate either her equity interest or the secured party’s security interest in the collateral. She does, however, have a right of alienation conditioned on the payment of the secured obligation. 81 Nevertheless, in many cases the debtor has the present “power” (in the Hohfeldian sense) 82 to alienate these property rights and thereby cut off the rights of the secured party in the collateral. 83 The secured party’s property rights are the exact opposite. He does not have immediate rights of custody, 84

77. It is common to speak of fee simple absolute as being the most complete property right in realty. This may be true as an empirical matter, but not as a theoretical one. Only the sovereign has the highest unlimited allodial estate.

78. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 670 n.17 (3d ed. 1993).

79. This is in contradistinction to a pledge, in which physical custody of the collateral is given to the secured party. In my example, the secured party’s right to take possession arises upon the debtor’s default. U.C.C. § 9-503 (1992).

80. See HOFHELD, supra note 34, at 36-38.

81. This is true in the sense that after the secured obligation is performed, the security interest of the secured party is extinguished. This means that all property rights held by the secured party revert back to the debtor.

82. See HOFHELD, supra note 34, at 50-60.


84. I have argued extensively elsewhere that, in order to be enforceable against others, a claim to a property right must also have an immediate possessory element. However, by possession, a Hegelian is not speaking of actual or vicarious physical custody of tangible things. Rather, I mean what I have
enjoyment, or alienation, but inchoate future rights conditioned on the debtor’s default.\(^\text{85}\) And, even then, the secured party’s rights of possession in the sense of “repossession,” enjoyment, in the sense of collection or strict foreclosure, and alienation, in the sense of foreclosure sale, are strictly limited by the procedural and substantive rules of the remedies section of Article 9 of the U.C.C.\(^\text{86}\)

The subtleties of these rights become even more apparent when one tries to determine how the rights of a secured party differ from the similar rights of a lessor.\(^\text{87}\) In other words, we can simultaneously require as a matter of jurisprudential “logic” that in order for a legal interest to be recognized as property (in the sense of being generally enforceable against third parties) it must contain the three traditional abstract elements of property, while also recognizing that there is great variety in empirical property rights.

D. RIGHTS CHOPPING

The conclusion that the abstract jurisprudential concept of property is internally coherent as a theoretical matter within Hegelian jurisprudence begs, rather than answers, the practical question posed by the Takings Clause. One approach to this Hegelian analysis is the superlibertarian position shared by Epstein and Chief Justice Rehnquist, which Margaret Jane Radin critiques under the awkward name “conceptual severance.”\(^\text{88}\) Believing that short and common Anglo-Saxon words are better than complicated septasyllabic, latinate neologisms, I will act on a suggestion made by Frank Michelman and call this process “rights chopping.”\(^\text{89}\) A rights chopping analysis recognizes that the historical takings rule embraced in *Loretto v. Teleprompter Manhattan CATV Corp.*,\(^\text{90}\) which
called elsewhere “objectification”—the requirement that the interest be intersubjectively recognizable by the class of subjects against whom the property claim is to be asserted. This flows from the “purpose” of property, which is ultimately recognition by others. I would analyze the perfection requirements of Article 9 of the U.C.C. in terms of the Hegelian “possession” or objectification requirement. See generally Schroeder, Legal Surrealism, supra note 38.

85. U.C.C. § 9-402 (1992). In a pledge, the collateral is in the secured party’s possession, but the secured party’s rights to use and alienate are limited by U.C.C. § 9-207 and, often, by the terms of the security agreement.


87. This is probably one of the most litigated provisions under Article 9 of the U.C.C. as well as the source of parallel disputes under tax law and accounting practices. The distinction identified by U.C.C. § 1-201(37) is that if, after the performance of the obligation by the debtor-lessee, the object subject to the property right has any residual value, then (i) the transaction is a security agreement and the obligor is a debtor if the obligor obtains the right to possess, enjoy, and alienate the object; and (ii) the transaction is a lease and the obligor is a lessee if the obligee (i.e., lessor) obtains the right to possess, enjoy, and alienate the object.

88. Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1676 (1977) [hereinafter Radin, Cross Currents]. To be slightly more accurate, Radin does not maintain that Chief Justice Rehnquist has been caught embracing conceptual severance, but that he flirts with it in some of his opinions.

89. Actually, Michelman calls it “entitlement chopping.” Frank Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1601 (1988). But as long as I’ve got the axe out, I’ll cut the four syllable word “entitlement” down to size as well.

90. 458 U.S. 419 (1982).
holds that a taking is most readily found when there is "permanent physical invasion of real property" is inadequate: this rule identifies property too closely with one element of possession, and the rule limits possession to only one of its many possible manifestations—physical custody of tangible objects. If interference with the element of possession is a taking, then regulations that interfere with either of the elements of enjoyment or alienation should also be takings. This is consistent with a Hegelian analysis.

Superlibertarians such as Richard Epstein would no doubt argue from this that, since property necessarily consists of manifestations of the three abstract Hegelian elements, any attempt to chop off any piece of any element in and of itself is a taking. That is, any curtailment of any empirical manifestation of any of the three abstract elements is, by definition, an interference with property rights and, therefore, a taking. This means that virtually all government regulations become per se takings. If one adopts the libertarian proposition that property is a natural right, then only the most minimal form of government can be justified.

Radin suggests that the result that flows from the superlibertarian reading is so absurd as to demonstrate the fallaciousness, not the power, of the chopping argument.\(^91\) I agree. Indeed, because the superlibertarian approach comes close to including everything under the rubric "property," it threatens to deprive property of its analytical power as a separate, distinguishable legal category.

But this critique can easily suggest an opposite, equally fallacious, conclusion from the Hegelian argument. If property rights can be actualized in any number of empirical variations, can not we declare that a claimant still has "property" and has not been subject to a taking no matter how much of her empirical rights we chop away, so long as we leave her with de minimis stubs of the three abstract elements? This would, obviously, give the government great power to regulate freely without compensating persons whose property is merely diminished but not totally destroyed. Of course, the problem with this theory is the mirror image of the superlibertarian error: both arguments so expand the concept of minimum property that they rob it of analytical value.

Consequently, some progressive critics reflect back the mirror image of Epsteinian libertarianism which results in the opposite conclusion. By this I mean that they implicitly agree that a traditionally expansive approach toward property and the Takings Clause would make much, if not most, legislation problematic. But, because they favor more governmental regulation and/or redistribution of wealth to further what they see as fundamental interests, they argue that this demonstrates that the traditionalist approach toward property cannot be supported. Some of these critics, most notably Grey and Nedelsky, argue that this is related to a more general societal realization that the traditional liberal notion of property has disintegrated\(^92\) or was a myth all

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91. See Radin, Cross Currents, supra note 88, at 1674-78.
92. See Grey, supra note 34, at 74.
along, in the pejorative sense of that term. They identify as a crucial paradox of liberalism the theory that property is a natural right that exists prior to law and politics, and the realization that property, as a legal right, can only be defined and enforced by the positive law of an organized society. As such, modern property may be too ephemeral and too contradictory to continue to have property’s traditional inspirational role in our society, let alone serve its assigned role under the Constitution as a barrier between law and politics.

Still other progressives wish to preserve the traditional inspirational rhetoric of property yet redirect it to other more “progressive” purposes. This requires an attempt to redefine property. Prominent examples of such approaches are those of Singer, who would base property rights on reliance interests and the relative power and dependence of rival claimants, and Radin, who would divide the potential objects of property into “personal property,” which is held for enjoyment, and “fungible property,” which is held for economic purposes.

These new conceptualizations of property require corresponding reconceptualizations of the purpose of the Takings Clause. For example, Michelman argues that the Takings Clause is designed to prevent the state from unjustly imposing on individuals tax burdens that are not generally imposed on all other similarly situated persons. Radin thinks that the Constitution should be read as a whole to further “human flourishing.” Therefore, she argues that the degree of constitutional protection for specific property rights should depend on the degree to which that property right furthers human flourishing; consequently, more protection should be given to personal property and less protection should be given to fungible property. Since these approaches undermine both the fundamental nature of the right of property—treating property instrumentally as a means to serve other ends—and, by extension, the barrier function of the Takings Clause, they also ameliorate the jurisprudential problem of developing a strictly logical or “objective” definition of property and takings. Consequently, Singer and Radin are both self-described “pragmatists” who advocate that courts use a situated, context intense, case-by-case approach in deciding legal issues.

93. How can “the tradition” be characterized by both coherence and endurance and by an apparently unlimited mutability in the purported core of the structure? The paradox itself suggests the answers: it is the myth of property—its rhetorical power combined with the illusory nature of the image of property—that has been crucial to our system. And it is this mythic quality that current changes in the concept may threaten.

95. See Radin, Property and Personhood, supra note 12, at 959-60; Radin, Cross Currents, supra note 88, at 1687-92. I critique Radin’s property extensively in Schroeder, Virgin Territory, supra note 5.
96. See supra note 70.
98. See Margaret Jane Radin, Lacking a Transformative Social Theory: A Response, 45 STAN. L. REV. 409 (1993); Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699
An interesting variation of this critique has recently been offered by Louise Halper.99 She upbraids Justice Scalia for his opinion in *Lucas v. South Carolina Coastal Council*100 in which the Supreme Court held that the diminution of value of property can constitute a taking. She characterizes this as a metonymy.101 In her words, Justice Scalia is confusing a part—value—for the whole—the land.102

I agree that this is indeed a metonymic trope, but not the one Halper identifies. The whole of property can never be the land itself. Although, in colloquial English, we often speak of our land as being our property, from a legal standpoint, our property must instead be understood as the set of rights of one legal subject enforceable against other legal subjects with respect to the possession, enjoyment, and alienation of an object. That is, land is merely the object of a property claim. Consequently, the metonymy that Scalia did, in fact, use was to substitute one of the three elements of property—enjoyment manifested in the form of the right to development for monetary purposes—for the whole of property.

Nevertheless, whatever the form of the metonymy, Halper's argument is that one does not destroy the whole of property by merely interfering with its parts. The libertarian should (correctly) reply that since property is by definition a collection of rights, the only way to destroy property is by destroying its parts.

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101. Halper , supra note 99, at 41-42, 46. Specifically, it is a synecdoche. A metonymy is the substitution of an attribute of a thing for the thing. A synecdoche is a subset of metonymy—a part for the whole. Halper, like me, is influenced by Lacan, who thought that all linguistic meaning consists of the slippage of meaning of metaphor and metonymy. Although the example he gives of a metonymy is arguably a synecdoche, see Jacques Lacan, *The Agency of the Letter in the Unconscious or Reason Since Freud, in Ecrits* 146, 156 (Alain Sheridan trans., 1977) (1966), it is clear from his analysis that he is not so limiting his definition. Lacan thought of metonymy as a substitute of "word-to-word," as opposed to metaphor, which is the substitution of "one word for another." Id. at 157. For a good introduction to Lacan's concepts of metaphor and metonymy, see Jean-Luc Nancy & Philippe Lacoue-LaBarthe, *The Title of the Letter: A Reading of Lacan* 71-76, 96-97, 139-40 (F. Raffoul & D. Pettigrew trans., 1992).

Lacan identified metaphor with the masculine and metonymy with the feminine. Elsewhere, I have argued that the Hegelian element of enjoyment of property reflects the Lacanian psychoanalytic concept of feminine jouissance. See Schroeder, *The Vestal and the Fasces*, supra note 5, at 914-17; Schroeder, *Virgin Territory*, supra note 5, at 165-68. It is, therefore, interesting from a Lacanian viewpoint that Scalia adopts the feminine trope—metonymy—to find that interference with the feminine element of property—enjoyment—is a taking.

Indeed, if property logically requires the three classic elements, the destruction of any one of the three elements by definition destroys the status of a claim as property.

Where does this leave takings law? Unless we limit takings to complete, 100% deprivations of all property rights, are not we stuck with what Halper calls a "metonymic" approach (a taking of some part will be treated as legally equivalent to the taking of the whole)? But does not this devolve into the libertarian argument which forbids virtually all government regulation?

To put it another way, how can I argue (as I have elsewhere)\textsuperscript{103} that property is not a random or arbitrary collection of disparate rights (as the "bundle of sticks" metaphor implies), but a recognizable combination of rights, yet at the same time acknowledge that it is intuitively and empirically wrong to say that a property interest is always destroyed if any one of the rights that comprise property is infringed? I believe that these statements are not incompatible for the same reason that a beach is still a beach after one removes one grain of sand. Nonetheless, as anyone with shore-front property knows, as the sea keeps removing grains of sand year after year, the beach will eventually disappear. Although property consists of identifiable elements, it is itself an identifiable quality which cannot be reduced to a collection of elements.

F. QUALITY

London (Reuter)—Simple laws of physics can explain one of life's oldest and most annoying truisms—that a dropped piece of toast always lands butter side down—a British physicist said Monday.

"Toast falling off the breakfast table lands butter side down, because the universe is made that way," Robert Matthews, a physicist at Aston University in Birmingham, said in a statement—\textit{Japan Times}.

Perhaps Professor Matthews will also discover why the rule is, jam tomorrow, and jam yesterday—but never jam today.\textsuperscript{104}

Hegel explains this phenomena in his chapter on Specific Quantity in the \textit{Greater Logic}. He uses the wonderful example of "the bald."\textsuperscript{105} The hairy

\begin{footnotes}
\item[103.] \textit{See generally} Schroeder, \textit{Bundle-O-Stix}, supra note 5.
\item[104.] \textit{The New Yorker}, Aug. 21 & 28, 1995, at 114.
\item[105.] The sudden conversion into a change of quality of a change which was apparently merely quantitative had already attracted the attention of the ancients who illustrated in popular examples the contradictions arising from ignorance [of the suddenness of changes in quality]; they are familiar under the name]\textsuperscript{105} of "the bald"... The question was asked: does the pulling out of a single hair from the head... produce baldness...? An answer in the negative can be given without hesitation since such a removal constitutes only a quantitative difference, a difference moreover which is itself quite insignificant; thus a hair... is removed and this is repeated, only one of them being removed each time in accordance with the answer given. At last the qualitative change is revealed; the head... is bald... In giving the said answer, what was forgotten was not only the repetition, but the fact that the individually insignificant
\end{footnotes}
young man who wakes up every morning to see a single hair on his pillow is still a hairy man—albeit a worried one. But eventually that inevitable and tragic dawn breaks when he looks in the mirror and a bald man stares back. Hegel's point is not that this demonstrates that the concepts "hairiness" and "baldness"—or property and no property—are irrational. In his language, these dyads are qualitatively different as a logical matter. It is absolutely necessary for Hegel's entire philosophical project in The Greater Logic to maintain a strictly logical distinction between changes in quality (e.g., from hairiness to baldness) and changes in quantity (e.g., from 1 million hairs to 999,999 hairs). The relation between quality and quantity is what Hegel calls "measure." The sublation of quality and quantity through measure is an essential step in the dialectical process, which charts the development from pure being through to the absolute idea.

Hegel argues that quantity and quality are dialectically related, identical yet different. Quantitative changes are gradual; qualitative changes are sudden. Something can have more or less of a Hegelian quantity, but it either has or does not have Hegelian quality. The Hegelian concept of the identity of identity and difference, however, means that quantitative change reveals itself as always already becoming qualitative change.

This means that it is logically necessary, on the one hand, that quantitative changes eventually become qualitative changes, yet, on the other hand, there can be no fixed point at which the change occurs. This is because (by definition) the identification of a specific point of transition is to assign a quality to the transition point. This does not solve the logical problem, it just replicates it. We have just substituted a different question of qualitative differentiation.

An example may make this clear. We all intuitively understand that it just doesn't work to reword the question asked of the anxious young man standing at the mirror, "Am I bald yet?" as "Am I now at the transition point between hairy and bald?" Those of us who are confronting middle age recognize that this former wording is not a clarification, but an unacceptable attempt to avoid the issue through euphemism. Further, to name the transition point "Am I now 'semi-bald'?" just restates the problem in increasingly painful detail.

It is, of course, impossible to compress the monumentally complex system of The Greater Logic into a few pages of a law review article. It should be

quantities (like the individually insignificant disbursements from a fortune) add up and the total constitutes the qualitative whole, so that finally this whole has vanished; the head is bald, the purse is empty.

Hegel's Logic, supra note 61, at 335.

106. Those hairy readers who smile condescendingly at our metaphoric hero's plight may want, instead, to contemplate the old, gray, and wrinkled.

107. Indeed, over one-third of Hegel's Logic is devoted to a discussion of quality, quantity, and their relationship.

108. Hegel's Logic, supra note 61, at 327.

109. In this article, I limit my discussion to the relationship of quality and quantity called "measure." This is not intended as a complete description of the complex and subtle concept of quantity. For
sufficient for my very limited purpose simplistically to explain that “quality” to Hegel is what he calls “determinate being.” This is a concept derived through sublation of the logical concept of pure or immediate being. That is, all things that exist share the abstract concept of pure immediate being per se—they all exist. Quality refers to the specific, affirmative aspect of a thing which distinguishes it from other things that exist—i.e., it is the aspect of a thing which is not shared; it is that which enables us to tell two “things” apart. For example, it is what enables us to understand the following conversation between two women at a cocktail party: “I think he’s kind of cute.” “Which one?” “The bald one.”

To put it another way, if being is pure and immediate, then nothing can be discerned. As a consequence, Hegel argues that pure being shares a moment of identity with pure nothing.110 In contrast, determinative being (or quality) is the concept that something discernable exists. But a quality can only be defined in terms of what it is not—it is defined by its own negation in the sense of “this is not that.”111 To be bald can only be understood in terms of not being hirsute.

Determinate being, moreover, by definition, is finite (otherwise it could not be determined).112 By this I mean that the very concept of determining what distinguishes one thing from another implies setting boundaries; separating one thing from another. If the thing is on this side of the boundary, it is X; if on the other side, it is not-X.

Quantity is the sublation of quality: Quantity is what results when one overcomes quality’s finitude. Finitude is quality’s dependence on otherness; i.e. the sense that a quality can only be understood in terms of what it is not, of what is fenced off. Because quantity is the expulsion of otherness, the quantity achieved by sublating any one quality is indistinguishable and continuous with all other “ones” that similarly result from sublating all other qualities (determinate beings). In other words, qualities are plural, but quantity is unity. By definition, there must be many qualities, each separate and distinguishable from the others in the sense that the quality of baldness is different from the quality of hairiness, or for that matter, the qualities of being hot, sweet, or whatever. In contradistinction, the concept of more or less is the same regardless of whether we are talking about more of this, or less of that—whether it be the number of hairs on a man’s head, the temperature, or sweetness. Quantity is, therefore, indifferent to quality.

In simple English, quality is differentiation, quantity is commensuration.

a succinct description of this journey from pure being to essence—beyond deconstruction, see David G. Carlson, The Hegelian Revival in American Legal Discourse, 45 U. MIAMI L. REV. 1051, 1062-67 (1992).

110. Because immediate being in its purity has no specific content, it is identical to pure nothing. Hegel’s Logic, supra note 61, at 82. The relationship between pure being and pure nothing is “becoming.” Hegel argues that it is this relationship of becoming which sets the dialectic process in motion. It is the sublation of the pure being and pure nothing which creates determinate being (quality).

111. Id.

112. See id. at 129.
Quality is difference; quantity is identity. The identity of quality and quantity is the famous Hegelian doctrine of the identity of identity and difference. Qualities are the differences of self from other. Quantity, in contradistinction, is what self and other have in common. Qualitative difference is a matter of is or is not. Quantitative difference is a matter of more or less. Quality asks "is it X or Y?" Quantity asks "how much Z do X and Y have?" This is why changes in quantity are sudden even though changes in quality are gradual. Nevertheless, changes in quantity eventually lead to changes in quality. This relationship between quality and quantity is called "measure."

Although not absolutely necessary to the limited argument of this article, it may be useful briefly to touch upon how quality underlies the Hegelian/Lacanian concept of freedom because this is the basis of my theory of feminism. To be free, of course, is not to have limits. As just discussed, quality (determinate being) can only be understood in terms of its finitude or limit. The very concept of any limit, however, necessarily includes within itself the concept that there is something beyond the limit. To resort to a spatial analogy, quality (determinate being) defines something by fencing it in, and this implies, in turn, that something is fenced out. True infinity (an important concept to Hegel which is beyond the scope of this article) consists of negating the limit of any specific quality. This is my definition of freedom—and the feminine. Let me slow down.

To reiterate, quality is the concept of identifying things in terms of that which they are not. It is, therefore, a setting of limits; a building of fences keeping some "things" on this side, and some "things" on the other side. If, as I have just posited, we can only identify a quality in terms of what it is not, then this means that to know the true quality of a thing, we must go beyond its limit. We must climb over the fence which prescribes a quality, see what is on the other side and then look back. In this sense, Hegel believes that logic itself requires that every time we confront a limit, we must exceed the limit.

The banal witticism "rules are made to be broken" is literally true to Hegel. The Hegelian paradox is precisely that limitation and finitude create the conditions of freedom and infinity. Freedom and necessity are, therefore, dialecti-

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113. For readers familiar with Lacanian psychoanalysis, this is the concept of the Real. The Real is the concept of that which cannot be captured in language/law (the "Symbolic") and imagery (the "Imaginary"). We experience the Real as that which limits the Symbolic and the Imaginary because it pre-exists them. In fact, the Real only exists because the Symbolic and the Imaginary exist. That is, language/law, the ability to speak and interrelate with other human subjects, requires that we categorize and limit things (in a process known as "castration"). This very process of setting limits presupposes something beyond that limit. We call this sense that there is something beyond the limit the "Real." The Real, therefore, does not pre-exist the Symbolic and Imaginary, but comes into existence simultaneously with them.

114. Once again, these concepts should sound familiar to Lacanians. Freud posited a portion of the psyche called the superego which internalized law, morality, and the ethics. The superego is the conscience. The Freudian superego constantly says, "Don't do that, don't enjoy yourself." Lacan, in contradistinction, recognized that the very concept of law presupposes its own transgression. That is, one does not forbid that which is impossible, only that which is possible but forbidden. To put it another
cally related. Freedom is the lack of limits, yet it is created by limits. Freedom is to not be bound by necessity, but limits necessitate that we seek to be free. That Hegel recognizes freedom as "the beyond of the limit" as not only a logical necessity, but an ethical mandate, is evidenced by the fact that he calls the demand to surpass all limits "the ought." 115

Finally, to clarify terminology used by some of the sources I cite later in this article, quality is sometimes called "being in-itself." This expression captures the idea that quality is that which makes something what it is (as opposed to what it is not). Quality is "fenced in"; enclosed within its own borders. In opposition, quantity is "being for itself." This captures the sense that since quantity expels otherness it is for itself, not for another. Curiously, therefore, quantity (unlike quality) ends up being that aspect of being which is the opposite (or negation) of being. By this I mean, quality is the concept that there are things that really exist and that we can distinguish one from another because they are different in some meaningful way. The concept of quantity, in contradistinction, does not require the existence of anything in particular. It just posits that if something did exist and could be measured, it could be described as more or less like this or that. Quality is the assertion "this is what I am—not that"; quantity is "this is what I'm like—I have some of this and some of that." Both are necessary yet insufficient ways of understanding something.

G. THE MOVEMENT OF SUBLATION

1. Negation and Preservation

The common misreading of the dialectic suppresses the preserving aspect of sublation beneath its negating aspect. It forgets that at the moment the self is negated and becomes identical to the other, it still remains differentiated and separate as the self. As property becomes nonproperty, it still always retains the notion of property. Nonproperty can only be understood in terms of property—that which it is not.

way, if the thing that the law forbids is really impossible, then the law is not really a law but a statement of fact.

Consequently, if the function of the superego is to establish law as law it must make the possibility of its own transgression a reality. This means that the Lacanian superego, in fact, constantly shouts "You can and must break the law. Enjoy!" 115. See Hegel's Logic, supra note 61, at 132-33. Immanuel Kant insisted that impossibility never exonerates a person from his ethical duty. Consequently, the Kantian response to the excuse "I can't" is the slogan "You can because you must!" (See, for example, Slavoj Zizek, The Metastases of Enjoyment: Six Essays on Woman and Causality 68 (1994), in which Zizek uses a scene from de Laclos's Les Liaisons Dangereuses to illustrate this concept.) Hegel, as always, goes a step further than Kant in recognizing that it is precisely the impossibility which changes an obligation into a duty. He writes, in effect, "You must because you can't!" See also Jacques Lacan, The Seminar of Jacques Lacan: Book VII—The Ethics of Psychoanalysis 1959-60, at 315-17 (Jacques-Alain Miller ed. & Dennis Porter trans., 1992).

It is far beyond the scope of this article, but this concept of freedom as the ought—the going beyond the limit, is the Lacanian feminist concept of the feminine which I develop in my forthcoming book. Schroeder, The Vestal and the Fasces, supra note *.
This is a crucial point for Hegel. He denies that only the positive has determinate characteristics, with the negative being a generic nonbeing.

[T]here still lingers on the thought of this difference of [nothing] from being, namely that the determinate being of nothing does not at all pertain to nothing itself, that nothing does not possess an independent being of its own, is not being as such. Nothing, it is said, is only the absence of being, darkness thus only the *absence* of light, cold only absence of heat, and so on. And darkness only has meaning in relation to the eye, in external comparison with the positive factor, light, and similarly cold is only something in our sensation; on the other hand, light and heat, like being, are objective, active realities on their own account, and are of quite another quality and dignity than this negative, than nothing. One can often find it put forward as a weighty reflection and an important piece of information that darkness is *only absence* of light, cold *only absence* of heat. About this acute reflection in this field of empirical objects, it can be empirically observed that darkness does in fact show itself active in light, determining it to colour and thereby imparting visibility to it, since, as was said above, just as little is seen in pure light as in pure darkness. Visibility, however, is effected in the eye, and the supposed negative has just as much a share in this as the light which is credited with being the real, positive factor; similarly, cold makes its presence known in water, in our sensations etc., and if we deny it so-called objective reality it is not a whit the worse for our doing so. But a further objection would be that here, too, as before, it is a negative with a determinate content that is spoken of, the argument is not confined to pure nothing, to which being, regarded as an empty abstraction, is neither inferior nor superior. But cold, darkness, and similar determinate negations are to be taken directly as they are by themselves and we shall then see what we have thereby effected in respect of their universal determination which has led them to be introduced here. They are supposed to be not just nothing but the nothing of light, heat, etc., of something determinate, of a content; thus they are a determinate, a contentful, nothing if one may so speak. But, as will subsequently appear, a determinateness is itself a negation, and so they are negative nothings; but a negative nothing is an affirmative something.\(^{116}\)

The loss of property is not a mere lack of rights, it is nonproperty—a positive taking.

2. Potentiality and Actuality

To those who are unfamiliar with the Hegelian dialectic, the concept of sublation and the suddenness of changes in quality versus the gradualism of changes in quantity might be hard to understand. Some are hampered by having

\(^{116}\) **HEGEL'S LOGIC**, *supra* note 61, at 101-02; *see also* id. at 323 (“At first, then, quantity as such appears in opposition to quality; but quantity is itself a quality . . . . But quantity is not only a quality; it is the truth of quality itself . . . .”).
been taught a crude caricature of the dialectic as thesis, antithesis, and synthesis whereby the internal contradistinction of thesis and antithesis are obliterated when they are replaced by synthesis. This formula is designed more as a means to discredit Karl Marx (who adopted Hegel’s method) than to understand philosophy. This is how I was introduced to it in high school.

Others might be hampered by the prejudice in our society that “contradictions” (like negativity) are bad things that can and must be eliminated. Consequently, it is easy to conclude that when Hegel identifies a contradiction in the abstract right of property he is making a judgment that property is somehow incoherent or bad and in need of replacement. Nothing could be more wrong. In the Hegelian dialectic, contradiction can not be bad and it can never be destroyed. Contradiction must be resolved, but each resolution necessarily creates a new contradiction. As a result, contradiction is not only a logically necessary aspect of the world, it is precisely that aspect of the world that creates change and dynamism.\(^{117}\)

Sublation is a process by which internal contradictions of earlier concepts are resolved, but not in the sense of the suppression of difference. The German word *Aufhebung* means, paradoxically, to preserve as well as negate.

\[\text{"To sublate" [i.e. "Aufhebung"] has a twofold meaning in [German]: on the one hand it means to preserve, to maintain, and equally it also means to cause to cease, to put an end to. Even "to preserve" includes a negative element, namely, that something is removed from its immediacy and so from an existence which is open to external influences, in order to preserve it. Thus what is sublated is at the same time preserved; it has only lost its immediacy but is not on that account annihilated.}\(^{118}\)

In sublation, the earlier stage is always preserved because it is always a necessary moment in the development of the later. To put it in more fashionable contemporary terminology, the earlier concept is at one moment always already the subsequent concept, but simultaneously the very existence of the later concept requires that the earlier concept is not yet the later concept.

Sublation (i.e., synthesis) can never destroy the differentiation between self

\[^{117}\text{Hegel is particularly critical of philosophers who try to do away with contradiction.}\]

\[^{118}\text{Id. at 237-38.}\]

\[^{118}\text{Id. at 107.}\]
and other (thesis and antithesis) precisely because sublation is the recognition that at one moment self and other are the same even when at another moment they are truly different. Moreover, the moment of identity is itself different from the self-identify of self and other. In other words, in the differentiation of self and other, identity is a possibility. It is through sublation that the possibility of identity is actualized. But at the same time, however, self and other must remain differentiated in order for actualization to remain possible. This is known as the "identity of identity and difference."

I have already suggested how, by definition, for something to be possible it must be actualized—the failure of something eventually to become actualized, means that it was not, in fact, possible. Something only retroactively becomes potential once it has already been fulfilled. This was why the abstract person as free will is driven to actualize its potential freedom as concrete freedom. But the dialectic works the opposite way as well. The logically later concept cannot exist except for the logical necessity of the continuance of the earlier; the earlier cannot exist except for the logical necessity of the possibility of the later. The later concept is actuality, but the earlier concept is the possibility that allows it to come into being.

To resort to metaphor, the earlier moment in the dialectic is like the foundation for the subsequent edifice. A foundation is dug before the building, but in anticipation of the building. The building requires the foundation because one cannot remove the foundation after the building is built without causing the entire edifice to come crashing down. But the foundation also requires the building in the sense that unless the building is subsequently built, it is not a foundation, but rather merely a hole in the ground. It becomes a foundation only retroactively. Similarly, the legal subject and abstract right are the foundations on which the individual citizen and the state will be built. The Hegelian dialectic is supposed to be circular. The Philosophy of Right tries to show that if one starts with an analysis of the free person, then logic will inevitably lead to the concept of the fully developed state. But to a Hegelian this means that if one, instead, started with an analysis of the fully developed state, the same logic would inevitably lead back to the concept of the free person. If autonomy and abstract rights are suppressed and subordinated to the state, the state will also cease to be. We would be left only with its ruins—tyranny and oppression. Or more accurately, we would be able to conclude, retroactively, that it was never, in fact, a "state."

3. Circularity and Retroactivity

To put it another way, the later stages of sublation are not superior to nor more authentic than the earlier ones; they do not "replace" the earlier moments.

119. That is, freedom is negative and, therefore, mere possibility. Right is the actualization of freedom. HEGEL, PHILOSOPHY OF RIGHT, supra note 6, at 35.
120. See Schroeder, The Vestal and the Fasces, supra note 5, at 818; Schroeder, Virgin Territory, supra note 5, at 123-27.
Each moment of a concept in the dialectic is equally true and authentic. The designations "later" and "earlier" do not refer to empirical events that take place in time. They are relative positions in a logical process that takes place outside of time. This point is important in light of the earlier discussion of the structure of The Philosophy of Right, which places the development of the abstract relations of property and contract prior to the development of more complex relations, including the family. Obviously, this is not empirically the case with human beings either individually or collectively.121

Hegel, by necessity, presents his analysis in a specific order. He claims, however, that the dialectical process is circular.122 Theoretically, one could start at any stage and derive the whole. This is necessary because Hegel tried to develop a logic which, unlike Kantian liberalism, did not require an unproven presumption.123 Although he recognized that, as a practical matter, one must temporarily start with a presupposition as a working hypothesis, he sought a dialectic that would circle back so that the later stages could logically prove the hypothesis retroactively. In other words, the dialectic is holistic; each hypothesis is deemed proven by virtue of its place in a coherent whole.124

4. Sublation as Quantum Leap

Because sublation simultaneously maintains the distinction between two concepts while creating a unity, the movement of sublation cannot be gradual. It is a change in quality, rather than quantity. The change from quantity to quality is, to use the language of modern physics, a quantum leap. Hegel explains how gradual quantitative change produces the quantum leap of qualitative change:

Since the quantitative determinateness of anything is thus twofold—namely, it is that to which the quality is tied and also that which can be varied without affecting the quality—it follows that the destruction of anything which has a

121. We are all individually born into family or other social relations, and legal property and contract rights are relatively modern inventions of bourgeois society.

122. Philosophy forms a circle. It has an initial or immediate point—for it must begin somewhere—a point which is not demonstrated and is not a result. But the starting point of philosophy is immediately relative, for it must appear at another end-point as a result. Philosophy is a sequence which is not suspended in mid-air; it does not begin immediately, but is rounded off within itself.

123. This problem is the subject of With What Must the Science Begin?, the introduction to the first book of Hegel’s Logic, supra note 61, at 67-78.

124. See, e.g., Hegel, Philosophy of Right, supra note 6, at 36-37. “The deduction that the will is free and of what the will and freedom are... is possible only with the context of the whole [of philosophy].” Hegel’s Logic, supra note 61, at 71 (alteration in original).
measure takes place through the alteration of its quantum. On the one hand this destruction appears as unexpected, in so far as the quantum can be changed without altering the measure and the quality of the thing; but on the other hand, it is made into something quite easy to understand through the idea of gradualness. The reason why such ready use is made of this category to render conceivable or to explain the disappearance of a quality or of something, is that it seems to make it possible almost to watch the disappearing with one's eyes, because quantum is posited as the external limit which is by its nature alterable, and so alteration (of quantum only) requires no explanation. But in fact nothing is explained thereby; the alteration is at the same time essentially the transition of one quality into another, or the more abstract transition of an existence into a negation of the existence; this implies another determination than that of gradualness which is only a decrease or an increase and is a one-sided holding fast to quantity. 

Nevertheless, it is a common logical error to conclude that because the qualitative change takes place through quantitative changes the qualitative change is itself gradual. We make this mistake not because the former follows from the latter as a logical matter, but because it is intuitively simple.

Since the progress from one quality [to another] is in an uninterrupted continuity of the quantity, the ratios which approach a specifying point are, quantitatively considered, only distinguished by a more and a less. From this side, the alteration is gradual. But the gradualness concerns merely the external side of the alteration, not its qualitative aspect; the preceding quantitative relation which is infinitely near the following one is still a different qualitative existence. On the qualitative side, therefore, the gradual, merely quantitative progress which is not in itself a limit, is absolutely interrupted; the new quality in its merely quantitative relationship is, relatively to the vanishing quality, an indifferent, indeterminate other, and the transition is therefore a leap; both are posited as completely external to each other. People fondly try to make an alteration comprehensible by means of the gradualness of the transition; but the truth is that gradualness is an alteration which is merely indifferent, the opposite of qualitative change.

One might be tempted to argue that if, as Hegel says, changes in quality are sudden not gradual, then one should be able to identify the exact point when the change occurs. Does not this suggest that the takings paradox should be easily solvable? This is, once again, a serious misunderstanding of sublation.

Slavoj Zizek, a philosopher who insists on the close interrelationship between Hegelian theory and Lacanian psychoanalysis, gives a characteristically brilliant account of why we can never identify the moment of sublation. The specific

125. HEGEL'S LOGIC, supra note 61, at 334-35.
126. Id. at 368.
examples he uses are Hegel’s descriptions of the movements from consciousness into self-consciousness, and from “in-itself” to “for-itself,” but it can be generalized to all sublations.

Hegel’s point is, again, that consciousness always-already is self-consciousness . . .

The passage of consciousness to self-consciousness thus involves a kind of failed encounter: at the very moment when consciousness endeavors to establish itself as “full” consciousness of its object, when it endeavors to pass from the confused foreboding of its content to its clear representation, it suddenly finds itself within self-consciousness—that is to say, it finds itself compelled to perform an act of reflection, and to take note of its own activity as opposed to the object. Therein resides the paradox of the couple of “in-itself” and “for-itself”: we are dealing here with the passage from “not yet” to “always-already.” In “in-itself,” the consciousness (of an object) is not yet fully realized, it remains a confused anticipation of itself; whereas in “for-itself” consciousness is in a way already passed over, the full comprehension of the object is again blurred by the awareness of the subject’s own activity that simultaneously renders possible and prevents access to the object.

In short, consciousness is like the tortoise in Lacan’s reading of the paradox of Achilles and the tortoise—Achilles can easily outrun the tortoise, yet cannot catch up with her. 127

Zizek refers to Lacan’s comparison of his notion of fantasy—which reflects a Hegelian sublative leap—to Zeno’s famous paradoxes. 128 In a Lacanian reading, Zeno did not merely intend to make the negative point that the reasoning of his teacher, Parmenides, led to the conclusion that Achilles could never catch up to a tortoise who is given a head start. Rather, Zeno was a brilliant satirist. He eruditely combined allusions to the tragic race to the death between Achilles

127. ZIZEK, supra note 115, at 188-89.
128. Zeno’s paradoxes were designed to demonstrate the theory of his teacher, Parmenides, “that reality is one, immutable, and unchanging; and all plurality, change and motion are mere illusions.” DOUGLAS R. HOFSTADTER, GOEDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 29-32 (1979). In the most famous paradox, Zeno posited a race between the proverbially slow tortoise and the legendary hero Achilles, the fleetest of all mortals. The paradox argues that if the tortoise is given a head start, then it is logically impossible for Achilles to catch up. Whenever Achilles comes to the place where the tortoise once was, the tortoise will have already moved further on.

And now the Tortoise is but a single rod ahead of Achilles. Within only a moment, Achilles has attained that spot . . . Yet in that short moment, the Tortoise has managed to advance a slight amount. In a flash, Achilles covers that distance, too . . . But in that very short flash, the Tortoise has managed to inch ahead by ever so little, and so Achilles is still behind. Now you see that in order for Achilles to catch the Tortoise, the game of “try-to-catch-me” will have to be played an INFINITE number of times—and therefore Achilles can NEVER catch up with the Tortoise!

Id. at 32. This common notion of infinity (i.e., an unending string of something, in this case of increasingly smaller subdivisions) is what Hegel called a bad or spurious infinity. HEGEL’S LOGIC, supra note 61, at 139-40. It is to be contrasted with the “true” infinity of “the beyond of the limit,” which I discuss supra in text accompanying note 115.
and Hector in *The Iliad* with the comic race between the hare and the tortoise in Aesop’s fable in order to make a profound philosophical point. Specifically, Zeno was referring to Homer’s description of the fatal race:

As in a dream, the pursuer never succeeds in catching up with the fugitive whom he is after, and the fugitive likewise cannot ever clearly escape his pursuer; so Achilles that day did not succeed in attaining Hector, and Hector was not able to escape him definitely.129

As explicated by Zizek:

[The] point is not that Achilles could not *overtake* Hector (or the tortoise)—since he is faster than Hector, he can easily leave him behind—but rather that he cannot *attain* him: Hector is always too fast or too slow. . . . The libidinal economy of the case of Achilles and the tortoise is here made clear: the paradox stages the relation of the subject to the object-cause of its desire, which can never be attained. The object-cause is always missed; all we can do is encircle it. In short, the topology of this paradox of Zeno is the paradoxical topology of the object of desire that eludes our grasp no matter what we do to attain it.130

In other words, it is not merely empirically difficult, it is logically impossible to identify the exact moment when quantitative change becomes qualitative change—that is, when it is no longer adequate to say there is more or less of

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In the climax of *The Iliad*, the petulant Achaean hero, Achilles, finally joins the battle and accepts the challenge of the Trojan champion, Hector. The scene that follows seems startlingly postmodern in its juxtaposition of tragedy and farce and its use of the surrealistic dream imagery. Indeed, the farcical element of the story increases our sense of Hector’s tragedy.

For 21 books, the epic seemed to have been building up to a glorious duel. Instead, Homer surprises us with slapstick. Hector, who up to now has been presented as the perfect warrior, panics and flees in terror while trying to convince himself that this was a clever diversionary tactic to tire Achilles out. Achilles chases Hector around the great walls of Troy three times before finally catching and killing him.

As every aficionado of Bugs Bunny knows, Aesop’s hare should have easily beat the tortoise in the race, but lost because of his own overconfidence. Similarly, Achilles, the fleetest of all mortals, should, but never does, beat the tortoise in Zeno’s race. Similarly, according to Homer, although Achilles does finally overtake Hector, it takes so long that Achilles and Hector feel that they are living the nightmare in which one runs without moving. As in Zeno’s paradox, the race seems to go on forever as Hector always moves away just as Achilles approaches.

Lewis Carroll, a mathematician by profession, recalls *Zeno* in the famous scene in *Through the Looking Glass* in which Alice runs and runs and runs only to find that she has never moved from the place she started. The Red Queen explains that “it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that.” CARROLL, supra note 1, at 196-97.

Jean-Claude Milner argues that each of Zeno’s other paradoxes similarly juxtapose a popular comic image with a familiar tragic one. See JEAN-CLAUDE MILNER, *DETECTIONS FICTIVES* 45-71 (1985).

130. *Id.*
something, and we must instead conclude that there has been a change of something into something else. We are always positioned either at the point where the change (i.e., in quality) has not occurred (when, in Lacanian terminology, it is the “not yet”), or after it has occurred (when it is “always already”), but never at the point of the transition itself because there is no such point.

In the words of the White Queen, in sublation, it is always jam yesterday and jam tomorrow, but never jam to-day.\(^{131}\)

III. TAKINGS AND FREEDOM

A. FREEDOM

But judges are forced to act “to-day.”\(^{132}\) Hegel’s abstract logic is impeccable, but Hegel always refuses to give the type of pragmatic advice needed by judges.\(^{133}\) How could he? He is trying to explain the nature of freedom—if he told us what to do, we would not be free.

On the one hand, there is a logically and intuitively recognizable qualitative distinction between property and no property. Moreover, a quantitative change in how much property one has is logically distinct from a qualitative change of having property to not having property. On the other hand, a quantitative diminution of property eventually becomes a qualitative change from property to no property. This is inherent in the logical nature of the concepts of quality and quantity. The problem in takings jurisprudence is that a declaration that a taking has occurred is precisely a judgment that the change of quantity in property has passed over into a change in quality. The relationship between possibility and actuality is traumatic.\(^{134}\) Also, according to Hegel, there is no logical way of identifying the moment when this occurs, because it either has

\(^{131}\) In other words, is not a kind of leap from “not-yet” to “always-already” constitutive of the Hegelian dialectics: we endeavor to approach the Goal . . . when, all of a sudden, we establish that all the time we were already there? Is not the crucial shift in a dialectical process the reversal of anticipation—not into its fulfillment, but—into retroaction? . . . [T]he fulfillment never occurs in the Present . . . .

\(^{132}\) This is the problem explored by Jacques Derrida in *The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 919 (1990).

\(^{133}\) See Hyland, supra note 59.

\(^{134}\) The ontological background of this leap from “not-yet” to “always-already” is a kind of “trading of places” between possibility and actuality: possibility itself, in its very opposition to actuality, possesses an actuality of its own. . . . [T]here is always something traumatic about the raw factuality of what we encounter as “actual”; actuality is always marked by an indelible brand of the (real as) “impossible.” The shift from actuality to possibility, the suspension of actuality through inquiry into its possibility, is therefore ultimately an endeavor to avoid the trauma of the real.
not yet occurred, or it has always already occurred. This problem is why pragmatism is always the necessary corollary to Hegelian idealism.\footnote{Hegel recognized this fact. He just thought that philosophy had nothing to add to pragmatism. When Plato recommended that nursemaids should rock babies to keep them from crying, he had left philosophy and entered prudence. \textit{Hegel, Philosophy of Right}, \textit{supra} note 6, at 21. "A further word on the subject of \textit{issuing instructions} on how the world ought to be: philosophy at any rate always comes too late to perform this function." \textit{Id.} at 81. This is partly an issue of terminology. American pragmatists think of their theories as a branch of philosophy. Hegel’s point is to distinguish that which can be logically demonstrated (what he calls philosophy) from that which isn’t but may be adopted for good reasons. This is, of course, similar to the Popper-Kuhn distinction between science and common sense, which is merely supposed to distinguish, not denigrate, the latter.}

The organization of our society is in large part based on a market economy and the institution of private property, which requires that we distinguish between property and no property. Consequently, we must make a pragmatic decision as to when we will declare that the dialectical passing of quantity into quality has occurred. To Hegel, pragmatic decisions cannot be decided by logic, but only by pragmatic reasoning. This can only be done by positive law (whether in the form of custom, judicial decision, legislation or whatever). This is probably why takings cases seem so illogical and “subjective.” From a Hegelian perspective, this is necessarily true.

It is also why, from a Hegelian perspective, the observation that property is both logically prior to positive law (in that it is a necessary moment in the development of subjectivity and the actualization of human freedom), yet simultaneously subject to the defining restraints of positive law, is not a troublesome logical contradiction (as it is in the classical liberalism embodied in the Constitution). Most important, it suggests that, although property is necessary for the actualization of human freedom, property is ill-suited for the role traditionally ascribed to it by liberal philosophies to “serve[...] in the office of a wall, or as a moat defensive to a house,”\footnote{\textit{William Shakespeare}, \textit{King Richard II} act 2, sc. 1.} protecting private rights from government oppression.

\section*{B. TOTALITARIANISM}

Because liberalism is based on the presumption of free, self-actuating, autonomous individuals pre-existing in some hypothesized state of nature, society and the state are defined as problems. They need to be justified in light of the individual’s pre-existing natural rights and liberties. As we have seen, property and the Takings Clause are traditionally seen as ways of protecting the free individual \textit{from} the state.

In contrast, Hegel believed that the presumption of the free individual is every bit as problematic as the justification of society or government. Although Hegel contingently started his political analysis in \textit{The Philosophy of Right} with the Kantian-liberal concept of the abstract free person (self-consciousness as free will), he argued that the very internal logic of this concept means that the person cannot actualize the potential freedom that is the essence of personhood...
except in the complex social relations of the family, civil society, and the state. Rights such as property are not pre-existing or natural, but are human creations. This does not, however, mean that they are unauthentic or inessential. They are logically necessary for the actualization of potential freedom.

It is tempting to misinterpret Hegel as justifying the totalitarian state to which individualism, freedom, and property are totally subordinated. This is based, once again, upon the usual misreading of sublation. Although the individual citizen in the developed state governed by ethical life is the last stage of the development of man and society discussed in *The Philosophy of Right*, this cannot mean that the state replaces the logically earlier institution of civil society or that ethical life (*Sittlichkeit*) replaces the earlier relationships of morality and abstract right. To reiterate, sublation requires that the logically earlier stages always remain present and intact as the building blocks of the logically later stages. If the freedom of man as abstract person, or the property rights of man as legal subject were infringed, then the ethical life of man as individual in the state (which is the eventual result of sublation of these other stages) would cease to exist.

Consequently, Hegel believed that it is absolutely crucial to the state's own existence that it recognize and protect individual freedom and property rights. One must always remain critically aware, however, that even if the abstract person and the developed state mutually require each other as a theoretical matter, the interests of the state and the person will frequently conflict as an empirical matter. Not all empirical governmental institutions qualify as Hegelian "states." Rather, they constitute more or less adequate manifestations of the notion of "state." Nevertheless, unlimited individual property rights would be self-defeating because they would impede complete actualization of freedom of the person, which requires the existence of civil society and the state.

The point for takings law is that although society demands both individualistic property rights and some communitarian limits on property rights, there is no logical algorithm that can determine the proper balance between the two. As we have discussed, the dialectical quantum leap between property and no property is simultaneously both not yet and always already from a logical standpoint. Since property is not a pre-existing natural right, but a human creation (albeit a necessary one), its limits can only be determined by humans.

Citizens, therefore, must be in a state of constant diligence, watching the government so that it does not (self-defeatingly) crush human freedom. This is not merely consistent with, but required by, the Hegelian concept of actualized freedom. Freedom cannot be actualized by passively submitting to a pre-existing Symbolic order. It requires a constant positive affirmation of its existence through the exercise of subjectivity through the active creation of law.

Hegel leaves this actualization of law as abstract right to positive law (*Gesetz*). As I have said, this can only be promulgated in the civil society and state on the basis of morality and ethical life. We must also consider who should
make this pragmatic decision—the executive, the legislature, the judiciary, or
the “people” (through constitutional amendment)?

The specific balance of rights will, by definition, be empirical and not logical.
This is because as the actualization of freedom it will have to contain a purely
subjective moment. If our actions were logically predetermined, then we would
not be free. It will always, therefore, have an unsatisfyingly ad hoc or arbitrary
aspect to it. There is no way around this. As Zizek said, the fundamental thesis
of Hegel is that the human condition is a failed encounter by definition. But it is
precisely this “failure” or incompleteness that leaves a space, an opening,
through which humans can and must constantly seek to actualize our freedom
and subjectivity by always exceeding our limits.

IV. BELIEVE THE IMPOSSIBLE

Alice laughed. “There’s no use trying,” she said: “one can’t believe
impossible things.”

“I daresay you haven’t had much practice,” said the Queen. “When I was
your age I always did it for half-an-hour a day. Why sometimes I’ve believed
as many as six impossible things before breakfast . . . .”

Hegelian freedom is “the ought”: the ethical and logical necessity of transcending
the limit. According to sublative logic, it is always already and not yet. But
it is never now. We can bear the deprivation of jam today only because of
memories of jam yesterday, and the self-confidence that we will win jam
tomorrow. Alice saw the White Queen’s paradox as the impossible and she
could not believe it. The White Queen understood that it followed from “living
backward”—the retroactive logic of the dialectic. Of course Alice is only a
child; she sees the White Queen as befuddled. But it is precisely the White
Queen’s understanding of, and belief in, the impossible that makes her sover-
eign and free.

137. Carroll, supra note 1, at 238.