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A Last Word on Eminent Domain

RICHARD A. EPSTEIN*

The discussion at the Conference, and the papers written in connection with it, raise many issues on which it seems appropriate for me to comment in closing. It is quite impossible to give a detailed response to each individual objection or to each author, so I plan instead to discuss only the most critical questions here. For ease of exposition I divide my remarks into two classes. In the first part, I examine criticism of my point of view as a matter of political theory. In the second part, I look at some of the more particular challenges to my legal and constitutional position. The division is necessary for it is quite clear that matters of political theory and political thought are not hemmed in by any authoritative text or by received canons of interpretation that are applicable to constitutional discourse. Political theory is reasoning *to* the eminent domain clause; constitutional interpretation is reasoning *from* it. Nonetheless, the eminent domain clause does lay strong claims to articulating a coherent normative view of the legal order, so that the distinction between political theory and constitutional interpretation is not as watertight as the above opposition suggests. Nonetheless, it offers a convenient first approximation around which to organize the analysis. Part one therefore deals with the relationship between natural rights and utilitarianism. Part two then turns to more concrete issues of constitutional interpretation.

I. NATURAL RIGHTS AND UTILITARIANISM

The status of natural rights, and their relationship to utilitarian theory, is one recurrent theme. In a historical vein, Professor Grey criticizes me for failing to understand the extent to which natural rights of private property under Locke give way to convention and social regulation within the framework of civil society. As a philosophical matter, Professor Paul is still distressed that my allegiance to natural rights is skin deep, and regards my general endorsement of any form of utilitarianism as a betrayal of sound libertarian principles. Professor Alexander assumes that I have “abandoned” altogether the natural rights theme of *Takings* in favor of a pure utilitarianism, and

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that the two theories are, and must remain, a mismatched pair. Professor Sunstein takes me to task for not understanding how the phenomenon of "adaptive preferences" undermines my defense of both private property and ordinary markets. Professor Radin argues that my failure to take into account the distinction between fungible and truly personal property flaws my analysis of both the public use and just compensation requirements.

A. *Natural Rights and Conventionalism*

Turning first to Tom Grey, he argues that even for the natural rights theorist, property is not a natural, but a conventional social institution: "Locke's view was the same [as others]; the natural right of property arising from labor applied only in the state of nature, while 'in Governments the laws regulate the right of property and the possession of land is determined by positive constitutions' subject to loosely specified restraints imposed by natural right."¹

The criticism misses its mark. The critical question is, what is the sense in which the term "regulate" should be taken in Locke's passage? Initially, it seems odd in the extreme that the term should be given its modern sense, that the state may so regulate the possession, use, and disposition of property with extensive zoning or land use schemes that destroy its value to the owner. What possible sense is there to say that the great purpose of government is to protect property against assaults by others, if the government is then able to limit the use and disposition of property by whatever scheme of regulation it chooses to impose?

There is, moreover, good reason to assume that "regulation" as used by Locke can be given a more restrictive but perfectly sensible interpretation. As a matter of general principle, there is no question that a sensible theory of property includes the need for certain requisite formalities. One can assume, as I do, that there is a natural right of acquisition by first possession, and a natural right of disposition, and still recognize the need for social convention to regularize holdings in property. Often the identification of the first possessor is far from trivial. A rule, a convention, that requires the possessor to post the corners of his lot goes a long way to removing boundary disputes. A rule which demands that a miner register the claim which he first worked goes a long way to preventing costly struggles over priorities. Both of these rules are in a sense types of regulation, but in neither case is regulation so powerful that it diminishes the force of the first

1. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 31 (1986) [hereinafter Grey, *supra* p. —].

possession rule. Quite the contrary, posting or recordation sharpens and refines that rule in ways that make it more workable.

The same can be said of various social regulations associated with the rights of disposition. A rule that requires deeds of sale or mortgage be in writing is a way to prevent unfortunate disputes as to when a conveyance was made or what terms and conditions it contained. A rule that requires a deed to be registered to give protection against all or most third parties improves the security of property. Both types of rules surely partake of social convention, and are not therefore "natural": there is no reason why one system of recordation in one culture need take the same form as the system of recordation in another.

These conventions, moreover, are well accounted for under my general theory. They are deviations from natural rights that fall squarely within the implicit in-kind compensation qualification to the first possession rule. Each of them is general in application and tends to increase the stock of wealth across society. These formalities of acquisition and conveyance are designed to strengthen the system of private property, which could hardly function without them.² Indeed Grey's own authority, James Tully, finds no apparent contradiction between ordinary property rights and the social conventions that surround them, for throughout his discussion he uses exactly the same definition of private property that I have defended in *Takings*.³ My *Funk & Wagnalls'* dictionary agrees.⁴ The constraints that natural

2. For a discussion, see Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982).

3. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter (p. —)]. "Three issues are involved in this part of Locke's explication of property. The first concerns the nature of the property which he says is conventional. To make this point I will use the two-part definition of private property enunciated by Macpherson: 'it is a right to dispose of, or alienate, as well as to use; and it is a right which is not conditional on the owner's performance of any social function.'" J. TULLY, *A DISCOURSE ON PROPERTY, JOHN LOCKE AND HIS ADVERSARIES* 99 (1980) (quoting C. MACPHERSON, *DEMOCRATIC THEORY* 126 (1975)).

Note, Locke thought that there were social constraints upon private ownership, which derived from property's being originally held in common. Locke's view is at variance with the common law view on the general subject, which starts from the assumption that all property is unowned in the original position. I criticize the Lockean view in *Takings* (p. 11-12).

4. Its two definitions of property are: "1. Any object of value that a person may lawfully hold; anything that may be owned; stocks, land etc; any possession. 2. The legal right to possession, use, enjoyment and disposal of a thing; a valuable legal right or interest in or to particular things." 2 *FUNK & WAGNALLS' INTERNATIONAL EDITION* (1982).

Note that this definition covers both the thing subject to the property rights and the rights in that thing. It also recognizes without difficulty property such as stocks and partial interests, and thus uses a "layman's definition" which is far more comprehensive than that offered in B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 113-67 (1977). I have criticized

rights, as Locke understood them, place on the civil rules were, and are, hardly as "loose" as Grey suggests.

B. *The Meaning of Natural Rights*

Within political theory, "natural rights" has always been an elusive phrase because it is often not made clear to what these natural rights are opposed. To use the wonderful phrase, coined by J.L. Austin,⁵ "natural" (like "real") operates as a "trouser" word, which receives clear meaning only when set in contrast with some other term. Sometimes natural rights are set in opposition to divine rights, so that utilitarianism becomes, for example, a species of ethical naturalism. On that score most of us believe in natural rights today. On other occasions natural rights theory is opposed to positivism: the rights which people have are only those which the state says that they have. Here the debate is extensive,⁶ but while the positivist may be correct in insisting that all unjust laws are nonetheless laws, they are not just law simply because they are laws. To the contrary, as a normative matter, it is correct to say that the state should prohibit certain conduct because it is wrong by some independent criterion, and not that this conduct is wrong because the state prohibits it. In a third sense, most relevant here, natural rights are set in opposition to utilitarian theories, as "deontological" theories are opposed to "consequentialist" ones. I have no doubt that the framers were in some sense natural rights theorists in this last sense, although I do not think that they saw the same hard-edged opposition between the two types of theories on which modern ethical theorists sometimes insist.

What is increasingly clear to me is that natural rights theories, as opposed to consequentialist ones, have never been able to carry the burden of justification demanded of ethical theories generally. All too quickly they become assertions based on intuitive or self-evident truths, which can only be perceived, but never challenged or explained. Yet there is no reason to leave the discussion at so abstract and inconclusive a level. When speaking of the ultimate justification

Ackerman's view in Epstein, *The Next Generation of Legal Scholarship* (Book Review), 30 STAN. L. REV. 635 (1978).

5. "Next, 'real' is what we may call a *trouser-word*. . . . [With] 'real' . . . it is the *negative* use that wears the trousers. That is, a definite sense attaches to the assertion that something is real, a real such-and-such, only in the light of a specific way in which it might be, or might have been, *not* real. 'A real duck' differs from the simple 'a duck' only in that it is used to exclude various ways of being not a real duck—but a dummy, a toy, a picture, a decoy, &c." J.L. AUSTIN, *SENSE AND SENSIBILIA* 70 (1962).

6. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

of legal rules, it is rare that the discussion does not turn into one about social consequences, and on balance that is a good thing. Nonetheless, it is very hard to articulate the transaction costs explanation against theft, and in some circumstances it is probably unwise to attempt that task. Generally speaking, people will make the right decisions if they follow the rule, "never steal," even if they have no idea that stealing reduces overall social output, or why. The standard injunction against theft is an excellent proxy for the overall social concern. It is therefore often convenient to use the narrow rule as a guide for human action because it combines great reliability with great clarity.

It must be stressed that there is really no effort to give a Platonic lie to social norms, as Ellen Paul protests. It is quite the opposite. Knowing the reason why theft is bad allows one to justify the rule, or at least to say, that enforcement of the rule has consequences that are socially desirable. While small children may not be able to follow the argument, the rest of us can. And nothing should be more comforting than to show the strong congruence between a high-powered utilitarian theory and our ordinary moral intuitions. Larry Alexander asserts, "Utility is not the right kind of thing for buttressing an implausible position on natural rights, and vice versa."⁷ If one drops the "implausible," then Alexander's observation is quite misguided. The system of natural rights usually refers to the rights to acquire and own property, and to have exclusive liberty to control one's own person and labor. There are very powerful utilitarian justifications on behalf of these rights, and there is no good reason why any natural rights theorist like Paul should want to oppose good utilitarian arguments that buttress her own substantive conclusions. The traditional natural rights theories stressed the relationship between man's nature and the rules that govern his conduct. All too often the search for man's essence has blinded theorists to the obvious differences between persons, to which any law must respond. Yet the "nature" of man, i.e., of different men and women, is consistent with great attainments by some individuals and total degradation in others, or indeed having the mighty fall, or the weak emerge triumphant.

Throughout this ebb and flow, we know too that self-interest is a powerful beacon that guides most forms of individual behavior. The natural lawyer had a program to find those legal rules that were "conformable" with human nature. It is not a very large step to interpret that as asking, what rules are appropriate for controlling human

7. Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223, 232 (1986) [hereinafter Alexander, *supra* p. —].

excesses and for releasing human potential? Why that inquiry should promote a consciously anti-utilitarian bias is far from evident, once we treat utilitarianism as a social theory of the good, and not simply as a covert disguise for egotism.

C. *The Inner Pie*

The congruence between ordinary conceptions of natural rights and utilitarianism can, I think, be established with some force, for there is a powerful parallelism between the ordinary definitions of private property, noted above,⁸ and the sensible configuration of property rights. In the course of the Conference, I was pressed to give some functional account of the inner pie, i.e., private property (ch. 1), whose value was enhanced by government protection. My answer was, and is, that the joining of the three rights of possession, use, and disposition in the same person reduces the bilateral monopoly problems associated with the efficient deployment of resources. To partition these incidents of ownership across separate holders means that the parties must enter into a costly, negative sum bargaining game before a resource can be utilized at all, or moved to a higher use. The compactness of the initial property rights structure minimizes those problems, for we have one person who is in the position to transfer the whole bundle to another.

I cannot claim that it is not possible to conceive of some configuration of rights that might in principle prove superior. But there is simply no hint of what that assignment of rights might look like. More specifically, at no point during the Conference, did anyone dispute the assumptions of this analysis by showing some social advantage that arises from the separation of the incidents of ownership, one from another. The argument for generality of this property rights system rests in large part upon the pervasive nature of the bargaining problems that the institution of property is designed to counter. Yet at no point did anyone explain how forced separation of the incidents of ownership could not create a bilateral monopoly problem. Nor did anyone suggest any alternative delineation of rights structures that could be more resistant to the problem. Nor did anyone urge that first possession should give a right to possession only and that first alienation (of something not possessed, no less) should give the power of alienation (to something which could not be delivered). And at no point did anyone undermine the consistent emphasis on the transaction costs problem that explains both the institution of private prop-

8. See *supra* note 3.

erty in its traditional form, and the need for forced exchanges (with just compensation) for those bilateral monopoly problems that persist even after systems of private property are in place, e.g., public goods problems overcome by taxation and various forms of regulation.

The basic proposition that private property shall be taken for public use only with just compensation can best be understood as an effort to maximize social welfare by minimizing bilateral monopolies and their associated transaction costs that otherwise prevent the redeployment of material resources. The approach draws upon both the common law tradition of property rights, the modern theories of transaction costs economics, and the tradition of rational choice in ethics.⁹ The book is an effort to integrate these separate traditions, and it is something of a mystery to understand how it can be regarded, for example, by Alexander as a theory "cut off from the meandering common law stream that was its origin."¹⁰

D. *The Status of Individual Preferences*

I also think that my approach is resistant to the other fundamental philosophical criticisms that have been directed against it. Professor Sunstein asserts, for example, that there are devastating theoretical arguments against any utilitarian position because individual preferences should not be regarded as exogenous, stable, or even self-regarding:

Societies have collective preferences, and people have "preferences about preferences." People may seek environmental laws even though they do not visit the national parks; they may want government to support public broadcasting even though they do not watch public broadcasting; they may favor welfare programs even though they do not give to the poor. In these and other cases, people may, through government, implement their preferences about preferences. This phenomenon—voluntary foreclosure of consumption choices—is the political analogue to the story of *Ulysses and the Sirens*.¹¹

Note, however, the difficulties—both conceptual and practical—that his position creates. The first sentence, which postulates some collective social preferences, eludes the enormous difficulties of how individual preferences should be aggregated to make social choices. The aggregation problem is present once unanimity is no longer possi-

9. See, e.g., D. GAUTHIER, *MORALS BY AGREEMENT* (1984) (trying to construct a system of interpersonal ethics out of a rational response to prisoner dilemma games).

10. Alexander, *supra* p. 233.

11. Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245, 247 (1986) [hereinafter Sunstein, *supra* p. —].

ble, and it is far more acute for those, like Sunstein, who embrace a large state, with lots of collective decisions, than it is for those like myself who endorse limited government in order to ease (but never eliminate) the conundrums of collective choice.

In addition, Sunstein's examples of "preferences about preferences" are themselves subject to more ominous interpretations. There are all sorts of private reasons why persons who do not like national parks could support environmental laws. They might be suppliers of pollution control equipment who benefit from an increased demand for their wares. Similarly, someone could support public television because it advances a view that confers upon them some political advantage. And someone could support welfare programs for the poor precisely because he is in the business of selling to the poor. The demonstration that some degree of egotism is not involved in these choices takes far more than a few well-crafted examples. It requires a detailed examination of the distribution of costs and benefits of concrete schemes.

But let us assume that the phenomenon of disinterested generosity does exist, as I believe that it does in some limited way. Still, this type of public sentiment does little to justify a system of broad legislative power. As an initial matter, Sunstein makes no demonstration of how *pervasive* the phenomenon of public spirited behavior really is. To judge from the mass of subsidy programs that litter the statute books, the betting here is that these sentiments too often take a back seat to the more insistent parochial drives that lead powerful individuals, firms, and groups to hire lobbyists to press their demands in official places. Why then create a system of broad legislative power when the virtuous will not be able to exploit it with anything like the meticulous efficiency of the self-regarding? Those people who do have "preferences about preferences" can honor them without exposing the public at large to the pervasive risks of ordinary first order self-interested behavior. They can, and do, engage in voluntary work, and they can, and do, make voluntary charitable contributions.

Voluntary charity is, of course, problematic because of the coordination problem between private donors. It was for just that reason that I suggested that tax deductions for charitable contributions did not have the same theoretical (or constitutional) difficulties as direct grants by government (p. 323). But if these collective action problems are the concern, there is no reason to adopt an opaque mode of exposition with its different preference tiers. At root what we have here is but another application of the prisoner's dilemma game. Thus, suppose the cooperative solution to any problem, be it charitable giving

or corporate control, allowed each party a payoff of 6; if one side defected he could obtain 9 for himself, but the other would receive 0. If both defect, then each has a payoff of 1. Each party's individual preference is for the alternative that yields him 9, but each recognizes the risk of the outcome of a dual 1. Hence their joint preference is for a structure (i.e., a preference about a preference) that prevents either of them from defecting—for which together they should be prepared to pay at least 3 (i.e., the difference between 12 and 9), and, as defection is a dominant strategy, more likely as much as 10 (i.e., the difference between 12 and 2). This view of the issue is not in opposition to the eminent domain approach, rather it only gives further evidence as to its sense. Our preference about preferences is nothing more than a sensible desire for the cooperative solution to this prisoner dilemma game. We can thus accommodate Sunstein's own view within the framework of the single theory that I use to account for private property and the subsequent network of forced exchanges.

There are also answers to Sunstein's other criticisms of the philosophical foundations of utilitarianism. Thus he insists that there is a necessary circularity about preferences because preferences depend upon rules, so that we cannot make rules depend upon preferences.¹² The claim is that our preferences are dependent upon the current structure of ownership rights, and hence we cannot use the set of preferences to justify those rights. At one level this argument is far too powerful, for it would invalidate all respect for anyone's preferences *ever*, no matter what the existing system of property rights. No matter how the world is organized, someone can say, "If the world were different, then everyone's preferences would be different as well. Therefore your preferences don't count because they are merely adaptive."

There is no reason to invite this despair. As a factual matter, any circularity between preferences and legal rules is far from evident. Are our preferences formed by legal rules? To be sure our behavior clearly adapts to these rules, which is why their content can be so critical. Yet the desire for individuals to maximize utility depends upon in large measure their need to fulfill certain basic drives of food, companionship, sleep, and procreation. The strategies chosen to fulfill those drives are heavily dependent upon the payoffs associated with the different alternatives created by different legal regimes. In a world where initiative is taxed, the self-interested person will take a more cautious view on innovation. In a world where theft is rewarded, then we shall have more theft. As people know more

12. Sunstein, *supra* p. 248.

about certain alternatives, their willingness to pursue them will increase or decrease with the available information. To be sure, once certain paths are taken, then there will be costs associated with shifting, but that is true whether the original constraint is imposed by law (which at some cost could be changed) or by a shortage in rice pudding (which at some cost could be eliminated). There is no system of social organization that ever allows anyone's present choices to be made independent of past choices or present circumstance: scarcity alone precludes so lofty a perch for human behavior. As all preferences are in some degree constrained, no philosophic insistence about the instability of subjective preferences should allow us to cast problems of social organization into an abstract framework which becomes so fiendishly complex as to resist any reasoned analysis.

Sunstein, with his obvious affection for Jon Elster,¹³ invokes the story of the fox and the sour grapes to demolish the presuppositions of utilitarian theory. But it is only a fairy tale, and it is one that is open to much more innocuous interpretations. (It is not that the fox thinks that the grapes are sour, or that he no longer likes grapes. It is only that he wants to rationalize his disappointment to save face. Take the grapes from the tree and lay them at his feet and he will gobble them up.) Sunstein uses this example to buttress the conclusion that certain types of law—addiction, gambling, even seat-belt laws—are misunderstood if one sticks to normal assumptions about private preferences. In part I agree with him, especially about addiction, which is why *Takings* veered away from the “morals” head of the police power, which raises these questions in most acute form (p. 109 n.4). Nonetheless, the major kinds of institutional issues that I address—taxes, regulation, and liability—do not raise any of these obscure phenomenological issues. None of these elements could be used to fashion a defense of rent control, for example. Do people develop an adaptive preference to wait on queues because the price is artificially constrained below market? Or do queues disappear when prices rise to market levels? For the mass of standard economic and social regulations to which *Takings* is directed, the safe assumption is that individuals act in ways that work to their own self-interest as they understand it. The descriptive and normative implications are pretty well understood on the assumption that individuals can know and order their preferences over time, and can revise them systematically on the basis of new information. To assume otherwise can only lead us into a methodological morass in which anything, hence nothing,

13. See J. ELSTER, SOUR GRAPES (1983).

goes. If individuals are so unstable in their own preferences, how can anyone be charged with the difficult task of governance at all?

E. *Subjective Value*

A similar response applies to Professor Radin's insistence that my simple approach toward human behavior overlooks the distinction between fungible and personal property. She writes:

Property that is personal in the sense of being justifiably bound up with the self and its individuality deserves, and in our system often receives, a higher level of respect and protection than property that is not.

Fungible property—that which is held merely for investment or exchange and is not justifiably bound up with the person—is fully interchangeable with its market value in money, while personal property is not.¹⁴

She then asks, whether wedding rings are the same as machine tools, or whether some property can be taken at all, or whether a premium should be paid?¹⁵ Yet these issues do not require some special theory to handle them. They only require that sufficient attention be paid to the general question of subjective value, i.e., the excess of use value over exchange value. The law of eminent domain that ignores the increment of use value can hardly be said to be consistent with a sensible utilitarian position. There are many manifestations of this problem that the standard utilitarian theory can explain: the prohibition against forced exchanges where there is no bilateral monopoly, the premium paid in certain taking situations, e.g., the Mill Act cases,¹⁶ bonus values for condemnation of residential property, the preference for taxation in cash instead of in kind.¹⁷ Occum's razor applies here as elsewhere. There is no reason to join Radin's unknown venture into "personhood" when conventional legal and economic tools are adequate for the job.

II. CONSTITUTIONAL INTERPRETATION

A. *Textualism and Literalism*

Takings has also been subject to sustained criticism because of its straightforward—some might say naive—views of constitutional

14. Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239, 244 (1986) [hereinafter Radin, *supra* p. —.].

15. *Id.* at 243-44.

16. (Pp. 170-76).

17. For discussion, see Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y — (1986).

interpretation. I have been called a literalist by Alexander, a formalist by Grey, and a conceptualist by Radin. In one sense it is very difficult to determine what is at stake in this debate. Within the traditional debate I regard myself as an interpretivist as opposed to a noninterpretivist. I also regard myself as a textualist, but not a literalist. And I think the two positions are consistent with each other.

Today, unfortunately, the lines have been blurred. In 1975, Grey introduced the standard terminology between interpretivist and noninterpretivist in order to explain the various approaches to constitutional law.¹⁸ The former included all those persons who believed that the Constitution depended upon the clear meaning of the text or the necessary implications from structure. The noninterpretivists, including Grey, were not bound in any exact way by those simple conventions, and believed in the living Constitution. The strategy of Grey's early piece was to show the number of important constitutional rights, generally accepted, which could not be generated by the interpretivist machinery. Today, however, Grey has retreated from that useful terminology:

It is common to call the opposing schools of thought on the question [of the proper approach to constitutional text] "interpretivist" and "noninterpretivist," but this distorts the debate. If the current interest in interpretive theory, or hermeneutics, does nothing else, at least it shows that the concept of interpretation is broad enough to encompass any plausible mode of constitutional adjudication. We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt. Repenting past errors, I will therefore use the less misleading labels "textualists" and "supplementers" for, respectively, those who consider the text the sole legitimate source of operative norms in constitutional adjudication, and those who accept supplementary sources of constitutional law.¹⁹

Grey obviously adopts the shift in terminology because he understands that noninterpretivism is not a legitimate mode of interpretation. But while his older distinction had the benefit of candor, his newer one is essentially useless. No one is a textualist as Grey defines it. The only question worth disputing is over the kinds of evidence that may be used to supplement the meaning of the text—a matter that Grey never addresses.²⁰ Here, I think that it is proper to rely on three such types of evidence. First, ordinary usage of the terms con-

18. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

19. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984).

20. He does note the rise of a third school of "rejectionist" scholars, who think that once

tained in the Constitution. Second, reasoning by analogy from core cases to their close substitutes. And third, exceptions to a general prohibition that must be accepted as a necessary implication from the text, given the theory which renders intelligible its central commands.

1. ORDINARY USAGE

The first question of interpretation is how meaning is to be assigned to the words and phrases of the Constitution. In my view the answer to that question is to ask about their ordinary usage in the time that they were written. As applied to the words "private property," the test of ordinary usage offers a sufficient guide for further analysis. To be sure, the outer limits of the concept may not be fully understood or explored, but the document draws its strength from the internal power of its text and its ability to handle most significant cases. The distinction between "core" and "penumbra" drawn by H.L.A. Hart²¹ does not capture all that we need to know about legal language. But it contains far more good sense in a sentence than the volumes of learned refutation written in opposition to him.

This sense that language has the capacity to include and exclude, to organize and to explain, is the only possible view of the subject that is consistent with any constitutional endeavour. It also provides an important clue for the importance of natural rights thinking. While, as noted above, I do not think that any natural rights argument provides a solid basis for general political theory, I do regard it as an indispensable aid to constitutional construction. The Constitution contains words like property, contract, and freedom. These words are used in clauses that are written to place explicit limitations upon the power of Congress and the states to act. It cannot therefore be the case that Congress and the states can escape the force of these prohibitions by redefining as they please the meaning of the very terms that limit their power. There must be some meaning external to the document which provides the appropriate understanding, and it is the theory of natural rights, and its close linkage to ordinary usage, which helps explain what these terms mean and why they are important.²²

supplementation is allowed, a judge can reach any position that he desires. *Id.* at 2. The rejectionist is the old noninterpretivist in disguise.

21. See H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961).

22. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (Marshall, C.J., dissenting).

2. ANALOGOUS CASES

My own version of textualism also recognizes the necessity to extend the central conception to analogous cases. Thus, in *Takings* I argue that the taking of property necessarily includes the destruction of property as well (pp. 37-39). Alexander insists that this conclusion is inconsistent with my so-called literalist approach, even though he could scarcely disagree with that doctrinal conclusion.²³ It would be odd for anyone to say that the government could deliberately blow up a building and then pay a pittance for the raw land coupled with the costs of the removal of the scrap that remains. But there is no reason for blind literalism here, and I have never adopted it. The argument for including destruction as part of taking rests upon a supplemental premise, that is, the clear sense that the constitutional prohibition on any practice necessarily requires one to think hard about whether the prohibition extends to its close substitutes. This mode of construction is not some modern piece of fancy. Medieval lawyers were always willing to ask whether an individual case fell within the "equity" of a statute. The general rules of statutory construction import as background conditions the usual excuses and justifications that go to the ultimate question of responsibility unless they are explicitly and clearly negated. It is just that program of supplementation that I follow in *Takings*.

3. IMPLIED EXCEPTIONS

Supplementation of the text occurs in yet another way. Alexander's literalist and Grey's formalist should not be able to tolerate implied exceptions to the written text. Yet the entire discussion of the police power, both in the general case law and my book, presupposes that just such an exception must be read into the eminent domain clause which contains no such phrase by—to use the standard phrase—necessary implication. Similar arguments are applicable to other provisions, e.g., the first amendment, that entrench certain defined types of rights, for even today immediate verbal commands to kill innocent people are not protected by the clause. This mode of implication is dependent moreover upon a clear political theory that speaks about the wrongs that private individuals are not allowed to commit against each other, and the power of the state to protect those who it represents.

This theory of implication does not change the meaning of the term private property—ordinary usage still controls there—but it

23. Alexander, *supra* p. 225.

does change the connection between the taking of private property and the obligation to make explicit cash compensation. Yet, by the same token, this route of necessary implication must be carefully circumscribed, so that the exception is kept congruent with the basic structure of the rule. Otherwise it allows the exception to swallow the clause itself, as has happened today with the police power. An asserted exception, for example, that says that just compensation need not be paid when the taking advances any legitimate social interest is wholly inconsistent with the structure of the takings clause; a simple showing that a taking is for a public use would thereby render the need for just compensation superfluous. But the police power directed against aggression committed by others is not, for it only prohibits individuals from doing the same kinds of action that are wrongful when undertaken by the state (ch. 8).

These linguistic attacks assume a somewhat different form by Professor Radin who introduces another strand of the skeptical argument. She regards me as an unreformed "conceptualist," who has been snookered by the belief that words, even difficult words, can have meanings that remain constant over time and across circumstances.²⁴ In one sense I plead guilty to the charge. A precondition for any normative or descriptive work is that terms be able to carry uniform meanings in different contexts. To state otherwise is to lapse into a situation where there can never be a joinder of issue on matters of substance because there will always be preliminary and unresolvable differences over semantic meaning. To take the nonconceptualist position on language is therefore only suitable for undermining the theories of others. The situation is quite different once you try to advance a theory of your own. Toward the end of her paper Radin does make some brief stabs in that direction. Thus she writes of the commendable virtue in being a "progressive naturalist." The reason:

This view would allow us to suppose we have reached a point in history when we can recognize that exclusionary rights countenancing discrimination on the basis of race, etc., are wrong, and have always been wrong. In my view, this would be more satisfactory than a positivist, consequentialist justification of the Civil Rights Act (anti-discrimination laws presently serve efficiency, or whatever), or Richard Epstein's, if he has one.²⁵

I do not want to discuss here my own views on the Civil Rights Act.²⁶ Suffice it to say that fully developed they would differ very

24. Radin, *supra* p. 241.

25. *Id.* at 243.

26. Civil Rights Act, 42 U.S.C. § 2000a (1982).

significantly from Professor Radin's views. But it is instructive to note that when she takes to the offense she reverts to the very style of argument that she criticizes. There is no hint of cultural relativism or linguistic skepticism. Certain forms of discrimination are, and always have been wrong; the self-evident confidence in natural law assertions thus reappears itself on behalf of a new cause. No longer are there consequentialist arguments that can stand in opposition. One wonders whether a demonstration that the Civil Rights Acts left everyone, including its intended beneficiaries, worse off than before would have influence on her evaluation of the statute. It should not, if consequentialism in all its forms is simply out of place. But there is at least this comfort: any differences between us will be on matters of substance precisely because she has become a conceptualist in order to articulate her own normative, and timeless, position. There is a high price to pay for linguistic relativism: silence on your own moral and political views. Professor Radin shows good sense in refusing to pay it.

B. *Property as a Contestable Concept*

This general concern with literalism, formalism, and conceptualism translates itself into a recurrent criticism that the idea of private property, both as it appears generally, and in the eminent domain clause, is a concept of such fluid and uncertain boundaries that it cannot serve as a clear foundation for any powerful constitutional theory. Thus, to use the fashionable phrase, it was said that property is an inherently "contestable" concept for which it is not possible to establish a single coherent meaning, much less one that speaks about the rights of possession, use, and disposition over external things, to which I have referred.

But look more closely. Start with the reference to "external things." It is important because it suggests that the idea of private property, at least as a textual matter, does not encompass the rights to one's own labor. As a matter of political theory there are powerful reasons to think that labor should receive the same, or at least similar, constitutional protections that are accorded to private property. The value of natural resources is enhanced by the labor that is added to it, so it seems strange to argue that labor is without protection when property is heavily protected under the eminent domain clause. Indeed it is just this concern about incomplete protection that has induced judges and lawyers to shy away from the takings clause and to analyze hard cases under the rubric of substantive due process or freedom of contract, for then labor (or liberty) and property can receive similar levels of protection. After all, a case involving collec-

tive bargaining involves the labor of the worker, and the capital and the land of the employer, so that it is odd that half the relation is covered by the eminent domain clause and half is not.

Grey thinks that my doubts about whether this particular issue, and the larger question of whether labor is included in private property, show the basic weakness of the interpretive method (without of course telling us how he would address the question himself).²⁷ Yet it shows only that the eminent domain clause does not cover all issues of social importance because the words private property, while very broad, do not cover everything of value. Private property, by the standard definitions, refers to things external to the self. This textual point hardly shows that the routine cases of land, cash, contract rights, and intangibles fall outside the scope of the clause.

Still another attack on the coherence of the eminent domain clause is directed to the idea that property comprehends the right of disposition of external things, as the standard definitions seem uncritically to assume. Thus, in connection with the medieval entail, it is said that the right of disposition is not part of the normal bundle of property rights. Yet the strange history of the entail and the subsequent rules on restraints on alienation hardly support that conclusion. Historically, the issue there was always whether the right of alienation was so powerful and so inherent in the idea of property itself (one almost waxes Hegelian) that it could not be eliminated by the explicit terms of the private grant that created the interest in question. There was nothing in that literature which suggested that ordinary definitions of property excluded the right of disposition from the bundle the owner could convey if he so chose. I think that voluntary limitations that the grantor imposes upon the right of alienation do not cause any serious social dislocation, for the grantor will have to bear a large fraction of the costs associated with their enforcement. I, therefore, would abolish the rule against perpetuities and the entire body of restraints on alienation.²⁸ But even if all this is wrong, the history of the entail shows that the legal system can demand alienation against the desires of its past owners. It is hard to see why the right of alienation becomes "contestable" when the historical evidence suggests that alienability is so strong that it trumps the principle of freedom of contract. Surely no one ever had any doubts about the alienability of the fee simple, the life estate, or the reversion.²⁹ Would one want to say

27. Grey, *supra* p. 32, 33.

28. See Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. — (1986).

29. There have been other concerns not raised in the discussion, as with certain kinds of contingent remainders. Yet some of these are genuinely inalienable, i.e., any gift to an unborn

that a general rule today which prohibited all sales and mortgages does not constitute a partial taking of property? If anything, the history would suggest that any efforts by the state to remove rights to alienation must be a taking because of the way in which it undercuts traditional, inherent common law rights.

The monolithic conception of property that I embrace also is attacked by Professor Radin, who notes that the history of the English law of future interests, uses, and dower rights shows how malleable the conception of property has proved over time.³⁰ A bit of history is a useful counterweight to Radin's excessive historicism. Some of the problems she raised occurred because the original acquisition of property had been made by first possession, and not by taking grants from the Crown. Where land was received from the Crown under grant, there was both a service and a real estate component to the transaction. As a business matter the Crown (just like any contracting party today) was worried about a shift in legal arrangements which would allow *B*'s services to be substituted for *A*'s without its consent. The restraints on the power to alienate by will are a natural consequence of that fear. But if land is acquired by first possession, such that possession is *prima facie* evidence of title in fee, then this service component drops out. We would expect the rules on alienation to differ, as in fact they did. The framers (like Locke) here were hardly concerned with the perpetuation of the feudal system, much less its reinstatement. Instead they tended to think of, and write about, property on the blank slate. Does anyone doubt that a rule which today converted *ipso facto* all land from fee simple into a life estate would not be a taking? If so, why does an estate tax simply fall outside the class of takings altogether, given that it takes a large slice of the decedent's wealth and transfers it to the state?

Radin also asks whether dower and forced share rules are unconstitutional. (Oddly enough some modern scholars might hold that they are.) Her point is that if these were allowed, then why oppose the inheritance tax? At the very least it is odd for someone who is steeped in social context not to distinguish between the obligations

or unascertainable person. Yet here the very inalienability of these interests led the common law to adopt rules of early vesting, i.e., those which said that if the contingent remainder did not vest within the period of the life estate it was void. Again this hardly shows the indifference to alienation, but precisely the opposite set of concerns. Note too that all these difficulties with divided interests are effectively controlled when they become equitable interests behind the trust, as is routine practice today. The only interests in land encountered in practice are the fee simple absolute in possession and the leasehold. The rest of the doctrine of estates lies behind trust for the simple reason that money is infinitely partible and fungible, while land is not.

30. Radin, *supra* p. 241.

that arise out of marriage and those which arise toward strangers. Surely we should be astonished, then and now, if these obligations were the same. To put matters further in context, it is useful to remember that for religious reasons divorce was not freely available at the time that dower was introduced. The point of the property rule therefore was simple; the obligations that existed on the spouses during life continued after death, at least insofar as they could be performed, be it by payment of money, or transfer of an interest in land. If parties could not escape those obligations by divorce during life, then they could not be allowed to circumvent them with a stroke of a pen after death. Dower (or some substitute) and indissoluble marriages go hand in hand. The laws were not designed for wealth redistribution between rich and poor, or to fund the government, but as a complement to a status relationship.

Today of course marriages are much less status and more contractual, and it is not surprising that antenuptial agreements have a far wider scope to play, especially in second marriages when either or both partners have substantial assets and children by previous marriage. Indeed the optimal structure of marriage contracts is very complex and probably does contain some post-divorce obligations.³¹ One could argue whether the dower laws are constitutional today given the changes in divorce (and indeed one could ask that about many features of marriage law), but there is no reason to assume that anything which one would say about the relationship of marriage, contract, and property should carry over to transfers between strangers where the elaborate nexus of contract, affection, and status is wholly absent. The point of *Takings* was quite simply that any revenue target demanded by the state could be reached with a flat tax on incomes, with allowable flexibility on timing and rate base questions (ch. 18). The estate and inheritance taxes introduce major allocative and administrative inefficiencies and work only redistributive functions, and hence were out of bounds as a matter of principle. Why that conclusion is called into question by the law of dower and curtesy is beyond comprehension.

C. *Welfare Rights*

I turn last to the question that most exercises Grey and others, which is my hard constitutional line on welfare transfer systems. In one sense the intensity of the disagreement is odd, especially with Grey, because he regards himself as a "consequentialist," which

31. See generally Cohen, *Marriage, Divorce and Quasi-Rents, Or "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. — (1987).

places him broadly within the utilitarian tradition that influences so much of this book. At that point the disagreements between us should in principle be resolved, because they are not concerned with the desirability of giving aid to the poor. Indeed the entire theory of private charity and imperfect obligation proceed on the opposite assumption: no one advocates a charitable drive to provide croissants for the rich. Rather the question is one of means to ends: Is there any way that the asserted ends of compulsory transfers can be achieved?

One way to look at the question is as one of political theory—for Grey himself invokes a long political tradition against my conclusion. It is fair to ask how Grey might justify the long concern for the plight of the poor. I can think of only one argument: the utility of wealth to the poor is greater than its utility to the rich, so that a simple transfer of assets will produce some overall social gain.³² This of course is an aggregate utility approach, which allows us to make some people worse off, to make others better off. It is important to note, moreover, that *only* this aggregate utility approach generates any welfare system. More concretely, no one can justify a welfare system under either the real (or Pareto) compensation criteria, or the hypothetical (or Kaldor-Hicks) compensation criteria. The former point is obvious because a move cannot be Pareto superior if it leaves any single person in state 2 worse off than he was in state 1. A similar conclusion follows for Kaldor-Hicks, because that test only sanctions the redeployment of *real* assets without actual compensation, where there is some overall gain in output sufficient to fund the hypothetical compensation, while creating some hypothetical surplus as well.

A cash transfer payment does not meet this test. It only enriches the one, and hurts the other. Even if the utility of money diminishes, the only way that we could envision hypothetical compensation to the original owner is to repay him all that he has transferred to the other side. Yet the moment incentive effects of pure transfer become negative, or administrative costs become positive, then there is an overall reduction in wealth, which precludes the hypothetical payment from being made. In all cases, the necessary amount for repayment must equal the amount transferred in the first instance. But some of that wealth is now gone by virtue of the process of transfer itself. In effect it becomes impossible to exploit any difference in private utilities of wealth to justify transfer payments under Kaldor-Hicks. If the rich person has a lower need for money, then per force it will take more money to get the right level of hypothetical compensation, as measured by the subjective utilities of the original wealthy party.

32. See generally Epstein, *The Uneasy Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201.

In reality I think that the situation is far worse. The rent seeking phenomenon exists when rights are made indefinite. It does not matter whether the money goes from rich to poor or from poor to rich. Any indefiniteness in rights structures will do. Resources that might otherwise be devoted to production are now dedicated to obtain transfer payments or to resist them. No matter where the payments are set, at the margin some individuals will spend \$100 to obtain \$101 in gain. The expenditure is deadweight social loss; the transfer is neither a plus nor a minus. The sum of the two is negative. The hard truth is that the system will not work to end poverty, as it has not worked to end poverty. It may help some to escape, but induce others to forego production in favor of securing transfers.

Indeed the present situation is still more ominous, for the current law takes a cavalier attitude to all transfers, whether by zoning, rent control, tax subsidies, crop payments, social security, or whatever. Yet most of these transfers do not benefit the poor, even indirectly. They benefit those like the elderly with the political clout to convert Social Security, with its regressive financing, into a heavy tax upon the working poor. They benefit those like the corporate farmers who can extract huge subsidies from the class of consumers. They benefit those who are able to throw up protective tariffs to keep out foreign competition. Ask yourself this hypothetical question: if there were no welfare, and no restrictions or subsidies of key commodities and services, would the poor (as a class) be better off than they are today? And let me suggest one possible answer. The wealth transfers from rich to poor are a tiny fraction of those which are generated by the present system of legislative dominance. Who then are the ultimate beneficiaries of the current system?

Yet Grey and others may counter by noting that we have a long tradition of transfer payment. It is Grey's strongest ground. In part it explains why I have insisted that the reliance interest is so strong that we cannot go back on major welfare programs, even if I am right about the implications of the eminent domain clause (pp. 324-29), or as noted in the Symposium, the commerce clause as well. But do Grey and the other belated converts to the theory of original intent really want to give history that decisive weight across the board, as consistency requires them to do? Is *Brown v. Board of Education*³³ wrong because the framers of the fourteenth amendment debated its provisions in segregated halls? Does Jim Crow need no further justification once it has become an established practice? Is the Alien and Sedition Act constitutional because the Court did not strike it down

33. 347 U.S. 483 (1954).

shortly after its passage? Are the decisions pointing to the abolition of the death penalty³⁴ misguided because of the routine nature of capital punishment at the time of the eighth amendment? Is *Roe v. Wade*³⁵ wrong because abortion statutes were common throughout our history?³⁶ Or is the recent decision in *Bowers v. Hardwick*³⁷ correct because of its heavy reliance on tradition?³⁸

On matters like these Grey, like the rest of us, must take the bitter with the sweet. It is critical to adhere to a consistent attitude towards historical practices across the board. If he finds limited comfort in the history of welfare practices, then he must use it as a uniform guide. There is an enormous burden on those who want to invoke the selective use of history, particularly in connection with a federal constitution for a new nation, which in many ways was trying to write on a blank slate in order to avoid the errors to which other nations, encumbered by history, had fallen.

In any event, one has to see what the stakes are. As I noted above, transfer payments have a possible justification on aggregate utility grounds that is simply not available for the tangle of other government programs that I attacked in my book. Many of those programs Grey and others would, I presume, support, at least against constitutional attack; yet they are silent as to the normative theory which gives them a defense. They have not explained how I have misread the applicable constitutional text or misunderstood the social consequences of the various institutional arrangements. Surely there is no deep seated historical argument that defends zoning, rent controls—both of which received serious constitutional challenges during

34. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

35. 410 U.S. 113 (1973).

36. Note, I have attacked the decision in Epstein, *Substantive Due Process by Any Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. I am now very uneasy about the title of the paper because it suggests that the key element in my view of the case goes to judicial restraint. The article was, however, devoted to showing how even a theory of minimum government, e.g., one limited to the Millian principle of protecting individuals against harms inflicted by others, could support an abortion statute, at least if the fetus is regarded as a person. That is a normative argument, notwithstanding the title, which in a sense was inaptly chosen for the purpose.

37. 106 S. Ct. 2841 (1986).

38. The Court noted:

Proscriptions against that conduct [e.g., sodomy] have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states [outlawed] sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

Id. at 2844-45 (citation omitted).

the 1920's³⁹—or the landmark preservation statutes of the 1970's.⁴⁰

Not only welfare rights are at stake. The attack on my treatment of welfare rights and coerced transfer payments should not be allowed to conceal that *nothing* anyone said at the Conference or has written thereafter has undermined the basic intellectual structure, developed in such detail in chapters 4 to 18 of the book, for all other systems of taxation, regulation, and tort liability. The critics offer no systematic defense of current Supreme Court doctrine, and they develop no substantive account of their own, because they have no central theorem, normative or descriptive, on which to base such an enterprise. Unable to develop alternative theories, they retreat to high philosophical abstraction, sometimes bolstered by outright indignation. The behavior is in a sense perfectly predictable. I wrote *Takings* in order to challenge the cozy consensus between liberals and conservatives over the constitutional status of private property and the proper role of judicial review. The book has struck a raw nerve on many who wish that the entire issue would simply go away, like a bad dream. Sorry. It still takes a theory to beat a theory,⁴¹ and as Alexander has acknowledged, *Takings* does offer "a complete theory of the takings clause, and the only such theory around."⁴²

39. See *Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (zoning); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control); *Marcus Feldman Holding Co. v. Brown*, 256 U.S. 170 (1921) (rent control).

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

41. See Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 *YALE L.J.* 1435, 1435 (1983).

42. Alexander, *supra* p. 223.