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BOOK REVIEW

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PROPERTY RIGHTS AND EMINENT DOMAIN. By Ellen Frankel Paul. New Brunswick, New Jersey: Transaction Books. 1987. Pp. 276.

*Reviewed by Eric Mack**

Those pleased or enraged by Richard Epstein's recent book, *Takings: Private Property and the Power of Eminent Domain*,[1] have more of the same reactions in store for them in Ellen Frankel Paul's book, *Property Rights and Eminent Domain*.[2] This is not to say that Paul's forceful essay is itself merely more of the same. Rather, it is a more internally consistent, and yet more radical, critique of legislative and judicial practices that trespass upon the rights of private property than Epstein's unconventional, pro-property approach in *Takings*. Although, like Epstein's work, *Property Rights and Eminent Domain* ranges over political philosophy and constitutional theory, Paul's greater consistency and radicalism flow from the character of her political doctrine and the role she assigns to it.

Her political philosophy in this ambitious and valuable work is a streamlined and hardnosed Lockean-Nozickian doctrine that affirms extralegal individual rights to person, liberty, and property.[3] Any serviceable morality must assign rights with respect to persons.[4] The only coherent assignment of such rights, consistent with moral equality among persons, ascribes to each a right over himself. Individual property rights in external objects rest initially on human creativity and on the right of the self-owning creator to his product.[5] These

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1. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

2. E. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987).

3. *Id.* at 185-245. *See generally* J. LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1967); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

4. E. PAUL, *supra* note 2, at 206-09, 224-27. *See generally* Paul & Paul, *Locke's Usufructary Theory of Self-Ownership*, 61 PAC. PHIL. Q. 384 (1980).

5. E. PAUL, *supra* note 2, at 227-37. For a theory similar to Paul's—although one which is not wholly defensible in Paul's view—see Kirzner, *Entrepreneurship, Entitlement, and Economic Justice*, in READING NOZICK 383 (J. Paul ed. 1981). Paul differs from Kirzner

rights to objects that are created from nature are not compromised by any Lockean proviso that says that "enough and as good"[6] of nature must remain for others. According to Paul, all such provisos flow from an unjustified belief in a primitive common ownership of nature, a belief that Locke associated with the idea that God had given the earth to all men in common.[7] Paul strongly contrasts the natural rights tradition within which she operates with both utilitarian and social contract theories of morality and politics. She systematically attacks the idea that aggregate goals, such as general happiness and wealth maximization, can either be coherently articulated or used to vindicate any infringements upon the moral side-constraints defined by individuals' rights. Contractarianism is not available as a substitute for God for the purpose of grounding politically enforceable positive duties to others or for providing the government with the right to engage in any activities other than the protection of individuals' absolute rights.[8] Government is legitimate only insofar as it serves to protect these rights.[9]

Essentially, political philosophy calls the tune, constitutional theory dances. More specifically, political philosophy calls both an "ideal world" and a "real world" tune.[10] Streamlined Lockean philosophy provides us with objectively correct, extralegal answers to questions about the moral permissibility of state action. The only permissible exercises of police power are those that prevent *A* from inflicting unchosen damage on *B*'s health or safety. And Paul's political philosophy finds all nondefensive takings of *A*'s property, whether or not it is for something called the public good or public use, to be morally impermissible. Thus, an ideal world constitution would grant government only a highly restricted police power and would ban any takings for the public use even if they were subject to compensation.[11] In effect, if a governmental constraint on a property right, or any other right, can be justified by a narrowly construed Millian Harm Principle—one construed more narrowly than by Mill himself—it is permissible under the police power. If it cannot be so justified, it is impermissible, even if compensation is given.

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insofar as his theory would allow a shift in ownership based on a person's ability to perceive a new use for property.

6. J. LOCKE, *supra* note 3, at 309.

7. E. PAUL, *supra* note 2, at 202-06; *see* J. LOCKE, *supra* note 3, at 327 (God "has given the Earth to the Children of Men, given it to mankind in common.").

8. E. PAUL, *supra* note 2, at 185-87, 212-24.

9. *Id.* at 248-54.

10. *Id.* at 254-66.

11. *Id.* at 254-60.

Of course, this ideal world constitution is not *our* Constitution. And even if it were—even if our best theory of constitutional interpretation were capable of showing that the essence of the Constitution is its underlying allegiance to streamlined Lockean rights while all else is to be explained away—neither legislators nor judges would acknowledge that happy interpretive discovery. For the real world, it is unrealistic to call for an absolute restriction on the police power.[12] So, aside from advocating the ideal restriction of the police power to prevent *A* from harming *B*, Paul urges that the real world police power should be subject to strict judicial scrutiny. "The presumption of validity adhering to police power measures . . . ought to be seriously reevaluated. . . . [S]tates should have to demonstrate that a compelling state interest overrides individuals' economic liberties."[13] Further, there is no denying the real world existence of the takings clause. But in this world, the takings clause can be useful. For putative police power restrictions that are not "pressing instances of protecting the public health and safety"[14] ought to be construed as takings that trigger a claim to compensation. But while eminent domain is thereby revitalized insofar as it invades the territory now governed by the more oppressive police power, it is to be driven back from private property that is taken under the guise of public use from *A* for the purposes or good of *B*. The use must be genuinely public, and as in all other matters, the courts should not defer to legislators' proclamations about the public character or the constitutional value of their needs.

So stands the basic doctrine of Paul's *Property Rights and Eminent Domain*. But more needs to be said about the complex and interesting structure, interconnections, and arguments of this book. As our framework, we can employ Paul Freund's characterizations of the eminent domain and police powers: "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful."[15] Freund's characterizations provide an outline of what Paul herself explicitly pursues, namely, a theoretical distinction between the police and eminent domain powers. Harmfulness straightforwardly vindicates state restriction in the form of state taking without need of compensation. But mere public utility cannot justify seizing an individual's property or constraining his activities without compensation. If the restraint is

12. *Id.* at 261-66.

13. *Id.* at 264.

14. *Id.*

15. *Id.* at 138 (quoting P. FREUND, THE POLICE POWER 546-47 (1904)).

not for the purpose of preventing harm, then *if* it may be imposed at all, it must be for a genuine public use, and the public must pay for its benefits.

Any given theorist's substantive position can be seen to be the application to this framework of that theorist's conceptions of "harm," "public use," and the moral weight ascribed to the public benefit achieved through public use. Paul's extended defense of Lockean rights to person, liberty, and property represent her account of what should count as "harm," namely, only actions that encroach on these rights. It is no accident that the environmentalist moral theories that are attacked in the opening chapter of this volume have been associated with so much of the recent land-use and zoning practices that Paul opposes. They represent alternative and far more inclusive conceptions of rights and harms. If trees or snaildarters have moral rights, then the basic framework that Paul accepts would require that they be protected against "aggressive" human development, however socially useful that development may be. Similarly, if as asserted by one county zoning department in the general tradition of Locke's proviso, " 'The land belongs to the people . . . a little of it to those dead . . . some to those living . . . but most of it belongs to those yet to be born,' "[16] Paul's insistence on absolute respect for property rights would require the most extreme no-growth policies. Thus, Paul's able critique of these moral theories is essential, given her own view of the "ideal" and "real" world role of the police power. And, with respect to the latter part of the Freudian framework, Paul's anti-utilitarian and antiwealth maximization arguments accord with her ideal world position that *no* public benefit achieved through the public use of what is currently *A*'s property has enough moral weight to override *A*'s moral rights.

Still, it is not much of a constitutional theory to say that in an ideal libertarian world there would be a highly restricted police power and no power of eminent domain. It is not much of a resolution of *our* "constitutional muddle"[17]—a muddle the history of which her lengthy and illuminating second chapter is devoted to documenting[18]—to say, even if it is true, that in an ideal world only part of one of the muddled elements will be around. How much of a resolution of this undeniable muddle is, then, provided within Paul's real world conclusions? The answer, I think, is not as much as Paul seeks

16. *Id.* (quoting Just v. Marinette County, 56 Wis. 2d 7, 24 n.6, 201 N.W.2d 761, 771 n.6 (Wis. 1972)).

17. *Id.* at 247-48.

18. *Id.* at 71-184.

when she indicates that her ambition is to identify theoretically distinct bases for the two powers.

Surely Paul is correct to insist that not every use, not even every use that advances aggregate utility or wealth, should count as a public use.[19] But her proposed restriction on public use, and hence, on the legitimate real world employment of eminent domain seems ill-suited to her purposes and disconnected with the central feature of eminent domain. Eminent domain bypasses the normal requirement for antecedent negotiation about and agreement on the terms of exchange. Paul asserts that "we ought to limit eminent domain to a narrow range of strictly public uses; highways, post offices, government buildings, courthouses, and the like."[20] But, if the idea here is that a taking is for public use as long as what is taken is then owned or used by government, Paul will only be encouraging governments to expand the scope of public property and public management of the properties that are currently conveyed through eminent domain proceedings to private redevelopers. Alternatively, if the idea here is that a taking is for public use as long as what is taken is widely used by "the public," then takings that Paul would want to prohibit, such as for mass audience sports complexes, amusement parks, and fast-food outlets, would qualify as public use takings.

Paul needs a better second-best doctrine of eminent domain—one that has a theoretically distinct rationale, while not being utterly abhorrent in its character or in its implications to her libertarian ideals. For her purposes, a nice second-best doctrine would put most resource acquisitions, e.g., site acquisitions for "post offices, government buildings, courthouses, and the like,"[21] on the same footing as acquisitions of sites for McDonald's and Pizza Hut, while reserving eminent domain to such traditional categories as highways and dams. A natural candidate for such a rationale would seem to be the view that takings accompanied by compensation are justified only when such forced exchanges accomplish what the many holders of the parcels of land needed for a highway or a dam, and the many beneficiaries of the highway or dam who hold funds sufficient to pay for those parcels would have chosen to accomplish had bargaining among them been feasible. The idea, of course, is that there are circumstances in which, because of transaction costs that may arise out of the self-defeating strategic incentives faced by the parties, mutually beneficial exchanges—exchanges that otherwise would have been cho-

19. *Id.* at 261-66.

20. *Id.* at 266.

21. *Id.*

sen—are not arrived at through uncoerced negotiation. Government employment of the eminent domain power might even be represented as artificially *enhancing* property rights by enabling property holders to overcome these market defects.[22]

Under this view, a taking would legitimately be for public use only if all the rightholders affected were net beneficiaries—meaning that just compensation would have to do more than make the parties whole—and the mutual benefits would not have been secured without government coercion. Eminent domain would accord with Freund's characterization of it as vindicated by its benefiting *A* and *B* rather than its preventing *A* from harming *B*.[23] The requirement that beneficiaries of takings pay for their benefits on the model of the beneficiaries of free exchange, and that such a taking only occur when comparable free exchange is not feasible, would seem to place difficult hurdles before any eminent domainer. And, according to Paul's view, the judiciary should closely review whether state activities surmount these hurdles.

Nevertheless, it is not clear that Paul would welcome this "transaction costs" construction of real world eminent domain. Paul would be quick to point out that it places no principled restriction on the purposes for which eminent domain may be used.[24] If normal market negotiations between General Motors and the Poletowners were genuinely infeasible and the Poletowners were to be more adequately compensated, this doctrine would seem to justify Detroit's condemnation of Poletown.[25] Moreover, as indicated in her discussion of the success of nonzoning in Houston,[26] Paul is certain to be duly suspicious of claims about "market failure" and their political use. Perhaps, if pressed further about her real world notion of public use, Paul could turn more extensively to the historical, albeit nontheoretical, use of this notion that encompasses such traditionally accepted "public works" as roadways and waterways, but not industrial enterprises or ecologically sacrosanct zones.[27] Such a historical recourse to the

22. R. EPSTEIN, *supra* note 1, at 332.

23. E. PAUL, *supra* note 2, at 138.

24. *Id.* at 214-24. For examples of the economic theory of property rights that Paul rejects, see R. POSNER, ECONOMIC ANALYSIS OF LAW (1972); Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

25. E. PAUL, *supra* note 2, at 32-37; *see* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

26. E. PAUL, *supra* note 2, at 259-60.

27. *Id.* at 266.

minds of the Founders and their political vision certainly would parallel Paul's final appeal to the courts, in the name of "the plain intent of the Constitution," to stand against "government's propensity to seek the public good at the expense of trenching upon property rights."[28]

28. *Id.*