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# Takings of Property and Constitutional Serendipity

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## I. INTRODUCTION

The takings clause of the fifth amendment<sup>1</sup> is, as every constitutional lawyer knows, the source of some of the murkiest constitutional law. This, as every constitutional lawyer also knows, is quite a distinction. The extant judicial “tests” for compensable takings are extremely vague and thus predictably unpredictable and inconsistent in their application.<sup>2</sup> The theories that academics have designed to supplant the judicial tests are quite abstract and incapable of easy translation into concrete decisions or intermediate rules, normatively problematic, and/or only tenuously connected to the constitutional text.<sup>3</sup> In other words, despite a mountain of case law and academic theorizing, there remains a giant vacuum in the analysis of the takings clause for a new theory to fill.

Richard Epstein’s book, *Takings*,<sup>4</sup> is designed to fill that vacuum. Epstein neglects neither the normative buttressing for his theory of takings, its tie to the Constitution, nor its translation into concrete decisions and intermediate rules for judicial application. In short, his is a complete theory of the takings clause, and the only such theory around.

Epstein’s theory is not only complete, but it is also powerful. Part of its power, of course, lies in its completeness—its linkage of normative values, constitutional text, institutional realities, and illustrative cases. But its power is also a product of Epstein’s argumenta-

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1. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

2. See, e.g., *Teleprompter Co. v. Loretto*, 458 U.S. 419 (1982); *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621 (1981); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

3. The previous major academic attempts to produce a theory of takings are: B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

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

tive skills, the amazing erudition and impeccable sense of the logic of positions that he displays over and over again for three hundred and fifty pages. Even if one ultimately disagrees with Epstein's conclusions, as I do, such disagreement is to a great extent overshadowed by respect and even awe.

Nevertheless, I do disagree with Epstein. Epstein's theory is erected upon, and follows logically from, three premises, each of which I either reject or at least have substantial doubts about. I shall label these premises the "interpretive thesis," the "natural rights thesis," and the "utility thesis." In brief, Epstein argues that the takings clause of the Constitution, properly interpreted, proscribes the destruction (=takings) of any right in the bundle of property rights enforceable at common law against private individuals or groups (=property), except insofar as public goods are realizable and overall wealth can be increased (=public use), and then only if all share pro rata in the increase in wealth (=just compensation) (p. 19-31). That is the interpretive thesis. He argues further that such constitutional protection of common law property is consistent with Lockean natural rights over resources that preexist the state—the natural rights thesis (p. 10). Finally, he argues that constitutional protection of Lockean natural rights over property realizes welfarist goals better than current, laxer interpretations of the takings clause, primarily by discouraging legislatures from engaging in wealth-destructive, rent seeking behavior—the utility thesis (p. 306-29).

In sum, Epstein finds in the Constitution a conception of private property and governmental power that gives both Lockean libertarians and welfare liberals all they can possibly want without distorting constitutional interpretation in the process. The miracle of 1787? I think not.

## II. THE INTERPRETIVE THESIS

The least attended to leg of the tripod upon which Epstein rests his theory of the takings clause is the interpretive thesis. Epstein devoted only one, twelve-page chapter to constitutional interpretation per se (pp. 19-31). And the proceedings of the Conference that is memorialized in these pages touches hardly at all upon the topic.<sup>5</sup> All of this is surprising given the fact that Epstein is writing about a specific clause in our Constitution and not about political theory in the abstract. It is even more surprising given the enormous amount of ink spilled in the last several years on the topic of constitutional interpre-

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5. *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49 (1986) [hereinafter *Proceedings*, *supra* p. \_\_\_].

tation.<sup>6</sup> It surely suggests that Epstein is far more interested in political theory than in the specifics of the Constitution.

Epstein's favored method of constitutional interpretation is to adhere to the (1787) core semantic meanings of the words of the text (pp. 22-26). He eschews reliance on the various and possibly conflicting purposes and specific conceptions of the ill-defined groups of persons we call the framers (pp. 26-29). The basic cast of his argument on behalf of textual literalism is utilitarian: it provides us with stable, predictable, publicly accessible meanings for our fundamental law, a law applied by a nonelected judiciary (pp. 19-20, 22-26). And, of course, Epstein believes that the method is possible; words do have stable core semantic meanings, even when used by people with different goals and different specific denotations, and even when applied in quite diverse social and technological environments.

Epstein's theory of constitutional interpretation is subject to two kinds of criticism. First, there is the internal criticism that Epstein applies the theory inconsistently. And second, there is the external criticism that Epstein fails to link up his theory of interpretation with any theory of why the Constitution is our fundamental source of legal authority.

The most glaring inconsistency in Epstein's application of his literalist approach is with respect to what acts count as *takings* of property.<sup>7</sup> Epstein argues that *takings* should include any *destruction* of rights within the property bundle (pp. 35-104). But his argument is not based on the word's semantic meaning, but on his nontextual argument that the framers did not convey to the government any power over others' property not possessed by individuals at common law, except where public goods are realizable and just compensation is paid. While that *is* an argument for a broad construction of takings, it is surely not the argument of a textual literalist.

A second internal inconsistency is Epstein's treatment of the incorporation of the takings clause into the due process clause of the fourteenth amendment. Epstein is launching a *constitutional* attack on the major features of the regulatory welfare state, including the redistribution of wealth. His attack succeeds against the federal government if the fifth amendment means what he says. Yet a vast amount of regulation and redistribution is state and local in origin

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6. See, e.g., *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Symposium: Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

7. See J. Paul, *Searching for the Status Quo* (Book Review), 7 CARDOZO L. REV. 743, 751 (1986).

and governed, not by the fifth amendment, but by the fourteenth amendment, which includes no takings clause.<sup>8</sup> Epstein offhandedly acknowledges in a couple of places in his book that he is only assuming for the sake of argument that the due process clause of the fourteenth amendment incorporates the takings clause, and that if incorporation is wrong, his arguments would be limited to actions of the federal government (pp. 18, 307 n.2). But given the enormous consequences riding on incorporation, and given that incorporation is prima facie inconsistent with textual literalism, it is surprising that Epstein argues throughout the book as if incorporation were correct.

The external criticism of Epstein's theory of constitutional interpretation is that he does not relate his theory to the Constitution's status as fundamental law.<sup>9</sup> Ultimately, the justification of an interpretive method must lie in the practical point of the interpretive project. If in interpreting the Constitution we are attempting to divine the norms that we have decided shall be supreme in our practical affairs, our interpretive method must be consistent with our reasons for giving these norms this supreme status. One reason to favor a method is the utility of the method in securing a stable and accessible public meaning of the Constitution. But it is the only reason upon which Epstein relies to support his method of textual literalism, and it is insufficient alone to prove Epstein's case.

When I say that to be acceptable, a method of constitutional interpretation must reflect why the Constitution is considered authoritative, I am surely not suggesting that we should interpret the Constitution as morally ideal. Of course, if the Constitution is morally ideal, its practical authoritativeness is unproblematic. But although every constitutional author aspires to create the morally ideal constitution, the wisdom of constitutionalism lies in the understanding that treating an actual constitution as if it already were morally ideal is usually less morally ideal than treating it according to some interpretive methodology that does not assume it to be morally ideal. In other words, a constitution that contains only the command to act wisely and justly would be useless as a constitution and lead to less wisdom and justice than a constitution that attempts to specify more concretely which actions are wise and just, coupled with an interpretive methodology that preserves the specifications and hence the possibility that the specifications will differ from what the interpreter person-

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8. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

9. Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1986).

ally considers wise and just. And the method of interpretation that leaves open the possibility that the constitution so interpreted will be less than morally ideal is itself justified by being more likely to produce a morally superior state of affairs than any other interpretive methodology.

Put somewhat differently, every normative decision constitutes both a recommendation of the substantive result reached and the method of decision-making employed—both the substance of the decision and its form. And what ultimately justifies substantive results may dictate formal methodologies for reaching those results that create the possibility that the result reached is substantively wrong. Constitutionalism and its interpretive methodologies are the formal dimension of our society's decision regarding how to govern substantively wisely and justly.

As the preceding paragraph illustrates, the arguments for a particular method of constitutional interpretation are complex, speculative, and steeped in paradox.<sup>10</sup> Epstein believes he can vanquish opposing methodologies by pointing out the utility of literalism. He cannot.

Of course, Epstein may feel less necessity to defend his interpretive method because when applied to the Constitution, it yields a meaning that is morally ideal for Epstein. If you agree with Epstein's normative values, and if incorporation can be squared with literalism, the Constitution interpreted *a la* Epstein is the ideal constitution, at least in the sense that its principles are the correct ones to hold. That result of interpretation does in fact support Epstein's choice of interpretive methods, although it is still theoretically possible that the method in the hands of those who are likely to be judges will lead to results less ideal in terms of Epstein's own values than the results derived from a different method. But surely the initial attractiveness of textual literalism as a method of interpretation, which is largely a product of its ease and stability, is greatly enhanced when literal interpretations produce morally attractive outcomes.

Because Epstein's method of constitutional interpretation produces a constitution that embodies the political and moral values that he believes to be correct, Epstein is able to avoid the question of the

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10. I have touched on these problems elsewhere. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 5-9 (1981); Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 458-62 (1983); Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985) (formal rules and substantive aims generally); see also Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

legitimate authority of the Constitution.<sup>11</sup> I said that the Constitution must be interpreted by a method that assumes the Constitution to be supreme legitimate authority.<sup>12</sup> There may, however, be no method of interpretation that can preserve the legitimate authority of the Constitution, even if the method is derived to reflect such authority. Epstein might argue that a constitution that, properly interpreted, tramples on natural rights and undermines social welfare is still preferable, in terms of rights and welfare, to constitutional anarchy, and that the Constitution should therefore be regarded as legitimate and should be changed solely through the methods it prescribes. But this is an argument that he does not have to make when the Constitution, properly interpreted, *is* morally ideal.

### III. THE NATURAL RIGHTS THESIS

The Richard Epstein of *Takings* believes in natural rights that governments do not create, but must respect. Those natural rights extend beyond persons' control over their bodies, labor, and talents to dominion over natural resources. The latter natural rights are acquired ultimately through the method of first possession recognized at common law (pp. 216-19). The specific set of rights of dominion over resources that one acquires through first possession is the set of rights reflective of ownership at common law. That set—common law property—is the property protected from takings under the fifth amendment. The Constitution merely prevents government from taking actions it has a preconstitutional moral duty not to do anyway.

This second leg of Epstein's theory of takings is by far the weakest. Although I find the libertarian's natural right over one's body, labor, and talents to be plausible, though troubling,<sup>13</sup> I, like others, find all arguments for natural rights over preexisting resources unpersuasive.<sup>14</sup> That is especially true of arguments like Epstein's that are based on first possession. The "is" of the acts of possession cannot be made to yield any "oughts," much less the particular "oughts" of common law property rights. Does the first act of plowing an unowned field yield ownership of the field (and the airspace above it, the minerals below it, etc.)? Does the first act of viewing a mountain yield ownership of the mountain or even the view?<sup>15</sup> The acts that

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11. See J. Paul, *supra* note 7, at 750 n.31.

12. See *supra* p. 226.

13. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

14. See Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 819-20 (1981) [hereinafter Alexander, *Liberalism*]; Alexander, *Kidney Pooling*, 2 COGITO 15 (1984).

15. See Alexander, *Liberalism*, *supra* note 14, at 835-38; Cohen, *Self-Ownership*, *World-*

constitute first possession are in themselves normatively silent.

At the Conference on his book, Epstein abandoned the natural rights leg of his argument in favor of a much more plausible utilitarian position that the bundle of rights that represents common law property, together with the first possession principle, are conventional rights that are highly instrumental for producing welfare and, therefore, justified on that basis.<sup>16</sup> That position is the utility thesis, and I will discuss it in due course. For now, although Epstein has abandoned the natural rights thesis, I wish to make some additional criticisms of it for anyone who is persuaded by its defense in Epstein's book.

I first must point out that many libertarians who accept natural property rights over nonhuman resources will reject the role Epstein carves out for legitimate exercise of the eminent domain power. Epstein deems the latter power, which authorizes nonconsensual takings of property, to be justified so long as it is exercised only to increase wealth and each person shares in that increase in proportion to his or her original property holdings. A strong libertarian would, however, deny the government any power to effect nonconsensual transfers, regardless of how beneficial the taking to the one whose property is appropriated.<sup>17</sup> For such a libertarian, only consent legitimates the surrender of natural rights. Epstein argues that actual consent to wealth-creating transfers is impractical because of transaction costs, holdouts, and free riders; and he is correct. But the strong libertarian would remain unmoved by what he would regard as a utilitarian corruption of the natural rights position, a corruption that presages Epstein's ultimate abandonment.

At this point it is necessary to describe briefly Epstein's entire natural rights scheme. In the state of nature, people, through first possession, acquire property rights with the exact dimensions of common law rights of ownership.<sup>18</sup> Those rights persist after formation of the state, with two qualifications. First, individuals relinquish to the state the right to enforce their property rights (the police power) (pp. 15-16). Second, the state has the power to take property without consent so long as: (1) total wealth is increased thereby, and transaction

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*Ownership, and Equality*, in JUSTICE AND EQUALITY HERE AND NOW 108 (F. Lucash ed. 1986); Cohen, *Self-Ownership, World-Ownership, and Equality: Part II*, 3 SOC. PHIL. & POL'Y 77 (1986); Steiner, *Liberty and Equality*, 29 POL. STUD. 555 (1981).

16. See also Fried, *Is Liberty Possible?*, in THE TANNER LECTURES ON HUMAN VALUES III 91, 119-31 (S. McMurrin ed. 1982); J. Paul, *supra* note 7, at 60-64.

17. See *Proceedings, supra* p. 107-09.

18. See, e.g., E. Paul, *Moral Constraints and Eminent Domain: A Review Essay*, 55 GEO. WASH. L. REV. — (1986) (reviewing R. EPSTEIN, TAKINGS (1986)).

costs, holdout, and free rider problems rule out the alternative of private transactions (public use) (pp. 161-70); and (2) the increase in wealth is distributed to everyone pro rata (just compensation) (pp. 4-5). The state can accomplish the latter distribution through explicit compensation (direct payment) (pp. 182-94) or through implicit compensation (indirect benefits) (pp. 195-215). The compensation must be proportionate to everyone's pretaking holdings, except that in some cases compensation that is in fact not so proportionate is sufficient so long as before the taking no one had any reason to believe that she would suffer or benefit disproportionately from the taking (*ex ante* proportionate impact) (pp. 236-45).

Epstein's definitions of "police power" and "public use" are relatively, though not totally, unproblematic under the natural rights thesis (that is once one allows eminent domain into the world of natural rights). Direct compensation presents no difficulties, but implicit compensation and the requirement of proportionate impact are different matters.

The implicit compensation and proportionate impact requirements work in tandem, and together with the possibility of *ex ante* compensation, threaten to undermine completely the natural rights approach to takings. To begin with, Epstein nowhere justifies the proportionate impact requirement on natural rights (or any other) grounds. One can easily trace the argument from natural rights and the three horsemen of transaction costs, holdouts, and free riders to the notion that forced exchanges are justified if they increase wealth. It is easy also to take the step that naturally follows and require that the government distribute the surplus wealth so that no one is worse off than before the taking. But the rationale for proportionate shares is opaque.<sup>19</sup> Why not equal shares?<sup>20</sup> Utility-maximizing shares? Maximum shares? The natural rights thread, weakened already by the allowance of forced exchanges, has vanished by the time we get to the pro rata distribution of surplus.

Epstein allows implicit compensation in the first place because he recognizes that requiring direct compensation will often be far too costly administratively in terms of calculating the amount that each piece of non-police-power regulation (each taking) benefits and burdens each individual (pp. 199-202). People would *ex ante* give up the right to the precise determination of whether they proportionately shared in the takings surplus to prevent absolute reduction of their shares through costly administrative procedures. Indeed, even when

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19. See *supra* note 14 and accompanying text.

20. See J. Paul, *supra* note 7, at 769.

the actual disproportionate impact of a rule on people becomes clear—even when it is clear that some people are worse off than before, and not just disproportionately better off—Epstein is willing to allow the rule to stand in *ex ante* even though no one could determine whether the taking would affect a given individual disproportionately or adversely (pp. 236-45).<sup>21</sup>

It is clear that Epstein's qualification of implicit and proportionate compensation by realism concerning administrative costs and by arguments *ex ante* leads him very close to pure Rawlsianism.<sup>22</sup> Because for Epstein the state of nature is not historically, but only logically, prior to the state, the "time" of the *ex ante* analysis can logically precede and thus qualify even the original acquisition of property. If we further assume that courts will be deferential to legislative judgments regarding whether a particular regulation or tax will increase social wealth and whether the long-term interests of the least advantaged will be maximized, then the takings clause becomes not a fortress for natural rights, but a virtually toothless component of a Rawlsian welfare state.<sup>23</sup> Almost every program that Epstein believes fails the takings test—and surely among those the redistribution of wealth to the poor (pp. 306-29) and many regulations of wages and prices (pp. 274-82)—can be plausibly supported as increasing social wealth otherwise unobtainable because of transaction costs, holdouts, and free riders, and as distributing that increase in a way that would be *ex ante* acceptable.

#### IV. THE UTILITY THESIS

The third prop for Epstein's theory of takings is the utility thesis, namely, that the reading he gives to the takings clause will lead to more welfare, and welfare that is more equitably distributed, than any alternative reading (pp. 306-29). The welfare gains occur on three fronts. First, the specific contours of common law property rights are utilitarian because they establish fixed and knowable boundaries and promote productive uses and exchanges (pp. 58-62). Second, the "public use" requirement that the government not take property except where total wealth is increased and where alternative, consent-based avenues are impractical prevents wealth-destructive, rent seeking behavior by legislatures (pp. 199-209). Third, the requirement of proportionate impact buttresses the defense against governmental

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21. See *supra* note 15.

22. See J. Paul, *supra* note 7, at 773.

23. *Id.* at 772-73.

rentseeking by making such activity more difficult to disguise as wealth-creating (p. 204).

The utility thesis is worthy of serious study, perhaps even study extending beyond the armchair empiricism that we normally prefer. From my armchair, however, I doubt that Epstein's version of the takings clause will prove utilitarian-superior to all alternatives. Common law property does not always have clear boundary lines, and other conceptions of property might prove preferable on utility grounds. Indeed, Epstein's desire to argue from natural law and from the text causes him to construe property rights in ways that are vaguer than necessary or desirable if utility is the goal. Moreover, destructive rent seeking behavior by legislatures might be averted by judicial standards that differ significantly from Epstein's mix of intermediate scrutiny of all regulations and the concomitant judicial inquiry into whether wealth has been created and distributed proportionately. At this level again, Epstein's desire to retain the natural rights and interpretive theses precludes him from fully considering alternative takings clause methodologies from the utility maximization perspective. There is a chance the utility thesis is correct, but it is surely unproven.

Epstein's book is must reading for anyone interested in the takings clause or, for that matter, in constitutional law in general. (There are, in fact, aside from the chapter on constitutional interpretation, a substantial number of pages devoted to other issues of constitutional law, at least as they intersect with the takings clause.)<sup>24</sup> It is also must reading for the much broader audience of those interested in political theory. And, it is always both instructive and fun to observe a powerful mind in action.

Nevertheless, I doubt that much of the substance of the book will "take," either in the academic world, or in the world of lawyers, judges, and politicians that Epstein especially wishes to influence. Ideological hostility to his theory is part of the reason Epstein will not succeed, but it will not be the entire explanation. The three theses that Epstein offers to support his position are each insufficient to do so individually, and it is not possible to add them together to create a super argument. Utility is not the right kind of argument for buttressing an implausible position on natural rights, and vice versa. And the trail from either to a literalist mode of constitutional interpretation is too swampy to follow. Epstein's theory of takings represents not the serendipitous and synergistic confluence of the independent streams

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24. (Pp. 88-92) (impairment of contracts); (pp. 134-40) (freedom of speech); (pp. 143-45, 210-15) (equal protection).

of constitutional interpretation, natural rights, and utility, but more likely a pretty oxbow lake, cut off from the meandering common law stream that was its origin, and destined, unreplenished by the other streams, to dry up.