

2001

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Recommended Citation

Richard A. Epstein, "Life in No Trump: Property and Speech under the Constitution," 53 *Maine Law Review* 23 (2001).

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LIFE IN NO TRUMP: PROPERTY AND SPEECH UNDER THE CONSTITUTION

Richard A. Epstein*

The editors of the *Maine Law Review* have been kind enough to offer me the opportunity to respond to Laura Underkuffler's criticism of my work in her recent Godfrey Lecture, "When Should Rights 'Trump'? An Examination of Speech and Property," which appears in the preceding issue. In my earlier writings on constitutional law, more specifically, in my paper, *Property, Speech and the Politics of Distrust*,¹ I took the position that modern Supreme Court jurisprudence had taken a turn for the worse insofar as it used different standards of review in passing on the constitutionality of legislation. The current position, roughly speaking, did (and to a large extent does) afford some level of strict scrutiny for the regulation of speech while adopting a far more deferential view towards the regulation of property. I thought that this result was indefensible for two related reasons. First, as a matter of textual interpretation, neither the First Amendment guarantee of the freedom of speech (i.e., "Congress shall make no law abridging the freedom of speech"²) nor the Fifth Amendment protection of property (i.e., "Nor shall private property be taken for public use, without just compensation"³) bears on its surface any sign of the differential levels of respect that might be accorded to property and speech. Second, as a matter of functional use, both provisions were aimed at the chronic dangers of representative government. More concretely, both clauses are directed to the way in which public power can be used to transfer wealth and opportunities from one group in society to another. In the short term, one group or the other might celebrate its factional victory. But, in the long run, the divisive impact of faction will result in the diminution of freedom and opportunity for us all. Freedom of speech and private property were thus seen as bulwarks not of privilege or special power. They were defended for their social function in limiting the abuses of power.

Professor Underkuffler accepts in large part my diagnosis of the overall system, but claims that it fails to see the social and structural justification for the differences in treatment that we observe under current law. In her view, all rights are weighed against some social interest that seeks to limit their significance. But, as she sees the matter, the difference in the treatment of property and speech depends on the nature of the interests that are arrayed against the claims for protected speech or property. She notes that in most cases speech interests are set off against interests of some different sort or type, while property interests are set out against claims to, put simply, other forms of property interests. She thinks, therefore, that where different forms of property interests are in conflict with each other, then the state should have the right to decide which will prevail and why. Yet, by the same

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1. Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992).

2. U.S. CONST. amend. I.

3. U.S. CONST. amend. V.

token, given that speech interests are set off against a different (and by implication lesser) interest, the speech interest is entitled to greater protection.

Underkuffler's argument proceeds at a high level of abstraction and is, I believe, vulnerable to criticism on both theoretical and practical grounds. Starting with the former, she is obviously drawn to Professor Ronald Dworkin's well-known metaphor of rights as trumps.⁴ The clear implication of his language is that a right is an absolute that simply rolls over interests (be they of convenience or principle) that are arrayed against it. The source of his appealing metaphor is the game of bridge where, of course, the lowest trump will prevail over the highest card in some other suit. Rights are the trumps; the competing interests are from the other suits, or so we should believe. But in truth this metaphor misunderstands the nature of all legal argument. Had Dworkin spent a bit more time dissecting his bridge metaphor, he would have realized that, at any given level, no one can play in trumps so long as there is anyone who wants to play in no trump. Life is the same way. So long as individuals put up their own reasons for action, then their game is played in no trump. There are, in other words, no absolutes in this world. The claims that are made are all, as Underkuffler elsewhere acknowledges, only *presumptive*. The serious question is what things count, and with what weight, on either side of the ledger. The thought that any claim for property or speech should count as an absolute is something that we should all be quite happy to disregard.

In my view, this presumptive nature of property rights is well captured by the Constitution, even as I wish to interpret it. The language of the Takings Clause is not drafted as an absolute. It does not say that "no property shall be taken for public use, without consent of the owner of the property in question." Its "just compensation" compromise allows the state to take so long as it pays and so long as it does so for public use. In so doing, it strips the individual of the right to resist any taking for a public use. The tough interpretation that I defend has built into it a recognition that the state can always purchase when its efforts to regulate fail. Let the state decide that its citizens need more open spaces, then it can purchase park land. This middle position is a vintage no trump situation. The state may decide to act, but if so, it cannot just trump the private property interest. It has to pay. There is a division of authority that respects the need to overcome holdouts (who could prevent the assembly of a highway or railroad) and also respects the equal need to be sure that ordinary individuals are not squashed simply because of some imperative social need to occupy and use their property. The upshot of this position is one of compromise that allows the state to call the shots so long as it is prepared to pay the piper.

A quick inspection of the First Amendment will show that it does not contain (at least on its face) any just compensation provision. It just provides that the state shall not abridge the freedom of speech, period. There is, moreover, a perfectly coherent explanation as to why the two clauses should differ in their basic structure in a way that makes the Constitution more protective of speech than it is of property. It is easy to see why land (to take only the most important form of property in the law of eminent domain) may often be of greater value in the hands of government than it is in the hands of private parties. A critical site could be necessary for a fort, or for an extension of a road. Voluntary purchase may be hard

4. See, e.g., RONALD DWORIN, TAKING RIGHTS SERIOUSLY (1977).

to arrange, especially if many individuals own segments of a large block of property that has to be assembled to be of value in state hands. The condemnation power is often needed to overcome the holdout problems raised by the need to assemble large tracts of land. But what reason is there for the government to buy out its critics beyond the selfish interest of staying in power by suppressing dissent. It is therefore the case that the United States could never condemn the New York Times Corporation, or for that matter its name, even if it were prepared to pay full value for either. The absolutist view, at least this far, has a lot to condemn it.

However, this difference between the First and Fifth Amendments should not be allowed to conceal one important similarity between them. Both require courts to draw some balance between state interest on the one side and private interests on the other, and to do so in the constitutional context that is required in ordinary disputes between private individuals.⁵ The right to speak does not give us the right to lie or to defame. It does not give us the right to take a microphone owned by another individual. It does not give us the right to threaten individuals with a choice between their money and their life. It does not give us the right to block public highways or even to sleep in public parks.⁶ It is, in other words, a provision that makes sense only because it is understood to be part of a complex mosaic of property and liberty interests. In effect, the First Amendment is not an absolute either, even if it does afford some absolute protection against reprisals for the criticism of the powers that be.

The logic of the Takings Clause is much the same. The ownership of property does not give us the right to use that property to kill other persons. It does not give us the right to pollute or otherwise to create a nuisance, public or private. It does not give us an absolute immunity from the taxes that are needed to provide the infrastructure that makes the property worth having. In short, the protection of private property is subject to a list of implied exceptions under the police power similar to those which exist under the First Amendment. And in each case the reasons are the same. We think that the exceptions to the basic right are as important as the right itself. We embrace that conclusion because we believe that the recognition of these exceptions will curb forms of private abuse (which is why we have government) without creating greater abuses by the state.

As far as I can see, the theories in question are thus identical. All this makes it hard to see why we should take an attitude of deference toward government in the one area and an attitude of strict scrutiny in the other. Indeed, if anything, I believe that we should resort to the original understanding of the founders when they treated property as the "guardian of every other right."⁷ The system that gives strong protection to property makes it harder for the government to stifle speech because it is easier for individuals to organize the production of newspapers that can criticize its actions. A system of small government and strong property rights also limits the power of the state to retaliate in "unrelated" areas of administration by reducing the scope of its overall discretion. The bare conceptual claims of Professor Underkuffler do little to break up this close connection.

5. Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992).

6. *Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984).

7. 4 ELLIOT'S DEBATES 553-54.

Thus far I have talked about these issues at a somewhat abstract level. Now let me make the point a bit more concrete. As I noted earlier, one key justification available for the state in both speech and property cases is its ability to prevent nuisances. In the area of speech, this interest is regarded as legitimate, but it is constantly hedged in with limitations on how it may be implemented.⁸ But what is clear without a doubt is that the state cannot simply brand an activity a public nuisance and use its own designation as a justification for suppressing the speech in question.⁹ The claims are always examined to see if the definition of public nuisance sweeps too broad. They are further examined to see if the means chosen to regulate are broader than is reasonable under the circumstances. Even when the state imposes a ban that has an ostensible neutral cause, a court will ask whether the ban in question has a disparate impact that works in favor of one group against another.¹⁰ Yet it seems as though all sensible forms of traffic and safety regulations survive this degree of scrutiny.

But what of the situation with property? Here courts no longer ask whether the regulations I question make sense. Rather, they assume that the issues of definition are so difficult that it is best to defer to the legislature. Professor Underkuffler quotes a well-known passage from Professor Sax addressing why the state should have such power.

A pristine example of the inextricability of property interests is marine life that breeds along the shallow wetlands shorelines, depending upon maintenance of the shoreline habitat. The wetlands owner thus does not use only his own tract, but demands, as a condition of developing his property, that ocean users tolerate a change in their use of the ocean.¹¹

Here the argument is that property interests fall on both sides of the line so that the state should have the right to decide which of these interests should prevail, even though that right is denied in a speech versus property situation. But look at the quotation a bit more closely. The argument here that allows the state to prevent development of the wetlands could easily prevent the development of the uplands as well. After all, it should not be difficult to offer component biological evidence that some species leave the water to forage or breed on the upland. So now we cannot build anywhere near the water if the state tells us that we are forbidden. But it is also clear that animals on land migrate with seasons from one location to another. So at this point we can now argue that no tree can be cut down either because their destruction will also disturb habitat. The Sax position really is that all land and water are so interconnected that any development can be treated as nuisance so long as the state decrees it to be such. Yet at the same time, this passage (and indeed his entire article) gives us neither a clue as to which dependencies should matter, nor any indication of when the state should or should not act. The result of his proposition is that between wetland protection and endangered species all development rights go over to the state.

Yet there is nothing new here at all. These dependencies within nature have always been understood at some level. The novelty of the claim is that they are

8. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

9. *Erznoznik v. Jacksonville*, 422 U.S. 205, 210 (1975).

10. *Church of the Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

11. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 159 (1971).

more pervasive today than before, not because the world has changed but because our perception of the world has changed. The plea here is that we react intelligently to new knowledge by stepping up our control of the environment. In part, no one can disagree. If we could now show that minute quantities of pollution cause far greater damage than before, then we have greater reason to ban this nuisance because the harm it causes is greater than we once supposed. But the Sax/Underkuffler position goes much further and holds that this new knowledge allows for the transfer of all development rights to the state without making any particular demonstration of harm.

Yet their position overlooks the enormous mischief that can ensue when so much discretion is vested in state hands. There is nothing that says that a localized ban will not be induced by nearby landowners who do not want competition or neighbors. So now the environmental issues become a cloak for partisan activities. Even if the environmental concerns are legitimate, nothing has been said that indicates that the confiscation of property interests (to wit, the development rights) is a sensible way to deal with the matter. Here the state has the strong incentive to condemn first and think later. Rather than allow the excess, let the state decide which environmental interests matter and then buy whatever property it thinks will serve those interests best. At this point, the state has a powerful set of incentives to decide which wetlands or uplands are worth having and which are not. It will take a good wetland that costs \$10,000 to condemn, but it will not take a poor wetland that costs \$100,000 to condemn. On this view of the world, the increased awareness of the interdependence between different activities does not justify a categorical transformation of the law of nuisance so that all productive activities fall into that category. Rather, it only justifies an expansion of the rate of acquisition of private lands, with compensation, in order to secure where necessary comprehensive habitat for the protection of various forms of wildlife.

At this point, I think that we can see the error of Professor Underkuffler's analysis. She is far too intent in showing that the tradeoffs in takings cases are different from those in speech cases. Let us assume that they are. The right question to ask is whether this difference justifies a radical difference in constitutional methodology as we move from clause to clause. My answer to that question is an emphatic no. The key question to ask for each clause is which methodology is most faithful to the text of the clause and to the objectives that it serves. In order for Professor Underkuffler to make out her case, she has to be able to show that the combined effect of state and private power in land (and water) cases works better under a rational basis test than under a test that questions both the state definition of a nuisance and the means used to control it. Here it does not do to say that it is appropriate to have more flex in the joints in property cases than in speech cases. I have already indicated why I believe that to be the case. But what must be shown is that any system of property rights will function well if the state is given the right to redefine property rights at will without having to face the obligation to compensate. So long as the risks of public abuse remain in land use cases, she cannot make out that case. What the state believes that it requires, it can purchase with tax revenues. The upshot is that we do not have to remake the law to take into account the changes in public perception of desirable land use or conservation. We need only expand the budgets devoted to environmental issues. The old maxim in takings law is that the state should not be allowed to force a person to bear the ex-

penses of public undertakings that work for the benefit of us all.¹² Wetlands preservation works for the benefit of the public at large, not the individual landowner (for that is what he was and remains) whose own ambitions are thwarted. We should make the public pay for what it wants and know that when we do so it will behave in a more responsible fashion than it does if it is simply allowed to regulate to its heart's content, as Professors Sax and Underkuffler would have it. My claim here is not that property are trumps; after all, wetlands can be purchased by the state against the will of the owner. The new ecological order fits quite well within the old constitutional order. We can do quite well when we play according to the original rules of constitutional no-trump.

12. *See* *Armstrong v. United States*, 364 U.S. 40 (1960).