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# TAKING STOCK OF *TAKINGS*: AN AUTHOR'S RETROSPECTIVE

RICHARD A. EPSTEIN\*

## I. *TAKINGS* A GENERATION LATER

It is my very great pleasure to write a short response to these presentations given at the conference held in connection with the decision of the faculty of the William & Mary School of Law to designate me as the recipient of the second Brigham-Kanner prize. I am especially grateful that the prize was awarded for my book *Takings*,<sup>1</sup> which seems after twenty years to have weathered at least some of the scathing criticisms sent in its direction on the occasion of its publication.<sup>2</sup> Before commenting briefly on the three papers in this symposium, let me express my continued puzzlement as to why the book has attracted such fierce criticism. The obvious reason is that my extended analysis of the Takings Clause ended with the “modest” conclusion that the vast redistributive programs of the New Deal were in fact unconstitutional if the Takings Clause was given its proper interpretation, one that properly combined its specific language with its larger intellectual structure.<sup>3</sup> Everyone knows that the clause itself says, “[N]or shall private property be taken for public use, without just compensation.”<sup>4</sup> As Eric Claeys points out, an aggressive reading of this clause cannot be blithely dismissed as suffering from the oxymoronic features of substantive due process.<sup>5</sup> Clearly, the text of the clause contains no internal contradiction. The key interpretive question asks what weight should be given to each of its constituent terms.

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<sup>1</sup> RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

<sup>2</sup> See, e.g., Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986); Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986) (reviewing EPSTEIN, *supra* note 1); Joseph Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986) (reviewing EPSTEIN, *supra* note 1). All three scholars were in attendance at a conference on *Takings* held in late 1985 at the University of San Diego Law School, whose proceedings were later reprinted in full. *Proceedings at the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49 (1986). For more choice tidbits, see Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439, 439–40.

<sup>3</sup> See EPSTEIN, *supra* note 1, at 281–82.

<sup>4</sup> U.S. CONST. amend. V.

<sup>5</sup> Claeys, *supra* note 2, at 441–43.

To start with the first key term, private property is one of our most comprehensive social institutions, so it seems odd to give it a narrow construction that bears scant resemblance to the term “private property” as it is used in the private law. Land and chattels are obviously part of the overall picture. And more importantly all interests in land—leases, mortgages, life estates, reversions—are part of it as well. When John Locke wrote that property embraced our “Lives, Liberties and Estates,”<sup>6</sup> he gave private property a broader definition than the standard account, by including the personal freedoms that in practice seem to be better located in the constitutional protections for speech, contract and religion. But even if these interests are excised, the Takings Clause still covers a lot of turf, and it is not a sensible construction of the phrase to try to limit it to, for example, the protection of the right to exclude only when the conception from Roman times forward has always included the rights of use and disposition as well.<sup>7</sup>

So perhaps then we could narrow the meaning of the clause by putting tough emphasis on the term “taken” which could be limited only to the outright physical dispossession of property. But it would be odd in the extreme to hold that the state has not taken property when it strips a mortgagee of his lien, when it denies the holder of a future interest the right to enter his land on the termination of a life estate, when it prohibits the holder of a patent from practicing his art, or when it requires the owner of a trade secret to share it with the rest of the world. Clearly a sensible reading has to accept that the meaning of the term “private property” covers liens, future interests, and intangible forms of property. The full range of private law interests are implicated by the clause, and any removal of rights from the standard bundle of rights—a phrase which will be addressed more later—subjects the government action to examination under the Takings Clause. Thus if a party lets a friend into his house for a day, and that person refuses to leave when the invitation has expired, it is just word play to insist that property has not been taken because the entrance was lawful even though the tenant’s holdover was not. Yet the constant effort to situate rent control statutes outside the law of takings rests on the odd conceit that the holdover tenant has not displaced the original owner.<sup>8</sup>

The clause’s coverage, moreover, does not stop with this individual taking. *Takings* makes a concerted effort to explain why in principle we can draw no sharp line between the outright confiscation of the land of one person, and the regulation of use or disposition by many persons.<sup>9</sup> The argument is that each fractional interest in property counts as property. The property of two or more individuals counts as property as well, so that regulation should be understood as consisting of many small takings

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<sup>6</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* ¶ 123, at 350 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>7</sup> EPSTEIN, *supra* note 1, at 63–92. On the definitional question, see A.M. Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107 (A.G. Guest ed., 1961).

<sup>8</sup> EPSTEIN, *supra* note 1, at 176–77, 186–88.

<sup>9</sup> *Id.* at 93–104.

from an ever-expanding number of separate individuals. The modern law of course rejects this view, but only at a horrible price of being utterly unable to explain which forms of regulation go “too far” and which remain on the acceptable side of the line. There is a continuum here both with respect to the number of persons whose property is taken and the extent of the taking from each. It may well be distressing for defenders of regulation to have to confront the argument that no form of regulation escapes scrutiny under the Takings Clause. But at the same time the defenders of the status quo concede the incoherence of the current system, which tries to draw a line at “all viable economic use,” without explaining why this fix makes sense, even to them. As I am fond of saying, it takes a theory to beat a theory, and on this point there is no theory out there which offers a unified treatment of traditional dispossessions and various forms of state regulation.

Next, what about just compensation? The key point here is that the division of thinking on the compensation issue parallels that on the regulation side. In cases of isolated takings the challenge is to figure out what measure of compensation is owing and why. With widespread regulations, the key element is to understand the role of implicit in-kind compensation, which receives so much attention in *Takings*.<sup>10</sup> Let us take these in sequence.

In evaluating the level of cash compensation for outright takings, it is critical to revert to the central purpose of the Takings Clause, which is to see that the state does not force special burdens on those individuals who have been forced to sacrifice their property to advance the common good. Yet the usual formulas that tie compensation to fair market value fall far short of that goal. Most obviously, they do not give any credit to the greater use or subjective value of property that is not up for sale. Nor does the formula attempt to take into account any of the dislocations that government coercion forces on the property owner. Wearing those blinkers means that the law excludes compensation, legal fees, appraisal fees, moving expenses, loss of good will, and a favorable neighborhood and environment. I can still recall when I first encountered Gideon Kanner’s trenchant exposition of this point in the *California Western Law Review*, with his ruthless exposé of the systematic shortfall under the law that is as cogent today as when it was written thirty-six years ago.<sup>11</sup> Kanner was of course primarily concerned with issues of text and fairness.<sup>12</sup> But the gaps in compensation are not just a matter of equity, although they are surely that. The basic error in compensation also leads to a systematic overcondemnation of land by understating the losses that the taking inflicts. The point here is not to deal with compensation solely from the vantage point of the party whose property has been taken, but from the larger social point of view of setting the right prices to avoid distortions in government decisions.

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<sup>10</sup> EPSTEIN, *supra* note 1.

<sup>11</sup> Gideon Kanner, *When Is “Property” Not “Property Itself”: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57 (1969), *discussed in* EPSTEIN, *supra* note 1, at 82.

<sup>12</sup> *See id.* at 61.

With respect to general regulations, it is manifestly impossible in most cases to offer cash compensation to the thousands of individuals who are adversely impacted by the state action. Nor is it necessary to try. The broad definition of a taking is in many instances offset by the broad definition of compensation, which takes into account the benefits that state action provides to the very people whom it regulates. A zoning regulation for example hits many people at the same time. In some instances it overcomes prisoners' dilemma games and allows them all to reach higher levels of utility. Many sign ordinances have this effect, by keeping everyone from blocking the views of the sign next door. In other cases, regulation is a device to cripple one competitor for the benefit of another. I see no reason why two forms of regulation should be treated the same if there is any sensible way to distinguish between them, and happily, there is, by looking first for a disparate *treatment* of the regulated parties, and next to the disparate *impact* of regulation on similarly situated parties. Why defend a regime that can zone a business parcel on one side of the road for agriculture, while the parcel across the way is allowed to have, without competition, a shopping mall? In working through the implications of the Takings Clause, my objective has never been to tilt the balance of advantage one way or the other. Far from seeking to create privilege, the purpose of a sound interpretation, then as now, is to limit its impact.

Next, there comes the question of public use. The obvious cases all include situations where the property is used by the public, where it is beyond the power of any court to knock out foolish proposals to build unneeded highways. But a sensible use of the conception also allows the state to take property for private use where the lands that are adversely impacted have little value to the owner who stands in a key location that allows him to extract a huge advantage from playing the holdout card. That is the import with cases that allow a mine to run a tram over scrub land to reach a railroad. Yet there is no reason because one goes this far to take the position that it is perfectly fine to condemn private homes for some grandiose urban renewal project that is never likely to get off the ground. Even though there will be some doubtful cases, we can surely distinguish the two extremes, and the failure to do this in *Kelo v. City of New London*<sup>13</sup> created a major league crisis of confidence for the Supreme Court. Liberals rightly saw in *Kelo* an urban bulldozer that allows insiders to take advantage of their political clout. On the other side, conservatives saw in *Kelo*, a gratuitous weakening of the institution of private property. Once again, there is little reason to be upset with the approach in *Takings*.

Thus far I have spoken only of the explicit components of the Takings Clause. The position taken in *Takings* was not literalist in any sense, but recognized that the Takings Clause, like all great constitutional commands, sets up a presumption that can be overridden in those cases in which the exercise of property rights necessarily trenches on the rights of others. The entire discussion of the much mooted notion of the police power—nowhere mentioned in the text—is an effort to trim the clause down to size, without allowing the exception to become so large as to swallow the entire provision.<sup>14</sup>

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<sup>13</sup> 545 U.S. 469 (2005).

<sup>14</sup> See EPSTEIN, *supra* note 1, at 107–45.

Thus stopping nuisances is one thing, but insisting that land remain vacant for the benefit of tourism is quite another. Working the way through the justifications that the state can use to limit the use of property does bring up some marginal cases (e.g., billboards), but that hardly means that the exercise is not worth undertaking. In the private law, we distinguish between activities that can be enjoined by neighbors and those which cannot. I see no reason why those insights cannot be used to explain the constitutional response in analogous situations.

Using this approach does call into question much of zoning and rent control, for example, but again the defenders of the status quo have to show why the critique of these forms of regulation is wrong or why either of these dysfunctional institutions should survive. I suspect, however, that the real unhappiness with *Takings* is the tough line that it took to all forms of redistribution, from unemployment benefits to social security, Medicare, and welfare. There are times when I share these doubts, as there is much that is laudable in seeking to give a helping hand to individuals who have suffered from bad luck. But that hardly clinches the case that the state imposition of free-wheeling transfer payments should be allowed. In all too many cases, the grotesque set of cross subsidies, such as agricultural and dairy products, has produced ruinous consequences. Many of the most ambitious programs like Social Security and Medicare, are impossible to change in midstream today, but their basic unsoundness was apparent on day one. There is no way to control the level of utilization of services that are consumed by any one person individually when they are paid for collectively. The need for welfare would be drastically reduced if the stronger protection of private property and (for completeness) economic liberty were respected in the courts. And the much feared welfare reforms of the Clinton administration have cut the welfare rolls without any of the dislocations that its critics predicted. My sense is that the system would work well if these programs were removed. But even if not, at least some effort to stop programs that work redistribution haphazardly, or worse, from poor to rich, should be curtailed. The New Deal was a peculiar mixture of market interferences and wealth transfer payments that did more harm than good, even on the dimension by which it chose to judge itself. In substance, its key program was all takings from A to B, without compensation. So the criticism was badly misplaced. To give a systematic exposition of where the law went wrong does not need an apology.

## II. COMMENTS ON THREE AUTHORS

Let me now turn to the three papers in this collection. Happily, as we move twenty years down the road, the temper of the times has changed, and the comments that the book receives today are far less harsh than those directed its way when it was first published. The entire intellectual climate that posited state regulation of markets was needed for comprehensive economic justice is no longer accepted on faith. The intellectual division of opinion is much more balanced, as is evident from these three papers.

*A. James Ely*

I am exceedingly grateful to James Ely for pointing out what I have long, and ruefully known—namely, that there is little reason to think that the courts have adopted my positions in whole, or even in part.<sup>15</sup> Although there is the odd movement in that direction,<sup>16</sup> it is strictly a case of two steps forward and one step backwards, if that. But writing a book like *Takings* can never be called a failure because it is unable to reverse the direction of judicial thinking that has lasted for over fifty years. It is quite enough to break the intellectual monopoly that once backed up the New Deal order. The overall political and intellectual debate will be conducted, in my view, at a far higher level precisely because political competition has replaced monolithic liberal orthodoxy. And the impacts will be felt at all levels, because political officials and private parties now have to think twice about whether they want to engage in the kinds of activities that *Takings* condemns. Obviously, many interested parties will work to preserve the status quo. But if one can switch the climate of opinion even a little bit, it will change the kinds of projects that are proposed and accepted, hopefully for the better. In that regard, I am more than happy that Professor Ely identifies this ability to help shift the general scope of public discourse as the greatest influence of my work.<sup>17</sup>

*B. Eric Claeys*

In one sense, Eric Claeys takes off where Ely and I began our essays by trying to puzzle through the huge chorus of boos that *Takings* generated when it hit the market. He stresses, as noted earlier, the unhappiness that liberal scholars had when a theoretical book sought to question the dominant intellectual Zeitgeist in which the realist tradition on property rights paved the way for the rise of the welfare state in which these rights were truncated in favor of the expansive administrative process of the sort that got going just as the older system of property rights fell into decay.<sup>18</sup> Nor was it easy to ignore the circumstances that surrounded the publication of the book. The Reagan White House had appointed Edwin Meese as Attorney General, and just before *Takings* was published, there was an article in the House organ of the Heritage Foundation, *Policy Review*, that mentioned me (along with Robert Bork, Antonin Scalia, and William Ball) as potential Supreme Court nominees,<sup>19</sup> which was quite enough to add distress to my many critics at the time. All this was of course a pipe dream, for, as

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<sup>15</sup> James W. Ely, Jr., *Impact of Richard A. Epstein*, 15 WM. & MARY BILL RTS. J. 421, 422–23.

<sup>16</sup> *See id.* at 422–24.

<sup>17</sup> *Id.* at 426–28.

<sup>18</sup> Claeys, *supra* note 2, at 439–40.

<sup>19</sup> Richard Vigilante, *Beyond the Burger Court: Four Supreme Court Candidates Who Could Lead a Judicial Counterrevolution*, POL'Y REV., Spring 1984, at 20.

Claeys points out, the Reaganites themselves took a much more cautious view of judicial power than I did, and in fact, as good government officials, they were more comfortable with the permanence and justice of regulation than this impatient outsider.<sup>20</sup>

Claeys is, I think, more or less on the money when he traces the reception that my views have received both in the Supreme Court and in academic rights.<sup>21</sup> As to the first, he rightly notes that *Lucas v. South Carolina Coastal Council*<sup>22</sup> advanced the proposition that a total economic wipe-out should be treated as a taking. However, subsequent decisions made it clear that, in general, the balancing tests of *Penn Central Transportation Co. v. New York City*,<sup>23</sup> which I have criticized elsewhere,<sup>24</sup> dominate in all but the narrowest class of total wipe-outs.<sup>25</sup> I only wish that he had more time to discuss the deep intellectual confusions that the intellectual timidity in *Lucas* spawned. In my view, the most regrettable features of Supreme Court jurisprudence in this area are driven by two points. First, Justices on all sides of the intellectual spectrum do not want to own up to the breadth of the Takings Clause, by reading it in parity with, say, the First Amendment protection of freedom of speech. Second, they have deep intellectual confusions about the ideal structure of property laws. If there were ever an area that shows the doctrinal chaos that can come from “taking one case at a time,” takings law is it. Decisions are laid down without any sense as to how they fit into a comprehensive framework. Watching their painful juxtaposition is to see constant movement and trendy argumentation in little intellectual light.

All these defects are further illustrated by Justice Kennedy’s remark in *Lucas* that he has no desire to see takings law freeze around “a static body of state property law.”<sup>26</sup> The remark is intended to convey the appearance of cautious awareness of the constant and rich evolution of property law. But it in fact throws the baby out with the bath water. In principle, there is much to commend about the static conception of the common law.<sup>27</sup> Rightly understood, it refers back to the stable set of expectations that is needed to allow voluntary transactions to take place with a minimum of fuss and confusion. Just think of how matters would be if the concept of property was subject to constant evolution so that the person who bought Blackacre on one day would not know whether he could sell it on the next. The entire force of the maxim *nemo dat quod non habet*—no one is allowed to convey what he does not own—is intended to

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<sup>20</sup> Claeys, *supra* note 2, at 440–42.

<sup>21</sup> *See id.* at 442–45.

<sup>22</sup> 505 U.S. 1003 (1992).

<sup>23</sup> 438 U.S. 104 (1978).

<sup>24</sup> Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2001–2002 CATO SUP. CT. REV. 5, 28–29.

<sup>25</sup> Claeys, *supra* note 2, at 443.

<sup>26</sup> *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

<sup>27</sup> Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

secure the chain of title to real property so that individuals who invest on one day will not see their holdings stripped from them on the next.

There are, of course, situations in which the evolution of property rights is needed, but this is a process that should never be undertaken casually by a court that thinks rights would be better configured in other ways. Rather, it is important in all cases to show how the transformation in rights is triggered by a technological change that the older system of property rights could not take into account. It is, therefore, sensible to think of pooling arrangements for oil and gas that lie under multiple plots of land, or to find ways to make the upper airspace a highway for aviation, or to allow for the free movement of radio waves across the borders of private property. But such changes satisfy a quite exacting set of standards. First, they all involve situations in which the relaxation of older property rules produces huge overall gains with little or no dislocation of the economic interests of any of the affected parties. In addition, these systems can be arranged so that virtually all persons whose property is taken receive in exchange a set of benefits that are equal to or, in practice, far greater than those which they surrendered, so that wholly without cash side payments they are left better off than before. Such was the reason I spent so much time dealing with the problem of implicit-in-kind compensation in *Takings*.<sup>28</sup>

The real question is how this particular insight applied to the regulation in *Lucas*, which told landowners that they could not build on their property at all given the risks of its destruction by hurricanes and land movements.<sup>29</sup> On this point, there is simply no reason why the traditional ownership rules did not apply to this situation. South Carolina could make no credible claim that building ordinary homes created a nuisance to other parties. The risk of destruction, which is quite real in these cases, should lie with the owners when the main function of the state is *not* to supply the subsidized insurance that encourages foolhardy adventures that turn sour. But the lesson to be taken from all of this is not that the state should be able to stop construction dead in its tracks, but that it should remove the subsidies that force others to pay for whatever construction a landowner makes along dangerous, but desirable, coastal regions. On this point, the last things we need are evolving rules. What is needed is a clear recognition that owners take the risk of destruction of their own property as the cost of getting the benefit from its use. The complex issues of coordinated networks and common-pools, issues that drive the airspace, telecommunications, and oil and gas industries, are nowhere to be seen. What is now needed is not a retreat from *Lucas* but a clear sense that it applies to all lesser schemes by the state that use an excess of legal process to starve and choke off development for the benefit of neighbors, an issue raised to an art form by the Supreme Court in its misconceived decision in *Williamson County Regional Planning Commission v. Hamilton Bank*.<sup>30</sup>

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<sup>28</sup> EPSTEIN, *supra* note 1, at 195–215.

<sup>29</sup> *Lucas*, 505 U.S. 1003.

<sup>30</sup> 473 U.S. 172 (1985).

I also think that Claeys is on the money in thinking that the Privileges or Immunities Clause of the Fourteenth Amendment is in fact the natural home by which the Takings Clause is made applicable to the states.<sup>31</sup> Correcting the sins of the *Slaughter-House Cases*<sup>32</sup> decision only took place by forcing these guarantees through the Due Process Clause, which led to the constant fight over the appropriate nature of this oxymoron. I do not think that we should transform the name “Takings” to “Abridgements”<sup>33</sup> because even though partial takings are abridgments of property rights, there are lots of areas in which the abridgments involved, are not takings claims. The important point to note here, however, is that the later amendments tend to speak in terms of “deny or abridge” as if they lack confidence that the limited notion of abridgment also embraces a total denial. But no one should want to read the First Amendment to allow the total abrogation of all speech because denials are the end point of a continuum that covers all abridgments. Takings run parallel argument in the opposite direction. There is no sensible case, with or without incorporation, to let it cover total deprivation of rights, ignoring all lesser incursions thereon. In both cases, the scope question is resolved in favor of broad judicial review, so that the battle takes place on the three frontiers of police power, public use, and just compensation.

At this point, Claeys shifts gear into high theoretical mode, and uses takings to attack the view that property is nothing more than an arbitrary assemblage of rights into a bundle of rights.<sup>34</sup> He has somewhat more distaste for that phrase than I do, but his substantive point is right, whether one embraces the bundle of rights metaphor or not. Thus the view that I defended in *Takings* stressed that there were certain incidents of ownership, possession, use, and disposition that fit together closely and functionally so that it is not possible to give one attribute, such as the right to exclude others (which need not include the *owner's* right to enter), priority over all the others. The explanation for this unity is that it avoids the endless wrangling that would occur if rights of possession were assigned to one person, use to a second, and disposition to a third. And it avoids the senseless social waste that might occur should someone decide to allocate possession, but deny that the rights of either use or disposition are part of the title to the land belonging to the first occupier. The point is that the unity of ownership is a coherent assembly of rights so that anyone who wishes to break it down has to explain why he is justified in doing so, and what compensation he will supply for disrupting that body of rights.

Although this need not be the case, the modern use of the bundle of rights is meant to suggest that you can “add a stick, remove a stick” at will, and it does not matter for

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<sup>31</sup> Claeys, *supra* note 2, at 443–47; accord Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 340–46 (2005).

<sup>32</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>33</sup> See Claeys, *supra* note 2, at 446.

<sup>34</sup> *Id.* at 447–53.

constitutional purposes. I think that larger political forces than the bundle of rights language were at work here. But whether Claeys is right to give the phrase causal efficacy is a second-order issue.<sup>35</sup> The key point is that the newer attitude toward property, championed by such writers as Robert L. Hale and Arthur R. Corbin, gives the state an unquestioned power to reconfigure or redefine property at will, so that no owner of land can be upset if the right to build over ten stories or lease the premises to pickle vendors is abridged.<sup>36</sup> As Claeys rightly notes, start down this path and you have not left it up to the administrative state to decide what rights belong in what bundles before you get to the question of constitutional protection.<sup>37</sup> It is no accident that Claeys singles out Bruce Ackerman's *Private Property and the Constitution* for raising this erroneous view of the world into a scientific truth.<sup>38</sup> As I argued when the book came out, it is just a deep misconception of how property rights function that invites the instability that is the hallmark of modern land use law.<sup>39</sup>

The upshot is that we no longer protect Lockean rights (which in truth imitate the Roman law conception) but whatever odd constellation of rights survive interest-group politics. If I am right that the compact or unitary bundles of ordinary ownership lead to the efficient allocation of resources, then you can make a knock-out claim against the current system. It spends a fortune to fractionate property rights in an inefficient fashion. This is indeed no idle pipe dream—the first major zoning case, *Village of Euclid v. Ambler Realty Co.*,<sup>40</sup> did this when it took a perfectly serviceable 68-acre lot and divided it into three separate zones, knocking down overall value by somewhere between seventy-five and eighty percent.<sup>41</sup> Indeed, Claeys is right to note that the entire Progressive movement (with Woodrow Wilson again over-claiming for the administrative state) started the ball rolling, setting the ground up for the rise of legal realism which led to what Thomas Grey eventually termed the disintegration of property rights.<sup>42</sup>

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<sup>35</sup> See *id.* at 450.

<sup>36</sup> See *id.* (discussing Arthur R. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922); Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922)).

<sup>37</sup> *Id.* at 451.

<sup>38</sup> See *id.* at 450–51 (discussing BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26 (1977)).

<sup>39</sup> ACKERMAN, *supra* note 38, at 26. For my review that takes Ackerman to task for privileging the so-called scientific view from the vulgar lay view, see Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635 (1978) (reviewing ACKERMAN, *supra* note 38).

<sup>40</sup> 272 U.S. 365 (1926).

<sup>41</sup> For discussion of its fate, see ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 76–92 (3d ed. 2005); for my comments, see Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong With Euclid*, 5 N.Y.U. ENVTL. L.J. 277 (1996).

<sup>42</sup> See Claeys, *supra* note 2, at 451 (citing Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980)).

After his truly splendid account of the transformation of property rights thinking in the United States, Claeys addresses the key point of difference between us, which is one of style and argumentation, and less of results.<sup>43</sup> Claeys sees the basic driver of property protection as the natural law tradition which gave pride of place to private property institutions.<sup>44</sup> I am respectful of that tradition, as he notes, but I tend to think that its utilitarian side was more important in the evolution of this doctrine than does Claeys.<sup>45</sup> The point is subject to immense difficulty because much of the modern economic jargon that allows for a coherent articulation of the economic position was not available in the formative years of natural law. It is hard to talk about property rights in water, for example, if one does not know the importance of marginal benefits and marginal costs. And it is hard to understand the role of just compensation if there is no linkage between that conception and the standard economic definitions of efficiency that derive from conceptions of Pareto optimality and superiority. But on balance, I think that understanding these variables gives us a greater appreciation as to why the law has assumed its current form, and a keener sense of where and how changes in the legal order can take place.

Claeys notes that my sunny optimism and good understanding of utilitarian principles (in my case of the Paretian and not aggregate sort) lead to a sensible justification of most traditional rules, which has been subject to trenchant (but friendly) criticism by small government thinkers in the libertarian school.<sup>46</sup> In general, I believe the overtly functional approach does a much better job in dealing with water rights, oil and gas, spectrum, and overflight than the natural law theory, which cannot show timeless devotion to rights in resources, many of which were unknown (or like water, not found in western rivers running through deep gorges) in England during the formative common law period. Claeys's other criticism, which postulates that slavery is not inconsistent with utilitarianism,<sup>47</sup> strikes me as simply wrong given the fact that we see no consensual movement toward slavery in comparison to employment or even apprentice regulations. The anti-slavery case had better be easy for all approaches to property rights, and it is in my view as well as his.

It is important not to overstate differences. In particular, there is no question that Claeys is correct to see the consequentialist handwriting behind much of the

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<sup>43</sup> See Claeys, *supra* note 2, at 453–55.

<sup>44</sup> See *id.* at 453.

<sup>45</sup> See *id.*

<sup>46</sup> See, e.g., Larry Alexander & Maimon Schwartzschild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 QUINNIPIAC L. REV. 657, 657 (2000); Eric Mack, *Comment: A Costly Road to Natural Law*, 12 HARV. J.L. & PUB. POL'Y 753 (1989). Naturally, I could not allow these challenges to pass by in silence. For my answer to Eric Mack, see Richard A. Epstein, *Postscript: Subjective Utilitarianism*, 12 HARV. J.L. & PUB. POL'Y 769 (1989). This was a postscript to my principal paper, Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989). My response to Alexander and Schwartzschild is found in Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783 (2000).

<sup>47</sup> See Claeys, *supra* note 2, at 453–55.

earlier natural law language,<sup>48</sup> so that the operational differences between the two views are often hard to make out. And where natural law theory slips into mindless Kantian dogmatism, as it does with the proposition that no one is allowed to lie in self-defense or to save his children from slaughter, few if any sane natural law thinkers will take the bait. Here, I think the real answer is, “in for a dime, in for a dollar.” If you let the consequentialist arguments into the picture, it becomes a distraction to mix and match two theories, while never being sure of the weight of either in any given case. I have no question that natural law views are what guide ordinary individuals in making particular decisions, and they are right to do so. The process of justification has to be consistent with these instincts, or explain why long-standing rules make little or no sense. But it does not discredit the theory to place it on firmer theoretical footings. The simple question from the Paretian is this: Is there any reason on natural law grounds to accept a distribution of rights that is Pareto inferior? If not, we are not all Keynesians, but rather consequentialists, perhaps in spite of ourselves. As Claeys and I both know, ours is a dispute between friends who are in essential agreement over all that matters.

### C. Eduardo Peñalver

Last, I turn to the fine contribution of Eduardo M. Peñalver,<sup>49</sup> who clearly has major misgivings with my overall project, especially as it pertains to welfare rights. Here it should be evident that the stakes are higher than in the differences between Claeys and myself. Whatever our substantive disagreements, however, I am, of course, grateful to Peñalver for his kind words, and am confident that he will go on to a distinguished career in the law. As one grows more senior in the profession, it becomes ever more apparent that we pay our debt to our own teachers by trying to help, in whatever way we can, the next generation of scholars and students. And in one sense, the highest praise is to take seriously younger scholars when they chase after you.

Peñalver is correct, I think, in noting that my academic career has taken this odd transformation.<sup>50</sup> I started off as a libertarian thinker who worked loosely within the natural rights tradition, and tended to have a strong sense of absolute rights. In part, I might add, this was because of the nature of the problems that I tended to work on in my early academic years, which were largely concerned with two-party or small-number relationships: buyer and seller, with perhaps an assignee or a third-party beneficiary; injurer and victim, with perhaps an intervening actor. For those situations, the strong libertarian view of property rights, which are protected against aggression and subject to voluntary exchange, works wonders and helps explain huge portions of our daily interactions. There is no other theory that helps us understand marriage,

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<sup>48</sup> See *id.* at 454–55.

<sup>49</sup> See Eduardo M. Peñalver, *Reconstructing Richard Epstein*, 15 WM. & MARY BILL RTS. J. 429 (2006).

<sup>50</sup> *Id.*

charity and business as well as this one, and we would be loath to reject it in its entirety because of counterexamples.

Yet at the same time, as the set of issues that dominated my thought, and that of the profession of which I am a part, started to shift, the theories had to shift with it. Dealing with questions of network industries, common-pool resources, or general taxation showed the inadequacy of pure libertarian models to explain the origins of the state on the one hand, and the sensible use of taxation and regulation on the other. *Takings* was, in part, an effort to show how forced exchanges required profound modifications in Robert Nozick's hard-line libertarian theories, which exerted much influence on my intellectual development.<sup>51</sup> As Peñalver points out, I do not embrace the unflinching egoistic view of personality associated with Thomas Hobbes,<sup>52</sup> but prefer the slightly softer version of self-interest tempered with "confined generosity," which was the staple of David Hume.<sup>53</sup>

The gist of Peñalver's criticism is that any retreat from the purity of the strong libertarian model requires us to fall into the "deadly embrace of the [social] welfare state," where entitlements are granted only to be revised by collective political action.<sup>54</sup> I think that there are two rejoinders to this notion. First, the entire discussion of implicit-in-kind compensation above is an effort to do just that—to allow for the state to create across-the-board improvements without getting into the business of using the state to facilitate the parochial goals of various factions. In addition, it relies on the various impulses of community to create "imperfect obligations" of voluntary assistance to the less fortunate, which could, but need not, include the partial forgiveness of loans, or allowing the gleanings of the crop to be harvested by others.<sup>55</sup> One reason to back off state coercion in the welfare business, in my opinion, is because it crowds out the more nuanced responses that arise when individuals make these choices through voluntary associations that are better able to match the assistance provided to the individuals who receive it. The great danger here is that the use of political systems to run transfers in either cash or kind crowds out the private arrangements so that we spend more and get less. The rapid decline in free or low-cost medical services by private physicians, which was a tradition in the 1940s and 1950s, was driven out in large measure by Medicare and Medicaid programs. I do not think that the larger welfare state requires

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<sup>51</sup> EPSTEIN, *supra* note 1, at 334–38; *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). I have hammered on this theme elsewhere. *See, e.g.*, Richard A. Epstein, *One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory*, SOC. PHIL. & POL'Y, Jan. 2005, at 286.

<sup>52</sup> *See generally* Ron Replogle, *Personality and Society in Hobbes's Leviathan*, 19 POLITY 570 (1987).

<sup>53</sup> Peñalver, *supra* note 49, at 430–31; *see also* DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 338 (1999).

<sup>54</sup> Peñalver, *supra* note 49, at 431 (quoting RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 8 (2003)).

<sup>55</sup> EPSTEIN, *supra* note 1, at 319–20; Peñalver, *supra* note 49, at 432–33.

a break down of these voluntary assistance programs for the poor. We can still have churches and friendly societies with local missions. And when push comes to shove, these same groups are a lot faster on the uptake than FEMA when it comes to getting aid to the victims of Hurricane Katrina—where the major function of government seemed to be to block the movement of charitable assistance under its own elaborate permitting process.

Peñalver is quite correct to observe that my objections to transfer payments rest as much on the empirical reality as to what they accomplish as on the formal tension between them and the Takings Clause.<sup>56</sup> Nonetheless, I disagree strongly with Peñalver that in practice the logic of my argument on forced exchanges pushes us in the direction of the welfare state to get all the downtrodden in the state of nature to sign on.<sup>57</sup> Even without a welfare system, they gain enormously from the protection of the political order. Their great peril does not lie in the absence of welfare, but in the imposition of barriers to entry into labor markets by minimum wage and antidiscrimination laws, and real estate markets by zoning and similar restraints. One key message of *Takings* is methodological: every time one sees a social problem, think of a regulation that could be removed rather than looking for another subsidy to be added. The former opens up markets, increases wealth, and reduces factional power. The latter closes markets, reduces wealth, and facilitates factional intrigue. There is no state of nature theory, nor any sound view of forced exchanges, that pushes us down so unwise a social path. In my own view, Amartya Sen's highly touted theory of capabilities to which Peñalver refers<sup>58</sup> is not a solution, but is, in fact, the problem. Sen's theory treats these differences in wealth as insuperable save by government education that limits the options; a minimum wage surely does for the very individuals whom it wants to help. Our goal is to get the political system to support competition, not transfer payments, as Peñalver wrongly supposes.<sup>59</sup>

#### CONCLUSION

I think that there is little need to repeat or summarize the arguments that I have raised in this brief response. But I will end on this note. The issues of private property and the Takings Clause, which I weighed in on over twenty years ago, are very much part of the mainstream legal landscape today, which I regard as a good feature no matter what the outcome of the debate. It is presumptuous for anyone to think that one book or even one career can shift mainstream understandings over an institution as important and complex as private property rights. But, gee, is it ever fun to try.

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<sup>56</sup> Peñalver, *supra* note 49, at 434–36.

<sup>57</sup> *Id.* at 434.

<sup>58</sup> *Id.* at 433; *see also* AMARTYA SEN, *RESOURCES, VALUES AND DEVELOPMENT* 336–37 (1984).

<sup>59</sup> Peñalver, *supra* note 49, at 433–36.